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Unfulfilled Promise:  
The Human Rights Class Action  

Beth Van Schaack

Historically, international law consisted primarily of substantive norms, leaving it to individual nation states to determine how to implement and enforce those norms.¹ Human rights class actions in U.S. courts represent one such fusion of international legal rights with domestic judicial remedies.² Since the late 1980s, victims of human rights violations have increasingly utilized Federal Rule of Civil Procedure 23 ("Rule 23"), which governs the certification and conduct of the class action in federal court.³ In certain respects, the rule embodies a unique feature of United States procedural law.⁴ The United States Supreme Court has recognized that class relief is "peculiarly appropriate" in cases in which the "issues involved are common to the class as a whole" and "turn on questions of law applicable in the same manner to each member of the class."⁵ Because human rights abuses are often committed on a widespread and systematic ba-

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² Tachiona v Mugabe, 234 F Supp 2d 401, 409 (S D NY 2002) ("International law ordinarily leaves it to each sovereign state to devise whatever specific remedies may be necessary to give effect to universally recognized standards."); Ralph G. Steinhardt, Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos, 20 Yale J Intl L 65, 76 (1995) ("International law does not generally prescribe the domestic means of its own enforcement. . . ."); The Torture Victim Protection Act of 1991, 102 S Rep 249, 102d Cong, 1st Sess. (1991) *5 ("Sen Rep") ("States have the option, under international law, to decide whether they will allow a private right of action in their courts for violations of human rights that take place abroad.").

³ For a discussion of this notion see Harold Hongju Koh, Transnational Public Law Litigation, 100 Yale L J 2347 (1991) (describing merger in domestic courts of national procedural law with substantive international law and creation of a transnational body of law).

⁴ Indeed, the human rights class action has been heralded as a "new trend of 'mass tort' transnational litigation." Kathryn L. Boyd, Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level, 1999 BYU L Rev 1139, 1140.

⁵ For a comparative discussion of class and other collective actions in civil law and other common law jurisdictions, see the symposium edition of 11 Duke J Comp & Intl L (2001).

sis, and because many international law norms prohibit collective harms (for example harms directed against a group *qua* group), the class action device appears, at first glance, to provide a good fit for human rights litigation. And yet, measuring the success of human rights class actions by the number of cases that have achieved certification or proceeded to an enforceable class judgment, or by the satisfaction of victim classes with the process or the results of their efforts, suggests that a number of challenges exist to employing this procedural mechanism in the context of human rights litigation.

This Article does not take the positions, advanced elsewhere, that class actions must (or even should) replace the individual human rights action or that human rights class actions are inherently unsound. It does attempt to navigate a course between unalloyed idealism and critique to a position that accepts that the class action device—notwithstanding its potential for abuse and the challenges to its application—may provide an appropriate litigation device for human rights litigants in certain circumstances.

This Article begins with a brief survey of "human rights class actions" with an emphasis on the certification phases of the cases. It then analyzes these cases within the context of several

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At first blush, [the class action] seems remarkably adapted to the objectives of promoting international human rights through adjudication. Fostering human rights, after all, is effective only when the restraint is applied to wrongful conduct of general application, and the class action device is a potent weapon for aggregating the interests of the victims, and bringing the consequences of the wrong to bear forcefully on the wrongdoer.


8 By "human rights class actions," this Article considers class action lawsuits involving conduct that has occurred abroad and seeking to (1) enforce international human rights norms as set forth in either in customary international law or multilateral human
long-running debates about the operation and propriety of class action, by identifying some of the particular advantages and challenges posed by the class action mechanism to human rights litigation. The Article concludes that the class action device is especially well-suited for cases involving the doctrine of command responsibility (for abuses committed by subordinates) or abuses involving a corporate course of conduct or collective harms. However, the Article cautions that, while proceeding as a class action can provide an important vehicle for enforcing human rights norms on behalf of an affected population, it is imperative that class counsel be committed to providing victims with a meaningful experience through litigation and to promoting the principle of human dignity that underlies the human rights edifice.

With these concerns in mind, this Article provides an interpretive framework for pursuing and managing human rights class actions within Rule 23’s provisions and established certification doctrines. This framework accepts that courts should construe Rule 23’s requirements in light of the unique characteristics of human rights claims and claimants, the clear congressional policy—as expressed by the Torture Victim Protection Act (“TVPA”) and amendments to the Foreign Sovereign Immunity Act (“FSIA”)—in favor of U.S. courts adjudicating alleged violations of human rights that occur abroad, and the courts’ capacity to adopt procedural innovations as a form of federal common law for violations cognizable under these statutes. In application, this will require class counsel to carefully manage relations with absentee class members in order to ensure a meaningful experience for class members. It may also require courts to adopt both more liberal and more stringent approaches to certain components of Rule 23. Although this framework cannot address all of the chal-

rights instruments (such as the Convention Against Torture, the Genocide Convention, and the Geneva Conventions) or (2) redress international law violations through domestic claims or legal remedies, such as conversion and unjust enrichment. Collectively, these cases represent a form of civil universal jurisdiction, because they involve the adjudication of allegations of grave human rights violations that occurred abroad in cases in which the victim or perpetrator may have no prior relationship with the United States. This Article will not canvass civil rights class actions involving domestic abuses that may also be characterized as “human rights violations” or collective actions brought under domestic statutes specifically authorizing such actions, although some of this Article’s reasoning and conclusions may be applicable to these classes of litigation as well. See, for example, Doe v Advanced Textile Corp, 214 F3d 1058 (9th Cir 2000) (allowing a class to proceed anonymously in a Fair Labor Standards Act collective action regarding working conditions on Saipan island); Haitian Centers Council, Inc v Sale, 823 F Supp 1028, 1039 (E D NY 1993) (certifying a class of Haitian refugees seeking declaratory and injunctive relief from U.S. government action).
challenges that may arise in human rights class actions, it does attempt to address certain procedural obstacles and structural dilemmas that have appeared in the past and that are likely to appear in future cases. It is hoped that these modest recommendations will better enable individuals engaged in human rights litigation—as counsel, litigants, and judges—to capitalize upon the potential of the class action model to enforce universal human rights norms.

I. SURVEY OF HUMAN RIGHTS CLASS ACTIONS

The human rights class actions adjudicated thus far have involved a wide range of international law claims and theories of responsibility. These cases can be grouped into three general categories: (1) cases against individuals under the doctrine of command responsibility; (2) cases against corporate entities alleging involvement in present day human rights violations; and (3) cases arising out of the World War II (“WWII”) period.

The first two classes of cases are generally filed under the Alien Tort Claims Act (“ATCA”)\(^9\) and/or the TVPA,\(^10\) which extend federal jurisdiction to violations of the law of nations.\(^11\) These types of cases trace their roots to the historic ruling in *Filartiga v Peña-Irala*,\(^12\) which first recognized the potential of the two hun-

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\(^9\) Alien Tort Claims Act, 28 USC § 1350 (2000). Some of the WWII cases were also predicated in part on the ATCA. See, for example, *Bodner v Banque Paribas*, 114 F Supp 2d 117, 127 (E D NY 2000) (asserting jurisdiction under ATCA); *Iwanowa v Ford Motor Co*, 67 F Supp 2d 424, 438 (D NJ 1999).


\(^11\) This Article will focus on federal class action procedure, but its observations may be relevant to the few human rights class actions that have been filed under state law. See, for example, *Taiheiyo Cement Corp v Superior Court*, 105 Cal App 4th 398, 406–07 (2003) (finding that public policy mandates judicial consideration of slave and forced labor allegations); *Alomang v Freeport-McMoRan, Inc*, 811 So2d 98, 101 (La App 2002) (affirming dismissal for failure to state a claim sufficient to support plaintiffs’ alter ego allegations); *Alomang v Freeport-McMoRan, Inc*, 718 So2d 971, 972–73 (La App 1998) (reversing dismissal for want of subject matter jurisdiction of class action filed on behalf of similarly situated victims of summary execution, torture, and other human rights violations allegedly committed in connection with defendants’ mining operations in Indonesia). Parallel lawsuits are often filed in state and federal court. See, for example, *In re World War II Era Japanese Forced Labor Litigation*, 114 F Supp 2d 939, 942 (N D Cal 2000) (denying plaintiffs’ motion for remand on grounds that the case raised substantial questions of federal foreign relations law); *Jeong v Onoda Cement Co*, 2000 US Dist LEXIS 7985, *717* (C D Cal) (remanding case because of lack of diversity and because claims were based on state law); *Sequihua v Texaco, Inc*, 847 F Supp 61, 63 (S D Tex 1994) (denying plaintiffs’ motion for remand to state court because federal question jurisdiction was present).

\(^12\) 630 F2d 876 (2d Cir 1980).
dred-year-old ATCA to enforce international human rights norms.13 Because most future human rights class actions fall within this tradition, the majority of this Article's analysis focuses on these cases.14

This Article does include a discussion of WWII historical justice cases as well—primarily because of what they teach about the management of, and issues of representation in, class actions. However, those cases, in many respects, are *sui generis* and thus provide limited applicability outside of their unique historical circumstances.15 Substantively, many of these WWII cases involved only domestic contract and tort claims for relief. More importantly, all invoked a complex interplay of law, politics, moral suasion, media attention, and diplomacy not easily reproduced in other contexts. Finally, these cases terminated in settlement or dismissal at early stages of the litigation. As a result, published opinions paid limited attention to class action mechanics, except with regard to the certification of settlement classes and, in some cases, the implementation of notice schemes.

Setting aside the historical justice cases, which proliferated during the 1990s, the number of human rights class actions is small but growing as the result of an increasing number of recent cases filed against corporate defendants.

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13 Id at 880, 887.
14 A handful of class actions have been filed under the Foreign Sovereign Immunity Act. See, for example, *Presbyterian Church of Sudan v Talisman Energy*, 2003 US Dist LEXIS 3981, *3–4* (S D NY) (ordering corporation and Republic of Sudan to brief question of whether Sudan is entitled to sovereign immunity under FSIA); *Nemariam v Federal Democratic Republic of Ethiopia*, Memorandum and Order, Civ Action No 00–CV–1392–TPJ (D DC Aug 2, 2001) (on file with U Chi Legal F), revd, 315 F3d 390, 391 (D C Cir 2003) (reinstating case dismissed for *forum non conveniens* on the ground that claims commission set up by the governments of Ethiopia and Eritrea does not provide an adequate alternative forum); *Hirsh v State of Israel*, 962 F Supp 377, 385 (S D NY 1997) (dismissing putative class action where allegations did not invoke exception to sovereign immunity).
15 Recently, several class actions in the tradition of the WWII class actions have been filed seeking reparations for African American slave labor during the antebellum period. See, for example, *Farmer-Paellmann v FleetBoston Financial Corp*, Complaint and Jury Trial Demand, available online at http://news.findlaw.com/hdocs/docs/slavery/fplmnfht032602cmp.pdf (visited September 23, 2003).
A. Command Responsibility Cases

Two ATCA/TVPA class actions have proceeded under the doctrine of command responsibility against top leaders of repressive regimes. The first ATCA/TVPA human rights class action was filed against Ferdinand Marcos, the former President of the Philippines. This case was not only the first command responsibility ATCA/TVPA case, but also the only human rights class action to result in a jury judgment for a class of victims. Several years later, a class of victims of subordinates of Radovan Karadzic, the self-proclaimed president of Republika Srpska, also filed suit and relied on Marcos as precedent.

1. Hilao v Marcos.

After Ferdinand Marcos fled the Philippines to Hawaii in 1986, multiple plaintiffs filed separate cases against him in Hawaii and in the Northern District of California. These suits included one putative class action, Hilao v Marcos, involving more than ten thousand plaintiffs. All of these cases were dismissed at the district court level on the basis of the “act of state” doctrine. However, in a consolidated appeal, the Ninth Circuit reversed and remanded on the grounds that Marcos was a private citizen residing in the United States and that neither the Philippines nor the United States objected to the judicial resolution of the

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16 According to this doctrine, superiors may be held legally responsible for unlawful acts of their subordinates. See Ford v Garcia, 289 F3d 1283, 1286–1294 (11th Cir 2002).

17 A handful of additional class actions have been brought against top leaders without a clear articulation of the theory of liability. See, for example, Tachiona v Mugabe, 169 F Supp 2d 259 (S D NY 2001) (dismissing class action as to head of state, but entering default judgment against ruling political party); Handel v Artukovic, 601 F Supp 1421, 1424 (C D Cal 1985) (putative class action against high Croatian official for his alleged involvement in the “deprivations of life and property suffered by the Jews in Yugoslavia during World War II,” including violations of the laws of war and crimes against humanity, dismissed on statute of limitations grounds).

18 Hilao v Estate of Ferdinand Marcos, 103 F3d 767, 771 (9th Cir 1996).

19 Doe v Karadzic, 866 F Supp 734 (S D NY 1994).

20 See Hilao, 103 F3d at 774 (9th Cir 1996).

21 Like the political question doctrine, the act of state doctrine precludes courts from “inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory” in “the absence of a treaty or other unambiguous agreement regarding controlling legal principles.” Banco Nacional de Cuba v Sabbatino, 376 US 398, 401, 428 (1964).
Although Marcos died in 1989, his estate ("Estate") became the defendant in the litigation.

On September 5, 1990, the Judicial Panel on Multidistrict Litigation consolidated the actions in the District of Hawaii. In 1991, the court certified a Rule 23(b)(1)(B) limited fund class action composed of "all civilian citizens of the Philippines who, between 1972 and 1986, were tortured, summarily executed or 'disappeared' by Philippine military or paramilitary groups." The class included three subclasses, (1) individuals tortured by Marcos's subordinates, (2) the heirs of individuals summarily executed by Marcos's subordinates, and (3) the heirs of individuals "disappeared" by Marcos's subordinates.

Although the class was technically mandatory, the court exercised its discretion under Rule 23(d) and required plaintiffs to opt into the class by returning a completed claim form. Individuals and victims' organizations received notice of the suit through the mail and via United States and Filipino publications. Over ten thousand claims forms were received, of which some were found to be facially invalid, although a few of those were

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22 Trajano v Marcos, 878 F2d 1439, *1–2 (9th Cir 1989) (reversing and remanding all dismissals).
23 See Hilao, 103 F3d at 771.
24 See In re Estate of Ferdinand Marcos Litigation, 25 F3d 1467, 1469 (9th Cir 1994).
25 According to FRCP 23(b):

(An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of . . . (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

This form of class action is commonly called the "limited fund" class action because it usually involves claims made by numerous individuals against a fund that is insufficient to satisfy all the claims were plaintiffs to prevail. This class action protects the available fund from depletion by prohibiting opt-outs and dividing the funds proportionally among all plaintiffs. See 1966 Amendments, Advisory Committee Notes, 39 FRD 69, 101 ("This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem."); Ortiz v Fibreboard Corp, 527 US 815, 838–44 (1999) (discussing requirements for limited fund class action). This class action form is not subject to the notice, opt out, predominance or superiority conditions required for voluntary classes under FRCP 23(b)(3). See id.
26 See Hilao, 103 F3d at 774.
27 Id at 771, 774.
later reinstated. Twenty-two individuals who could link Marcos directly to the harm they had suffered (for example by proving with evidence that he ordered or monitored their detention and interrogation) proceeded against Marcos individually under theories of direct and command responsibility.

The district court trifurcated the consolidated trial into liability, punitive damages, and compensatory damages phases and proceeded in that order. In the first two phases, the jury found the Estate liable to the class for acts of torture, summary execution, and disappearance and awarded $1.2 billion in punitive damages. The court appointed a Special Master to conduct the compensatory damages phase. Recognizing the impracticality of holding a mini-trial for each member of the class, the Special Master borrowed a technique first employed in the asbestos context. He used statistical sampling to identify, and arrange for the deposition of, a subset of 137 claimants; to determine a compensation schedule for various abuses; and to compute an aggregate judgment for compensatory damages. The Special Master reviewed each deposition transcript to determine whether the claims fell within the class definitions—specifically that members of the military or paramilitary forces under Marcos’s command committed or enabled the alleged harms, and that the abuses oc-

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30 Hilao, 103 F3d at 771.
31 See Estate of Marcos, 910 F Supp at 1462. In order to prevent the Estate from transferring any assets and to preserve the possibility of collecting any judgment, plaintiffs obtained an order prior to trial continuing a preliminary injunction that had been obtained by the Republic of the Philippines in a separate action, but had been dissolved upon the settlement of the underlying claims. See Republic of the Philippines v Marcos, 862 F2d 1355, 1358 (9th Cir 1988) (affirming original preliminary injunction). Defendants’ appeal of the preliminary injunction came down after the Marcos liability and punitive damages trials, and the Ninth Circuit affirmed. In re Estate of Marcos, Human Rights Litigation, 25 F3d 1467, 1477–80 (9th Cir 1994).
32 See Estate of Marcos, 910 F Supp at 1463–64.
34 See Cimino v Raymark Industries, 751 F Supp 649, 653 (E D Tex 1990). Cimino was reversed on Seventh Amendment grounds after these techniques were employed and affirmed by the Ninth Circuit in the Hilao case. Cimino v Raymark Industries, 151 F3d 297, 321 (5th Cir 1998). The Fifth Circuit distinguished Hilao on the grounds that the ATCA enabled the Ninth Circuit to apply substantive principles of federal or international law, rather than state law, such that statistical sampling in that context did not contravene any substantive rights under state law vis-à-vis proof of causation or individual damages. Id at 319.
The Special Master also ranked each torture claim on a scale based on the nature and extent of the physical and mental torture suffered by the victim, the length of detention, the age of the victim, and any actual financial losses. He then recommended standard damage awards for various sets of facts. The Special Master also recommended a compensation schedule, largely adopted by the jury. The jury awarded over seven hundred million dollars in compensatory damages to the class. The district court rejected the Estate's due process and Seventh Amendment challenges to the statistical methods employed to calculate the damages, and the Ninth Circuit affirmed the process and results.

In order to satisfy the judgment, in November 1995 the court ordered the Estate to execute an assignment of Marcos's assets that had been deposited in Swiss banks to the plaintiff class as partial satisfaction of the jury judgment. The court also ordered various Swiss banks to deposit into the court registry all of Marcos's assets that they held. On appeal, the Ninth Circuit vacated this order on the grounds that the court could not levy the Swiss banks' California branches that did not actually hold any of the challenged assets.

Plaintiffs responded by filing suit against the parent banks directly and seeking a preliminary and permanent injunction prohibiting them from transferring or dissipating Marcos's assets. On a petition for a writ of mandamus, the Ninth Circuit dismissed the plaintiffs' suit against the banks on act of state grounds, because the assets had been frozen by a federal executive order upon the request of the Republic of the Philippines.

Following these enforcement attempts, the Swiss banks hosted a series of negotiations between the Philippine govern-

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36 See id at 1465.
37 Id.
38 Id.
39 Estate of Marcos, 910 F Supp at 1465; Hilao, 103 F3d at 782-84.
40 Estate of Marcos, 910 F Supp at 1467, 1469.
41 Hilao, 103 F3d at 786 ("While the district court's methodology in determining valid claims is unorthodox, it can be justified by the extraordinarily unusual nature of this case."). In dissent, Judge Rymer argued that causation and damages should be proved individually. Id at 788.
42 Estate of Marcos, 910 F Supp at 1471 (describing order).
43 See Hilao v Estate of Marcos, 95 F3d 848, 851 (9th Cir 1996) (describing order).
44 Id.
45 See Credit Suisse v United States District Court for the Central District of California, 130 F3d 1342, 1345 (9th Cir 1997) (recounting procedural history).
46 Id at 1347.
ment, Marcos's heirs, and the human rights victims. The Estate eventually settled the case for $150 million in 1998. On April 29, 1999, the district court affirmed the settlement, even though objectors traveled from the Philippines to testify against it on the grounds that it included a statement denying Marcos's liability, it represented too small a fraction of the compensatory damages award, and it provided too great a fee to class counsel. In 1997, the Swiss Supreme Court ordered the banks to transfer a portion of Marcos's deposited funds to an escrow account in the Philippine National Bank, stating that the rights of the plaintiff class should be taken into account with respect to the ultimate dissolution of the funds. The Philippine government had to approve the transfer of the money from a Swiss bank account holding $590 million in frozen Marcos family assets. Objectors filed briefs in the Philippine court, contesting the settlement and the transfer of the funds. The Philippine court refused to recognize the settlement, leading the U.S. court to vacate the settlement. Enforcement of the class judgment remains elusive, but a Philippine court recently ruled that funds from several Swiss bank accounts could be released to the government for distribution. Although the majority of these funds will go toward the country's agrarian

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47 See Manila says its claim on Marcos money superior to victims' claim, Deutsche Press-Agentur (Apr 15, 1997).
48 The settlement included a 1986 default judgment that had been obtained against Marcos's daughter, Imee Marcos-Manotoc. See In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F2d 493, 495, 496-98 (9th Cir 1992) (affirming default and rejecting arguments that defendant Manotoc should be accorded foreign sovereign immunity).
49 In Re Estate of Marcos Human Rights Litigation, Judgment (D Haw Apr 29, 1999) (approving settlement) (on file with U Chi Legal F); Lori Tighe, $150 Million Settlement in Marcos Suit Bittersweet, Honolulu Star-Bulletin (April 30, 1999); Rights victims reject 150-million-dollar settlement with Marcoses, Deutsche Presse-Agentur (March 11, 1999).
52 See Republic of the Philippines v Marcos, Rejoinder to the Amicus Brief by Attorneys Domingo and Fruto and the "petition" of Rep Rosales, et al, Civ Case Nos 0141 and SB 0185 (Sandiganbayan 1st Div June 21, 1999) (arguing that the majority of victims oppose the settlement, because the settlement was obtained without consultation with victims or victims' groups and that class counsel manipulated victims' NGOs in order to garner attorneys' fees) (on file with U Chi Legal F).
53 Philippines v Marcos, Civil Case Nos 0141 and 0185, slip op at 17 (Rep of Philippines, Sandiganbayan July 27, 1999), cited in Macinnon, 6 ILSA J Intl & Comp L at 571 n 11 (cited in note 7).
reform program, legislation is pending that would ensure that the members of the class receive some percentage.\textsuperscript{55}

2. Doe v Karadzic.

The other command responsibility class action, \textit{Doe v Karadzic},\textsuperscript{56} was filed against Radovan Karadzic, the self-proclaimed president of Republika Srpska in Bosnia-Herzegovina.\textsuperscript{57} An individual action, \textit{Kadic v Karadzic},\textsuperscript{58} involving several individual victims and women’s organizations as plaintiffs was filed concurrently.\textsuperscript{59} The plaintiffs in both cases alleged that they suffered abuses, including rape, summary execution, torture, and other cruel, inhuman and degrading treatment at the hands of Bosnian-Serb military forces under the command and control of Karadzic.\textsuperscript{60} Prior to class certification, the district court dismissed both actions for lack of subject matter jurisdiction (on the theory that non-state actors could not violate the law of nations).\textsuperscript{61} The Second Circuit reversed, declaring that certain international law violations do not require state action.\textsuperscript{62}

On remand, the \textit{Doe} plaintiffs sought certification as a voluntary class under Rule 23(b)(3) or, in the alternative, as a limited fund class under Rule 23(b)(1)(B).\textsuperscript{63} The plaintiffs argued that, regardless of the class option adopted, the court should require notice and allow opt-out rights, in order to recognize the time and expense already expended by the \textit{Kadic} plaintiffs and the due process rights of absentee class members.\textsuperscript{64}

\textsuperscript{55} Id.
\textsuperscript{56} 866 F Supp 734, 736 (S D NY 1994).
\textsuperscript{57} Id.
\textsuperscript{58} 1997 WL 746512 (S D NY).
\textsuperscript{59} Id.
\textsuperscript{60} Karadzic, 866 F Supp at 735.
\textsuperscript{61} Id at 739–41.
\textsuperscript{62} Id at 736–37 (granting defendant’s motion to dismiss for lack of subject matter jurisdiction), revd as Kadic v Karadzic, 70 F3d 232, 236–37 (2d Cir 1995).
\textsuperscript{63} See Doe v Karadzic, Plaintiffs’ Memorandum of Law in Support of Motion for Class Certification, No 93 Civ 878 (PLK) (S D NY July 3, 1997) (on file with U Chi Legal F). See also Doe v Karadzic, Supplemental Memorandum of Law in Support of Class Certification (S D NY Oct 20, 1997) (seeking certification under FRCP 23(b)(1)(B) in the alternative) (on file with U Chi Legal F). To obtain certification under this head of FRCP 23, it must be shown that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”
\textsuperscript{64} Doe v Karadzic, Supplemental Memorandum of Law in Support of Class Certification (S D NY Oct 20, 1997) at 6 n 7 (on file with U Chi Legal F).
The court certified the plaintiffs as a limited fund class consisting of "all people who suffered injury as a result of rape, genocide, summary execution, arbitrary detention, disappearance, torture, or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb Forces under the command and control of [Karadzic] between April 1992 and the [present]." The court chose to proceed under Rule 23(b)(1)(B) partially because of a letter written by the defendant to the court indicating that he did not have the financial resources to bring witnesses for his defense to the United States for depositions or trial. The court also noted that the first set of plaintiffs to go to judgment would likely receive large awards and exhaust any funds available to other potential plaintiffs.

In declining to certify the class as a voluntary class, the court further noted that it had "grave doubts" about the plaintiffs' ability to satisfy the predominance and manageability requirements of Rule 23(b)(3). In any case, the court noted that where either class form is appropriate, courts should utilize the mandatory option in order to avoid overburdening the court system. In this ruling, the court reserved a discretionary decision, pursuant to Rule 23(d)(5), on whether to allow class members to opt out of the mandatory class.

The Kadic plaintiffs thereafter moved to opt out of the class. Although the Doe plaintiffs did not oppose this motion, the court denied it at the outset, as well as upon reconsideration, because allowing the Kadic plaintiffs to proceed independently could impair the ability of the class members to protect their interests. The court also determined that the claims and procedural posture of the moving plaintiffs' case were not significantly dis-

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65 Doe v Karadzic, 176 FRD 458, 461 (S D NY 1997).
66 Id at 463.
67 Id. ("[C]ertification [as a limited fund class] will prevent a situation where one plaintiff lays claim to the lion's share of defendant's limited resources, leaving thousands of others with nothing simply because they lost the race to the courthouse.").
68 Id.
69 Karadzic, 176 FRD at 463 (citing Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1772).
70 Doe v Karadzic, 182 FRD 424, 463 (S D NY 1998).
71 Rule 23(d)(5) authorizes the district court to issue procedural orders in the conduct of class actions.
72 Karadzic, 182 FRD at 425.
tistinguishable from those of the class, such that opting out was appropriate or necessary.\textsuperscript{74}

Subsequent to that decision, the Supreme Court decided Ortiz v Fibreboard Corp,\textsuperscript{75} which significantly limited the availability of Rule 23(b)(1)(B) classes in those mass tort cases that deviate from the traditional model of a limited fund class.\textsuperscript{76} Citing Ortiz, the Kadic plaintiffs moved to decertify the class.\textsuperscript{77} The court, exercising its duty to revisit its certification decision in light of subsequent legal developments, decertified the class.\textsuperscript{78} The court explained that the plaintiffs had failed to present facts establishing the existence of a limited fund.\textsuperscript{79} Subsequently, a dozen former members of the Doe class successfully moved to intervene pursuant to Federal Rule of Civil Procedure 24(b)(2) as plaintiffs,\textsuperscript{80} and both cases proceeded to massive default judgments.\textsuperscript{81} The case has never been appealed, and the judgment remains unexecuted.

\textsuperscript{74} Karadzic, 182 FRD at 428.
\textsuperscript{75} 527 US 815 (1999).
\textsuperscript{76} In Ortiz, the Court held that the "limited fund" rationale is not appropriate to aggregate unliquidated tort claims without evidence that there are truly insufficient funds to satisfy the judgment, the whole fund would be devoted to the claimants, and the claimants would be treated equitably among themselves and proceed under a common theory of recovery. Id at 838–39. The Court was concerned that mandatory class actions that depart from this model have the potential to offend the due process principle that one is not bound by a judgment in an action in which one was not a party. Id at 846. The Court did not, however, entirely preclude the use of mandatory limited fund class actions in the mass tort context. Id at 862 ("While we have not ruled out the possibility under the present Rule of a mandatory class to deal with mass tort litigation on a limited fund rationale, we are not free to dispense with the safeguards that have protected mandatory class members under that theory traditionally.").
\textsuperscript{77} Doe v Karadzic, 192 FRD 133, 135 (S D NY 2000).
\textsuperscript{78} Id at 144.
\textsuperscript{79} Id at 141–42.
\textsuperscript{80} Doe v Karadzic, 2000 US Dist LEXIS 8108, *7 (S D NY):

[Although the specific injuries of each potential plaintiff differ in their disturbing details, the Intervenors' claims 'present the same core of operative facts' as those of the existing plaintiffs, at least with respect to their allegation that the defendant ordered, knew, or should have known of acts deliberately and intentionally inflicted by forces under his command and control.

(internal citation omitted). The fact that the case proceeded despite the decertification of the class belies the conventional wisdom that the failure to achieve certification inevitably sounds the death knell for the suit. See also Beanal v Freeport-McMoRan, Inc, 969 F Supp 362, 367 (E D La 1997) (putative class representative missed the certification deadline but proceeded individually).

\textsuperscript{81} The Kadic plaintiffs obtained a $745 million judgment against Karadzic. See Christine Haughney and Bill Miller, Karadzic Told To Pay Victims $745 Million, Wash Post A13 (Aug 11, 2000). Some time later, a $4.5 billion judgment was awarded in the Doe case.
B. Corporate Cases

A number of additional ATCA and TVPA class actions have been brought against multinational corporations that are engaged in resource extraction or offshore production in so-called "developing countries." These putative classes have asserted a variety of claims. Some have challenged the operation of joint venture projects between multilateral corporations and host governments. Others have criticized corporate policies concerning, among other things, environmental safeguards, the provision of security to facilities and pipelines, land use, and labor practices.

The majority of the class action cases waged against corporations

See David Rohde, Jury in New York Orders Bosnian Serb to Pay Billions, NY Times A10 (Sept 26, 2000).

42 The Karadzic case in many respects paved the way for these corporate cases by recognizing that private actors may be liable for certain international law violations. Kadic v Karadzic, 70 F3d 232, 236 (2d Cir 1995) ("[W]e hold that subject-matter jurisdiction exists, that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor."). But see Sanchez-Espinoza v Reagan, 770 F2d 202, 206-07 (DC Cir 1985) (dismissing claims of torture and rape against Nicaraguan Contras where court was "aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals. As for the law of nations so-called 'customary international law' . . . we conclude that this also does not reach private, non-state conduct of this sort."). (internal citation omitted).


44 See, for example, Sarei v Rio Tinto PLC, 221 F Supp 2d 1116 (C D Cal 2002) (alleging that mining operations in Papua New Guinea destroyed the environment and harmed the health of citizens and that the corporation engaged in war crimes, crimes against humanity, and racial discrimination); Presbyterian Church of Sudan v Talisman Energy, Complaint at 24 (S D NY Feb 25, 2002) (seeking class certification on behalf of a class of "non-Muslim, African Sudanese residents of areas within fifty (50) miles of the [petroleum company] or other oil concession areas and transportation routes in the Sudan" who suffered abuses in connection with oil exploration in the region) (on file with U Chi Legal F); Arias v DynCorp., Complaint at ¶¶ 58–135 (D DC Sept 11, 2001), available online at http://www.laborrights.org/ (last checked September 23, 2003) (alleging corporate responsibility for torture, environmental destruction, crimes against humanity, cultural genocide, negligence, trespass, nuisance, medical monitoring, etc., stemming from defendants' use of toxic herbicide in Colombia); Bao Ge v Li Peng, 201 F Supp 2d 14 (D Col 2000) (dismissing complaint alleging that Adidas and Chinese governmental agencies were responsible for forced prison labor); Beanal v Freeport-McMoRan, Inc, 969 F Supp 362 (E D La 1997), affd 197 F3d 161 (5th Cir 1999) (alleging that defendant's mining operation in Indonesia caused environmental destruction).
have been dismissed prior to class certification or have had certification denied. This Part will discuss some exemplary cases.

1. Jota v Texaco.

Several class actions have been filed against Texaco in connection with its petroleum operations in Ecuador. The first, Sequihua v Texaco, Inc, was removed to the Southern District of Texas, which dismissed the case on the basis of forum non conveniens and international comity. Soon thereafter, Aguinda v Texaco, Inc was filed in the Southern District of New York, where Texaco is headquartered, on behalf of thirty thousand indigenous citizens of Ecuador alleging that the company had engaged in large-scale environmental abuses in the Ecuadorian rain forest. Abuses alleged included the generation of toxic spills and other pollution, the unlawful and harmful disposal of hazardous wastes, and the spoliation of the rain forest habitat and plaintiffs’ property.

Plaintiffs sought certification under Rule 23(b)(3) and alleged that these abuses impacted their rights to life, liberty, and the security of their person. Plaintiffs sought compensatory damages under theories of negligence, public nuisance, strict liability, civil conspiracy, and trespass. They also requested specific equitable relief to remedy the spoliation, restore the environment, and rebuild the allegedly faulty oil-pumping infrastructure. Specifically, plaintiffs sought:

- undertaking or financing environmental cleanup, to include access to potable water and hunting and fishing grounds, renovating or closing the Trans-Ecuadoran Pipeline, creation of an environmental monitoring fund, formulating standards to govern future Texaco oil development, creation of a medical monitoring fund, an injunction restraining Texaco from entering into activities that run a
high risk of environmental or human injuries, and restitution.\textsuperscript{91}

In 1994, a companion class action suit was filed, \textit{Ashanga v Texaco, Inc},\textsuperscript{92} by a class of twenty-five thousand indigenous persons and tribes residing in the downstream Peruvian rain forest, setting forth similar allegations about cross-border environmental harm resulting from Texaco's management of its oil extraction projects in Ecuador.\textsuperscript{93}

\textit{Aguinda} and \textit{Ashanga} have complex procedural histories involving several years of legal challenge by Texaco\textsuperscript{94} and apparent dissension among plaintiffs' counsel.\textsuperscript{95} Ultimately, following the death of the judge initially assigned to \textit{Aguinda}, the court dismissed the two cases on grounds of \textit{forum non conveniens}, international comity, and the failure to join indispensable parties,\textsuperscript{96} relying on the precedent of the \textit{Sequihua} case.\textsuperscript{97} The \textit{Aguinda} and \textit{Ashanga} appeals were consolidated in \textit{Jota v Texaco},\textsuperscript{98} and the Second Circuit vacated the dismissals and remanded the cases, partially because Texaco would have to consent to jurisdiction before the Ecuadorian courts in order to make dismissal on the basis of \textit{forum non conveniens} appropriate.\textsuperscript{99} On remand, Texaco

\begin{itemize}
  \item \textsuperscript{91} Id at 156 n 2.
  \item \textsuperscript{92} Complaint on File with U of Chi L F
  \item \textsuperscript{93} See \textit{Jota}, 157 F3d at 155 (describing \textit{Ashanga} case).
  \item \textsuperscript{94} In particular, Texaco moved to dismiss the suit on \textit{forum non conveniens} and other grounds, but the court reserved its ruling to allow for limited discovery concerning events relating to the harm alleged by plaintiffs that occurred in the United States and to events outside the United States subject to voluntary discovery. \textit{Aguinda v Texaco Inc}, 1994 US Dist LEXIS 4718, *3–4 (S D NY), affd on reconsideration, 850 F Supp 282 (S D NY 1994). That said, the court did indicate that it was inclined to dismiss plaintiffs' class action damages claims due to the difficulty of litigating such claims in a United States court, but noted that retaining plaintiffs' equitable relief claims may be appropriate to the extent plaintiffs' desired relief could be enforced entirely within the United States. Id at *11–12.
  \item \textsuperscript{95} See, for example, \textit{Aguinda v Texaco, Inc}, Memorandum and Decision and Order (S D NY June 19, 1995) (noting withdrawn motion for substitution of counsel) (on file with U Chi Legal F); \textit{Aguinda v Texaco, Inc}, 1994 US Dist LEXIS 18364, *1–2 (S D NY) (denying plaintiffs' motion for the creation of a structure for plaintiffs' representatives).
  \item \textsuperscript{96} \textit{Aguinda v Texaco, Inc}, 945 F Supp 625, 626–27 (S D NY 1996).
  \item \textsuperscript{97} Id; see \textit{Sequihua v Texaco, Inc}, 847 F Supp 61 (S D Tex 1994).
  \item \textsuperscript{98} 157 F3d at 155.
  \item \textsuperscript{99} Id. At the time \textit{Aguinda} was filed, Ecuador issued a statement indicating that it opposed the case because it had determined that allowing it to proceed in U.S. courts would provide a disincentive to investors. \textit{Aguinda}, 1994 US Dist LEXIS at *28. After a change of government in Ecuador while the case was pending appeal, the Ecuadorian government moved to intervene, stating its support for the litigation proceeding in the United States. See \textit{Aguinda v Texaco, Inc}, 175 FRD 50, 51 (S D NY 1997). In light of this change in governmental policy, the \textit{Aguinda} plaintiffs moved for reconsideration. The district court denied the motion for reconsideration and ruled that the motion to intervene
renewed its motions to dismiss both cases on *forum non conveniens* grounds and consented to jurisdiction in Ecuador and/or Peru. The court eventually granted these motions, and these decisions were affirmed on appeal. The case against Texaco will proceed in Ecuador in October 2003.

2. Doe v Unocal.

Similarly, in *Doe v Unocal Corp*, a plaintiff class brought suit against Unocal; Total S.A.; the Myanma Oil and Gas Enterprise ("MOGE"); the government of Burma, formerly known as the State Law and Order Council ("SLORC"); and several corporate officials. In a revised briefing, the putative class was defined as:

all residents of the Tenasserim region of Burma . . . who have been, are, or will be subject to the following acts in furtherance of the Yadana gas pipeline project in which defendants are joint venturers: forced relocation, forced labor, torture, violence against women, arbitrary arrest and detention, cruel, inhuman or degrading treatment, crimes against humanity, the death of family members, battery, false imprisonment, assault, negligent hiring, or negligent supervision.

was untimely. Id. Upon vacating the dismissal, the Second Circuit ordered the district court to consider the new government's position on remand. *Jota*, 157 F.3d at 160-61. *Aguinda v Texaco, Inc*, 2000 US Dist LEXIS 745, *10* (S.D.N.Y) (reserving judgment on dismissal pending additional briefing on whether the courts of Ecuador provide an adequate forum). In the meantime, both sets of plaintiffs unsuccessfully sought the recusal of Judge Rakoff on the grounds that the judge attended a conference that was partially funded by Texaco and the cases had been in abeyance for an inordinate amount of time. *Aguinda v Texaco, Inc*, 139 F. Supp. 2d 438, 439–40 (S.D.N.Y 2000). The Second Circuit denied plaintiffs' writ of mandamus. *In re Aguinda*, 241 F.3d 194, 198 (2d Cir 2001).


The case against Total was dismissed for lack of personal jurisdiction. *Doe v Unocal Corp*, 27 F. Supp. 2d 1174, 1179 (C.D. Cal 1998), aff’d 248 F.3d 915 (9th Cir 2001).

Suits against MOGE and the SLORC were dismissed on foreign sovereign immunity grounds. *Doe v Unocal Corp*, 963 F. Supp. 880, 884 (C.D. Cal 1997).

A companion case was brought on behalf of several individuals, the exiled democratic government of Burma, and the Burmese Federation of Trade Unions. See *National Coalition Government of Union of Burma v Unocal, Inc*, 176 FRD 329, 342 (C.D. Cal 1997) (allowing case to go forward on behalf of individual plaintiffs and labor organization).

Plaintiffs sought injunctive, declaratory, and compensatory relief, alleging that the corporate defendants were engaged in a joint venture with the SLORC and knowingly allowed the SLORC's military, intelligence, and police forces to employ violence and intimidation to relocate entire villages, enslave people in areas in which the pipeline was being installed, and confiscate property, and that the joint venture (and thus the companies) benefited from these practices.  

Plaintiffs eventually sought certification under Rule 23(b)(2) for injunctive and declaratory relief. They sought an order compelling Unocal to terminate its participation in the joint enterprise and its payments to the SLORC until the human rights violations ceased. The court ruled that the class representatives lacked standing to seek this relief on behalf of the proposed class. Although they had demonstrated that they would again be subject to the contested abuses, they could not show that the desired relief would protect against this threat. The court concluded that the abuses would not likely stop with Unocal's withdrawal because the SLORC was committing them. Moreover, other oil companies, including Total, might take Unocal's place in the joint venture. Finally, the court noted that the construction of the pipeline was substantially completed so that injunctive relief was inapposite. Subsequently, the district court granted summary judgment to Unocal because Unocal could not be held responsible for acts of the SLORC under the theories of liability
advanced by plaintiffs. Although the case was reinstated by the Ninth Circuit, it was recently subject to en banc review.

C. Historical Justice Cases

A number of class actions were filed in U.S. courts against German, Swiss, Japanese, French, and other national banks and enterprises alleging harms inflicted during the WWII period. These cases involve international law allegations—including the use of forced and slave labor, sexual slavery, and torture—as well as various municipal contractual and tort claims for relief (such as conversion, breach of contract, and unjust enrichment). Most cases involving European defendants were resolved prior to class certification through broad-based settlements or executive action brokered by interested governments, non-governmental organizations, and other key figures in addition to the parties' lawyers. In contrast, the cases involving Japanese defendants have not succeeded and have to date been dismissed.

1. The Swiss Bank cases.

After attempts to reach a negotiated solution to the lingering problem of dormant Swiss bank accounts stalled in 1996 and 1997, survivors of the Holocaust and their heirs filed four class

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120 In addition to the three sets of cases discussed in Part C, a number of additional class actions were filed against European insurance companies. See, for example, In re Assicurazioni Generali spa Holocaust Insurance Litigation, 228 F Supp 2d 348, 353 (S D NY 2002) (denying defendants' motion to dismiss for forum non conveniens in part on the determination that the non-governmental International Commission on Holocaust Era Insurance Claims did not constitute an adequate alternative forum to litigate plaintiffs' claims).
121 For a more detailed discussion of the Swiss bank cases, see Ramasastry, 31 Vand J Transnatl L at 325 (cited in note 50); Detlev Vagts and Peter Murray, Litigating the Nazi Labor Claims: The Path Not Taken, 43 Harv Intl L J 503 (2002); Michael J. Bazyler, www.swissbankclaims.com: The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks, 25 Fordham Intl L J 64 (2001); Jeffrey Craig Mickletz, Comment,
actions against the three largest Swiss banks. They alleged that the banks were complicit in the Nazi government's efforts to convert plundered assets and profit from slave labor during the WWII period. In particular, the various classes alleged that the banks became the primary means for the Nazi regime to liquidate and convert victims' wealth into currency because the banks knowingly accepted looted assets, concealed and converted assets deposited by Jewish victims, profited from deposits generated by forced labor, and intentionally concealed and prevented the recovery of deposited assets. Plaintiffs' claims included breach of contract, accounting, breach of fiduciary duty, conversion, conspiracy, unjust enrichment, violations of international law, negligence, fraud, and fraudulent concealment. Plaintiffs' theories of liability invoked concepts of conspiracy, fraud on the market, and market share liability because in many cases it was impossible to link specific banks to precise assets. Plaintiffs also alleged that this problem of proof resulted from defendants' purposeful concealment of evidence. Plaintiffs sought compensatory and equi-


After being lobbied for years, the Swiss Bankers Association entered into an agreement on May 2, 1996, with the World Jewish Restitution Organization and the World Jewish Congress to set up an "Independent Committee of Eminent Persons" headed by Paul Volcker, former Chairman of the U.S. Federal Reserve Bank to examine the fate of dormant accounts in Switzerland and to establish a claims resolution process for these funds. See Roger P. Alford, The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks, 20 Berkeley J Intl L 250, 250, 254–55 (2002). However, victims groups grew increasingly frustrated with the pace and operations of the Committee and eventually filed suit. See William Z. Slany, Historian, Department of State, U.S. and Allied Efforts To Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II, Preliminary Study at viii (May 1997), available online at http://www.state.gov/www/regions/eur/ngrpt.pdf, (visited September 23, 2003).

Over the years, the inflexibility of the Swiss Bankers’ Association and other Swiss banks made it extremely difficult for surviving family members of Nazi victims to successfully file claims to secure bank records and other assets. This overall pattern of apparent Swiss bankers' indifference to the needs of the victims of the Holocaust and their heirs persisted until the current international pressures came to bear. See Sean D. Murphy, Contemporary Practice of the United States Relating to International Law, 93 Am J Intl L 879, 891 (1999).

See In re Holocaust Victim Assets Litigation, 105 F Supp 2d 139, 141 (E D NY 2000). Similar class actions filed against Austrian banks were also settled under the auspices of Senator Alfonse D’Amato as Special Master. See In re Austrian and German Bank Holocaust Litigation, 80 F Supp 2d 164, 180 (S D NY 2000) (approving settlement of forty million dollars and denying motion to intervene as untimely), affd as D’Amato v Deutsche Bank, 236 F3d 78, 87 (2d Cir 2001).

See Holocaust Victim Assets Litigation, 105 F Supp 2d at 141.

Id.

Id.

table relief, including an accounting and the disgorgement of profits from looted, cloaked, and deposited assets.127

In 1997, the four class actions were consolidated for pretrial purposes only.128 Defendants moved to dismiss the suits, arguing, among other things, that the court should abstain because of ongoing efforts at non-judicial initiatives to redress plaintiffs’ claims.129 Before the court considered the motions to dismiss or issues surrounding class certification and at the court’s invitation, the parties began settlement discussions.130 A number of key organizations, nations, and individuals, including Jewish restitution organizations, the government of Israel, and officials of the United States Department of State supported the settlement discussions.131 In 1998, a settlement was reached, which resulted in the creation of a $1.2 billion settlement fund, a waiver of all defenses by the defendant banks, the revival of claims that may have otherwise expired, and a release from liability by all the plaintiffs partaking in the settlement.132 In 1999, the court preliminarily approved the settlement,133 which included five settlement subclasses: individuals deprived of their deposited assets by the defendant banks; individuals whose assets were looted or cloaked by the defendant banks; individuals forced to become refugees because they were not admitted into or were deported from Switzerland;134 and two classes of individuals who were subjected to forced labor.135 The notice scheme implemented to con-

127 Holocaust Victim Assets Litigation, 105 F Supp 2d at 141–42.
128 Id.
129 Id.
131 Holocaust Victims, 225 F3d at 193–94.
132 Holocaust Victim Assets Litigation, 105 F Supp 2d at 142–43.
134 This class was composed of victims or targets of persecution that were denied entry into or deported from Switzerland. These individuals did not necessarily have claims against the defendant banks. Nonetheless, the Swiss government insisted upon the inclusion of this class in order to ensure that the settlement was a global “all Switzerland” settlement. See Holocaust Victim Assets Litigation, 105 F Supp 2d at 143–44.
135 Holocaust Victim Assets, 105 F Supp 2d at 143–44. See also Bazylter, 25 Fordham Intl L J at 71, 84–85 (cited in note 120). Four of the five subclasses were composed only of Jewish, Romani, Jehovah’s Witness, homosexual, and physically or mentally disabled or handicapped persons who were victims of Nazi persecution; in contrast, one slave labor class comprised anyone who performed slave labor for any entity based in Switzerland. Holocaust Victim Assets Litigation, 105 F Supp 2d at 161–62. On the final day to file objections to the settlement, an organization representing Polish victims of the Nazi era, the Polish American Defense Committee, and several individuals filed a motion to intervene,
tact members of the various classes and enable individuals to opt out of the settlement has been described as the most ambitious effort ever to notify members of a putative class. Consuming 2% of the settlement (twenty-five million dollars), this “multi-faceted notice plan” included multilingual direct mail, worldwide publication in over five hundred newspapers, public relations efforts, the creation of survivors’ organizations, and internet and community outreach measures.

In light of the settlement, the court held a fairness hearing pursuant to Rule 23(e) in which it examined both the process by which the settlement was reached and the substantive terms of the settlement. The fact that numerous attorneys involved in the suit had waived their attorneys’ fees favored a finding that the settlement did not result from collusion or self-dealing by and among counsel. Any fees sought were capped at 1.8% of the fund and were disbursed through the lodestar formula for time expended. Additionally, the court, relying upon factors set forth in City of Detroit v Grinnell Corp, determined that the settlement was substantively fair. In particular, the court noted that the defendants had raised significant questions regarding whether plaintiffs could pursue their claims under international or municipal law and that strong moral claims are not necessarily easily converted into successful legal causes of action. Under

seeking to amend the settlement to include ethnic Polish victims in all five subclasses. In particular, the interveners argued that as a result of conflicts of interest on the part of class representatives and counsel, the definition of the class had been narrowed, thus improperly excluding them from four of the five sub-classes. The district court's denial of this motion was affirmed on appeal on the grounds that the motion was untimely and that allowing the intervention would jeopardize the settlement.

See Bazyler, 25 Fordham Intl L J at 68 (cited in note 120) (citing Henry Weinstein, Search Opens for Holocaust Claimants, LA Times A3 (June 29, 1999)).

see id at 145.

Id at 145–46.

Id at 146.

495 F2d 448 (2d Cir 1974). See id at 463 (obliging the court to look to (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of maintaining the class action through trial; (6) the ability of the defendants to withstand a greater judgment; (7) the range of reasonableness of the settlement in light of the best possible recovery; and (8) the range of reasonableness of the settlement fund to a possible recovery in light of the attendant risks of litigation).

Holocaust Victim Assets Litigation, 105 F Supp 2d at 148–49; In re Holocaust Victim Assets Litigation, 2000 US Dist LEXIS 15644 (E D NY) (final order and judgment). See
the supervision of a Special Master, payments to claimants fi-
nally began in late 2001 after the settlement agreement had been
finalized, the complex notice scheme had been effectuated, the
fairness appeals process (which included a teleconference hearing
with survivors in Israel) exhausted, Swiss intransigence to shar-
ing files overcome, and an allocation program created and coordi-
nated with the work of the Independent Committee of Eminent
Persons (headed by Paul Volcker) and nascent German restitu-
tion efforts.¹⁴³

2. The German Industry cases.

Beginning in 1998, many of the lawyers working on the Swiss
bank cases filed similar class action suits against German indus-
trial, financial, and insurance enterprises.¹⁴⁴ Some of the early
German class action cases were dismissed before sufficient politi-
cal momentum developed to achieve the type of broad-based reso-
lution obtained in the Swiss bank cases. For example, in
Iwanowa v Ford Motor Co,¹⁴⁵ a putative voluntary class alleged
that defendants had forced members of the class to perform slave
labor under inhumane conditions between 1941 and 1945. The
suit was dismissed prior to certification on multiple grounds, in-
cluding the expiration of the statute of limitations, the non-
justiciable political questions in the case, the failure to state a
claim upon which relief could be granted, and that the resolution
of the suit would offend international comity.¹⁴⁶

¹⁴³ Also in re Austrian and German Bank Holocaust Litigation, 80 F Supp 2d at 177 (noting
significant legal impediments to plaintiffs' claims in historical justice cases).

¹⁴⁴ See generally Kara C. Ryf, Note, Burger-Fischer v Degussa AG U.S. Courts Allow
Siemens and Degussa to Profit from Holocaust Slave Labor, 33 Case W Res J Intl L 155
(2001); Stuart M. Kreindler, Comment, History's Accounting: Liability Issues Surrounding
German Companies for the Use of Slave Labor by Their Corporate Forefathers, 18 Dick J
Intl L 343 (2000); http://www.state.gov/www/regions/eur/holocausthp.html (visited June
29, 2003) (containing research, press statements, and other materials about the cases);
Justin H. Roy, Comment, Strengthening Human Rights Protection: Why the Holocaust
Slave Labor Claims Should be Litigated, 1 Scholar 153 (1999) (discussing German enter-
prise cases).

¹⁴⁵ 67 F Supp 2d 424 (D NJ 1999).

¹⁴⁶ See id at 461–68. Likewise, Burger-Fischer v Degussa AG, 65 F Supp 2d 248 (D NJ
1999), disposed of the claims of four putative class actions seeking to represent, for exam-
ple, classes consisting of:

all Holocaust victims and survivors, their heirs and beneficiaries, who
were injured as a result of Degussa's independent conduct in, and par-
ticipation in the Nazi regime's systematic practices of (i) looting personal
Notwithstanding these initial rulings, additional class actions were filed against a number of other German enterprises. In contrast to the Swiss bank cases, in which plaintiffs' claims generally sounded in contract, the German industry cases involved claims for substantive international law violations, such as the utilization of slave labor and torture. In 1998, prior to any rulings on class certification, negotiations began among the class action lawyers, Stuart Eizenstat (then U.S. Under Secretary of State for Economic Affairs), representatives from German industry, diplomats from interested states, non-governmental organizations, and others, to design a joint state/industry restitution fund. This initiative resulted in a July 17, 2000 executive agreement ("Agreement") between the United States and Germany expressing support for the "Remembrance, Responsibility and the Future" Foundation ("Foundation") created by the German Parliament to administer funds collected from German industry and the government. Although the plaintiffs' lawyers

property, including but not limited to gold, jewelry, eyeglasses, watches and dental gold; (ii) using and profiting from slave and/or forced labor; and (iii) manufacturing, marketing, and profiting from the sale to the Nazi regime of Zyklon B, a key component of the Nazi regime's program of genocide.

Id at 252. Plaintiffs sought restitution and disgorgement as well as compensation for violations of international law. Id at 252–53. Like Iwanowa, the case was dismissed on political question grounds. Id at 282. Plaintiffs did not pursue appeals in these early cases as international negotiations toward the creation of a restitution fund had been initiated. Stephen Whinston, Can Lawyers and Judges be Good Historians?: A Critical Examination of the Siemens Slave-Labor Cases, 20 Berkeley J Intl L 160, 160, 167 (2002). See also Fishel v BASF Group, 1998 US Dist LEXIS 21230, *19–22 (S D Iowa) (dismissing putative class action filed on behalf of WWII forced labor victims for lack of personal jurisdiction over defendant corporations).

All cases against German enterprises, including industrial corporations and insurance companies, were ultimately consolidated in the district of New Jersey. In re Nazi Era Cases Against German Defendants Litigation, 198 FRD 429, 430 (citing Transfer Order, Docket No. 1337 (August 4, 2000)).

See Part I.C.1.


See generally In re: Nazi Era Cases Against German Defendants Litigation, 198 FRD 429, 431–32 (D NJ 2000) (describing negotiation process). Similar funds have been created for individuals who provided slave or forced labor on Austrian territory, see http://www.reconciliationfund.at/history.htm (visited September 23, 2003), and with claims involving property in Austria, see http://www.nationalfonds.org/aef/english/index.htm (visited September 23, 2003).

United States-Germany: Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” 39 ILM 1298 (2000) ("Agreement"). One of the stated purposes of the Foundation was "to lay the groundwork for countering lawsuits, particularly class actions in the USA, and remove the rationale for any campaigns against the reputation of our country and its business community." Murphy, 93 Am J Intl L at 886 (cited in note 121).
participated in the execution of the Agreement and the establishment of the Foundation, neither effort technically represents a settlement of the class action lawsuits.\footnote{The majority of the other WWII cases were similarly resolved through executive, rather than judicial, action. Ratner, 20 Berkeley J Intl L at 213 (cited in note 118). See also id at 230–32 (arguing for superiority of court-administered settlement within the structural safeguards of Rule 23 over executive branch negotiations and agreement).}

The Foundation will consolidate the funds provided by the German government and German industry, and will provide payments totaling close to $4.8 billion to almost one million former slaves and forced laborers, victims whose property was confiscated, and persons wrongly denied insurance claims. This is the biggest restitution fund ever created in the history of human rights claims in U.S. courts.\footnote{See Kreindler, 18 Dick J Intl L at 343 (cited in note 144).} It intends to be the “exclusive remedy and forum” for the resolution of all claims filed against German industry.\footnote{Art 1, Agreement, 39 ILM at 1299.} Pursuant to this Agreement, the United States agreed to file statements of interest in all pending cases advising the court of its foreign policy interests in keeping the Foundation as the sole source of compensation for WWII-era victims of German industry human rights violations.\footnote{Art 2(1), Agreement, 39 ILM at 1300. See also \\textit{Nazi Era Cases}, 198 FRD at 435.} In exchange for compensation, plaintiffs provided German industry with “legal peace” by voluntarily dismissing, with prejudice, all outstanding lawsuits. This included over forty putative class action suits that required court approval for settlement.\footnote{See \\textit{Nazi Era Cases}, 198 FRD at 430, 438–39.} Pursuant to Rule 23(e), the court approved the settlement of the class actions, dismissed the majority of the class actions with consent and prejudice,\footnote{But see \\textit{In re Austrian, German Holocaust Litigation}, 250 F3d 156, 159–65 (2d Cir 2001) (granting petition for mandamus and ordering dismissal of German cases with consent despite district court’s concerns about the implementation of the settlement).} and ruled that notice to the putative class was not required because the class had never been certified.\footnote{See Nazi Era Cases, 198 FRD at 444–46. The individual actions were also dismissed. See Nazi Era Cases, 129 F Supp 2d 370, 383–84 (D NJ 2001) (dismissing case without consent on international comity and political question grounds in light of the Agreement and a U.S. statement of interest filed in the case).} Individual victims have begun to receive between twenty five and seventy five hundred dollars each, depending upon the degree of the harm they suffered.\footnote{See Vagts and Murray, 43 Harv Intl L J at 522 (cited in note 120).} In particular, slave laborers, defined as those individuals detained in concentration camps, received the highest awards. These dis-
parities in awards resulted in significant acrimony between concentration camp victims and other forced labor victims.\(^\text{160}\)

3. The Japanese cases.

The majority of the Japanese class actions have not achieved the same success as the European cases.\(^\text{161}\) For example, a class action against Japan was filed in the District of Columbia, seeking monetary damages and a declaration that Japan had engaged in crimes against humanity in connection with its administration of the "comfort women" program during World War II.\(^\text{162}\) In contrast to the executive support accorded the European class actions, the Bush administration filed a statement of interest urging the court not to hear the case on political question grounds.\(^\text{163}\) The court ruled that no exception for sovereign immunity existed and that the action involved non-justiciable political questions concerning the propriety of post-WWII treaties with Japan and the right to war reparations that compelled dismissal.\(^\text{164}\) This case is currently on appeal to the D.C. Circuit.

Likewise, In re World War II Era Japanese Forced Labor Litigation\(^\text{165}\) concerned a series of class actions involving Japanese, Korean, Chinese, and United States WWII veterans forced to labor without compensation during the War. These veterans sought damages and other remedies from the Japanese companies for whom they had worked. The cases invoked a 1999 California statute allowing individuals forced to labor without compensation by the Nazi regime or its sympathizers or allies to bring suit against any entity for whom that labor was per-

\(^{160}\) See id.


\(^{164}\) Joo, 172 F Supp 2d at 67.

\(^{165}\) 164 F Supp 2d 1160 (N D Cal 2001), affd as Deutsch v Turner Corp, 317 F3d 1005 (9th Cir 2003), as amended, 2003 US App LEXIS 3937 (9th Cir).
formed. The various cases filed in federal court were consolidated for pretrial proceedings in the Northern District of California. The court dismissed the actions involving United States and Allied veterans, ruling that the 1951 Treaty of Peace with Japan waived their claims. With respect to the non-Allied veterans, the court later found the California statute unconstitutional as applied to the defendants, because it infringed on the federal government’s exclusive power to conduct foreign affairs. Plaintiffs attempted to assert claims under the ATCA and state law as well, but the court ruled that all of these claims were time barred.

II. ADVANTAGES & DISADVANTAGES OF THE CLASS ACTION MECHANISM FOR HUMAN RIGHTS LITIGATION

This survey of human rights class actions reveals that they have an equivocal track record, at best. Only two human rights class actions have proceeded to judgment: one against a deceased defendant’s estate (Marcos) and one upon the defendant’s default (Karadzic). Not one of the federal class actions against corporations has proceeded past the class certification stage. Courts have either dismissed the cases outright on jurisdictional or other grounds, or denied certification. Some of the European historical

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170 Japanese Forced Labor Litigation, 164 F Supp 2d at 1181–82.

171 To be sure, it is difficult to compare the success of the relatively few human rights class actions with other class actions, the majority of which may not achieve certification or may settle well before trial. Thus, the track record of human rights class actions may actually be no worse than for other class actions. Nonetheless, human rights class actions can be evaluated against the relative success obtained in individual human rights actions, which have consistently resulted in important victories for individual plaintiffs.
justice cases did succeed in generating monetary restitution for members of the putative classes, but only as a result of intense diplomatic efforts and not necessarily to the satisfaction of all members of the class.

Notwithstanding the mixed results of these prior efforts, new human rights class actions are filed on a regular basis, especially against corporate defendants. This indicates that litigants continue to see benefit from proceeding under Rule 23. This Part discusses some of the theoretical advantages presented by the class action mechanism to human rights litigation. It then discusses the various challenges to class suits that have prevented the theoretical advantages from full realization and have prevented victims from achieving full satisfaction from the process of collective action.

A. The Theoretical Advantages Of The Class Action Mechanism In Human Rights Litigation

Using the Rule 23 mechanism in the human rights context offers litigants many of the same advantages available in mass tort, civil rights, and other more standard collective actions. These include the ability to pool resources to pursue the action; the ability of plaintiffs to obtain the same “economies of scale” enjoyed by defendants litigating common issues; the reduction of discovery, motion practice, and other pretrial procedures; the opportunity for a single judge to familiarize herself with the entire dispute; the need to litigate defenses only once; the need to obtain personal jurisdiction over the defendant only once; the ability of non-named members of the class to avoid exhaustion requirements; the enhanced chance of a global settlement or of receiving

172 Most recently, for example, class actions have been filed in the Eastern District of New York against Barclays and other corporate defendants under the ATCA alleging that defendants aided and abetted the apartheid regime in South Africa. See Naomi degli Innocenti & John Reed, The shadow of apartheid, Financial Times (May 18, 2003); available online at <http://bigclassaction.com/human_rights.html> (visited September 23, 2003). Likewise, a class action suit has been filed against Shell Oil in the Southern District of New York alleging that the company is responsible for abuses by members of the Nigerian military in Ogoniland, where Shell engages in oil exploration and extraction. See Shell Oil, available online at <http://www.bigclassaction.com/class_action/complaint_form_shell.html> (visited September 23, 2003). This class action follows on the heels of an individual action filed against Shell Oil, alleging that the company was complicit in abuses by the Nigerian government in Ogoniland. See Wiwa v Royal Dutch Petroleum Co, 1998 US Dist LEXIS 23064, *1–3 (S D NY) (dismissing case on forum non conveniens), reinstated at 226 F3d 88 (2d Cir 2000). Class actions against corporate defendants will likely increase as foreign investment by multinationals increases.
attorneys' fees through the creation of a common fund; and increased visibility for the case.173

However, some of the typical rationales for employing the class action mechanism in other contexts may not operate effectively in the human rights context.174 Human rights class actions do not involve small or "negative value" claims, brought primarily for their deterrence value, that could not be efficiently litigated as individual actions. Rather, the claims invariably possess high individual value. Indeed, human rights claimants who have prevailed in individual actions have won multi-million dollar judgments.175 Likewise, human rights class actions do not generally consolidate multiple suits that would otherwise proceed independently in different jurisdictions with all of the attendant impacts on judicial efficiency and the potential for contradictory pronouncements. On the other hand, like many class actions, without class treatment, it does not follow that all members of a hypothetical class of human rights victims would pursue individual suits, because of the many barriers to bringing such suits. In fact, allowing human rights cases to proceed as class actions may actually result in an increase in the expenditure of judicial resources, because without class treatment the cases may not proceed at all.

This Section identifies certain advantages of class treatment uniquely significant in the human rights context. Many of the advantages that class treatment offers human rights claimants may not be relevant under, or recognized by, the Federal Rules. Moreover, all of the traditional objectives of the class action model may not be operative in the human rights context. Yet, the unique nature of human rights claims and the predicaments and objectives of human rights claimants lend themselves, at least

175 Most recently, the author was involved in a case in which three plaintiffs won a $54.6 million jury verdict against two former Ministers of Defense of El Salvador. See Robert Collier, Florida jury convicts 2 Salvadoran generals of atrocities, San Fran Chron A12 (July 24, 2002).
theoretically, to class treatment. When evaluating human rights class actions, one must consider the role that the class action mechanism can play in promoting redress for victims and accountability of human rights violators, especially with large-scale and systemic abuses.

1. A mechanism to expose and redress systemic harms.

The class action mechanism has the potential to give force to grievances about government or corporate practices and policies that violate human rights on a collective scale. Adopting an expansive conception of the causes of the harm alleged by members of the class facilitates the discovery and disclosure of a pattern of wrongdoing, perhaps not readily apparent from singular or scattered cases. This allows for a more accurate assessment of the systemic harm done to a group and can potentially generate more effective remedies to address class-wide injuries, thus ensuring symmetry between substantive rights and available remedies.

Further, the class action device can restore the “balance of power” between plaintiffs and defendants by holding human rights violators accountable for a fuller range of the harm caused than an individual action might. Moreover, proceeding as a class action may generate a powerful deterrent effect. Particularly with respect to human rights cases against corporations, class treatment may be necessary to create “optimum incentives” for multinational corporations to take due care in arranging for project security, providing weapons and other materiel to host governments, protecting the environment in which they are operating, and designing and implementing offshore personnel policies—all issues that have served as the basis for cases against corporate entities. Without the threat of aggregative liability and unless defendants are forced to bear the full costs of the harm caused, unlawful conduct may remain “profitable.”

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177 See Three Theories of the Class Action, 89 Harv. L. Rev. 1329, 1368 (1976).
179 Boyd, 1999 BYU L. Rev at 1210 (cited in note 3) (noting that “such incentives may deter corporate joint ventures with corrupt governments in mass victimization of plaintiffs’ rights under CIL”).
180 David Rosenberg, The Causal Connection In Mass Exposure Cases: A “Public Law” Vision Of The Tort System, 97 Harv. L Rev 851, 906–07 (1984) (noting that critical mass of victims must prosecute claims in order for responsible institutions to be confronted with threat of liability powerful enough to invoke deterrence); Developments in the Law, 89
tive action in response to systemic harms may result in a fuller realization of the substantive policies underlying applicable international norms.\(^1\)

2. The collective nature of international law claims and forms of individual responsibility.

The ATCA provides federal courts with jurisdiction over torts “committed in violation of the law of nations.”\(^2\) This includes claims arising from the tort analogs of international criminal law violations (that subset of international law that gives rise to individual criminal responsibility) or arising under the pantheon of international human rights norms.\(^3\) The definitions of many international criminal law and human rights violations contemplate collective harms, which often differentiate international from domestic crimes and delicts.\(^4\) This may render human rights claims more amenable to class treatment than the claims typically advanced in domestic mass tort cases, which are based on underlying substantive rights that are strongly individual in character.\(^5\)

For example, the international offense of crimes against humanity encompasses a constellation of acts made criminal under international law when committed within a widespread or systematic attack against a civilian population.\(^6\) Likewise, genocide requires a showing that a protected group was subjected to vio-

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Harv L Rev at 1355–56 (noting that class actions force defendants to confront the full social costs of their actions).

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1 See Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stanford L Rev 1183, 1186 (1982) (noting that class actions focus on institutional practices); Amy Laderberg, The “Dirty Little Secret”: Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse, 40 Wm & Mary L Rev 323, 328 (1998) (noting similar advantage in civil rights class actions).

2 28 USC § 1350.


4 See generally Beth Van Schaack, The Definition of Crimes Against Humanity: Resolving the Incoherence, 37 Colum J Transnatl L 787 (1999) (discussing the definitional mechanisms employed in international criminal law to distinguish international from domestic offenses).

5 I am indebted to Professor Richard Nagareda for this observation.

lent acts, intended by the perpetrator to destroy the group. Theoretically, an individual plaintiff can be the victim of a crime against humanity or genocide. However, because the concepts themselves contemplate mass or systemic actions against groups, it may be difficult for both the victim and the jury assessing her damages to individualize these concepts. Thus, these claims may be most effectively pled and enforced through collective legal action.

In addition, several international criminal law norms—such as the prohibitions against genocide, persecution, and crimes against humanity—are identity based, meaning that they prohibit abuses targeted against particular groups. The crime of genocide, for example, involves the commission of any number of acts against a national, ethnic, racial, or religious group. Invoking these norms in a collective fashion, through the mechanism of the class action device, provides a forum for groups bound by ethnic or cultural characteristics to assert their shared identity. Groups that may not otherwise benefit from political or other recognition can thus utilize the class action mechanism to engage in group definition and identification. In this regard, several hu-

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188 Article II of the Genocide Convention reads in full: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Id. The notion of a “national” group has been interpreted to encompass national minorities. See William A. Schabas, Genocide in International Law: the Crimes of Crimes 116-18 (Cambridge 2000).


190 See Chibundu, 39 Va J Intl L at 1109 (cited in note 6) (noting that the class action device is an effective litigation tool where it is “wielded not to vindicate the aggregate of otherwise individualized interests, but [to exemplify] ideological group interests”).
Human rights class actions have involved allegations, by indigenous or other minority groups, that corporate practices are destroying the groups' unique cultural characteristics and ability to maintain their traditional relationships with the land.191

Human rights law contemplates three "generations" of rights: civil and political rights; economic, social and cultural rights; and collective rights of groups, encompassing rights of political, cultural, economic, and social self-determination and development.192 Many cases against corporate defendants have involved allegations that a corporate entity, or a government engaged in a joint venture with a corporate defendant, violated the "third generation of human rights" of indigenous or minority groups.193 In such cases, the litigant is often conceived of as the group itself, in keeping with the entity model of class representation.194

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191 See, for example, Aguinda v Texaco, Inc, 1994 US Dist LEXIS 4718 (S D NY) (action on behalf of indigenous Amazon people alleging destruction of tropical rainforest habitat); Beanal v Freeport-McMoRan, Inc, 969 F Supp 362, 366 (E D La 1997) (alleging the commission of "cultural genocide").


193 See generally Boyd, 1999 BYU L Rev at 1169 (cited in note 3) ("Judicial recognition of collective private rights under [customary international law], through class certification and implementation of class remedies, enables individuals to exercise rights that, due to costs, they would not otherwise enjoy.").

194 See David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L Rev 913, 919 (1998). See also Boyd, 1999 BYU L Rev at 1183 (cited in note 3) (noting that the entity model "fits the human rights case in which the litigant is a cohesive group possessing collective rights"). But see Chibundu, 39 Va J Int'l L at 1109 (cited in note 6) (noting that the class action model allows the vindication of individual interests, not group interests); John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, And Loyalty In Representative Litigation, 100 Colum L Rev 370, 380–85 (2000) (arguing that class actions seeking money damages constitute an aggregation of individuals holding similar claims against common defendants rather than an entity distinct from its members).
Litigants and lawyers involved in these cases have theorized that the class action mechanism could serve a constitutive function in the formation of international law by enabling the judicial enforcement of these collective rights, which have heretofore had an "ambiguous jural status" in international law. Through the class action, plaintiffs have advanced claims of cultural genocide and environmental torts, which have not been enforced or adjudicated in prior domestic proceedings under the ATCA. For the most part, however, these efforts have not enjoyed success, as courts have ruled that the norms in question have not risen to the level of "torts . . . in violation of the law of nations" as required by the ATCA. For example, the putative class in Beanal v Freeport-McMoRan, Inc alleged that the defendant mining company committed cultural genocide, various human rights abuses, and environmental torts that destroyed an Indonesian indigenous group's unique cultural identity and its ability to sustain itself and its cultural practices. The district court held and the Fifth Circuit affirmed that claims of cultural genocide and environmental harm were not cognizable under the ATCA, because they were not sufficiently definable, universal, or obligatory to constitute violations of the law of nations. That said, as these norms become the subject of more binding pronouncements and more concrete definitions, they may receive a better reception under ATCA jurisprudence.

195 See Geoffrey B. Hazard, The Effect of the Class Action Device upon the Substantive Law, 58 FRD 307, 307 (1973) (noting that "[s]ubstantive law is shaped and articulated by procedural possibilities").
196 Id.
197 Boyd, 1999 BYU L Rev at 1147 (cited in note 3) (arguing that the judicial pronouncement of class definitions provide a means of developing new substantive international law norms); id at 1172–73 (opining that the class action device provides a mechanism for defining and enforcing collective rights).
199 969 F Supp 362 (E D La 1997).
200 Id at 373, 382.
201 Id at 373.
202 Beanal v Freeport-McMoRan, Inc, 197 F3d 161, 168 (5th Cir 1999).
203 Id at 167–68.
Forms of responsibility recognized by international law also lend themselves to the class action model. For example, the Marcos and Karadzic cases proceeded under the theory of command responsibility, which provides that a military or civilian superior can be liable for the criminal acts of subordinates if the superior knew or should have known that subordinates committed abuses and failed to either prevent or punish the criminal conduct. The class action device allows a class of victims to hold a defendant commander liable for all abuses by his subordinates attributable to his derelictions of command.

3. The opportunity to bear witness to and record a community's stories.

Human rights victims and advocates assert the existence of a "right" to truth. Accordingly, human rights claimants may seek the creation of a public historical record of the harm caused to a particular region or population as a result of a repressive course of conduct. Litigation allows a group of victims to preserve their collective memory through the public airing and recording of the stories of a community of victims. The right of a class to seek declaratory relief pursuant to Rule 23(b)(2) in the form of a court acknowledgement that particular rights were violated on a collective scale provides a mechanism for formalizing a judicial determination in this regard.

Given the collective nature of international law norms and forms of responsibility, proceeding as a class action allows class plaintiffs to seek the discovery and introduction of a broader range of evidence that may more accurately reflect the nature of the repression suffered under a particular regime or at the hands of a particular individual. Such broad discovery aids in creating a more accurate and complete historical and judicial record.

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205 See *Ford v Garcia*, 289 F3d 1283, 1288 (11th Cir 2002) (discussing the elements of liability under the command responsibility doctrine).


207 See, for example, *Presbyterian Church of Sudan v Talisman Energy*, Complaint at 27 (S D NY Feb 25, 2002) (seeking declaration that defendants "violated international law in connection with their oil exploration and drilling activities in Sudan, or has aided and abetted therein").

208 See Rosenberg, 62 Ind L J at 587 (cited in note 176) (noting that the class action mechanism encourages courts to look to systemic, class wide nature of the challenged conduct, which may be lost to "judicial myopia" where independent claimants proceed in
Without the rubric of the class action, courts may resist the introduction of such evidence as redundant, irrelevant, or overly prejudicial to the defendant if it does not relate directly to the dispute between the two parties at bar.\textsuperscript{209}

4. A vehicle for class-wide injunctive or other equitable relief.

The most obvious objective of a civil case brought by victims of human rights violations—whether as an individual suit or as a class action—is to secure a monetary judgment, recognizing, however, that a victim of grave human rights violations may never receive full compensation for the harm suffered. Beyond compensation for past harms, human rights claimants may also seek injunctive relief,\textsuperscript{210} including changes in corporate policies or implementation of remedial measures,\textsuperscript{211} such as an environ-

\textsuperscript{209} See FRE 403 (excluding evidence where its introduction would lead to "unfair prejudice, confusion of the issues . . . undue delay, waste of time, or needless presentation of cumulative evidence"). That said, in individual cases involving crimes against humanity or command responsibility allegations, such evidence may be admissible for the purpose of either establishing one of the elements of crimes against humanity (for example, the existence of an attack on a civilian population) or to establish notice on the part of the defendant. For example, in \textit{Romagoza v Garcia}, plaintiffs were permitted to introduce expert and other testimony about the nature and extent of repression against civilians in El Salvador in the early 1980s in order to show that (1) defendants knew, or should have known, that subordinates were committing abuses; (2) that they failed to intervene to prevent or punish this criminal conduct; and (3) that there were patterns to the violence, which implied organization from the top rather than random abuses by subordinates. The court admitted voluminous evidence in this regard, prefacing it with limiting instructions to the jury as to the purposes for which such evidence was admitted. See, for example, \textit{Romagoza v Garcia}, Trial Transcript, at 740:18 – 742:7 (S D Fl July 2, 2002) (allowing the introduction of evidence relevant to whether defendants were on notice of abuses) (on file with U Chi Legal F).

\textsuperscript{210} See generally Sarah Light, Note, \textit{The Human Rights Injunction: Equitable Remedies Under the Alien Tort Claims Act}, 9 Transnatl L & Contemp Probs 653 (1999) (discussing cases in which injunctive relief in the human rights context may be appropriate, notwithstanding concerns stemming from extraterritorial effect, such as doctrine of international comity and challenges related to enforcement).

\textsuperscript{211} Several human rights class actions against corporate defendants have sought such equitable relief from corporate conduct and policies allegedly harming the plaintiff group.

For example, plaintiffs in \textit{Aguinda} sought equitable relief against Texaco in the form of undertaking or financing environmental cleanup, to include access to potable water and hunting and fishing grounds, renovating or closing the Trans-Ecuadoran Pipeline, creation of an environmental monitoring fund, formulating standards to govern future Texaco oil development, creation of a medical monitoring fund, an injunction restraining Texaco from entering into activities that run a high risk of environmental or human injuries, and restitution.
mental cleanup or medical monitoring. Likewise, human rights claimants may seek, via declaratory relief, a public and judicial acknowledgement of the violation of particular rights and the illegality of a particular course of conduct.

The Federal Rules recognize the propriety of seeking such relief through legal proceedings involving all individuals who will be impacted by the relief sought. Specifically, Rule 23(b)(2) allows for class treatment if “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” This Rule was designed specifically for civil rights cases “seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons.” To obtain this relief, the putative class must demonstrate that “the interests of the class members are so like those of the individual representatives that injustice will not result from their being bound by such judgment in the subsequent application of principles of res judicata.”

Such cases rest on allegations that the defendant’s conduct is common to all class members “irrespective of their individual circumstances and the disparate effects of the conduct.” Rather than aggregating individual claims, mandatory Rule 23(b)(2) class actions involve claims that belong to the collectivity. Thus, a Rule 23(b)(2) class may be appropriate where a human rights case, such as Jota v Texaco, Inc, 157 F3d 153, 156 n 2 (2d Cir 1998) (discussing Aguinda). Conceivably, a plaintiff class could seek equitable relief against an individual defendant in a command responsibility case; however, it is difficult to conceive of how such relief would be enforced. See Kadic v Karadzic, Complaint, at 19 (seeking to enjoin defendant from “permitting to occur under his command, any genocidal acts or ‘ethnic cleansing’”) (on file with U Chi Legal F).

Although the question is not entirely settled, medical monitoring may be best conceived of as a form of prospective injunctive relief, rather than as retrospective compensatory payments for realized harms. See John C. P. Goldberg and Benjamin C. Zipursky, Unrealized Torts, 88 Va L Rev 1625, 1709–12 (2002) (discussing medical monitoring and the duty to aid the imperiled); Barnes v American Tobacco Co, 161 F3d 127, 132, 142 (3d Cir 1998) (treating medical monitoring as a form of injunctive relief).

See Samuel Issacharoff, Preclusion, Due Process, and the Right to Opt Out of Class Actions, 77 Notre Dame L Rev 1057, 1058–59 (2002) (describing cases in which no individual litigant will have “an autonomous right to an independent outcome in the litigation”).

FRCP 23(b)(2).


Baby Neal for and by Kanter v Casey, 43 F3d 48, 57 (3d Cir 1994) (citing 7A Wright § 1763 at 219).
class's interests are cohesive and indivisible, the relief sought would be undermined if members of the class were allowed to opt out or pursue separate actions, the defendant could otherwise be subject to conflicting directives concerning its conduct, or individual litigants with extreme positions may seek relief that would be unwelcome to other members of the group. Further, Rule 23(b)(2) class actions do not raise issues of predominance, manageability, and representation, which would be the case if members of the class were to seek individualized, intangible and retroactive damage awards based upon the merits of individual claims and proof of actual injury. Thus, Rule 23(b)(2) enables the class to proceed collectively even where the individual circumstances of class members may predominate over common issues, which would render certification under Rule 23(b)(3) unavailable.220

Assuming that class representatives and class counsel take their fiduciary responsibilities seriously, pursuing injunctive relief for the class provides a democratic aspect to a suit and ensures that the relief sought is desired by those who will be impacted by it. Such relief will only be authorized, however, where the entity before the court is capable of effectuating it. Thus, injunctive relief will only be appropriate where a corporate defendant possesses the ability to remedy the harm to the plaintiff

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218 See Robinson v Metro-North Commuter R R Co, 267 F3d 147, 165 (2d Cir 2001) ("Where class-wide injunctive or declaratory relief is sought in a (b)(2) class action for an alleged group harm, there is a presumption of cohesion and unity between absent class members and the class representatives such that adequate representation will generally safeguard absent class members' interests and thereby satisfy the strictures of due process.").

219 Issacharoff, 77 Notre Dame L Rev at 1073 (cited in note 213). For example, where a plaintiff class seeks medical monitoring, all plaintiffs stand in the same relation toward the claim, because they are each subject to the same probabilistic risk of harm. Id at 1076.

220 See Allison v Citgo Petroleum Corp, 151 F3d 402 (5th Cir 1998) (denying certification under Rule 23(b)(2) because the predominant relief sought was money damages, and Rule 23(b)(3), because claims for compensatory and punitive damages predominated over common issues). Monetary damages may be available in the context of Rule 23(b)(2) class actions where such relief is essentially a group remedy incidental to the injunctive relief sought, which is to say that it flows directly from a finding of a defendant's liability to the class as a whole. Id at 413–15. For example, in the employment discrimination context, courts may consider backpay an integral part of the remedial remedy provided by the relevant statutes. See Johnson v Georgia Highway Express, Inc, 417 F2d 1122, 1125 (5th Cir 1969); Issacharoff, 77 Notre Dame L Rev at 1069 n 59 (noting different approaches to the award of damages in Rule 23(b)(2) class actions) (cited in note 213).

221 See, for example, Unocal, 67 F Supp 2d at 1146. But see Jota v Texaco, Inc, 157 F3d 153, 161–162 (2d Cir. 1998), vacating sub nom Aguinda v Texaco, Inc, 945 F Supp. 625 (SD N Y 1996) (ordering district court to consider equitable relief notwithstanding inability to join state petroleum agency).
class, through, for instance, environmental cleanup or medical monitoring. The flexibility inherent to proceeding in equity can enable a court to fashion a remedial scheme that will ameliorate specific harms alleged by the claimants, even if complete relief cannot be obtained. Such relief may “more effectively influence behavior than damage awards” and may better address ongoing harms.

Equitable relief may also be appropriate in situations where a plaintiff’s claims could potentially be declared moot due to changed circumstances. For example, where a plaintiff has become a refugee and is no longer subject to a repressive regime or policy, it may be difficult to demonstrate the credible threat of recurring injury necessary to seek injunctive relief. Where a class seeks injunctive relief, the court focuses on the standing of the class to seek the equitable relief desired, rather than the standing of the named plaintiff. Thus, even if the named plaintiff’s claim to injunctive relief is subsequently found moot, the claims of the class to the desired relief survive.

5. A basis for negotiation.

Class members may use litigation and any judicial pronouncements as “bargaining chips” in seeking a negotiated solution or structural reform. The class action device places victims of human rights abuses in a powerful litigation posture that may enable the class to operate on a corporate or diplomatic level with a degree of political power generally unavailable to individual claimants. For example, the Marcos jury award factored into the negotiations between the Swiss banks holding Marcos’s assets and the new government of the Republic of the Philippines. The

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222 See, for example, Aguinda, 850 F Supp at 283 (seeking the establishment of a medical program and environmental remedies in Ecuador).
223 Jota, 157 F3d at 162 (noting that “an injunction might require Texaco to make good faith efforts to institute all, or at least portions, of the relief that the plaintiffs seek”).
224 Light, 9 Transnatl L & Contemp Probs at 657 (cited in note 210).
225 See, for example, Los Angeles v Lyons, 461 US 95, 110 (1983) (holding that plaintiff had no standing to seek injunctive relief because he did not face “a real and immediate threat of again being illegally choked”).
226 But see Doe v Unocal Corp, 67 F Supp 2d 1140, 1143–44 (C D Cal 1999) (finding that a credible threat of future harm had been alleged where plaintiffs, who were all refugees in Thailand, might be forcibly repatriated to Burma either by attacks by the SLORC on refugee camps or as a result of Thai refoulement actions).
227 See, for example, LaDuke v Nelson, 762 F2d 1318, 1325 (9th Cir 1985).
228 Id.
229 See note 33.
Swiss banks ultimately agreed to transfer the funds to the Philippines, but a Filipino court, facing objections from members of the class, rejected the settlement because it benefited the lawyers and Marcos's Estate, but not the victims.\(^{20}\)

Likewise, the European WWII class action proceedings in many respects galvanized the diplomatic and intergovernmental efforts that eventually led to the establishment of several European and industry investigative, claims, and compensation commissions and tribunals, and the negotiation of broad settlements.\(^{21}\) Thus, the class action suits became an arrow in the quiver of the WWII restitution movement that included municipal sanctions, boycotts, and governmental pressure. This movement provided an incentive for German, Swiss, and other national entities to recognize their moral debt to the victim classes, even when the plaintiffs' legal claims were tenuous because of the passage of time and complicated problems of proof. This result is not inevitable; the European WWII cases achieved what they did through a complex interplay of law, diplomacy, and politics. By contrast, the Japanese WWII class actions have been vigorously defended and have been unable to motivate the degree of political will required to effectuate settlements or restitution schemes comparable to those achieved in the European cases.\(^{22}\)

From the perspective of the accused individual or entity, all class actions potentially "blackmail" a settlement of even unmeritorious claims. From the defendant's perspective the potential exposure of a class action presents too great of a risk.\(^{23}\) Putting aside the historical justice cases, settlement—strictly speaking—

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\(^{20}\) See note 53.

\(^{21}\) See Bazyler, 25 Fordham Intl L J at 90–91 (cited in note 120) (noting the effectiveness of trade threats in encouraging European enterprises to settle); Authors and Wolfe, The Victim's Fortune 219 (cited in note 118) (noting opinion that the cases were being used as a "matrix for a larger negotiation").


has rarely occurred in the human rights context. In the first generation of cases against individual perpetrators inaugurated by *Filartiga*, defendants usually contested the jurisdiction of the court and fled the United States immediately following service of process or after losing an initial round of motions to dismiss, resulting in a series of default judgments. Where defendants have not fled, they have defended the action through trial, as in *Ford v Garcia* and *Romagoza v Garcia*.

The possibility of settlement—and thus of a coerced settlement—may be more likely in cases against corporate defendants, who cannot flee and who may face significant public relations pressures. Nevertheless, corporate defendants thus far have vigorously defended human rights suits and, in many cases, have obtained dismissals. The *Unocal* case, in which a panel of the Ninth Circuit recently reversed summary judgment on behalf of Unocal, may provide the first opportunity for a real possibility of settlement, depending upon the outcome of the full circuit’s review of the case.

6. The lack of other options for redress.

A community of human rights victims may find proceeding as a class desirable because representative justice may provide the only possible justice for victims of a particular policy or individual. Substantial barriers exist for human rights plaintiffs pur-

234 630 F2d 876 (2d Cir 1980).
235 See, for example, *Mushikiwabo v Barayagwiza*, 1996 US Dist LEXIS 4409, *6 (S D NY) (noting defendant’s claim to immunity and refusal to submit to the jurisdiction of the court). See also Perl, 88 Georgetown L J at 794 (cited in note 7) (noting that former government officials in ATCA/TVPA cases have no incentive to settle because they are confident any award will not be enforced against them).
236 *Ford v Garcia*, 289 F3d 1283 (11th Cir 2002), was a command responsibility case against two former Salvadoran officials residing in Florida on behalf of the families of four American churchwomen raped and murdered in El Salvador in 1980. Id at 1286. *Ford* resulted in a defendants’ verdict. See id at 1292 (upholding jury instructions which led to judgment for defendants at district court). A companion case filed against the same two defendants, *Romagoza v Garcia*, resulted in a $54.6 million judgment for the plaintiffs. *Romagoza v Garcia*, Final Judgment (July 31, 2002) (on file with U Chi Legal F). The author served on the trial team of the *Romagoza* case. In addition to the two Salvadoran cases, the *Marcos* case is so far the only other ATCA/TVPA case that proceeded to trial without a default.
237 See, for example, *Bao Ge v Li Peng*, 201 F Supp 2d 14 (D Col 2000) (dismissing case against Adidas for lack of state action).
239 At the same time, although proceeding as a class allows all victims of a particular policy to be part of a legal process, it should be noted that individual human rights actions
suing justice independently. Victims often lack the resources necessary to pursue a claim or lack access to lawyers or to courts able to hear their claims. It may be difficult for multiple plaintiffs to obtain personal jurisdiction over the defendant on more than one occasion.\textsuperscript{240} Human rights plaintiffs may also lack a basic knowledge of their legal rights under international law.\textsuperscript{241} Class actions allow individuals who may fear violent retaliation (against themselves or their loved ones) to participate in the legal process, without having to assume a public or prominent role in the litigation.\textsuperscript{242} Accordingly, in certain contexts, class treatment may provide the only feasible method of adjudication for the victims of human rights abuses.\textsuperscript{243}

For example, at the time the \textit{Marcos} case was filed, Philippine law required a defendant to be served in the situs for a case to proceed. Once Marcos fled to Hawaii, his victims could not obtain justice in the Philippines. Allowing victims based in the Philippines to participate in the class action in U.S. courts ensured that they received some measure of justice.\textsuperscript{244} Likewise, in \textit{Karadzic}, it was unlikely that any additional victims could have obtained personal jurisdiction over the defendant after he was served by the \textit{Doe} and \textit{Kadic} plaintiffs in New York. He was only

\begin{footnotesize}
\begin{enumerate}
\item See Perl, 88 Georgetown L J at 789 (cited in note 7) (noting that proceeding as a class action “enables all the claims of the entire class to proceed while only requiring that the defendant be properly served once”).
\item See \textit{Chandler v Southwest Jeep-Eagle, Inc}, 162 FRD 302, 310 (N D Ill 1995) (a class action protects the rights of consumers who may be unaware of statutory protection).
\item See, for example, \textit{Mullen v Treasure Chest Casino, LLC}, 186 F3d 620, 625 (5th Cir 1999) (finding joinder impracticable and thus numerosity requirement satisfied where plaintiffs still employed by defendant feared workplace retaliation). The identity of class members can remain under seal if issues of confidentiality are at issue. See \textit{Doe v Advanced Textile Corp}, 214 F3d 1058, 1069 (9th Cir 2000) (holding that plaintiffs may sue anonymously in Fair Labor Standards Act collective action where plaintiffs feared retaliation).
\item In general, the various international human rights institutions do not entertain collective action by victims of human rights abuses. See \textit{William J. Aceves, Actio Popularis: The Class Action in International Law}, 2003 U Chi Legal F 253.
\item See Ellen L. Lutz, \textit{The Marcos Human Rights Litigation: Can Justice be Achieved in U.S. Courts for Abuses that Occurred Abroad?}, 14 B C Third World L J 43, 45 (1994). At the time the case was filed, Marcos had already fled the Philippines and the new president, Corazon Aquino, refused to allow his repatriation. Id.
\end{enumerate}
\end{footnotesize}
in the United States to attend meetings at the United Nations and to fundraise throughout the Serbian expatriate community.

B. The Disadvantages Of, And Challenges To, Using The Class Mechanism In The Human Rights Context

Notwithstanding the appeal of the class action in the human rights context, a number of disadvantages and challenges to using the class mechanism exist.

1. *A compromise to claim autonomy.*

Human rights class actions invoke the same tension between collective justice and individual autonomy that characterize all class actions. Although class actions routinely proceed in the personal injury and mass tort contexts, the Advisory Committee's notes to Rule 23 indicate that this approach is disfavored. Such reluctance stems in part from the ideal of each plaintiff having his "day in court" in cases involving grave physical harm, and few claims are as personal as torture or cruel treatment. Victims of human rights abuses, like all victims, value having a personal

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245 Indeed, in their motion to certify the class, the *Doe* plaintiffs noted that most class members would not be able to bring individual actions against Karadzic and thus would achieve no justice at all if they were not given representative access to the court through the class. See *Plaintiffs' Memorandum of Law in Support of Motion to Certify Class at 13 (S D NY July 3, 1997) (on file with U Chi Legal F).*

246 Steinhardt, 20 Yale J Intl L at 93 (cited in note 1) ("A mass human rights tort trial inevitably compromises claim autonomy.").

247 See 1966 Amendments, Advisory Committee Notes, 39 FRD 69, 103:

A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

See also *Castano*, 84 F3d at 746 n 23 (noting that courts are hesitant to certify mass torts class actions outside of the single disaster context). However, at least one of the drafters of this note has backed off this position. See Herbert B. Newburg, *Newberg on Class Actions* § 17.06 at 373 (Shepard's/McGraw-Hill 2d ed 1985) (quoting Professor Charles Allen Wright):

I was an ex-officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an advisory committee note saying that mass torts are inappropriate for class certification. I thought then that was true. I am profoundly convinced now that that is untrue. Unless we can use the class action and devices built on the class action, our judicial system is not going to be able to cope with the challenges of the mass repetitive wrong.
relationship with an advocate and participating directly in a legal process, rather than accessing the legal system through a representative who may be inaccessible or unresponsive to the particulars of an individual plaintiff's case.\textsuperscript{248} Adopting a leading role in the litigation enables a plaintiff to commence, frame, and pursue the litigation in accordance with his own interests. Without the opportunity to experience these "process values,"\textsuperscript{249} a class action may deny victims the full rehabilitative potential of litigation and the sense of satisfaction resulting from the process and the judgment. At the extreme, it may even create a sense of being kidnapped by the legal process.\textsuperscript{250}

Nevertheless, class-wide injunctive relief, more optimal levels of deterrence, the articulation and affirmation of legal norms, disgorgement of profits, and obtaining some form of corrective justice may provide significant benefits to members of the class, despite the lack of individual participation. Especially when the option of individual justice does not exist as a practical matter, a collective process and class-wide relief may be better than no process or no relief at all.\textsuperscript{251}

Furthermore, the procedural safeguards associated with the certification of voluntary classes under Rule 23(b)(3) mitigate to some degree concerns about claim autonomy. Prior to the Ortiz ruling,\textsuperscript{252} some advocates argued that human rights class actions

\textsuperscript{248} See Chibundu, 39 Va J Intl L at 1106 (cited in note 6) (questioning whether participation as a member of a class of human rights victims provides the same degree of catharsis and closure as an individual action). See id at 1108 ("... it is hard to imagine how the class victim thousands of miles away from U.S. shores and with at most the dimmest conception of the complicated proceedings that go on in American courthouses can possibly share a sense of justice from those proceedings.").

\textsuperscript{249} See Robert S. Summers, \textit{Evaluating and Improving Legal Processes—A Plea for "Process Values"}, 60 Cornell L Rev 1, 3 (1974) (defining "process values" as "standards of value by which we may judge a legal process to be good as a process, apart from any 'good result efficacy' it may have").

\textsuperscript{250} See MacKinnon, 6 ILSA J Intl & Comp L at 573 (cited in note 7):

Unsought and unwanted representation in a class raises the possibility that some of the intangible and expressive gains from human rights litigation ... may be undermined. ... Being forcibly lumped into a group-based class, thereby deprived of direct or actual representation, being represented in name (or no name) only, survivors of group-based atrocities can experience the process as furthering the deprivation of humanity that human rights law promises to restore.

\textsuperscript{251} In the words of one class action attorney, we “should not allow the perfect to be the enemy of the good.” Conversation with Elisabeth Cabraser (Nov 2, 2002). See \textit{In re Antibiotic Antitrust Actions}, 333 F Supp 278, 282 (D C NY 1971) (rejecting defendants’ argument that “no remedy is better than an imperfect one”).

\textsuperscript{252} See note 75.
involving the assertion of collective rights should proceed exclusively as mandatory class actions under Rule 23(b)(1), even where money damages were sought. The theory was that allowing individual members of the class to opt out of the class at will would undermine the substantive interests of the class. This reasoning failed to acknowledge the potential for intra-class conflicts and agency costs in the human rights context and presumed that all members of a human rights class have equal interests in the litigation—assumptions not born out in practice. Preserving the right of plaintiffs to assert their claims individually, or to opt out of a human rights class, engenders a sense of empowerment and reflects the fact that the human rights edifice has at its base the promotion of human dignity, which is undermined when individuals are forced into a judicial process they do not support.

2. The impact of proceeding as a class on other aspects of the case.

Although not expressed in the case law, the fact that a case was commenced as a putative class action impacts court rulings on pre-trial motions from defendants seeking dismissal, for instance, on justiciability or via abstention doctrines, even where defendants assert these defenses well before the initiation of class certification. For example, the two class actions filed against Texaco alleging environmental harms in Ecuador and Peru were dismissed prior to certification on grounds of international com-

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253 See Boyd, 1999 BYU L Rev at 1207 (cited in note 3):

In general, procedures such as opt out and notice designed to preserve individual autonomy are less compelling in the adjudication of collective human rights where shared interests are a prerequisite to the collective rights claims. Moreover, when balanced with considerations of corporate deterrence of human rights abuses through group remedies, a policy toward disallowing opt out rights is justified.

254 See, for example, Doe v Karadzic, 182 FRD 424, 428 (S D NY 1998) (denying the Kadid plaintiffs' motion to opt out of mandatory class).

255 Courts may not consider the likelihood of success on the merits of the suit when ruling on certification motions, Eisen v Carlisle & Jacquelin, 417 US 156, 172 (1974) (eschewing the authority "to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"), although they may inquire into the merits of the suit to ensure that Rule 23's certification requirements are met. Szabo v Bridgeport Machs, Inc, 249 F3d 672, 675-77 (7th Cir 2001). Although the concern identified by this sub-section is a different one, it is related in that it criticizes the premature consideration of class certification issues in the determination of affirmative defenses available to the defendant.
ity, *forum non conveniens*, and the failure to join indispensable parties, such as Ecuador and the state-owned petroleum company involved in the pipeline project. The *Aguinda* court's *forum non conveniens* analysis identified a number of impediments to conducting the litigation on behalf of thousands of inaccessible indigenous persons who spoke a myriad of languages. Class aspects of the case impacted the court's *forum non conveniens* analysis long before it had reached a decision, or even considered briefing, on class certification.

Likewise, class actions alleging widespread government abuses likely impact U.S. foreign policy more than individual actions, and thus render these cases more vulnerable to dismissal on political question grounds. In *In re Assicurazioni Generali*, a WWII case against an Italian insurance company, suggests a better approach. In *Assicurazioni*, the court deferred ruling on whether European courts could provide an adequate forum until after the plaintiffs had precisely defined the class.

3. Threats of collusion.

Like in all class actions, "collusion" between class counsel and defendant's counsel, between class representatives and class counsel, between defendant's counsel and class representatives, and between counsel and the court can taint human rights class actions. These risks were perhaps less acute in the first generation of human rights cases, which were individual actions brought by pro bono lawyers who were part of the so-called "human rights movement." However, human rights cases are no longer the exclusive province of non-profit human rights lawyers, especially since the advent of cases against corporate entities and the development of an established body of jurisprudence. As a result, tactics observed in traditional class actions, including sweetheart settlements, reverse auctions for class counsel, using the *res judicata* effects of the class mechanism to limit the scope of a defendant's liability in the event of a proliferation—or feared

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257 See *Aguinda v Texaco, Inc*, 945 F Supp 625 (S D NY 1996).
259 See, for example, *Sarei v Rio Tinto PLC*, 221 F Supp 2d 1116, 1195–99 (C D Cal 2002).
260 228 F Supp 2d 348 (S D NY 2002).
261 Id at 364.
262 The variety of counsel bringing such cases belies arguments by some that human rights cases are brought by activist or advocacy groups for purely political purposes. See Chibundu, 39 Va J Intl L at 1104 (cited in note 6).
proliferation—of individual actions, or attempts to "decapitate" a class by reaching a side settlement with class representatives, have entered into human rights litigation. Indeed, as in other contexts, entrepreneurial attorneys may increasingly initiate human rights class actions and then troll for a handful of representative clients, diluting the idea of a party plaintiff and the classical model of individual client control.

Allegations of collusion amongst, and stated dissatisfaction with, plaintiffs' counsel have already tainted human rights class actions. For example, there were substantial objections among the plaintiff class members and class representatives to the Marcos settlement, which, although approved by the district court judge, was ultimately rejected by a Filipino court partially because of affidavits filed by dissenters. Victims objected to the fact that the settlement agreement denied all liability on the part of Marcos and his family members. In the victims' eyes, this provision denigrated the victims' experiences and negated the jury's judgment. Some plaintiffs also believed that the settlement represented a mere fraction of the compensatory award that the jury had granted them and awarded too large a percentage of the settlement to the plaintiffs' attorneys.

Similarly, named plaintiffs and victims' organizations in many of the WWII class actions have publicly and vocally withdrawn from the settlement agreements obtained in those cases, partially because too much of the settlement fund went to the class action lawyers. Although many of the attorneys working...
on the Swiss bank cases relinquished their fees, they did seek fees in subsequent WWII cases.²⁶⁹

4. Potential to prevent other forms of accountability or redress.

Although the class action device may place victims in a powerful negotiating position, seeking collective redress through litigation can also release home governments from responsibility in terms of providing non-judicial redress for victims through a social welfare system or by paying government-sponsored reparations.²⁷⁰ For example, the government of the Republic of the Philippines did not create any sort of truth or claims commission for Marcos's victims because victims would be compensated via the class action.²⁷¹ As a result, the government essentially competed with the victims in seeking the return of Marcos's ill-gotten wealth from Swiss banks.²⁷² Without the potential of a class action judgment, the victims may have been able to exercise more political clout at home to ensure that they were at least partially compensated out of any wealth returned to the Philippines.²⁷³

Similarly, in certain circumstances, the WWII class actions hindered efforts to create an historical record of abuses and to establish effective non-judicial restitution mechanisms, because the relevant companies either feared that litigation results would

See generally Authors and Wolffe, The Victim's Fortune (cited in note 118) (describing dissatisfaction articulated by victims).
²⁶⁹ Authors and Wolffe, The Victim's Fortune at 202 (cited in note 118) (describing Swiss bank cases as “loss leaders”).
²⁷⁰ For a discussion of some non-legal governmental responses to WWII claims, see Derek Brown, Comment, Litigating the Holocaust: A Consistent Theory in Tort for the Private Enforcement of Human Rights Violations, 27 Pepp L Rev 553, 576–80 (2000). This potential tradeoff between party-controlled litigation and non-judicial avenues of redress (such as legislation) is in some respects a feature of all class actions. See Linda S. Mullenix, Lessons From Abroad: Complexity And Convergence, 46 Vill L Rev 1, 27–31 (2001) (discussing legislative alternatives to litigation employed in other legal systems). Congress's decision to condition eligibility to the September 11th Victim Compensation Fund upon a waiver of legal claims against the airlines (and to cap awards available to those plaintiffs who do decide to sue) reflects this tension between remedies available through the judicial and political branches of government. See generally Richard Nagareda, The Preexistence Principles And The Structure Of The Class Action, 103 Colum L Rev 149 (2003).
²⁷¹ I am indebted to Paul Hoffman for this observation.
²⁷² See Manila says its claim on Marcos money superior to victims' claim, Deutsche Presse-Agentur (Apr 15, 1997).
²⁷³ Of course, the class action provides an avenue for redress where there is or would inevitably be legislative inaction in response to mass harms.
be used against them or did not want to face double liability. On the other hand, the threat of litigation may have spurred efforts by European countries to reexamine their wartime history. Thus, judicial action may actually encourage other branches of government to respond to the needs of victims.

5. Difficulties in allocating compensation.

In a human rights class action where the plaintiff class seeks money damages, the wide variations in plaintiffs' experiences and the extreme nature of the abuses suffered present a challenge to ascertaining a reasonable and acceptable model for allocating compensatory damages. The highly individualized and personal nature of the claims in human rights cases suggests that successful litigants should receive a particularized process to determine damages. Yet, such a process may be unfeasible where thousands of members belong to a human rights class.

A class action, however, can result in the establishment of a quasi-administrative scheme that limits the need to determine individualized damages awards and speeds the payment of compensation to individuals. In the Marcos case, a Special Master employed inferential statistics to compute an average damage award for various harms. Victims may consider this sort of coldly mathematical calculation of damages dehumanizing because it overlooks the individual harms suffered. Further, deny-
ing each plaintiff the opportunity to testify about the harms experienced can limit the cathartic or rehabilitative effect of the litigation process. At the same time, a class award may create distributional equities that are attractive to a victim group and avoid impressions of unfairness where “the luck of the draw” results in vastly different individualized determinations. The opportunity to participate in litigation at all can also provide victims of human rights violations with a form of non-monetary rehabilitation by restoring a sense of justice, dignity and “moral equilibrium.”

To the extent that a repressive government no longer wields power, litigants may be able to use home government social welfare agencies to collect evidence and undertake individualized determinations of applicable claims and compensatory damages.

In addition to the challenges of computing compensatory damages with a large class, intra-class conflicts almost inevitably emerge when seeking relief or allocating damages between different groups of plaintiffs or sub-classes. This is especially true where the damages sought involve intangible and individual assessments of pain and suffering, as opposed to the types of damages more amenable to objective proof, such as lost wages or medical costs. Such structural conflicts have tarnished victims’ experiences with collective actions. For example, in the German forced labor cases, once specific settlements were contemplated, different victims groups found themselves competing with each other for the limited funds available.

is supposed to recreate and the sense of personal worth litigation should vindicate.

Shapiro, 73 Notre Dame L Rev at 928 (cited in note 194).

See, for example, Boyd, 1999 BYU L Rev at 1187 (cited in note 3) (noting that the calculation of damages is less complex when the entity theory of class certification and recovery is employed).

Id at 1189 (cited in note 3).

See Rhode, 34 Stan L Rev at 1189 (cited in note 181) (noting that factions within the class inevitably emerge when relief specifics are contemplated).

See Schreiber & Weissbach, 31 Loyola LA L Rev at 482–83 (cited in note 33) (discussing strategy for computing lost wages in Marcos litigation).

For a discussion of infighting between recipients of the WWII restitution settlements, see Bazyler, 25 Fordham Intl L J at 101 (cited in note 120); Vagts and Murray, 43 Harv Intl L J at 522 (cited in note 120).

See Bazyler, Holocaust Justice at 269–85 (cited in note 118); Authors and Wolfe, The Victim’s Fortune at 233–34 (cited in note 118) (describing acrimonious negotiations between groups and attorneys representing Jewish and Eastern European individuals who had been conscripted into forced labor).
III. THE FUTURE OF THE HUMAN RIGHTS CLASS ACTION

The class action mechanism has the potential to provide victims of large-scale human rights abuses with the ability to achieve some measure of justice in cases where the alternative may be no justice at all. The nature of many international norms and international theories of liability lend themselves to class treatment, because they address collective harms or acts targeted at particular protected groups or communities. In addition, class treatment may be appropriate for cases involving allegations of command responsibility or violative corporate conduct. Class actions ensure that any remedy reflects the collective nature of the harm suffered and that individuals or organizations responsible for human rights abuses will face accountability for the full scope of the harm that they cause. Class actions also enable victims of human rights violations to exercise negotiating power on a governmental or corporate level that would otherwise be unattainable.

On the other hand, class actions may result in dissatisfaction among members of the victim class if counsel or the courts do not facilitate the participation of class members or where collusion between various actors undercuts class claims, interests, or involvement. Proceeding as a class may also hinder other forms of accountability through intergovernmental, governmental, or nongovernmental spheres. On balance, however, the class action suggests great potential as a tool to enforce international human rights norms under the ATCA and the TVPA.

Given the advantages and disadvantages to employing the class action mechanism in the human rights context, this Article concludes by outlining an interpretive framework for the federal class action certification and management rules. This framework relies on the argument that, in applying Rule 23’s certification requirements, courts should recognize Congress’s strong policy in favor of these cases being heard in United States courts. Accordingly, courts should approach human rights class actions mindful of the unique characteristics and objectives of human rights litigation, including the collective nature of international claims and responsibility theories, the political and often oppressive contexts in which victims of human rights abuses bring suit, the daunting hurdles faced by such victims in obtaining justice, and these
cases’ foundation in traditional public law litigation.\footnote{See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv L Rev 1281, 1284, 1302 (1976) (noting emergence of new forms of litigation involving “sprawling” party structure, negotiation and mediation processes, a central role for the judge in organizing the case, and complex forms of relief); Koh, 100 Yale L J at 2348–49 (cited in note 2) (describing motivations of transnational public law litigants); Joan Fitzpatrick, The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation, 67 St John’s L Rev 491, 503 (1993) (noting that human rights class members might more closely resemble the “ideologically motivated plaintiffs in desegregation suits” than victims of ordinary mass torts). But see Mullenix, 33 Val U L Rev at 415, 426 (cited in note 264) (arguing that mass tort litigation is not within the tradition of public law litigation heralded by Chayes, because such cases are not typically brought to seek the reform of public or quasi-public institutions and primarily involve private parties alleging private harms and seeking private remedies).} This framework also recognizes that federal courts are charged with fashioning common law remedies for cases brought under these statutes in the absence of congressional guidance. At the same time, given the unique vulnerabilities of absentee human rights claimants, courts must, to ensure a just and meaningful result, continually guard against collusive moves between other participants in the litigation.

This Part thus conducts a brief review of the procedural rules governing the certification and management of class actions, illustrating the ways in which human rights class actions may be fit within established doctrines.\footnote{This Part assumes that after Ortiz, most human rights class actions will proceed as voluntary classes under Rule 23(b)(3). This Article does not consider legislative solutions to some of the challenges identified because existing procedural rules can accommodate the human rights class action.} The interpretive methodology offered here invites courts to adopt more liberal and more stringent approaches to Rule 23’s requirements in order to reflect the special nature of human rights class cases.\footnote{It has been suggested that the courts in the Marcos and Karadzic class actions adopted a more lenient approach to the Federal Rules in light of the uniqueness of these cases. See Perl, 88 Georgetown L J at 779–87 (cited in note 7) (describing how courts have not subjected human rights class actions to stringent certification requirements imposed on other mass tort cases).} These modest proposals may help human rights litigants more fully realize the advantages of the class action mechanism. These recommendations may also assist courts in developing approaches for administering human rights class actions, notwithstanding the unique challenges that they present.

A. The Interpretive Framework

With the passage of the ATCA and the TVPA, and with the adoption of human rights amendments to the FSIA, Congress has
expressly empowered the federal courts to adjudicate violations of
international law. These statutes do not address the availability
of class treatment for cases arising under them. However, in the
absence of a direct expression by Congress to depart from Rule 1,
which provides that the Federal Rules govern the procedure in
“all suits of a civil nature,” class relief is authorized. Further,
where Congress has declined to provide guidance as to how hu-
man rights class actions should be managed, federal courts are
invited to create “federal common law to provide justice for any
injury contemplated” by those statutes. This will ensure that
the courts effectuate the purposes of international law and those
statutes and ensure an appropriate remedy for the violations at
issue.

By way of background, the ATCA is an ancient statute, origi-
nally enacted in 1789 as part of the First Judiciary Act. The
statute was rarely used until the seminal 1980 case of Filartiga,
in which the Second Circuit confirmed that the ATCA provides
federal jurisdiction over international law violations. In 1984,

292 Alvarez-Machain v United States, 331 F3d 604, 635 (9th Cir 2003) (“[B]ecause the
ATCA invokes international law principles of universal concern, it holds a unique place
among federal statutory tort causes of action, and application of federal common law is
therefore appropriate.”); Estate of Marcos, 910 F Supp at 1469 (“Because Congress in the
TVPA offered no methodology as to how damages should be determined, federal courts are
free to and should create federal common law to provide justice for any injury contem-
plated by the Alien Tort Statute and the TVPA or treaties dealing with the protection of
human rights.”); Abebe-Jira v Negevo, 72 F3d 844, 848 (11th Cir 1996) (“[T]he Alien Tort
Claims Act establishes a federal forum where courts may fashion domestic common law
remedies to give effect to violations of customary international law.”); Tachiona v Mugabe,
216 F Supp 2d 262, 267 (S D NY 2002).
293 Filartiga v Peña-Irala, 577 F Supp 860, 866 (E D NY 1984) (concluding that by
enacting the ATCA, “Congress entrusted the task [of enforcing international law] to the
federal courts and gave them powers to choose and develop federal remedies to effectuate
the purposes of international law incorporated into the United States common law. In
order to take the international condemnation of torture seriously this court must adopt a
remedy appropriate to the ends and reflective of the nature of the condemnation.”); Tachiona v Mugabe, 234 F Supp 2d 401, 417 (S D NY 2002) (“[C]ourts, in order to reflect
the true magnitude of the universally recognized wrongs at issue and confer relief propor-
tionate to the harms engendered, have felt compelled to pick and choose from among
available remedial options one that advances the purposes of the ATCA and international
law.”).
294 See generally Anne-Marie Burley, The Alien Tort Statute and the Judiciary Act of
intent behind ATCA). Although the statute was part of the First Judiciary Act, it has no
legislative history to speak of. ITT v Vencap, Ltd, 519 F2d 1001, 1015 (2d Cir 1975) (“This
old but little used section is a kind of legal Lohengrin; although it has been with us since
the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came.”).
295 630 F2d 876.
296 Id at 878.
however, *Tel-Oren v Libyan Arab Republic*\(^{297}\) called the *Filartiga* precedent into question. *Tel Oren* was brought on behalf of survivors and representatives of individuals killed during a terrorist attack on a bus in Israel.\(^{298}\) In a fractured appellate opinion affirming the district court's dismissal of the case, Judge Bork argued in concurrence that Congress, in originally enacting the ATCA, did not intend to provide a cause of action over international law violations such as those alleged in *Tel Oren* or, for that matter, in *Filartiga*.\(^{299}\)

Congress responded to Judge Bork's argument with the passage in 1991 of the TVPA.\(^{300}\) The legislative history of the statute indicates that Congress soundly rejected Judge Bork's position in *Tel-Oren* and sought to reaffirm the line of cases inaugurated by *Filartiga*.\(^{301}\) The legislative history also notes that the TVPA was mandated by the United States' signing and eventual ratification of the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment ("Convention"),\(^{302}\) which obliges state parties to provide victims of torture with a right to reparations.\(^{303}\) This Convention was part of a larger movement in international law recognizing a right to reparations for human rights violations.\(^{304}\) The purpose of the TVPA was thus

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\(^{297}\) 726 F2d 774 (DC Cir 1984).

\(^{298}\) Id at 775.

\(^{299}\) Id at 799, 820 (Bork concurring).


\(^{303}\) See *House Report* at 3 (cited in note 301) ("Essentially enforcement-oriented, this [Torture] Convention obligates state parties to adopt measures to ensure that torturers are held legally accountable for their acts."); *Torture Victim Protection Act, 138 Cong Rec S2667, *S2668 (Mar 3, 1992) ("The Senate has ratified the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which obligates state parties to adopt measures to ensure that torturers within their territories are held accountable for their acts. [The TVPA] accomplishes that purpose in a manner consistent with the Constitution.") (Statement of Senator Specter).

\(^{304}\) See Van Schaack, 42 Harv Intl L J at 165–69 (cited in note 174) (cataloging the right to reparations under international law).
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to "ensure that torturers . . . are held legally accountable for their acts . . . [and] that torturers and death squads will no longer have a safe haven in the United States."[^305]

Congress's policy toward the adjudication of human rights claims is also apparent in recent amendments to the FSIA.[^306] By delineating a handful of exceptions to the general cloak of immunity enjoyed by states and their instrumentalities,[^307] the FSIA provides the sole statutory basis for obtaining jurisdiction over a foreign state in U.S. courts.[^308] Because of this presumptive immunity, most suits claiming human rights violations committed abroad could only be brought against individual defendants under the ATCA or TVPA.[^309] However, 1996 amendments to the FSIA withdrew immunity from foreign states designated as "state sponsors of terrorism"[^310] for acts of terrorism, or for providing material support for acts of terrorism, which include torture, extrajudicial killing, and hostage taking.[^311]

This clear congressional policy favoring U.S. courts hearing cases involving human rights abuses committed abroad and in enforcing international human rights norms is relevant to interpreting procedural doctrines as they arise in human rights litiga-

[^305]: Sen Rep at *3 (cited in note 1).
[^307]: See 28 USC § 1605 (2003) (setting forth exceptions to immunity). The original exceptions allowed suits against foreign nations to proceed where there had been an express or implied waiver of immunity, or where the claims involved, among other things, commercial activity within the United States, property expropriated in violation of international law, property located within the United States, or noncommercial torts committed within the United States. Id.
[^309]: See, for example, Hirsh v State of Israel, 962 F Supp 377 (S D NY 1997) (dismissing class action against Israel and Germany on foreign sovereign immunity grounds).
[^310]: The defendant state must have been so designated under § 6(j) of the Export Administration Act of 1979, 50 USC App § 2405(j), or the Foreign Assistance Act of 1961, 22 USC § 2371, either at the time the challenged act occurred or as a result of the challenged act. Currently, Cuba, Iran, Iraq, Libya, Sudan, Syria, and North Korea have been designated as "state sponsors of terrorism." 61 Fed Reg 43462 (Aug 22, 1996).
[^311]: 28 USC § 1605(a)(7) authorizes U.S. courts to hear claims in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

In order to bring suit, the claimant must provide the state a reasonable opportunity to arbitrate the claim. In addition, the claimant or the victim must be a United States citizen. See generally David Mackusick, Comment, Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act, 10 Emory Intl L Rev 741 (1996) (recounting history of foreign sovereign immunity under U.S. law, including 1996 amendments).
tion. For example, in *Wiwa v Royal Dutch Petroleum Co*, an individual ATCA action arising out of Shell Oil’s alleged complicity in the deaths of several environmental activists in Nigeria, the Second Circuit ruled that the strong congressional policy favoring jurisdiction is relevant to courts’ application of the *forum non conveniens* doctrine. In particular, the court noted that the TVPA, “in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy favoring receptivity by our courts to such suits.” In so ruling, the court noted that: “One of the difficulties that confront victims of torture under color of a nation’s law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred.”

These equitable concerns about access to justice and the fact that victims may have no remedy absent class treatment are equally relevant and should be prioritized over pure efficiency concerns when evaluating the propriety of class treatment in the human rights context. These concerns thus infuse the following discussion of the way in which human rights class actions can be situated within Rule 23’s procedural matrix. In particular, where proceeding as a class action is “markedly superior” to other methods available for a fair and efficient adjudication of the controversy, the various certification requirements should be construed “broadly”—at least in the early stages of the litigation.

**B. The Certification Requirements As Applied To Human Rights Class Actions**

A member of a class may sue as a representative party if the class satisfies the four requirements set forth in Rule 23(a): numerosity, commonality, typicality, and adequacy of representa-
In addition, the class action must fall under one of the three subdivisions of Rule 23(b). In light of the Supreme Court's ruling in *Ortiz*,
most future human rights class actions will likely proceed as Rule 23(b)(2) mandatory classes, where injunctive or declaratory relief is sought, or as Rule 23(b)(3) voluntary classes, which require a showing that common issues predominate and that proceeding as a class action is superior to other forms of adjudication. Rule 23(b)(1)(B) mandatory limited fund actions remain available in the human rights context in situations in which the plaintiffs can demonstrate the existence of a "limited fund" that preexists the class action, such as where a defendant is bankrupt (or would be rendered bankrupt by any award) or is an estate (as was the case in *Marcos*).

Even assuming the availability of mandatory limited fund class actions, voluntary class actions may present the best model for human rights class actions in which the plaintiff class seeks money damages. Voluntary class actions enable litigants to gain the benefits of collective action without entirely sacrificing claim autonomy or experiencing the preclusive effects of res judicata from a process that they did not voluntarily participate in and may not have supported. And yet, under traditional modes of analysis, some of the certification requirements for voluntary classes—particularly the predominance and manageability components of the Rule—could serve as significant impediments to class certification in human rights cases. This Part will discuss

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317 According to FRCP 23(a):

[O]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Although each element requires a separate determination, the relevant factors do often merge. See *General Telephone Co of Southwest v Falcon*, 457 US 147, 157 n 13 (1982).

318 Recent case law and scholarship have suggested that constitutional limits on punitive damage amounts—as discussed in *BMW of North America v Gore*, 517 US 559 (1996), and *State Farm Mutual Automobile Insurance Co v Campbell*, 123 SCt 1513 (2003)—may lead to a finding that a limited fund exists. See, for example, *In re Northern Dist of California "Dalkon Shield" IUD Products Liability Litigation*, 521 F Supp 1188, 1193 (N D Ca 1981) (certifying mandatory punitive damages class on theory that constitutional limits on punitive damages created a limited fund within meaning of the Rule). See generally Elizabeth Cabreser, *Undoing Underdeterrence Through Classwide Punitive Damages*, 36 Wake Forest L Rev 979, 1027–33 (2001).

319 See text accompanying notes 218–221 supra.
the ways in which human rights class actions may be conceptualized vis-à-vis the various certification requirements, with an eye toward encouraging courts to adopt a creative approach to vindicating human rights norms through the class mechanism.

1. Numerosity.

Numerosity has not historically presented an impediment to certification of human rights classes. To date, all human rights class actions have involved allegations of large-scale abuses impacting thousands of potential class members. Yet, to the extent that litigants seek certification of multiple subclasses or a class of individuals subject to a single massacre or repressive episode, the numerosity requirement may present more of an impediment to certification if victims are not sufficiently numerous.

The numerosity requirement turns on the “impracticability,” not impossibility, of joinder, and this determination depends on the particular circumstances of each case. Accordingly, the geographic diversity of the class members, the class’s economic means, class members’ continued confinement, the ability of claimants to institute individual suits, the requests for prospective injunctive relief, and the nature of the harms alleged by human rights claimants may weigh in favor of a finding that joinder would be impracticable. Class members’ fears of reprisals

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321 See, for example, Hilao, 103 F3d at 772 (involving a class of ten thousand individuals); Aguinda v Texaco, Inc, 1994 US Dist LEXIS 4718, *2 (S D NY) (seeking to represent a class of over thirty thousand indigenous persons). It is not necessary for the party seeking certification to provide evidence of the exact class size to satisfy the numerosity requirement. See Robidoux v Celani, 987 F2d 931, 935 (2d Cir 1993).


323 See Wilkinson v FBI, 99 FRD 148, 156 n 9 (C D Cal 1983) (denying certification to small subclass).

324 Robidoux, 987 F2d at 935.

325 Id at 936.


328 See Armstead v Pingree, 629 F Supp 273, 276 (M D Fla 1986).

329 Robidoux, 987 F2d at 936.

330 Id.
present an additional factor in considering the practicability of joinder.\textsuperscript{331}

2. Commonality.

The commonality requirement of Rule 23(a) requires the existence of questions of law or fact common to the class. It is not necessary for all questions of law or fact to be common or for all class members to assert identical claims.\textsuperscript{332} Class members may assert a common complaint, even if they have not all suffered the same actual injuries, as long as they were subjected to the same harm.\textsuperscript{333} A common question is one that arises from a "nucleus of operative facts," regardless of whether the "underlying facts fluctuate over the class period and vary as to individual claimants."\textsuperscript{334} Thus, human rights claimants contesting a repressive policy or course of conduct need not have each experienced the same physical or mental harm in order to constitute a viable class.\textsuperscript{335}

As a threshold matter, in all ATCA cases, claims for relief must constitute torts in violation of the law of nations.\textsuperscript{336} Further, many international law norms contain elements, such as attendant circumstances, state action, or \textit{mens rea} elements, the proof of which would be common to all members of the class. For example, to prove the commission of war crimes, violations of interna-

\textsuperscript{331} See, for example, \textit{Mullen v Treasure Chest Casino, LLC,} 186 F3d 620, 625 (5th Cir 1999) (noting a fear of retaliation by employer); \textit{Trautz v Weisman,} 846 F Supp 1160, 1166 (S D NY 1994) (noting fear of retaliation by workers at adult care facility).

\textsuperscript{332} As an additional requirement, in cases seeking to certify voluntary classes under Rule 23(b)(3), plaintiffs must also show that these common issues predominate over uncommon issues. See FRCP 23(b)(3). In contrast, in FRCP 23(b)(2) classes, factual differences among plaintiffs are less relevant as "class actions seeking injunctive or declaratory relief ... by their very nature present common questions of law or fact." \textit{Haitian Refugee Center,} 694 F Supp at 877.

\textsuperscript{333} See \textit{Hassine v Jeffes,} 846 F2d 169, 176–77 (3d Cir 1988) (noting plaintiffs' assertions that they were subject to certain conditions of confinement, even if they had not at the time been injured by those conditions, were sufficient to allow class certification); \textit{Baby Neal,} 43 F3d at 56, 61 (finding that the differing degree and nature of the plaintiffs' injuries did not preclude a finding of commonality where plaintiffs challenged defendant's conduct toward the class).

\textsuperscript{334} \textit{Cohen v Uniroyal,} Inc, 77 FRD 685, 690, 691 (E D Pa 1977).

\textsuperscript{335} \textit{Sterling v Velsicol Chemical Corp,} 855 F2d 1188, 1197 (6th Cir 1988) ("[W]here the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy.").

\textsuperscript{336} See \textit{Unocal,} 963 F Supp at 890 (noting that ATCA requires allegations of the commission of a tort in violation of international law). See also Boyd, 1999 BYU L Rev at 1160 (cited in note 3) (noting that common questions of law include whether there is an applicable and recognized rule of international law that has been violated).
tional humanitarian law must have occurred in a time of armed conflict.\textsuperscript{337} Crimes against humanity occur within the context of a widespread or systematic attack against a civilian population where the defendant had knowledge of the attack.\textsuperscript{338} Likewise, torture is prohibited by international law only when committed by state actors,\textsuperscript{339} unless it is committed as a war crime, crime against humanity, or genocide.\textsuperscript{340} For example, in Karadzic, the common questions of law and fact asserted by the plaintiffs focused on whether Karadzic acted with the intent to destroy in whole or in part a protected group (an element of genocide); whether the acts alleged were committed within the course of an armed conflict (an element of war crimes); whether the Srpska regime constituted a state for the purpose of state action requirements; and whether Karadzic acted under the color of law.\textsuperscript{341} In order to oppose many defenses (such as those advanced under the political question or act of state doctrines), plaintiffs must put forth common proof that supports a finding of commonality. These defenses can be judged once, with respect to all members of the class. Because the substantive law applied in these cases is primarily federal and international law, and because members of the class may be overseas, it is unlikely that human rights class actions will present the kinds of conflicts of law questions that plague other mass tort class actions and threaten commonality (not to mention predominance).\textsuperscript{342}

\textsuperscript{337} According to Article 2 of each of the four Geneva Conventions, the Conventions apply to all cases of declared war “or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” See, for example, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 \textit{6} UST 3114, 3116, Art 2, TIAS no 3362 (1942).

\textsuperscript{338} See notes 184, 186.

\textsuperscript{339} See Art 1, Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment of Punishment \textit{GA Res} 39/46, \textit{UN GAOR}, 39th Sess, Annex 39, Supp No 51, at 197, \textit{UN Doc A/39/51} (1984) (cited in note 302) (prohibiting torture when committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”).

\textsuperscript{340} See \textit{Unocal}, 2002 \textit{US App LEXIS} at *31:

\begin{quote}
[E]ven crimes like rape, torture, and summary execution, which by themselves require state action for \textit{ATCA} liability to attach, do not require state action when committed in furtherance of other crimes like slave trading, genocide or war crimes, which by themselves do not require state action for \textit{ATCA} liability to attach.
\end{quote}


\textsuperscript{342} See, for example, \textit{In re Laser Arms Corp Securities Litigation}, 794 \textit{F Supp} 475, 495 (finding plaintiffs' pendent state law claims not amenable to class treatment where the
Human rights class actions alleging the liability of a corporate entity should easily satisfy the commonality requirement where a conspiracy, common course of conduct, or general policy is at issue. For example, common questions of law and fact in this context regularly include: whether the operation of the corporation’s offshore enterprise violated international law or was otherwise unlawful; whether the corporation was responsible for abusive practices either directly, as an aider and abettor or co-conspirator, or by virtue of its membership in a joint venture with a repressive government; whether the corporate entity knowingly or intentionally used slave or other forced labor in its operations; whether the corporate entity provided material or financial assistance to state actors who were responsible for the abuses; whether the corporate entity knew that revenues paid to the host government were supporting the commission of abuses; whether plaintiffs suffered the harms alleged as a result of actions taken in furtherance of the joint venture or project at issue; whether the corporate defendant can be considered a state actor by virtue of the structure and operation of its joint venture; whether the corporation has been unjustly enriched by abusive practices; and whether a parent corporation may be liable for acts of a subsidiary operating in a particular country. Similarly, where the case arises from actions of a joint venturer, the corporation’s knowl-

court would have to apply the law of each state in which a potential class member resided). Further, human rights claims do not present issues of contributory negligence, causal indeterminacy, or latency that characterize other mass tort cases. See, for example, In re American Medical Systems, Inc, 75 F3d 1069 (6th Cir 1996) (decertifying class where individual issues of causation and harm predominated); Boyd, 1999 BYU L Rev at 1162 (cited in note 3) (noting that variations in the degree of harm in human rights cases do not matter for purposes of typicality when the proximate cause of the harm is the same).

By way of analogy, securities fraud and RICO actions often proceed under this single course of conduct theory of commonality. See, for example, Laser Arms, 794 F Supp at 494–95 (alleging defendants engaged in a common course of fraudulent conduct to illegally distribute shares); Kirkpatrick v J C Bradford & Co, 827 F2d 718, 722 (11th Cir 1987); Kennedy v Tallant, 710 F2d 711, 717 (11th Cir 1983) (noting that plaintiffs claimed that defendants “committed the same [violations of the securities laws] in the same method against an entire class”); Buford v H & R Block Inc, 168 FRD 340, 349–50 (S D Ga 1996) (finding commonality where plaintiffs sued under RICO, alleging a uniform and concerted effort to defraud the class).

See, for example, Presbyterian Church of Sudan v Talisman Energy, Amended Class Action Complaint at 25–26 (S D NY Feb 25, 2002) (on file with U Chi Legal F); Bodner v Banque Paribas, 114 F Supp 2d 117, 125–26 (E D NY 2000) (finding plaintiff class’s conspiracy allegations to be sufficient); Sarei v Rio Tinto, plc, Class Action Complaint For Violations of the Alien Tort Claims Act 19–20 (C D Cal Nov 2, 2000) (on file with U Chi Legal F); Pollack v Siemens AG, First Amended Class Action Complaint (E D NY Sept 1, 1998) (on file with U Chi Legal F); Doe v Unocal, Complaint for Damages and Injunctive and Declaratory Relief (C D Cal Oct 3, 1996) at 9–10 (on file with U Chi Legal F).
edge or support of these abuses also presents a question of fact that will be common to the class.\footnote{Simpson v Specialty Retail Concepts, 149 FRD 94, 99 (M D NC 1993) (finding scienter to be common question).}

Likewise, in cases invoking the doctrine of command responsibility, and brought against military or civilian superiors, the key issues are command, knowledge, and omission, which are analyzed with respect to the entire class.\footnote{See Blackie v Barrack, 524 F2d 891, 905-906 (9th Cir 1975) (noting that common issues predominate in securities actions where defendant’s omissions are at issue).} Although each plaintiff must prove that a subordinate of the defendant commander injured her, the other aspects of the doctrine, for example, whether the defendant was on notice of abuses by subordinates and whether he fulfilled his duty of command by preventing or punishing such abuses, are common to all members of the class.\footnote{Causation is inherent to a finding of the three elements of the doctrine, so it need not be proved by each individual plaintiff. Hilao, 103 F3d at 774 (finding that the issue of causation was resolved by the finding of liability); Ford v Garcia, 289 F3d 1283, 1298-99 (11th Cir 2002) (Barkett concurring) (finding inclusion of proximate cause instruction in jury instructions erroneous).}

Thus, common questions of law and fact in command responsibility cases include: the structure, organization and chain of command within a state security or military apparatus and the defendant’s position and power within that structure; whether subordinates of the defendant engaged in abuses; whether the defendant had actual or constructive notice of the violations; whether the defendant failed in his duty to supervise and control his subordinates; and whether the defendant qualifies as a state actor if the relevant international norms require state action.\footnote{Doe v Karadzic, Amended Complaint for Genocide; War Crimes and Crimes Against Humanity; Summary Execution; Forced Disappearance; Torture; Cruel, Inhuman or Degrading Treatment; Wrongful Death; Assault and Battery; and International Infliction of Emotional Harm 10 (S D NY June 30, 1997) (on file with U Chi Legal F).}

In these corporate and command responsibility cases, liability becomes an “all-or-nothing” proposition. Because of the broad questions of liability applicable to all members of the plaintiff class, a defendant’s liability is not determined on a plaintiff-by-plaintiff basis,\footnote{See In re AH Robins Co, Inc, 85 BR 373, 379 (E D Va 1988) (finding insurance carrier’s liability to be an “all-or-nothing proposition” unable to be resolved on a plaintiff-by-plaintiff basis).} and defendants are likely to contest liability regarding the entire class, rather than regarding individual members of the class.\footnote{See In re “Agent Orange” Product Liability Litigation, 100 FRD 718, 723 (E D NY 1983).}
That said, to the extent that significant variations exist in the nature of the harm suffered (for example, if some members of a class were subjected to torture, and others to summary execution, property damage, or environmental harm),\textsuperscript{351} courts can utilize a number of case management techniques to address the disparities within the context of class treatment. These include creating sub-classes and appointing additional class representatives under Rule 23(c)(4)(B),\textsuperscript{352} allowing limited opt-out rights,\textsuperscript{353} bifurcating the liability and damages phases of a trial and requiring the filing of individual damage claims after a finding of liability,\textsuperscript{354} recruiting Special Masters to conduct mini-hearings on damages, and certifying class treatment for selected common issues, such as liability or punitive damages, pursuant to Rule 23(c)(4)(A).\textsuperscript{355}

Courts have successfully used these techniques in several human rights class actions. For example, the WWII cases dealt with varying allegations by certifying subclasses.\textsuperscript{356} The statistical sampling employed in the Marcos case allowed the jury to evalu-
ate the damages of a random sample of plaintiffs in three subclasses: plaintiffs who were tortured, the families of individuals who were summarily executed, and the families of individuals who were disappeared.\textsuperscript{357} In \textit{Sarei v Rio Tinto PLC},\textsuperscript{358} a putative class action seeking to hold Rio Tinto mining company responsible for destroying the environment and fomenting a civil war in Papua New Guinea,\textsuperscript{359} plaintiffs had contemplated three subclasses: (1) those individuals injured or killed as a result of the conflict in Papua New Guinea (the so-called “War Crimes Class”), (2) those individuals seeking relief because of environmental, social, or cultural harm (the so-called “Environmental Right to Life Class”), and (3) those individuals residing near the mine in question who were exposed to toxic effluents and other hazardous agents (the so-called “Medical Monitoring Class”).\textsuperscript{360} Still, courts must guard against the “Balkanization” of the class through the proliferation of sub-classes and class counsel so that the class does not fragment “into a loose-knit coalition of potentially feuding enclaves.”\textsuperscript{361}

3. Typicality.

To satisfy the test for typicality, the class representative's claims must “arise [] from the same event or course of conduct that gives rise to claims of other class members and the claims [must be] based on the same legal theory.”\textsuperscript{362} Typicality, therefore, exists when a single defense, such as a lack of command, or the applicability of the political question doctrine, applies to all class members and makes a defendant’s liability indivisible.\textsuperscript{363} Typicality does not require total identity of issues between the class representative and the members of the class. Factual differences “will not render a [representative’s] claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on

\textsuperscript{357} See \textit{Estate of Marcos}, 910 F Supp at 1462.
\textsuperscript{358} 221 F Supp 2d 1116 (C D Cal 2002).
\textsuperscript{359} Id.
\textsuperscript{360} \textit{Sarei v Rio Tinto PLC}, Class Action Complaint for Violations of the Alien Tort Claims Act 18 (C D Cal Nov 2, 2000) (on file with U Chi Legal F).
\textsuperscript{361} Coffee, 100 Colum L Rev at 375–76 (cited in note 194).
\textsuperscript{362} \textit{Dura-Bilt Corp v Chase Manhattan Corp}, 89 FRD 87, 99 (S D NY 1981).
\textsuperscript{363} See \textit{In re Agent Orange Product Liability Litigation}, 818 F2d 145, 166–67 (2d Cir 1987) (noting commonality and typicality of government contractor defense vis-à-vis all plaintiffs).
the same legal theory." Even "relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories," as in class actions alleging command responsibility or corporate complicity.

As was seen with respect to the commonality requirement, the nature of human rights class claims lend themselves to typicity findings: "Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice." In the corporate liability context, a claim of unjust enrichment can satisfy the typicality requirement. By focusing on how defendants have been enriched by the alleged harm, this approach diminishes the salience of different conditions under which individuals may have been harmed by a corporate entity and reinforces the commonality of plaintiffs' accusations and the typicality of the named representative's experience. As in domestic discrimination class actions brought under U.S. civil rights statutes, human rights

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344 Newberg and Conte, Newberg on Class Actions § 3.15 at 3–78 (cited in note 215). See, for example, Lawson v Wainwright, 108 FRD 450, 456 (S D Fla 1986), revd on other grounds as, Lawson v Singletary, 85 F3d 502 (11th Cir 1996) (finding factual differences relating to inmates' conditions, duration, type, or location of confinement did not defeat typicality of representative's claims where there was a sufficient nexus between those claims and the common questions of law and fact).

345 Baby Neal, 43 F3d at 58.

346 Id.

347 See David N. Fagan, Note, Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations, 76 NYU L Rev 626 (2001) (analyzing core elements of potential unjust enrichment claims against corporations). This was the approach taken by plaintiffs in many of the post-WWII cases. See Vagts and Murray, 43 Harv Intl L J at 520–21 (cited in note 120) ("All plaintiffs shared a common interest in identifying and assessing the pool of unjust enrichment redounding to a defendant from the use of forced and slave labor. Practically any claimant could serve as a representative for the others.").

348 In General Telephone Co of Southwest v Falcon, 457 US 147, 157–58 (1982), the Supreme Court rejected the Fifth Circuit's "across the board" approach to discrimination class actions by holding that commonality and typicality are not satisfied where the class representative alleged conclusively that the class suffered discrimination on the basis of their membership in a particular group. Rather, the Court ruled that plaintiffs must show the application of similar discriminatory employment practices among class representatives and the putative class. See also Shipes v Trinity Industries, 987 F2d 311, 316 (5th Cir 1993) (" Allegations of similar discriminatory employment practices ... satisfy the commonality and typicality requirements of Rule 23(a)."). Thus, a plaintiff asserting one type of discrimination can represent a class of individuals asserting other types of discrimination, so long as there are allegations that his harm manifested itself in the same general fashion as the discriminatory acts directed to other members of the class or was orchestrated by the same group of individuals within an organization. See Rossini v Ogilvy & Mather, Inc, 798 F2d 590, 597–98 (2d Cir 1986).
claimants cannot satisfy the typicality requirement with conclusory allegations that the class representative and the plaintiff class were targeted by virtue of their ethnic, racial, religious, or national identity. Rather, "plaintiffs must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded" the defendant's conduct.\textsuperscript{365} This includes evidence of a centralized policy toward or decisionmaking about the contested policy.

For example, the Ninth Circuit, in approving the certification of the plaintiff class in \textit{Marcos}, conceptualized the typicality requirement in terms of the pain and suffering experienced by the plaintiffs and their family members as a result of the torture, summary execution, or disappearance at the hands of Marcos's subordinates.\textsuperscript{370} In particular, the court noted that the question of whether any compensable injury exist[ed] for a particular class member [was] virtually identical in each case. Did the victim experience pain and suffering from the torture, summary execution, or "disappearance"? In the case of those who were executed or "disappeared", did their survivors suffer from the loss of the victim's earnings?\textsuperscript{371}

To the extent that courts focus on the different torts alleged, or the different conditions under which individuals were injured, the appointment of multiple class representatives can ensure typicality.\textsuperscript{372}

4. Adequacy of representation.

The adequacy of representation requirement of Rule 23(a)(4) ensures that the representative parties protect the absentee class members' interests. A court must ensure that: (1) there are no conflicts of interest among the class representatives and other members of the class that would prevent the class representative from vigorously advocating the class claims, and (2) class counsel is adequate to represent the class.\textsuperscript{373} The key consideration is "the forth-rightness and vigor with which the representative party can

\textsuperscript{365} \textit{Hartman v Duffey}, 19 F3d 1459, 1472 (D C Cir 1994).

\textsuperscript{370} \textit{Hilao}, 103 F3d at 774.

\textsuperscript{371} Id.

\textsuperscript{372} \textit{Hoxworth v Blinder, Robinson and Co, Inc}, 980 F2d 912, 923 (3rd Cir 1992) (finding typicality satisfied where plaintiff added additional class representatives to represent each claim).

\textsuperscript{373} See \textit{Dura-Bilt Corp v Chase Manhattan Corp}, 89 FRD 87, 100–01 (S D NY 1981).
be expected to assert and defend the interests of the members of the class.374 The court has a continuing duty to ensure that the representation requirement is met during all stages of the litigation.375

In human rights cases, it is perhaps less likely that members of the class and class representatives would possess antagonistic interests in terms of legal claims or desired relief.376 However, concerns about class representatives accurately and fairly representing the interests of the absentee members of the class remain acute, which suggests that courts should take an active role in monitoring the choice of class representatives in human rights cases. Courts and counsel can ensure that the class representatives are capable of undertaking their fiduciary obligations by identifying natural leaders in the impacted community, such as individuals who have already spoken out about abuses in a representative capacity, individuals who have formed or lead victims' organizations, or individuals who have otherwise earned the respect of other members of the potential class. Courts and class counsel must also ensure that individual claimants can sufficiently and meaningfully oversee the conduct of litigation and be actively involved in the prosecution of their claims.377 Courts can also establish procedures to facilitate the participation of class members, other members of impacted communities, and interested outsiders such as human rights advocates in establishing notice regimes and in evaluating proposed settlements or the allocation of attorney's fees.378 This may require courts to ensure the existence of a continual outreach process that enables class counsel and representatives to discern and accurately reflect the positions of their constituencies. This active involvement in victims' communities will also ensure a process through which the

374 Mersay v First Republic Corp of America, 43 FRD 465, 470 (S D NY 1968).
375 See Key v Gillette Co, 782 F2d 5, 7 (1st Cir 1986) (affirming revocation of certification where representative would not fairly and adequately protect the interests of the class).
376 See Amchem, 521 US at 626 (finding interests of already-injured versus exposure-only claimants to be unaligned).
377 See Mullenix, 33 Val U L Rev at 436–37 (cited in note 264) (citing examples of uninformed class representatives); Massengill v Board of Education, Antioch Community High School, 88 FRD 181, 185 (N D Ill 1980) (stating that personal characteristics of the class representative may be relevant in assessing adequacy). But see Kirkpatrick 827 F2d at 727 (noting that the economics of class actions are such that the vigor to pursue the case may be provided by class counsel rather than class representatives).
potentially “unstable, inchoate, or conflicting preferences” of members of the class can be aired and debated, so that some consensus can be reached. Thus, these strategies will enable class members to have a “voice” in the conduct of the litigation, if they so desire.

In determining whether class counsel’s representation is “adequate,” courts should consider more than whether class counsel has experience managing class actions. Courts should also consider to what degree a particular practitioner has experience working with human rights victims, or will be partnering with human rights advocates in litigating the case. This ensures that the special needs and vulnerabilities of victims of human rights abuses are accounted for. Furthermore, courts should ensure that class counsel are knowledgeable about the unique circumstances of the region where the abuses occurred. Taken together, these procedures will help class members monitor class representatives and counsel in order to minimize the agency costs inherent to class representation.

5. Predominance.

Voluntary classes require not only commonality, but also that the common questions of law and fact predominate in the litigation. This requirement demands more than the commonality requirement. It ensures that the proposed class is sufficiently cohesive to warrant representative treatment. The predominance requirement also asks whether proceeding as a class action

380 See Shapiro, 73 Notre Dame L Rev at 940 (cited in note 194) (noting importance of establishing widest representation possible consistent with efficient case management concerns and undertaking periodic sampling of members of class).
381 See generally Coffee, 100 Colum L Rev 370 (cited in note 194) (discussing need and strategies for increasing class members’ voice and exit rights and the loyalty of agents in class action litigation).
382 This could include any of the human rights legal clinics, such as the Lowenstein Human Rights Clinic at Yale Law School, or human rights non-profits that specialize in ATCA/TVPA litigation, such as the Center for Constitutional Rights in New York or the Center for Justice & Accountability in San Francisco.
384 See Amchem, 521 US at 624 (discussing questions underlying class cohesion).
serves judicial economy and prevents a multiplicity of suits, thus obviating the need for excessive judicial supervision. Because human rights class actions often challenge a course of conduct occurring over a period of time, they are in many respects more analogous to mass tort class actions than to other class action forms, such as the mass accident class action, which address a single incident. As a result, the claims of individual plaintiffs may be more dispersed, which will impact the court’s treatment of the predominance requirement in the human rights context. In particular, predominance may be undermined where members of a class have suffered different harms. Variations in the allegations of class members may also give rise to disparities in compensatory damage claims.

However, the many questions of law and fact common in command responsibility and corporate liability cases can support a finding of predominance. In particular, where plaintiffs’ claims rely on allegations of a common scheme or conspiracy, the mere presence of certain individual factors should not render the claims unsuitable for class treatment. Furthermore, these cases often involve norms requiring proof of multiple common elements or subject to all-or-nothing defenses, such as the application of the political question or act of state doctrines, which ensure that common questions predominate. Thus, the only issues that remain for individual claimants are whether they were injured by the conduct or policy in question or, in the case of command responsibility cases, by subordinates of the defendants. Because the amount of damages due to each plaintiff is often an individualized issue in any class action, this alone will not defeat predominance, especially where the court employs a quasi-

386 See, for example, Zinser v Accufix Research Institute, Inc, 253 F3d 1180, 1189 (9th Cir 2001) (finding no predominance where the law of many states would have to be applied).
387 See, for example, In re Shell Oil Refinery, 136 FRD 588, 591 (E D La 1991) (noting that where “the defendant’s conduct occurs in a single incident, such as the explosion at Shell’s refinery, the defendants’ conduct towards each plaintiff is identical”).
388 Amchem, 521 US at 625 (noting that mass accident cases may more easily satisfy the predominance requirement). See, for example, Doe v Karadzic, 176 FRD 458, 463 (S D NY 1997) (noting that predominance requirement has the potential to impede certification).
389 See Allison, 151 F3d at 419.
390 See Kirkpatrick, 827 F2d at 724–25 (noting that issues of reliance would not defeat predominance where plaintiffs alleged the use of a common fraudulent scheme); Amchem, 521 US at 625 (noting that mass tort cases arising from a “common cause” or disaster may satisfy the predominance requirement).
391 See Traut v Weisman, 846 F Supp 1160, 1167 (S D NY 1994):
administrative regime to determine and allocate damages as in *Marcos*.

6. **Superiority.**

Finally, courts considering certification of a voluntary class must ensure that the class action method is superior to other forms of adjudication. The superiority requirement directs courts to consider the four factors set forth in Rule 23(b)(3): (A) the interests of members of the class in individually controlling the prosecution or defense or separate actions; (B) the extent and nature of any litigation already commenced by or against members of the class; (C) the desirability of concentrating the litigation in a particular forum; and (D) the difficulties likely to be encountered in the management of the action. As in other mass tort contexts, class certification may be inappropriate where "the claims vitally affect a significant aspect of the lives of the claimants . . . [and] there is a wide range of choice of the strategy."

Given the unique characteristics and contexts of command responsibility or corporate liability class actions, the four superiority factors may favor certification. Most class members in human rights classes will be unable to bring individual actions. Thus, the difficulties of obtaining justice in the human rights context favor a finding of the superiority of class treatment. As a

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[Defendants] contend that the court will be forced to make an individual determination of damages based upon such factors as the length of stay, whether the harm inflicted upon an individual gave rise to a constitutional tort, and the degree of mental anguish suffered. While the damage calculation may prove to be difficult, we do not think it sufficient reason to deny plaintiffs' motion for class certification since we retain the power to modify the class, by dividing it into subclasses or certifying it only as to certain issues or claims.

See also *Green v Wolf Corp*, 406 F2d 291, 300–01 (2d Cir 1968) (noting that if individualized determinations that are inherent to every action were allowed to defeat predominance, no class action could be maintained).

See FRCP 23(b)(3).


See note 259.

*See Valentino v Carter-Wallace, Inc*, 97 F3d 1227, 1234–35 (9th Cir 1996) (ruling that a class action is superior if no other alternative exists); *Phillips Petroleum Co v Shutts*, 472 US 797, 808, 809 (1985) (observing that class action is an "invention of equity," properly used when "plaintiffs would have no realistic day in court if a class action were not available"); *Korn v Franchard Corp*, 456 F2d 1206, 1214 (2d Cir 1972) (finding class action treatment superior where there were no other suits pending); *In re Prudential Securities Inc Ltd Partnerships Litigation*, 163 FRD 200, 208–09 (S D NY 1995) (considering access to justice factors in connection with superiority requirement).
result, considerations of individual control and alternative forums may be less important in these cases. Furthermore, because human rights claims rarely arise in domestic courts and involve conduct that occurred in different political and cultural milieu, there are benefits to concentrating litigation in a single jurisdiction in terms of educating the court and consolidating the presentation of proof.

To be sure, large class actions involving overseas plaintiffs may present daunting manageability concerns. The Federal Rules impose no geographic limitations on the size or scope of classes. Accordingly, courts have certified large "international" classes requiring elaborate transnational notice schemes. Further, courts have broad equitable powers to devise novel remedial approaches to ensure the manageability of complex class actions. This is especially true in the human rights context, where the relevant federal statutes invite courts to devise procedural innovations as a function of federal common law. Although U.S. courts may be relatively unfamiliar with the subject matter of human rights suits, such suits do not necessarily present manageability concerns that surpass those of other large-scale class actions. For example, in Marcos, the district court, with approval from the Ninth Circuit, devised creative and complex trial management and notice schemes that enabled the case to proceed as a class action without offending Rule 23's manageability requirement.

Still, the notice requirement can impact determinations of whether the class action provides the superior method of adjudi-

397 See Califano, 442 US at 702 ("Nothing in Rule 23 ... limits the geographical scope of a class action that is brought in conformity with that Rule.").
398 See, for example, Agent Orange, 506 F Supp at 785–89 (certifying a class of U.S. and Australian service persons exposed to Agent Orange); In re A H Robins Co, Inc, 85 BR 373, 376–78 (E D Va 1988) (finding joinder impracticable where allegedly defective product had been distributed overseas); Montelongo v Meese, 803 F2d 1341, 1352 (5th Cir 1986) (affirming certification of international class of migrant farm workers).
399 See, for example, Vancouver Women’s Health Collective Society v A H Robins Co, Inc, 820 F2d 1359, 1361–63 (4th Cir 1987) (approving worldwide notice program to over ninety countries and involving mass media public service announcements, outreach to medical establishments and government agencies, and press releases); Montelongo, 803 F2d at 1351–52 (upholding notice effectuated through bilingual letters, media campaigns, and personal contacts); Agent Orange, 818 F2d at 155 (acknowledging district court's proposed notice through domestic and international media).
400 See, for example, Estate of Marcos, 910 F Supp at 1469 (inviting courts to create federal common law, such as damages methodologies, to provide justice for victims of human rights abuses in the face of congressional silence).
401 See note 292. (citing Hilao and Abebe-Jira)
cation. Specifically, with ongoing abuses, members of a class may be incarcerated, in hiding, or seeking refuge. In conflict or immediate post-conflict situations, members of a class may be scattered throughout refugee or transit camps and may not have access to media or other notice publication modes. That said, certification should not be denied purely on the basis of manageability concerns where the defendant created the difficulties identified.

In the Karadzic case, for example, the court certified the class as a mandatory class, noting that the plaintiffs might not satisfy the predominance and manageability requirements of a voluntary class action. The case was filed at a time when most members of the class were still in Bosnia or Croatia. By the time the district court dismissed the case and then reinstated it on appeal, class members had scattered all over the globe, leaving the protective web of refugee resettlement agencies. At the time of certification, class counsel indicated their intention to submit a manageable notice scheme involving individual notice through the International Committee of the Red Cross and substitute notice through publication, websites, and other non-governmental organizations (NGOs). The scheme was not ultimately implemented, as the class was certified as a limited fund class and then decertified in light of Ortiz, but such a scheme would have undoubtedly been difficult to implement in any meaningful way,

402 Rule 23(c)(2) requires the court in the case of voluntary classes to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The notice requirement allows litigants to enter appearances through counsel, monitor the conduct of class counsel, and object to any contemplated settlement pursuant to Rule 23(e). For these reasons, calls to abolish or limit notice in human rights class actions are misguided. See Boyd, 1999 BYU L Rev at 1205–06 (cited in note 3) ("Arguments for viewing the class as a litigant may call for more selective notice so long as an adequately representative group is notified."). In the human rights context, the provision of adequate notice may actually be of heightened importance given the intensely personal nature of human rights claims, the imperative of respecting individual autonomy, and the emerging potential for collusive proceedings.

403 Six Mexican Workers v Arizona Citrus Growers, 904 F2d 1301, 1306–07 (9th Cir 1990) (noting that the potential for numerous unlocated class members stemmed from defendant's failure to keep adequate records as required by law and holding that defendant may not attempt to avoid a class suit because its own actions have made class treatment more difficult); Appleton Electric Co v Advance-United Expressways, 494 F2d 126, 135 (7th Cir 1974) ("The difficulties defendants complain of are of their own making.").

404 Doe v Karadzic, 176 FRD 458, 463 (S D NY 1997).

405 Doe v Karadzic, Plaintiffs' Memorandum of Law in Support of Motion for Class Certification 15 n 6 (S D NY July 3, 1997) (on file with U Chi Legal F).

406 See Doe v Karadzic, 192 FRD 133, 135 (S D NY 2000).
especially for *pro bono* counsel, who may not have the resources necessary to implement an international notice scheme.

As with the *Karadzic* notice plan, notice can be effectuated to members of human rights classes through social welfare organizations and agencies, legal aid and relief organizations, victims' organizations and NGOs, and refugee resettlement agencies. For example, in *Marcos*, the district court ordered notice through several NGOs in which the victims of martial law in the Philippines were members, including the Society of Ex-Detainees for Liberation Against Detention and for Amnesty, the Task Force Detainees of the Philippines, and Families of the Involuntary Disappearances. In human rights class actions with large or potentially difficult to define classes, courts can consider requiring members to opt into the class, as the *Marcos* court did. In *Marcos*, the notice plan required potential class members to return the notice form in order to join the class. Over ten thousand persons returned the form and over 9,500 participated in the eventual award. Such an opt-in scheme requires a significant investment by class counsel to ensure against the exclusion of the most vulnerable class members, and thus may not be appropriate until situations have stabilized such that communication with all potential class members is made possible. Future litigants can also imitate the strategies employed in the WWII cases, which utilized elaborate notice schemes involving direct mail; outreach to victims' organizations, national NGOs, and government entities; paid advertisements in national periodicals; and internet sites.

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408 See *Estate of Marcos*, Order at 1 (May 16, 1991) (setting forth notice plan) (on file with U Chi Legal F). Although these organizations originally assisted in the conduct of the litigation, some later repudiated the settlement reached in that case. See *Republic of the Philippines v Marcos*, Rejoinder to the Amicus Brief by Attorneys Domingo and Fruto and the “petition” of Rep Rosales, et al, Civ Case Nos 0141 and SB 0185 (Sandiganbayan 1st Div June 21, 1999) (submission by SELDA opposing settlement) (on file with U Chi Legal F).


411 *Estate of Marcos*, 910 F Supp at 1462 n 1.

412 See, for example, *In re Austrian and German Bank Holocaust Litigation*, 80 F Supp 2d 164, 169, 175 (S D NY 2000) (describing notice scheme).
CONCLUSION

In order for international human rights norms to be meaningful, the international community must rigorously enforce them and provide comprehensive redress to victims. Class action suits in domestic courts can potentially play an important role in this process. Yet, this brief survey of the advantages and challenges of utilizing the class action mechanism in human rights litigation reveals an uneasy fit.

For class actions to become an effective vehicle for human rights litigation, it is necessary to overcome the challenges of obtaining certification. Likewise, litigants and courts must address agency costs that diminish the absentee class members’ sense of involvement in the process and result in disappointment and dissent within classes. In particular, lawyers and class representatives must take their fiduciary duties seriously, given the special vulnerabilities of human rights victims, the communication difficulties with absentee class members, and the intensely personal nature of human rights abuses and claims. While courts should be creative about how they conceptualize the commonality and predominance elements of a class of human rights victims, they should scrutinize and continually monitor the adequacy of representation requirement of class certification to ensure that class counsel and class representatives effectively implement their fiduciary duties.

Although proceeding as a class may not result in perfect justice for victims of human rights violations, it may be better than the alternative: an absence of justice for the victims of systematic corporate conduct or derelictions of duty by commanders failing to supervise their troops and incomplete accountability for responsible individuals and entities. Although human rights class actions may be appropriate in these contexts, the individual action remains a vibrant method of obtaining justice for individual victims with discrete claims who want to control the conduct of the litigation.