Solving the Settlement Puzzle in Human Rights Litigation

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ABSTRACT

In human rights litigation, there are no formal standards to guide lawyers and their clients when they are considering whether to settle a case. Moreover, there is a paucity of published data on human rights settlements. This Article provides a quantitative assessment of recorded settlements in human rights cases litigated under the Alien Tort Statute and Torture Victim Protection Act. It examines both confidential and public settlements. It then considers how and why these cases settled. Finally, this Article proposes a set of standards for assessing proposed settlements. When cases involve fundamental rights and individuals have suffered immeasurable harms, litigants, lawyers, and judges should know whether the costs of settlement are worth the price.

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INTRODUCTION

For over forty years, victims of serious human rights abuses have filed civil lawsuits against alleged perpetrators in U.S. courts.[1] These cases involved egregious harms—human trafficking, torture, war crimes, and genocide.[2] Cases were typically filed in U.S. courts because accountability mechanisms were often lacking in the countries where the harms occurred.[3] Most cases were dismissed on jurisdictional grounds, and few cases ever reached a jury.[4] However, some cases

1. *See generally* WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF *FILARTIGA V. PEÑA-IRALA* (2007); MARIA ARMOUDIAN, LAWYERS BEYOND BORDERS: ADVANCING INTERNATIONAL HUMAN RIGHTS THROUGH LOCAL LAWS AND COURTS (2021); ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS (2009); RALPH G. STEINHARDT, PAUL L. HOFFMAN & CHRISTOPHER N. CAMPONOVO, INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS (2008); BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008).

2. *See, e.g.*, Filártiga v. Peña-Irala, 630 F.2d. 876 (2d Cir. 1980) (alleging claims of torture).

3. *See* William J. Aceves, *Liberalism and International Legal Scholarship: The* Pinochet *Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129 (2000); Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002); Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305 (2004).

4. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (case dismissed for failing to overcome the presumption against extraterritoriality).

were settled by the parties.[5]

At first glance, it may seem puzzling that victims of serious human rights abuses would settle their claims. These individuals—including both direct victims and their family members—suffered egregious harms committed by perpetrators who have not been held accountable nor accepted responsibility for their crimes. In these cases, plaintiffs seek justice. But, they also seek truth—information about what happened to family members and why they were harmed.[6] In addition, they seek to promote respect for human dignity, uphold the rule of law, and deter future harms.[7] Finally, plaintiffs seek closure.[8] In sum, these cases—at least when they begin—are rarely about money.[9]

Many human rights cases also involve systemic harms—massive abuses suffered by a large segment of the population.[10] Crimes against humanity, genocide, and war crimes often involve hundreds or even thousands of victims. Claims of slavery and human trafficking can also involve large numbers of victims.[11] While

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5. *See* Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-*Kiobel, 102 CALIF. L. REV. 1495 (2014); Cortelyou C. Kenney, *Measuring Transnational Human Rights*, 84 FORDHAM L. REV. 1053, 1072–74 (2015).

6. *See* Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211, 2236 (2004); Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 180–82 (2005).

7. NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS 223 (2005); Tricia D. Olsen, Leigh A. Payne & Andrew G. Reiter, *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 HUM. RTS. Q. 980, 983 (2010); Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153, 157 (2003); Erin Foley Smith, *Right to Remedies and the Inconvenience of* Forum Non Conveniens*: Opening U.S. Courts to Victims of Corporate Human Rights Abuses*, 44 COLUM. J.L. & SOC. PROBS. 145, 155 (2010).

8. *See* Coliver et al., *supra* note 6, at 180–82; E. Allan Lind, Robert J. Maccoun, Patricia A. Ebener, William L. F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990); Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295 (2005).

9. *See* STEPHENS ET AL., *supra* note 1, at 445; Dolly Filàrtiga, *American Courts, Global Justice*, N.Y. TIMES, Mar. 30, 2004, at A21; Julia Lieblich, *Bearing Witness*, CHI. TRIB. MAG., May 25, 2003, at 10.

10. David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION 229, 238–39 (2006). Ambassador Scheffer uses the term "atrocity crimes" to address human rights abuses that are widespread or systematic and that involve a large number of victims:

> In non-legal terms, these are high-impact crimes of severe gravity that are of an orchestrated character, that shock the conscience of humankind, that result in a significant number of victims, and that one would expect the international media and the international community to focus on as meriting an international response holding the lead perpetrators accountable before a competent court of law.

Id. at 239; *see also* David Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT'L L. 111 (2008).

11. *See generally* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT (2019) (identifying millions of trafficking and slavery victims worldwide); THE HUMAN TRAFFICKING LEGAL CENTER, FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION (2018) https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf [https://perma.cc/ANC2-LH72].

plaintiffs in human rights litigation bring claims to address their own injuries and personal suffering, their cases often mirror the individual stories of other victims.

Human rights settlements thus raise difficult questions.[12] As Owen Fiss wrote in his groundbreaking 1984 article, *Against Settlement*, "[t]o settle for something means to accept less than some ideal."[13] In a human rights settlement, the truth about what happened to victims may never emerge.[14] The reasons why victims were targeted, the manner of death, and the location of their remains—these vital truths may remain hidden. Settlements seldom require an admission of responsibility by the defendants or even expressions of regret. In addition, some settlement agreements require confidentiality, which means the terms remain secret. As a result, these agreements are less likely to influence behavior or deter harmful conduct.[15] If these cases are not about money, why would individuals who have been enslaved, tortured, or suffered the brutal death of family members settle their claims with perpetrators?[16]

Another puzzling feature of human rights litigation is the absence of formal standards for litigants, lawyers, or judges to assess the legitimacy of proposed settlements. In addition, judicial approval is not required for most settlements because Rule 41 of the Federal Rules of Civil Procedure allows for voluntary settlements without judicial approval if both parties agree.[17] In contrast, Rule 23 requires judicial approval of any class action settlement.[18] Moreover, Rule 23(e) provides detailed guidelines for courts to consider in deciding whether to approve a class action settlement.[19] Other federal statutes contain similar requirements of

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12. *See generally* Benjamin C. Fishman, *Binding Corporations to Human Rights Norms Through Public Law Settlement*, 81 N.Y.U. L. REV. 1433 (2006); Theresa Harris, *Settling a Corporate Accountability Lawsuit Without Sacrificing Human Rights:* Wang Xiaoning v. Yahoo!, 15 HUM. RTS. BRIEF 10 (2008); Mike Perry, *Beyond Dispute: A Comment on ADR and Human Rights Adjudication*, 53 DISP. RESOL. J. 50 (1998).

13. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1086 (1984).

14. *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); H. Lee Sarokin, *Justice Rushed is Justice Ruined*, 38 RUTGERS L. REV. 431 (1986).

15. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 3 (1979); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995). *But see* Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995); Michael Moffitt, *Three Things to be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203 (2009).

16. This dynamic is quite different from most damages actions. Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1196 (2009) ("[I]n most damages actions, the claimants are concerned less about a court finding of wrongdoing than they are about recovering compensation for their injuries.").

17. FED. R. CIV. P. 41(a)(1)(A).

18. FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval."). *See generally* Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J.L. ANALYSIS 167 (2009).

19. FED. R. CIV. P. 23(e)(2).

judicial review or approval before cases can be settled or dismissed.[20] No such requirement exists for the majority of civil settlements, including human rights cases.[21]

The Federal Rules provide that the dismissal of lawsuits is an administrative function performed by the clerk.[22] In most cases, a judge's approval is not required.[23] Even lawyers are provided relatively little guidance. The *Model Rules of Professional Conduct* impose a generalized duty on counsel to render candid advice on legal matters and to abide by their client's decision on whether to settle a case.[24] Beyond this, there are no substantive parameters to offer meaningful guidance to attorneys as they consider settlement terms or to individual litigants as they decide whether to accept a settlement offer. Human rights lawyers can face additional challenges when their clients live in other countries.[25] Transnational litigation adds complexity because of competing foreign procedural rules, ethical standards, and client expectations.[26]

To date, human rights settlements have received little attention despite their unique status and significance.[27] The standards for assessing these settlements have also been ignored. This Article seeks to address these omissions by

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20. *See, e.g.*, FED. R. CIV. P. 23.1(c) ("A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders."); FED. R. CIV. P. 66 ("An action in which a receiver has been appointed may be dismissed only by court order."); FED. R. BANKR. P. 9019(a) ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."). *See* Keith William Diener, *Judicial Approval of FLSA Back Wages Settlement Agreements*, 35 HOFSTRA LAB. & EMP. L.J. 25 (2018).

21. Marc S. Galanter, *Federal Rules and the Quality of Settlements: A Comment on Rosenburg's, the Federal Rules of Civil Procedure in Action*, 137 U. PA. L. REV. 2231 (1989); Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1520 (2017); Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55 (1999).

22. FED. R. CIV. P. 41 (Dismissal of Actions).

23. FED. R. CIV. P. 41(a)(1)(A).

24. *See* MODEL RULES OF PROF.'L CONDUCT R. 1.2 (2016) (Scope of Representation & Allocation of Authority Between Client & Lawyer) [hereinafter MODEL RULES]; MODEL RULES R. 2.1 (Advisor).

25. *See* Deborah J. Cantrell, *Sensational Reports: The Ethical Duty of Cause Lawyers to be Competent in Public Advocacy*, 30 HAMLINE L. REV. 567 (2007); Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109 (2009); Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891 (2008); Shannon M. Roesler, *The Ethics of Global Justice Lawyering*, 13 YALE HUM. RTS. & DEV. L.J. 185 (2010).

26. STEPHENS ET AL., *supra* note 1, at 45–46; *see also* Morial Shah, *Ethical Standards for International Human Rights Lawyers*, 32 GEO. J. LEGAL ETHICS 213 (2020); Luc Walleyn, *The Role of Victims' Lawyers in Reparation Claims*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 381 (Carla Ferstman & Mariana Goetz eds., 2d ed. 2020).

27. Some scholars have considered human rights settlements as part of broader studies on the litigation process. *See* Oona Hathaway, Christopher Ewell & Ellen Nohle, *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. (forthcoming 2022); Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 128–29 (2013); Kenney, *supra* note 5, at 1072–73; *Alien Tort Statute Cases Resulting in Plaintiff Victories*, THEVIEWFROMLL2 (Nov. 11, 2009), https://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/ [https://perma.cc/U3F4-H54Z] [hereinafter VIEW FROM LL2].

examining recorded settlements in cases litigated under two federal statutes: the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA).[28] Lawsuits filed under these statutes involve claims of human rights abuses—from torture and extrajudicial killing under the TVPA to a broader group of harms under the ATS such as genocide, crimes against humanity, and war crimes.[29] Part I of this Article provides an overview of ATS and TVPA litigation and offers a quantitative assessment of human rights settlements, including both public and confidential settlements. The dataset that informs this analysis appears in the Appendix to this Article. Part II examines the common features of human rights settlements and considers why these agreements are made. Finally, Part III proposes a set of standards that would address some of the challenges that arise when plaintiffs in human rights cases consider settlement.[30] These standards can guide lawyers contemplating human rights settlements. While this Article frames these issues in the context of ATS and TVPA litigation, its findings and recommendations apply to any cases that implicate human rights concerns.[31]

To be clear, this Article does not question the extraordinary bravery and perseverance of the plaintiffs in these cases, all of whom experienced great suffering and yet still came forward to bring their claims in U.S. courts. Nor does it question the dedication or strategic decisions of their counsel, who diligently pursued these cases against overwhelming odds. It is written in solidarity with them and with the hope of supporting future survivors and their lawyers.

I. SETTLING HUMAN RIGHTS CASES IN U.S. COURTS

The age of human rights litigation in U.S. courts began in 1979, when Joel and Dolly Filártiga filed a civil lawsuit under the Alien Tort Statute in federal district court for the Eastern District of New York.[32] The ATS provides federal subject matter jurisdiction over civil actions filed by foreign nationals alleging torts

28. 28 U.S.C. § 1350 (Alien Tort Statute); 28 U.S.C. § 1350 (note) (Torture Victim Protection Act). The dataset includes lawsuits that raised other jurisdictional statutes or causes of action along with the ATS or TVPA. However, it does not include lawsuits that did not include the ATS or TVPA. *See, e.g.*, Siderman de Blake v. Republic of Arg., 965 F.2d 699 (9th Cir. 1992) (lawsuit filed against the Argentine government pursuant to the Foreign Sovereign Immunities Act); Tim Golden, *Argentina Settles Lawsuit By a Victim of Torture*, N.Y. TIMES (Sept. 14, 1996), https://www.nytimes.com/1996/09/14/us/argentina-settles-lawsuit-by-a-victim-of-torture.html [https://perma.cc/4Z54-9XKS].

29. *See, e.g.*, Kadic v. Karadzic, 70 F.3d. 232 (2d Cir. 1995); Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1997).

30. While this Article focuses on plaintiffs and their interest in the settlement process, defendants may also have strong incentives to settle cases.

31. Other federal statutes afford victims of human rights abuses a mechanism for seeking civil redress, including the Foreign Sovereign Immunities Act (18 U.S.C. § 1605(a)) (waiving sovereign immunity for certain claims against foreign governments, including torture, extrajudicial killing, and hostage-taking); Anti-Terrorism Act (18 U.S.C. § 2333) (authorizing civil remedy for acts of international terrorism); and Trafficking Victims Protection Act (18 U.S.C. § 1595) (authorizing civil remedy for acts of slavery, forced labor, and human trafficking).

32. Verified Complaint, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79 C 917) [hereinafter Filártiga Complaint].

committed in violation of international law.[33] While the ATS was adopted in 1789 as part of the First Judiciary Act,[34] the Filártiga lawsuit brought the statute into prominence and modern use.

The Filártiga family filed their lawsuit in the United States because they were seeking accountability for the torture and murder of Joelito Filártiga, who was killed in Asuncion, Paraguay.[35] The defendant was Americo Peña-Irala, a Paraguayan police official who was responsible for Joelito's death and who had moved to the United States.[36] The complaint alleged that claims of torture and wrongful death were actionable under the ATS.[37] The district court dismissed the lawsuit, holding that the Filártiga family had not alleged a violation of international law under the ATS.[38] In *Filartiga v. Pena-Irala*, the Second Circuit reversed and upheld federal jurisdiction under the ATS when an alleged torturer is found and served with process in the United States.[39] Following the Second Circuit's decision, a bench trial was held, and the judge awarded the Filártiga family over $10 million in compensatory and punitive damages.[40] While the Filártiga family never collected any money from the judgment, the decision was deeply significant to them.[41]

Since the *Filartiga* decision, dozens of lawsuits have been filed under the ATS.[42] In most cases, the plaintiffs pursued individual claims although some cases were filed as class action lawsuits.[43] Some defendants were private individuals or foreign government officials; other defendants were corporations.[44] In addition to the ATS, plaintiffs began using other federal statutes to pursue human rights cases in U.S. courts.[45] The Torture Victim Protection Act was adopted by

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33. 28 U.S.C. § 1350 (2012).

34. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

35. *See generally* ACEVES, *supra* note1, at 28–76; RICHARD ALAN WHITE, BREAKING SILENCE: THE CASE THAT CHANGED THE FACE OF HUMAN RIGHTS (2005); Ralph Steinhardt & Jeffrey M. Blum, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act after* Filártiga v. Peña-Irala, 22 HARV. INT'L L.J. 53 (1981).

36. Filártiga, 630 F. 2d at 876, 879 (2d Cir. 1980).

37. Filártiga Complaint, *supra* note 32, at 1–2.

38. Filártiga v. Peña-Irala, No. 79 C 917. slip op. (E.D.N.Y. May 1, 1979).

39. Filártiga, 630 F.2d at 876.

40. Filártiga v. Peña-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984).

41. ACEVES, *supra* note 1, at 9–10, 76. For an analysis of the impact of the Filártiga case in Paraguay, see NATALIE R. DAVIDSON, AMERICAN TRANSITIONAL JUSTICE: WRITING COLD WAR HISTORY IN HUMAN RIGHTS LITIGATION 78–105 (2020).

42. *See generally* JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS (2008); PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW, HISTORY AND ANALYSIS (2009); Natalie R. Davidson, *Shifting the Lens on Alien Tort Statute Litigation: Narrating U.S. Hegemony in* Filártiga *and* Marcos, 28 EUR. J. INT'L L. 147 (2017).

43. STEPHENS ET AL., *supra* note 1, at 521–22.

44. *See* MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH U.S. TORTS LAW 5–6 (2009).

45. *See* Gwynne L. Skinner, *Beyond* Kiobel: *Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in A New (Post-Kiobel) World*, 46 COLUM. HUM. RTS L. REV. 158, 191–92 (2014).

Congress in 1992 to reinforce the ability of victims to bring claims involving torture and extrajudicial killing against individuals who were acting under the color of foreign law.[46] Unlike the ATS, the TVPA gave U.S. citizens the right to bring these claims in U.S. courts.[47]

Between 1980 and 2020, approximately 350 ATS or TVPA cases were filed in U.S. courts.[48] Most of these cases were dismissed on procedural grounds, including lack of subject matter jurisdiction, immunity, *forum non conveniens*, or the political question doctrine.[49] As a result, few cases ever reached a jury. When cases were presented to a jury, they typically resulted in a verdict for the plaintiffs.[50] Default judgments also resulted in significant awards to plaintiffs.[51] Yet despite its notoriety, human rights litigation constitutes a miniscule portion of the federal docket.[52]

Within this group of ATS and TVPA cases, several were settled by the parties during the litigation process. Between 1980 and 2020, approximately twenty-nine of these cases settled.[53] Settlements typically occurred only after defendants had exhausted their procedural challenges to the litigation, and a trial date had

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46. Torture Victim Protection Act, Pub. L. No. 102–256, 106 Stat. 73 (1992). The TVPA provides a federal cause of action for torture and extrajudicial killing. It appears as a statutory note to 28 U.S.C. § 1350.

47. *See* Yoav Gery, *The Torture Victim Protection Act: Raising Issues of Legitimacy*, 26 GEO. WASH. J. INT'L L. & ECON. 597, 597 (1993); Michael J. Stephan, *Persecution Restitution: Removing the Jurisdictional Roadblocks to Torture Victim Protection Act Claims*, 84 BROOK. L. REV. 1355, 1358 (2019).

48. Kenney, *supra* note 5, at 1068–69.

49. STEPHENS ET AL., *supra* note 1, at 335–438.

50. *See, e.g.*, Pascale Bonnefoy, *Florida Jury Finds Former Chilean Officer Liable in '73 Killing*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/world/americas/chile-victor-jara-lawsuit.html [https://perma.cc/8G3X-7C58]; Jon Burstein, *Ex-Generals Must Pay for Tortures, Jury Says*, ORLANDO SENTINEL (July 24, 2002), https://www.orlandosentinel.com/news/os-xpm-2002-07-24-0207240298-story.html [https://perma.cc/TG5Z-V3VL]; David Rohde, *Jury in New York Orders Bosnian Serb to Pay Billions*, N.Y. TIMES (Sept. 26, 2000), https://www.nytimes.com/2000/09/26/world/jury-in-new-york-orders-bosnian-serb-to-pay-billions.html [https://perma.cc/X5FJ-KTYG].

51. *See, e.g.*, Bob Egelko, *Former Argentine General Ordered to Pay $21 Million in Civil Rights Case*, AP (Apr. 25, 1988), https://apnews.com/411c63bdc574ba7caf5d9193f81715da [https://perma.cc/E8DM-TZG7].

52. Kenney, *supra* note 5, at 1059–60; Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485, 491 (2001); John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539, 539 (1997).

53. These cases are listed in the Appendix. This list does not include cases where the ATS or TVPA claims were dismissed before a settlement was reached. *See, e.g.*, Gov't of the Dom. Rep. v. AES Corp., 466 F. Supp. 2d 680 (E.D. Va. 2006) (dismissing ATS claim before settlement was reached). *See generally* Jef Feeley & Mark Chediak, *Power Company AES Settles Claims That it Killed or Deformed Babies with Dumped Coal Ash*, BLOOMBERG (Apr. 4, 2016), https://www.bloomberg.com/news/articles/2016-04-04/aes-settles-suit-over-coal-ash-dumping-in-dominican-republic [https://perma.cc/P64B-MEGN]. In addition, the list does not include cases where the settlement occurred after a jury verdict. *See e.g.*, Judgment, *In re* Estate of Marcos Human Rights Litig., (D. Haw. 1999) (involving negotiations between the Marcos estate, the Philippine government, and the plaintiffs regarding the distribution of the judgment). *See generally* Nate Ela, *Litigation Dilemmas: Lessons from the Marcos Human Rights Class Action*, 42 L. & SOC. INQUIRY 479 (2017); 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 (1993); Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279, 284–89.

been scheduled.[54] Some of these settlements were confidential, and no terms were disclosed.[55] However, a few settlements were announced by the parties or their terms were otherwise made public.[56]

Inevitably, this list does not (and cannot) reflect every possible settlement. Lawsuits are routinely dismissed with no explanation provided by the parties or the court. Confidentiality agreements may prevent both clients and their attorneys from disclosing a settlement or its terms. Accordingly, there may be cases that were settled by the parties with no public explanation or evidence.

While each of these twenty-nine cases is unique, the Holocaust litigation cases are *sui generis* within this population of cases. In the 1990s, thousands of Holocaust-era victims filed lawsuits in U.S. courts.[57] They targeted numerous defendants, including financial institutions, insurance companies, and other corporations.[58] The lawsuits raised claims of slavery, forced labor, expropriation, and other serious human rights abuses.[59] Some even targeted the U.S. government.[60] Jurisdiction was based on the Alien Tort Statute because many of the plaintiffs were foreign nationals, and their claims alleged violations of international law.[61] Unlike most ATS cases, the Holocaust-era lawsuits garnered significant support from the U.S. government.[62] While some foreign governments were receptive to these cases, others were either skeptical or hostile.[63] Through litigation and public pressure, most of these cases eventually settled.[64] These

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54. *See infra* Part I(B)(1). *See also*, Note, *The "Prudential Exhaustion" Doctrine in Transnational Litigation in U.S. Courts*, 134 HARV. L. REV. 840, 842 (2020).

55. Some parties announce that a confidential settlement has been reached even though they did not disclose the terms of the settlement. Other parties provide no such announcement and, therefore, it is not possible to determine whether a settlement was reached or whether the case was simply dismissed with no agreement.

56. *See infra* Part I(B).

57. *See generally* MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003); MICHAEL R. MARRUS, SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S (2009); Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*, 80 WASH. U. L.Q. 835 (2002); Leora Bilsky, *Transnational Holocaust Litigation*, 23 EUR. J. INT'L L. 349 (2012).

58. *In re* Nazi Era Cases against German Defendants Litig., 198 F.R.D. 429 (D.N.J. 2000); *In re* Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164 (S.D.N.Y. 2000); *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139 (E.D.N.Y. 2000); Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

59. *See In re* Nazi Era Cases, 213 F. Supp. 2d 439; *In re* Holocaust Victim Assets, 105 F. Supp. 2d 139; *In re* Austrian & German Bank Holocaust, 80 F. Supp. 2d 164.

60. Rosner v. United States, 2012 WL 13066527 (S.D. Fla. March 1, 2012).

61. *See* Michael Thad Allen, *The Limits of Lex Americana: The Holocaust Restitution Litigation As A Cul-De-Sac of International Human-Rights Law*, 17 WIDENER L. REV. 1, 45 (2011).

62. Ronald J. Bettauer, *The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 BERKELEY J. INT'L L. 1 (2002); Morris A. Ratner, *The Settlement of Nazi-Era Litigation Through the Executive and Judicial Branches*, 20 BERKELEY J. INT'L L. 212 (2002).

63. BAZYLER, *supra* note 57, at 1–6, 69–70, 99–100.

64. *See* Judah Gribetz & Shari C. Reig, *The Swiss Banks Holocaust Settlement*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 114 (Carla Ferstman & Mariana Goetz eds., 1st ed. 2014); Leora Bilsky Rodger D. Citron, & Natalie R. Davidson, *From Kiobel Back to Structural Reform: The Hidden Legacy of Holocaust Restitution Litigation*, 2 STAN. J. COMPLEX LITIG. 139 (2014).

settlements were often finalized through international negotiations, culminating in formal agreements.[65] The settlements provided financial redress and included statements of responsibility and remorse by the defendants.[66]

A. PUBLIC SETTLEMENTS

Eleven of the twenty-nine human rights cases that settled between 1980 and 2020 were public settlements, meaning the settlements were formally announced by the parties and the settlement terms were disclosed.[67] The financial terms of these public settlements varied greatly, ranging from $80,000 to $5.6 billion.[68]

This section examines two important cases: *Wiwa v. Royal Dutch Petroleum Co.* and *In re South African Apartheid Litigation (Khulumani)*. Both cases addressed corporate complicity in human rights abuses. They also represent two high profile public settlements.

1. *WIWA V. ROYAL DUTCH PETROLEUM CO.*

A public settlement was reached in *Wiwa v. Royal Dutch Petroleum Co.*, a case involving the execution of noted Nigerian activists Ken Saro-Wiwa and John Kpuinen by the Nigerian military regime in 1995.[69] This case was originally filed in the federal district court for the Southern District of New York on November 8, 1996 by the families of the two victims against Royal Dutch Petroleum Company (Royal Dutch) and Shell Transport and Trading Company (Shell).[70] The complaint claimed federal jurisdiction under the ATS and other federal statutes and raised ten causes of action, including summary execution,

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65. *See generally* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 165 (Michael J. Bazyler & Roger P. Alford eds., 2006); STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003); Leora Bilsky, *The Judge and the Historian: Transnational Holocaust Litigation as a New Model*, 24 HIST. & MEMORY 117 (2012).

66. Michael J. Bazyler & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT'L L. 684 (2003); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in U.S. Courts*, 80 WASH. U. L.Q. 795 (2002).

67. *See infra* Appendix.

68. *See, e.g.*, Jenny Strasburg, *Saipan Lawsuit Terms OKd: Garment Workers to Get $20 Million*, S.F. CHRON., Apr. 25, 2003, at B1; Wale Akinola, *Nigeria: MKO Abiola's Death - FG Offers Family $650,000 Compensation,* ALLAFRICA (Nov. 25, 2007), https://allafrica.com/stories/200711250019.html [https://perma.cc/33T5-V7FW]; Nancy Cleeland, *Firms Settle Saipan Workers Suit*, L.A. TIMES (Sept. 27, 2002), https://www.latimes.com/archives/la-xpm-2002-sep-27-fi-saipan27-story.html [https://perma.cc/N94F-NEZ6]; *GM Settles with S. Africa Apartheid Victims*, REUTERS (Mar. 1, 2012), https://af.reuters.com/article/topNews/idAFJOE82007720120301 [https://perma.cc/99WQ-T7SF]; David Smith, *General Motors Settles with Victims of Apartheid Regime*, THE GUARDIAN (Mar. 2, 2012), https://www.theguardian.com/world/2012/mar/02/general-motors-settles-apartheid-victims [https://perma.cc/SAJ7-UVCC].

69. *See generally* ROY DORON & TOYIN FALOLA, KEN SARO-WIWA (2016); IKE OKONTA & ORONTO DOUGLAS, WHERE VULTURES FEAST: SHELL, HUMAN RIGHTS, AND OIL IN THE NIGER DELTA (2001); KEN WIWA, IN THE SHADOW OF A SAINT: A SON'S JOURNEY TO UNDERSTAND HIS FATHER'S LEGACY (2001).

70. Complaint, Wiwa v. Royal Dutch Petroleum Co., No. 1:96-cv-08386 (S.D.N.Y. Nov. 8, 1996). The original complaint was amended on several occasions, culminating in the filing of the Fifth Amended Complaint on March 16, 2009. The plaintiffs were represented by the Center for Constitutional Rights, EarthRights International, and several private attorneys.

crimes against humanity, torture, arbitrary detention, and cruel, inhuman, or degrading treatment.[71] According to the complaint, the executions of Saro-Wiwa and Kpuinen "were carried out with the knowledge, consent, and/or support of defendants . . . as part of a pattern of collaboration and/or conspiracy" between the defendants and the Nigerian government.[72] The goal of the defendants and the Nigerian regime was "to violently and ruthlessly suppress any opposition to Royal Dutch and Shell's conduct in their exploitation of oil and natural gas resources in Ogoni and in the Niger Delta."[73] Two related lawsuits were subsequently filed by Nigerian activists.[74]

The case proceeded for several years and resulted in numerous court rulings. On September 25, 1998, the district court determined the United Kingdom was a more appropriate forum for the litigation and dismissed the lawsuit pursuant to the doctrine of *forum non conveniens*.[75] The Second Circuit subsequently reversed the district court's dismissal and also upheld personal jurisdiction.[76] As the litigation progressed, the defendants made numerous efforts to dismiss the case. On April 23, 2009, the district court rejected, yet again, the defendants' argument that the court lacked subject matter jurisdiction.[77] Trial was scheduled for the following month although it was subsequently delayed.[78] On June 3, 2009, the Second Circuit held in a related case that the plaintiffs could seek further information from Shell Petroleum Development Company (SPDC) for purposes of determining whether it was subject to personal jurisdiction, thereby allowing that case to proceed.[79]

On June 8, 2009, the parties reached a settlement.[80] The settlement was publicly announced, and its terms were contained in a Settlement Agreement and Mutual Release filed with the court.[81] The Settlement Agreement addressed all three lawsuits and began with a set of preambulatory statements:

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71. *Id.* at 16–21.

72. *Id.* at 2.

73. *Id.*

74. Subsequent lawsuits were filed against Brian Anderson, who was the head of Nigerian operations for Royal Dutch/Shell, and Shell Petroleum Development Company, which was Shell's Nigerian subsidy.

75. Wiwa v. Royal Dutch Petroleum Co., No. 1:96-cv-08386 (S.D.N.Y. Sept. 25, 1998).

76. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92 (2d Cir. 2000).

77. Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377, 381 (S.D.N.Y. 2009).

78. Christine Kearney, *New York Trial Delayed for Nigerians Suing Shell*, REUTERS (Apr. 6, 2009), https://www.reuters.com/article/rbssEnergyNews/idUKN0641522820090406?editioe-redirect=uk [https://perma.cc/L9HW-T7T3].

79. Wiwa v. Shell Petroleum Dev. Co. of Nigeria, 335 Fed. Appx. 81, 85 (2d Cir. 2009).

80. Press Release, Ctr. for Const. Rts., Settlement Reached in Human Rights Cases Against Royal Dutch/Shell (June 8, 2009). *See generally* Ralph G. Steinhardt, *Introductory Note to the Settlement Agreement in* Wiwa v. Royal Dutch Petroleum Co. *(S.D.N.Y. 2009)*, 48 I.L.M. 969 (2009).

81. Settlement Agreement and Mutual Release, Wiwa v. Shell Petroleum Dev. Co. of Nigeria, No. 96 Civ. 8386 (S.D.N.Y. June 8, 2009), https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf [https://perma.cc/YEK6-L3MC] [hereinafter *Wiwa* Settlement Agreement].

> Whereas, Plaintiffs initiated the Litigations against Defendants;
>
> Whereas, Defendants denied the allegations of wrongdoing contained in the complaints in each of the Litigations and deny any wrongdoing or liability to Plaintiffs;
>
> Whereas, the parties are entering into this Settlement Agreement to eliminate the uncertainties, burden and expense of further protracted litigation;
>
> Whereas, the parties and their counsel conducted a course of negotiations;
>
> Whereas, Plaintiffs are entering into a settlement of their own individual claims and do not purport to negotiate on behalf of the Ogoni people;
>
> Whereas, Plaintiffs want the resolution of their individual claims to provide some benefit to the Ogoni people and thus Plaintiffs have agreed to the creation of the Trust contemplated by this Settlement Agreement;
>
> Whereas, Plaintiffs will set up a trust for the purposes of education, health, community development and other benefits for the Ogoni people and their communities, including Educational Endowments, Skills Development, Women's Programmes, Agricultural Development, Small Enterprise Support, and Adult Literacy (the "Trust"). Governance of the Trust will be independent from Plaintiffs and Defendants.[82]

Pursuant to the settlement, the defendants agreed to transfer $11 million into an escrow account.[83] This account would be used at the plaintiffs' discretion to pay for attorneys' fees as well as disbursements and *ex gratia* payments.[84] The balance from the escrow account would then be used to fund a trust that would be established by the plaintiffs.[85] In return, both parties agreed to a stipulation of dismissal with prejudice.[86] The Settlement Agreement was intended to constitute "a full, final and mutual disposition, release and settlement" of all claims between the parties.[87] The Settlement Agreement also indicated that it represented "a compromise of disputed claims" and that the negotiations surrounding the Agreement did not constitute admissions or concessions by either party.[88] Furthermore, the Agreement acknowledged it was the result of "mutual arms-length negotiation" between the parties, and that each party would bear its own costs and attorneys' fees.[89]

A second Settlement Agreement was prepared between the plaintiffs and a third party, Energy Equity Resources Limited (EER).[90] EER was a separate oil

82. *Id*. at 3–4.

83. *Id*. at 4. Shell Petroleum N.V. and Shell Transport and Trading Company would contribute $7.5 million, and Shell Petroleum Development Company would contribute $3.5 million. *Id*.

84. *Id*. at 5.

85. *Id*.

86. *Id*. at 4.

87. *Id*. at 5.

88. *Id*. at 7.

89. *Id*.

90. Settlement Agreement Between Wiwa Plaintiffs and Energy Equity Resources Limited re Wiwa v. Shell Petroleum, Wiwa v. Royal Dutch Petroleum Co., No. 1:96-cv-08386 (S.D.N.Y. Sept. 25, 1998) https://

and gas company that operated in Nigeria.[91] According to the agreement, money that SPDC owed to EER would be used to help fund the trust.[92] The agreement noted that EER supported the resolution of the litigation and supported the creation of the trust.[93] It also indicated the money was intended to facilitate the resolution of three specific claims: summary execution, crimes against humanity, and torture.[94] Pursuant to the settlement agreement, EER directed SPDC to transfer $4.5 million into the escrow account.[95]

In addition to the two Settlement Agreements, the plaintiffs also prepared a Trust Deed. In this document, the plaintiffs established an irrevocable Trust Fund of $5 million for the benefit of the Ogoni people.[96] The Trust Fund was named the Kiisi Trust and would be managed by three appointed trustees.[97] (In the Ogoni language, the word "Kiisi" means "progress."[98]) The object of the Trust would be: "[e]ducation, health, community development and other benefits for the Ogoni people and their communities, including Educational Endowments, Skills Development, Women's Programmes, Agricultural Development, Small Enterprise Support, and Adult Literacy."[99] It took several years before the Kiisi Trust became operational and began its charitable work.[100]

Both the plaintiffs and their attorneys issued statements about the settlement. In their joint statement, the ten plaintiffs indicated that "[t]he decision to accept Shell's offer came after lengthy and exhaustive deliberations" and that they "collectively agreed that it is time to move on with our lives and we have decided to put this sad chapter behind us."[101] While the litigation process had been difficult, the plaintiffs were "extremely satisfied with the result."[102] In addition, the plaintiffs emphasized that the settlement only resolved their individual claims against

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ccrjustice.org/sites/default/files/assets/EER%20agreement.pdf [https://perma.cc/83XB-DTXX] [hereinafter EERL Settlement Agreement].

91. According to one news report, Energy Equity Resources helped facilitate the settlement. Ben Amunwa, *Shell in Nigeria: The Struggle for Accountability*, PAMBAZUKA NEWS (Feb. 18, 2010), https://www.pambazuka.org/governance/shell-nigeria-struggle-accountability [https://perma.cc/3SQ9-76W2].

92. EERL Settlement Agreement, *supra* note 90, at 2.

93. *Id.*

94. *Id.*

95. *Id.*

96. Trust Deed (June 8, 2009), https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_TRUST_DEED-1.pdf [https://perma.cc/AZL8-JQBV] [hereinafter Trust Deed].

97. *Id.* at 2.

98. *The Kiisi Trust to Benefit the Ogoni People*, TRUST AFRICA (2017), http://www.trustafrica.org/en/kiisi-trust-fund [https://perma.cc/8Q26-Q89P].

99. Trust Deed, *supra* note 96, at 2.

100. *Kiisi Trust Fund, Frequently Asked Questions*, TRUST AFRICA (2017), http://trustafrica.org/images/KTF-FAQs_2017.pdf [https://perma.cc/9XHM-8CLG].

101. Press Release, Ctr. Const. Rts., Statement of the Plaintiffs in Wiwa v. Royal Dutch/Shell, Wiwa v. Anderson, and Wiwa v. SPDC (June 8, 2009), https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_Statement_of_Plaintiffs-1.pdf. [https://perma.cc/G2DY-JW2F] [hereinafter *Wiwa* Plaintiffs].

102. *Id.*

the defendants and that "[t]he larger disputes between Shell and Ogoni remain and are beyond the scope of our settlement."[103]

The plaintiffs' attorneys issued a separate statement expressing satisfaction that their clients had been provided with substantial compensation for their claims.[104] At the same time, the attorneys were pleased that portions of the settlement were intended "to benefit thousands of other people in Ogoni."[105] They added, however, that outstanding issues remained between the Ogoni people and Shell, "and it is Shell's responsibility to resolve those issues with the Ogoni people themselves."[106] Finally, the plaintiffs' attorneys expressed hope that the settlement would reinforce the principle of accountability and would serve as a deterrent to prevent future atrocities.[107]

In its own separate statement, Shell announced it had settled the case and had made "a humanitarian gesture to set up a trust fund to benefit the Ogoni people."[108] According to a Shell official, the settlement would "assist in the process of reconciliation and peace in Ogoni land, which is our primary concern."[109] However, Shell indicated it "had no part in the violence that took place."[110] Moreover, Shell "maintained the allegations were false."[111] While "Shell was prepared to go to court to clear [its] name, we believe the right way forward is to focus on the future for Ogoni people, which is important for peace and stability in the region."[112]

While the *Wiwa* lawsuit settled, a similar lawsuit filed against Royal Dutch Petroleum was dismissed. *Kiobel v. Royal Dutch Petroleum Co.* was filed in 2002 as a class action by a different group of plaintiffs, although many of the claims mirrored the *Wiwa* claims.[113] In fact, the lawsuit was filed in the same federal district and was assigned to the same judge who presided over the *Wiwa* litigation.[114] While *Wiwa* settled in 2009, the *Kiobel* litigation proceeded and reached the Supreme Court in 2013. In a landmark decision, the Supreme Court held that

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103. *Id.*

104. Press Release, Ctr. Const. Rts., Statement of the Plaintiffs' Att'ys in Wiwa v. Royal Dutch/Shell, Wiwa v. Anderson, and Wiwa v. SPDC (June 8, 2009), https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_Statement_of_the_Attorneys-1.pdf [https://perma.cc/JY5J-QUX9] [hereinafter *Wiwa* Attorneys].

105. *Id.*

106. *Id.*

107. *Id.*

108. Press Release, Shell Settles Wiwa Case with Humanitarian Gesture (June 8, 2009) [hereinafter Shell Press Release].

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Class Action Complaint, Kiobel v. Royal Dutch Petroleum, Case No. 1:02 CV 07618 (S.D.N.Y. Sept. 20, 2002).

114. Alex S. Moe, *A Test by Any Other Name: The Influence of Justice Breyer's Concurrence in* Kiobel v. Royal Dutch Petroleum Co., 46 LOY. U. CHI. L.J. 225, 254 (2014); Matthew R. Skolnik, *The Forum Non Conveniens Doctrine in Alien Tort Claims Act Cases: A Shell of Its Former Self After* Wiwa, 16 EMORY INTL. L. REV. 187, 223 n.185 (2002).

ATS claims must touch and concern the United States with sufficient force to overcome the presumption against extraterritorial application of U.S. law.[115] In the absence of any meaningful connections between the *Kiobel* litigation and the United States, the Court affirmed the lower court's dismissal of the case.[116] Given the similarities between *Wiwa* and *Kiobel*, these cases provide a stark example of the vagaries of litigation as well as the risks and rewards faced by litigants.

2. *IN RE SOUTH AFRICAN APARTHEID LITIGATION* (*KHULUMANI*)

In re South African Apartheid Litigation (*Khulumani*) represents another example of a public settlement.[117] This case arose from the systemic human rights abuses that occurred in South Africa during the apartheid era. In 2002, a large group of plaintiffs filed several ATS lawsuits in the federal district court for the Southern District of New York against approximately fifty multinational corporations, alleging they were complicit in the abuses of the South African regime.[118] The litigation proceeded for years and resulted in numerous legal decisions on matters relating to personal jurisdiction and subject matter jurisdiction.[119] While some defendants were dismissed in the early years of the litigation, others remained as parties.

On December 29, 2011, the plaintiffs and the successor entity for one of the defendants, General Motors, agreed to settle the case.[120] The settlement occurred while *In re South African Apartheid Litigation* was pending before the Second Circuit. In consideration for dismissing the claims against General Motors with prejudice, the plaintiffs received $1.5 million.[121] The settlement included a provision indicating that the agreement could not be deemed an admission of fault or liability to any of the claims raised in the litigation.[122] In a subsequent statement, a spokesperson for General Motors indicated the payment was made as a "show

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115. Kiobel v. Royal Dutch Petroleum Co. 569 U.S. 108 (2013).

116. *Id*. at 124–25.

117. *See generally* Ingrid Gubbay, *Towards Making Blood Money Visible: Lessons Drawn from the Apartheid Litigation*, *in* MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 337 (Juan Pablo Bohoslavsky & Jernej Letnar Cernic eds., 2014); Janet A. Jobson, *Corporate-State Relations and the Paralysis of Accountability: A Case Study of the* Khulumani et al. v. Barclays et al. *Lawsuit*, 5 ST. ANTONY'S INT'L REV. 55 (2009).

118. *See generally* Lucien J. Dhooge, *Accessorial Liability of Transnational Corporations Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the Lessons of Central Bank*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 247 (2009); Ereshnee Naidu, *Symbolic Reparations and Reconciliation: Lessons from South Africa*, 19 BUFF. HUM. RTS. L. REV. 251, 262–63 (2013); Mia Swart, *The* Khulumani *Litigation: Complementing the Work of the South African Truth and Reconciliation Commission*, 16 TILBURG L. REV. 30 (2011).

119. Khulumani v. Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007); s*ee, e.g*., *In re* S. Afr. Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

120. Order Approving Agreement Resolving Proofs of Claim Nos. 1206, 7587, and 10162, *In re* Motors Liquidated Company, Case No. 09-50026 (S.D.N.Y. Feb. 24, 2012).

121. *Id*. at 3 (The Settlement Agreement).

122. *Id*. at 6.

of good faith" even though General Motors had declared bankruptcy in 2009 and argued it had no legal obligation to make the payment.[123] The plaintiffs' lawyers viewed the settlement as a positive step and hoped it would place pressure on other defendants to settle.[124] The settlement proceeds were placed in a trust.[125] The individual plaintiffs would receive a relatively small amount, and the remainder of the trust proceeds would be distributed to a broader group of victims.[126] While General Motors agreed to settle, the other defendants did not. After extensive litigation, the remaining cases were dismissed.[127]

B. CONFIDENTIAL SETTLEMENTS

Eighteen of the twenty-nine human rights cases that settled between 1980 and 2020 were confidential settlements.[128] In some of these cases, the parties simply announced that a settlement had been reached without disclosing the terms. In other cases, the parties did not even announce that a settlement had been reached. Instead, the existence of the settlement was disclosed in media reports or court filings.

This section examines three cases: *Salim v. Mitchell*, *In re XE Services Alien Tort Litigation*, and *Doe v. Unocal*. While each case reflects distinct facts and claims, they all resulted in confidential settlements. These cases also reveal the different ways in which the existence of confidential settlements or their terms are disclosed.

1. *SALIM V. MITCHELL*

A confidential settlement was reached in *Salim v. Mitchell*.[129] This case arose out of the Rendition, Detention, and Interrogation Program operated by the Central Intelligence Agency (CIA) following the 9/11 terrorist attacks.[130] The lawsuit was filed on October 13, 2015 by three plaintiffs: Suleiman Abdullah Salim, Mohamad Ahmed Ben Soud, and Obaid Ullah on behalf of Gul

123. Smith, *supra* note 68.

124. *Id.*

125. *Id.*

126. *Id.*

127. Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013); *see, e.g.*, Balintulo v. Ford Motor Co., 796 F.3d 160 (2d Cir. 2015).

128. *See infra* Appendix.

129. Complaint, Salim v. Mitchell, No. 2:15-CV-286-JLQ (E.D. Wash. Oct. 13, 2015) [hereinafter *Salim* Complaint]. The plaintiffs were represented by the American Civil Liberties Union and several private attorneys.

130. *See generally* William J. Aceves, *Interrogation or Experimentation? Assessing Non-Consensual Human Experimentation During the War on Terror*, 42 DUKE J. COMP. & INT'L L. 41 (2018); Jameel Jaffer, *Known Unknowns*, 48 HARV. C.R.-C.L. L. REV. 457 (2013); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585 (2006).

Rahman.[131] The defendants were two psychologists, James Mitchell and Bruce Jessen, who worked with the CIA to develop and implement interrogation protocols for high-value detainees.[132] The complaint claimed federal jurisdiction under the Alien Tort Statute and raised three causes of action: torture and other cruel, inhuman, or degrading treatment, non-consensual human experimentation, and war crimes.[133]

The plaintiffs alleged the defendants had "designed, implemented, and personally administered an experimental torture program" for the CIA.[134] Both Salim and Ben Soud had been subjected to various interrogation techniques, including "solitary confinement; extreme darkness, cold, and noise; repeated beatings; starvation; excruciatingly painful stress positions; prolonged sleep deprivation; confinement in coffin-like boxes; and water torture."[135] Rahman had been subjected to similar treatment and eventually died of hypothermia.[136]

Despite repeated efforts by the defendants to dismiss the lawsuit, the case moved through the litigation process. The district court rejected the defendants' jurisdictional arguments as well as their claims of immunity.[137] On August 7, 2017, the district court denied the defendants' final motion for summary judgment.[138] Trial was scheduled for September 5, 2017.[139] Unlike countless other lawsuits raising claims arising from U.S. counterterrorism operations, the *Salim* case was the first to overcome jurisdictional challenges and would be the first case that would be presented to a jury.

Yet on August 17, 2017, the parties announced they had settled the case.[140] The parties requested a joint stipulation of dismissal with prejudice, which the court granted.[141] While the terms of the settlement were confidential, the parties released joint and individual statements.[142] The following joint statement was released by the parties.

> Drs. Mitchell and Jessen acknowledge that they worked with the CIA to develop a program for the CIA that contemplated the use of specific coercive methods to interrogate certain detainees. Plaintiff Gul Rahman was subjected

131. *Salim* Complaint, *supra* note 129, at 2–3.

132. JAMES E. MITCHELL & BILL HARLOW, ENHANCED INTERROGATION: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIC TERRORISTS TRYING TO DESTROY AMERICA (2016).

133. *Salim* Complaint, *supra* note 129, at 3.

134. *Id.* at 2.

135. *Id.* at 2–3.

136. *Id.*

137. Salim v. Mitchell, 183 F. Supp. 3d 1121, 1130-31 (E.D. Wash. 2016).

138. Salim v. Mitchell, 268 F. Supp. 3d 1132, 1161 (E.D. Wash. 2017).

139. Larry Siems, *CIA Torture: Lawsuit Settled Against Psychologists who Designed Techniques*, THE GUARDIAN (Aug. 17, 2017), https://www.theguardian.com/us-news/2017/aug/17/cia-torture-lawsuit-settled-against-psychologists-who-designed-techniques [https://perma.cc/FV6C-EY5E].

140. Judgment in a Civil Action, Salim v. Mitchell, No. 2:15-CV-286-JLQ (E.D. Wash. Aug. 17, 2017).

141. *Id.*

142. Sheri Fink, *Settlement Reached in C.I.A. Torture Case*, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/us/cia-torture-lawsuit-settlement.html [https://perma.cc/HM5A-ZS6Y].

> to abuses in the CIA program that resulted in his death and in pain and suffering for his family, including his personal representative Obaidullah. Plaintiffs Suleiman Abdullah Salim and Mohamed Ahmed Ben Soud were also subjected to coercive methods in the CIA program, which resulted in pain and suffering for them and their families. Plaintiffs assert that they were subjected to some of the methods proposed by Drs. Mitchell and Jessen to the CIA, and stand by their allegations regarding the responsibility of Drs. Mitchell and Jessen. Drs. Mitchell and Jessen assert that the abuses of Mr. Salim and Mr. Ben Soud occurred without their knowledge or consent and that they were not responsible for those actions. Drs. Mitchell and Jessen also assert that they were unaware of the specific abuses that ultimately caused Mr. Rahman's death and are also not responsible for those actions. Drs. Mitchell and Jessen state that it is regrettable that Mr. Rahman, Mr. Salim, and Mr. Ben Soud suffered these abuses.[143]

Both parties also issued separate statements. In their joint statement, the plaintiffs noted that they had brought the case to seek "accountability and to help ensure that no one else has to endure torture and abuse, and we feel that we have achieved our goals."[144] Their statement also highlighted the tangible results of the lawsuit: "We were able to tell the world about horrific torture, the CIA had to release secret records, and the psychologists and high-level CIA officials were forced to answer our lawyers' questions."[145] While the lawsuit had "been a long, difficult road," the plaintiffs indicated they were "very pleased with the results."[146]

The defendants released separate statements through their attorneys.[147] In his statement, James Mitchell indicated his work with Bruce Jessen had been legal and necessary to "save countless lives" following "the most vicious attack on American soil in our history."[148] He acknowledged, however, that the plaintiffs

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143. Press Release, ACLU, On Eve of Trial, Psychologists Agree to Historic Settlement in ACLU Case on Behalf of Three Torture Victims (Aug. 17, 2017), https://www.aclu.org/press-releases/cia-torture-psychologists-settle-lawsuit [https://perma.cc/VR65-53G9] [hereinafter Salim Press Release].

144. *Id.*

145. *Id.*

146. *Id.*

147. Because Mitchell and Jessen were psychologists, the American Psychological Association ("APA") offered its own reaction to the settlement. According to APA President Antonio E. Puente:

> We are relieved that James Mitchell and John 'Bruce' Jessen abandoned their ill-advised effort to fight the lawsuit alleging that they were responsible for harming three men who were imprisoned and tortured in a secret CIA prison. However, this settlement in no way absolves them of responsibility for violating the ethics of their profession and leaving a stain on the discipline of psychology. We hope that the settling of this case gives some solace to the three plaintiffs and others who endured similar treatment.

Press Release, Am. Psych. Ass'n, APA Reaction to Settlement of Torture Case Against Psychologists Mitchell, Jessen (Aug. 17, 2017), https://www.apa.org/news/press/releases/2017/08/torture-settlement [https://perma.cc/CN5T-NFAW].

148. Ellen Nakashima & Julie Tate, *Architects of CIA Interrogation Program Settle Lawsuit Brought on Behalf of Brutalized Detainees*, WASH. POST (Aug. 17, 2017), https://www.washingtonpost.com/world/

had been subjected to unauthorized acts: "[I]n an effort to find those terrorists and stop another attack on America, certain individuals performed acts on detainees, including plaintiffs, without our knowledge or consent, and without authorization from the CIA—acts that should not have occurred and for which we are not responsible."[149] Bruce Jessen offered a similar statement, indicating his actions with James Mitchell were both legal and authorized: "Neither Dr. Mitchell nor I knew about, condoned, participated in, or sanctioned the unauthorized actions that formed the basis for this lawsuit."[150] Both Mitchell and Jessen emphasized that they had served their country to prevent "another vicious attack."[151]

2. *IN RE XE SERVICES ALIEN TORT LITIGATION*

While the *Salim* settlement garnered support from all the plaintiffs, other confidential settlements were more controversial. For example, *In re XE Services Alien Tort Litigation* involved several lawsuits arising out of the 2007 Nisoor Square massacre in Baghdad that occurred when heavily armed military contractors fired upon a group of Iraqi civilians.[152] The attack resulted in numerous casualties, including the death of eight civilians. In June 2009, the Iraqi survivors and the estates of Iraqi nationals who were killed filed lawsuits under the ATS against several private contractors and alleged both war crimes and summary execution.[153] The lawsuits were consolidated and resulted in several years of litigation.

On October 21, 2009, the federal district court issued a ruling on the defendants' motion to dismiss.[154] While the court determined the plaintiffs had failed to state valid federal claims, it allowed the plaintiffs to amend their complaint.[155] The court also determined the case did not raise nonjusticiable political questions nor should it be dismissed pursuant to the *forum non conveniens* doctrine.[156] Soon after the decision was issued, the parties agreed to settle the case.

The settlement in *XE Services* was subject to a confidentiality agreement.[157] Accordingly, the withdrawal of the complaints and stipulation of dismissal

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national-security/architects-of-cia-interrogation-program-settle-lawsuit-brought-on-behalf-of-brutalized-detainees/2017/08/17/a114a4a6-8383-11e7-b359-15a3617c767b_story.html [https://perma.cc/93MU-D3E8].

149. *Id.*

150. *Id.*

151. *Id.*

152. *See generally* CTR. CONST. RTS., FACTSHEET: GUNS FOR HIRE IN IRAQ, THE CASES AGAINST BLACKWATER (July 13, 2008), https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/factsheet-guns-hire-iraq-cases-against [https://perma.cc/S5A5-PVQL].

153. *Id.*

154. *In re* XE Services Alien Tort Litig., 665 F. Supp. 2d 569 (E.D. Va. 2009).

155. *Id.* at 603.

156. *Id.* at 602.

157. Liz Sly, *Iraqis Say They Were Forced to Take Blackwater Settlement*, L.A. TIMES (Jan. 11, 2010), https://www.latimes.com/archives/la-xpm-2010-jan-11-la-fg-iraq-blackwater11-2010jan11-story.html [https://perma.cc/4N8H-R3U8].

contain no details about the settlement.[158] The final order of dismissal simply indicates both parties agreed to settle the case.[159] News reports reveal some information about the settlement terms, although this information cannot be corroborated because the agreement remains confidential.[160] One of the plaintiffs indicated the defendants offered $100,000 to families of deceased victims and $30,000 to those who had been wounded.[161] In a brief statement, one of the plaintiffs' attorneys indicated the settlement would provide the plaintiffs "with compensation so they can now bring some closure to the losses they suffered."[162] The defendants also offered a brief public statement about the settlement. According to their attorney, they "[w]ere pleased that the original settlement ha[d] been affirmed by the plaintiffs. This enables XE's new management to move the company forward free of the costs and distraction of ongoing litigation and provides some compensation to Iraqi families."[163]

Following the settlement, some of the plaintiffs criticized the agreement and claimed they were pressured to accept it.[164] One of the plaintiffs alleged their attorneys had indicated the defendants would soon claim bankruptcy, which would prevent victims from receiving any compensation.[165] Citing the confidentiality agreement, the plaintiffs' counsel declined to comment.[166] However, other plaintiffs supported the settlement and the financial payments they received.[167]

3. *DOE V. UNOCAL*

Another confidential settlement was reached in *Doe v. Unocal*. This case arose out of the development of the Yadana natural gas pipeline project in Burma (Myanmar).[168] The project was developed by the Burmese government in a joint

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158. *See, e.g.*, Notice of Withdrawal of John Doe Declarations, *In re* XE Services Alien Tort Litigation, No. 1:09-cv-615 (E.D. Va. Nov. 6, 2009); Notice of Withdrawal of Amended Complaints, *In re* XE Services Alien Tort Litig., No. 1:09-cv-615 (E.D. Va. Nov. 6, 2009).

159. *In re* XE Services Alien Tort Litig., No. 1:09-cv-615, slip op. (E.D. Va. Jan. 6, 2010).

160. David Zucchino, *Iraqis Settle Lawsuits over Blackwater Shootings*, L.A. TIMES (Jan. 8, 2010), https://www.latimes.com/archives/la-xpm-2010-jan-08-la-na-blackwater8-2010jan08-story.html [https://perma.cc/p2QZ-9G5Z].

161. *Id.*

162. *Blackwater Settles Iraq Killings in Two Separate Legal Cases*, COMMON DREAMS (Jan. 7, 2012), https://www.commondreams.org/news/2012/01/07/blackwater-settles-iraq-killings-two-separate-legal-cases [https://perma.cc/9PJN-7N87]; Mike Baker, *Blackwater Settles Civil Lawsuits over Iraq Deaths*, NEWSDAY (Jan. 7, 2010), https://www.newsday.com/business/blackwater-settles-civil-lawsuits-over-iraq-deaths-1.1688869 [https://perma.cc/9FYC-KXMZ].

163. *Blackwater Settles Iraq Killings*, *supra* note 162; see *also* Jeremy Scahill, *Blackwater Settles Massacre Lawsuit*, THE NATION (Jan. 6, 2010), https://www.thenation.com/article/archive/blackwater-settles-massacre-lawsuit/ [https://perma.cc/97A4-DH6V].

164. Sly, *supra* note 157.

165. *Id.*

166. *Id.*

167. *Id.*

168. Several federal and state lawsuits were filed against Unocal Corp. for its alleged actions in Myanmar. *See, e.g.*, Doe v. Unocal Corp., 2002 WL 33944506 (Cal. Super. Ct. 2002); Nat'l Coal. Gov't of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997).

venture with Unocal Corporation and Total, S.A.[169] The Burmese military committed numerous human rights violations during the development of the project, including torture, extrajudicial killing, and forced labor.[170]

In October 1996, fifteen Burmese villagers filed a federal class action lawsuit in the federal district court for the Central District of California against Unocal Corporation, Total, S.A., and two corporate officials.[171] The plaintiffs alleged federal jurisdiction under several statutes, including the ATS.[172] While Total, S.A. was dismissed for lack of personal jurisdiction, the district court initially allowed the ATS lawsuit against Unocal to proceed.[173] However, a subsequent decision by the district court granted summary judgment on behalf of Unocal because the plaintiffs had failed to establish that the corporation could be held liable for the alleged claims under international law.[174] In 2002, the Ninth Circuit reversed the lower court's dismissal, although it affirmed some portions of the court's decision.[175] The parties then prepared briefing for *en banc* review by the Ninth Circuit. In September 2004, a California state court judge also ruled in a similar case against Unocal that the lawsuit could proceed to trial on the plaintiffs' claims of forced labor, rape, and murder.[176] After several delays, a trial date was set for 2005.

On December 8, 2004, the parties announced a preliminary agreement to settle the case.[177] In March 2005, the parties filed a stipulated motion to dismiss, which was granted by the Ninth Circuit.[178] As part of the stipulation, the court agreed to

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169. Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997).

170. *Id.*

171. *Id*. at 896.

172. Third Amended Complaint at 2, Doe v. Unocal, No. 96-6959-RAP (C.D. Cal. Oct. 3, 1996).

173. *Doe*, 963 F. Supp. at 884.

174. Doe v. Unocal, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000). Unocal subsequently sought to tax costs from the plaintiffs in the amount of $141,941.

175. Doe v. Unocal, 395 F.3d 932, 962–63 (9th Cir. 2002). The Ninth Circuit reversed the district court's grant of summary judgment in favor of Unocal on the plaintiffs' ATS claims for forced labor, murder, and rape. *Id*. at 962. However, it affirmed the district court's grant of summary judgment in favor of Unocal on the ATS claims for torture as well as RICO claims against Unocal. *Id*. at 962–63. The Ninth Circuit also affirmed the dismissal of claims against Myanmar and the Myanmar military. *Id*. at 963.

176. *See* Press Release, Ctr. Const. Rts., Court Orders Unocal to Stand Trial for Abuses in Burm*a*, https://ccrjustice.org/home/press-center/press-releases/court-orders-unocal-stand-trial-abuses-burma [https://perma.cc/L5X7-PA7G] (last modified Nov. 24, 2009); Reuters, *Unocal to Face Suit on Human Rights*, N.Y. TIMES (June 12, 2002), https://www.nytimes.com/2002/06/12/business/unocal-to-face-suit-on-human-rights.html [https://perma.cc/54NS-JT9K]; Peter Waldman, *Unocal Will Stand Trial Over Myanmar Venture*, WALL ST. J. (June 11, 2002), https://www.wsj.com/articles/SB1023834384306624800 [https://perma.cc/J9EH-4SYM]. *See generally* SIMON BAUGHEN, HUMAN RIGHTS AND CORPORATE WRONGS: CLOSING THE GOVERNANCE GAP 166–72 (2015).

177. *See* Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES (Mar. 22, 2005), https://www.latimes.com/archives/la-xpm-2005-mar-22-fi-unocal22-story.html [https://perma.cc/JE5X-ZQBJ]; Lisa Girion, *Unocal to Settle Rights Claims*, L.A. TIMES (Dec. 14, 2004), https://www.latimes.com/archives/la-xpm-2004-dec-14-fi-unocal14-story.html [https://perma.cc/5JLF-TLRT].

178. Doe v. Unocal, 403 F.3d 708 (9th Cir. 2005).

vacate the district court's earlier decision granting summary judgment for Unocal.[179] The parties also released the following joint statement:

> The parties to several lawsuits related to Unocal's energy investment in the Yadana gas pipeline project in Myanmar/Burma announced today that they have settled their suits. Although the terms are confidential, the settlement will compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region. These initiatives will provide substantial assistance to people who may have suffered hardships in the region. Unocal reaffirms its principle that the company respects human rights in all of its activities and commits to enhance its educational programs to further this principle. Plaintiffs and their representatives reaffirm their commitment to protecting human rights.[180]

Because the settlement was confidential, its terms were not officially disclosed. However, news reports indicate the settlement amount may have reached $30 million.[181] In November 2005, Unocal's partner in the Yadana pipeline project, Total S.A., agreed to pay $6.1 million in compensation to another group of Burmese villagers who had filed a similar lawsuit in French courts.[182]

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In total, approximately twenty-nine human rights cases settled between 1980 and 2020.[183] However, this list does not (and cannot) reflect every possible settlement. Lawsuits are routinely dismissed with no explanation by either party or the court. Accordingly, there may be cases that were settled by the parties with no announcement or explanation. This lack of transparency makes it even more important to develop a set of standards for assessing human rights settlements.

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179. The withdrawn opinion was issued in 2000 and had granted summary judgment in favor of Unocal. Doe v. Unocal, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). The opinion addressed several issues, including whether Unocal was legally responsible for the acts of the Burmese government. *Id.*

180. Press Release, EarthRights Int'l, Final Settlement Reached in Doe v. Unocal (Mar. 21, 2005).

181. Rachel Chambers, *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, HUM. RTS. BR. 14 (2005); Paul Magnuson, *A Milestone for Human Rights*, BUS. WEEK, (Jan. 23, 2005), at 63; Duncan Campbell, *Energy Giant Agrees Settlement with Burmese Villagers*, THE GUARDIAN (Dec. 14, 2004), https://www.theguardian.com/world/2004/dec/15/burma.duncancampbell [https://perma.cc/Q5MZ-NXNH]. An analysis of ERI's corporate documents for 2009 suggest the organization may have received over $2 million in attorneys' fees for its work on the case. ADAM SIMPSON, ENERGY, GOVERNANCE AND SECURITY IN THAILAND AND MYANMAR (BURMA) 139 (2014).

182. *Total to Pay Burmese Compensation*, BBC NEWS (Nov. 29, 2005), http://news.bbc.co.uk/2/hi/business/4482536.stm [https://perma.cc/VH52-8WLZ]; *Total Settles Rights Case*, N.Y. TIMES (Nov. 29, 2005), https://www.nytimes.com/2005/11/29/business/worldbusiness/total-settles-rights-case.html [https://perma.cc/3WY9-8455].

183. *See infra* Appendix.

II. SOME REFLECTIONS ON SETTLEMENT

Human rights settlements are inevitably influenced by the nature of the underlying claims and the goals of the parties. While each settlement is distinct, there are common issues that must be considered during negotiations.[184] These issues are often reflected in the settlement agreement.

First, settlements generally provide direct financial redress to the plaintiffs, and the amount of compensation is always subject to negotiation.[185] While plaintiffs may receive payments directly, they can also agree to allocate them to other victims or place them into a charitable trust.[186] Compensation is typically offered as a lump sum payment, and it does not reflect distinctions between compensatory and non-compensatory damages.[187] Second, settlements may include other non-financial provisions, such as an agreement to seek the withdrawal of prior court decisions.[188] Third, settlements can provide attorneys' fees to plaintiffs' counsel and cover litigation expenses.[189] Fourth, the settlement may include substantive statements about the litigation.[190] These are often carefully crafted statements that undergo extensive review by both sides. These statements offer parties and their attorneys the opportunity to frame the settlement agreement in advantageous

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184. JOHN FELLAS, III TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE §30.81 (June 2020). Common features of settlement agreements include: (1) identification of the parties and definitions of key terms; (2) a description of the dispute; (3) a statement that the defendant does not admit liability by settling, or that neither party admits liability or non-liability (disclaimer of liability); (4) a release of one or more parties' claims and/or a promise not to sue in the future; (5) a description of the obligations and undertakings assumed by each party; (6) a recital identifying which payments are for which claims; (7) provisions setting forth how the lawsuit will be dismissed; (8) provisions concerning breach and remedies (e.g., liquidated damages); (9) provisions concerning the tax implications of the settlement; and (10) collateral items such as responsibility for attorney fees, choice-of-forum or choice-of-law clauses, and provisions for amending or terminating the settlement agreement. *Id.*

185. *See, e.g.*, Stipulation and Order of Discontinuance, Smith v. Rosati, No. 9:10-cv-01502-DNH-DEP (N.D.N.Y. Jan. 7, 2014) (stipulation of dismissal with prejudice due to $80,000 settlement); Abiola v. Abubakar, No. 02-cv-06093 (N.D. Ill. Jan. 14, 2008) (reflecting settlement agreement between parties).

186. *See, e.g.*, Settlement Agreement and Mutual Release, Wiwa v. Shell Petroleum, No. 1:96-cv-08386-KMW-HBP (S.D.N.Y. June 8, 2009), https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf [https://perma.cc/T3QR-5CQH]; Order Approving Agreement Resolving Proofs of Claim Nos. 1206, 7587, and 10162, *In re* Motors Liquidated Co., Case No. 09-50026 (S.D.N.Y. Feb. 24, 2012). *See also* Smith, *supra* note 68.

187. Stephen R. Klaffky, *The Problem of the Payor's Intent in Tort-Based Settlements: Amos v. Commissioner*, 58 TAX LAW. 347, 352 (2004).

188. *See, e.g.*, Joint Stipulation to Dismiss All Claims and Vacate the Court's Memorandum Opinion and Order Dated June 27, 2006, Abiola v. Abubakar, No. 02-cv-06093 (N.D. Ill. Jan. 14, 2008) (reflecting settlement agreement between parties).

189. *See, e.g.*, Stipulation and Order of Dismissal with Prejudice, Jama v. Esmor Correctional Services, No. 2:97-cv-03093-DRD-MAS, at *1 (D.N.J. Aug. 9, 2010) (stipulation of dismissal with prejudice due to confidential settlement agreement where defendants agreed to pay plaintiff's attorneys' fees); Settlement Agreement and Mutual Release, Wiwa v. Shell Petroleum, No. 1:96-cv-08386-KMW-HBP (S.D.N.Y. June 8, 2009), https://ccrjustice.org/sites/default/files/assets/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf [https://perma.cc/T3QR-5CQH].

190. *See, e.g.*, Rosner v. United States, No. 01-Civ-1859-Ungaro, 2012 WL 13066527 (S.D. Fla. 2012); Bazyler & Fitzgerald, *supra* note 66.

terms. Fifth, the parties must decide whether the terms of the settlement will be made public or remain confidential.[191] However, even confidential settlements may be subject to the disclosure of some information, such as whether a settlement was reached. Sixth, settlements can include non-disparagement clauses, which limit the ability of parties to make negative statements about the other side.[192] Finally, settlements inevitably address the dismissal of the underlying action and the ability of the plaintiffs to raise similar claims in the future.[193]

There are several reasons why plaintiffs may choose to settle cases involving serious human rights abuses rather than proceed to trial. Civil litigation is designed to encourage the resolution of disputes.[194] The Federal Rules of Civil Procedure are structured to facilitate negotiated solutions, from Rule 16 pretrial conferences to Rule 68 offers of judgment.[195] Even Rule 41—which governs the process for dismissal of actions—is drafted to simplify voluntary dismissals when both parties agree.[196]

Financial considerations and the uncertainties of the litigation process inevitably influence these decisions even if money is not the primary motivation for the lawsuit. Most plaintiffs are not wealthy, and modest settlements can have a significant financial impact.[197] The financial interests of plaintiffs' counsel are also a relevant factor. In most cases, they are representing their clients on a pro bono or contingency fee basis.[198] As a result, they incur costs throughout the litigation

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191. *See, e.g.*, Order and Final Judgment Approving Settlement and Dismissing Actions with Prejudice, Doe I, et al. v. The Gap, Inc., et al., No. 1:01-cv-00031 (D.N. Mar. I. Apr. 23, 2003) (acknowledging dismissal based on approval of public settlement agreement). *See also* Order of Dismissal with Prejudice, Eastman Kodak v. Kavlin, No. 1:96-CV-02218 (S.D. Fla. Feb. 23, 1999) (reflecting dismissal); VIEW FROM LL2, *supra* note 27 (reflecting confidential settlement in Eastman Kodak v. Kavlin).

192. *See, e.g.*, Overbey v. Mayor of Baltimore, 930 F.3d 215 (4th Cir. 2019).

193. *See, e.g.*, Joint Stipulation of Dismissal with Prejudice, Garcia v. Chapman, No. 1:12-cv-21891-CMA (S.D. Fla. Dec. 4, 2014); Administrative Order Closing Case, Garcia v. Chapman, No. 1:12-cv-21891-CMA (S.D. Fla. Oct. 16, 2014). *See also* Order of Dismissal on Settlement Announcement, Luu v. Int'l Inv. Trade & Serv. Grp., No. 3:11-CV-00182 (S.D. Tex. Aug. 6, 2014) (reflecting dismissal without prejudice because of settlement).

194. Lisa Blomgren Bingham, Tina Nabatchi, Jeffrey M. Senger & Michael Scott Jackman, *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 OHIO ST. J. DISP. RESOL. 225 (2009); J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012); Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009).

195. FED. R. CIV. P. 16 (Pretrial Conferences; Scheduling; Management); FED. R. CIV. P. 68 (Offer of Judgment).

196. FED. R. CIV. P. 41 (Dismissal of Actions).

197. This effect is magnified when the plaintiffs reside in countries with relatively low income levels, a common occurrence in human rights cases. In Myanmar, for example, the per capita income in 2005—when the *Unocal* case was decided—was $244. In Nigeria, the per capita income in 2009—when the *Wiwa* case was settled—was $1,891. *See GDP Per Capita*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD [https://perma.cc/FS37-TZK5].

198. Michael J. Bazyler, *The Gray Zones of Holocaust Restitution: American Justice and Holocaust Morality*, *in* GRAY ZONES: AMBIGUITY AND COMPROMISE IN THE HOLOCAUST AND ITS AFTERMATH 339, 352–53 (Jonathan Petropoloulos & John K. Roth eds., 2005).

process.[199] Before the complaint is even filed, counsel has already incurred significant costs investigating the case, compiling evidence, and talking with potential witnesses. These costs grow as the litigation process moves forward. This financial burden will inevitably place some pressure on plaintiffs' counsel to settle. In the extreme, these pressures may even give rise to a potential conflict of interest between plaintiffs and their attorneys.[200]

While some settlements were made within two years of the complaint being filed, others occurred after many years of litigation. For example, the *Khulumani* litigation continued for nine years, and the *Wiwa* litigation proceeded for thirteen years.[201] It is unsurprising that parties would be more receptive to settlement after lengthy delays. The litigation process is a difficult experience for any litigant. For victims of human rights abuses, this process can be both daunting and traumatic, as they are repeatedly forced to relive the worst moments of their lives.[202] This occurs throughout the litigation process—from the drafting of the complaint, through the discovery process, and at trial. In fact, the trial—a public proceeding where the plaintiffs' suffering is itself on trial—may be the most traumatic part of the litigation process.

There may be strategic reasons for settling lawsuits, even those involving egregious harms.[203] Human rights cases raise a myriad of complicated legal issues, and they are difficult to litigate.[204] Challenges arise immediately at the pleading stage and continue throughout the litigation process. Despite discovery, information asymmetry remains, and there will always be a degree of uncertainty for both parties.[205] In contrast, settlements can offer both finality and certainty. *In re South*

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199. STEINHARDT ET AL., *supra* note 1, at 1204–05. Some plaintiffs' attorneys work with, or are affiliated with, social justice organizations, such as the American Civil Liberties Union, Center for Constitutional Rights, Center for Justice & Accountability, and EarthRights International. *See, e.g.*, Susan Burke, *Accountability for Corporate Complicity in Torture*, 10 GONZAGA L. REV. 81 (2006/07); Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT'L CRIM. JUST. 745 (2010); Richard Herz, *Corporate Alien Tort Liability and the Legacy of Nuremberg*, 10 GONZAGA L. REV. 76 (2006/07); EARTHRIGHTS INT'L, IN OUR COURT: ATCA, SOSA AND THE TRIUMPH OF HUMAN RIGHTS (2004). Other attorneys are members of the tort bar and litigate these cases without any affiliations to such groups.

200. CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 410–11 (8th ed. 2016); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 120–21 (1979).

201. *See also* STEPHENS ET AL., *supra* note 1, at 446 (noting that the *Unocal* case continued for nine years).

202. O'Connell, *supra* note 8, at 331, 336; STEPHENS ET AL., *supra* note 1, at 443–47.

203. *See generally* Marc Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55, 62–63 (1988); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71 (2007).

204. STEPHENS ET AL., *supra* note 1, at 443–49.

205. *See generally* William P. Lynch, *Why Settle for Less? Improving Settlement Conferences in Federal Court*, 94 WASH. L. REV. 1233 (2019); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996); Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619 (2006); *see also* Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1820–22 (1986).

African Apartheid Litigation (*Khulumani*) highlights the advantages of settlements over litigation. In *Khulumani*, the plaintiffs sued several corporations.[206] After years of litigation, one of the defendants agreed to settle for $1.5 million.[207] Other defendants declined to do so. The remaining cases were eventually dismissed, and the plaintiffs received nothing. This dynamic—where one lawsuit is settled by the parties and a similar lawsuit is dismissed—occurred in several cases, including *Wiwa* and *Kiobel* as well as *Al-Quraishi* and *Saleh*.[208] These disparate outcomes highlight the risks of litigation.

The uncertainty of litigation extends to the trial itself. Only a handful of ATS or TVPA cases have gone to trial.[209] Most plaintiffs succeed at trial.[210] On some occasions, however, the jury rules in favor of the defendants.[211] In *Bowoto v. Chevron*, for example, a jury found the defendants were not liable for human rights abuses in Nigeria after nine years of litigation and despite numerous favorable rulings for the plaintiffs.[212] But even a successful jury verdict does not ensure the plaintiffs' victory. In *Mamani v. Berzain*, the district court overturned a jury verdict and ruled in favor of the defendants as a matter of law because it determined there was insufficient evidence to support the verdict.[213] In *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, an appeals court overturned a jury verdict

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206. *In re* South African Apartheid Litig., 617 F. Supp. 2d 228, 241–43 (S.D.N.Y. 2009).

207. Smith, *supra* note 68.

208. *Compare* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *and* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013), *with* Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702 (D. Md. 2010), *and* Saleh v. Titan, 580 F.3d 1 (D.C. Cir. 2009).

209. Some cases, such as *Filártiga v. Peña-Irala*, resulted in default judgments when the defendants declined to participate in the litigation. In these cases, there was no formal trial. Instead, damages were established at a prove-up hearing held by the court after default was entered. *See* ACEVES, *supra* note 1, at 59–70; *see also Al-Quraishi*, 728 F. Supp. 2d at 135 (describing damages award issued by the jury following default judgment in the case against Radovan Karadzic).

210. Altholz, *supra* note 5, at 1519; Kenney, *supra* note 5, at 1074–78; *see, e.g.*, Pascale Bonnefoy, *Florida Jury Finds Ex-Chilean Officer Liable in a Killing During the 1973 Coup*, N.Y. TIMES (June 27, 2016), https://www.nytimes.com/2016/06/28/world/americas/chile-victor-jara-lawsuit.html [https://perma.cc/X2QB-RS33]; Manual Roig-Franzia, *Torture Victims Win Lawsuit Against Salvadoran Generals*, WASH. POST (July 24, 2002), https://www.washingtonpost.com/archive/politics/2002/07/24/torture-victims-win-lawsuit-against-salvadoran-generals/0b8f8f84-cab8-4330-b457-894e4b9529fb/ [https://perma.cc/9UEZ-ZQ65]; Ronald Smothers, *3 Women Win Suit Over Torture By an Ethiopian Official in 1978*, N.Y. TIMES (Aug. 21, 1993), https://www.nytimes.com/1993/08/21/us/3-women-win-suit-over-torture-by-an-ethiopian-official-in-1978.html [https://perma.cc/NW3N-VHM3].

211. *See, e.g.*, Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Kyle Whitmire, *Alabama Company is Exonerated in Murders at Colombian Mine*, N.Y. TIMES (July 27, 2007), https://www.nytimes.com/2007/07/27/business/27drummond.html [https://perma.cc/GR75-MRJN].

212. *See, e.g.*, Richard C. Paddock, *Chevron Cleared in Nigeria Shootings*, L.A. TIMES (Dec. 2, 2008), https://www.latimes.com/archives/la-xpm-2008-dec-02-me-chevron2-story.html [https://perma.cc/YQ5F-DYWQ]; Press Release, Ctr. Const. Rts., Chevron Found Not Liable for Killings, Shootings and Torture of Nigerian Peaceful Protestors (Dec. 1, 2008), https://ccrjustice.org/home/press-center/press-releases/chevron-found-not-liable-killings-shootings-and-torture-nigerian [https://perma.cc/EP4A-6MWN].

213. Mamani v. Berzain, 2018 WL 2435173 (S.D. Fla. 2018). This decision was subsequently overturned on appeal by the Eleventh Circuit, which ordered a new trial. Mamani v. Sánchez Bustamante, 968 F.3d 1216 (11th Cir. 2020).

because it concluded that the ATS claims lacked a sufficient nexus to the United States.[214] These decisions highlight the inherent uncertainty of litigation and the potential benefits of settlement.

Other considerations influence settlement decisions. Settlements offer something that a trial cannot provide—flexibility.[215] A myriad of negotiation points are available in settlements. Of course, money is the most obvious point of discussion. But other negotiation points exist. For example, the parties can agree to seek the withdrawal of adverse legal decisions. In *Unocal*, the parties discussed whether to request the Ninth Circuit to vacate the district court's earlier decision granting Unocal's motion for summary judgment. Eventually, the plaintiffs submitted an unopposed motion to the Ninth Circuit, and the court subsequently vacated the district court's decision.[216]

The flexibility of settlements can be measured in other ways. A judgment following a trial can be deeply meaningful to plaintiffs. It can establish clear liability and impose corresponding financial sanctions on the defendant. While they may not offer the same closure as a trial on the merits, settlements can still serve an important function in promoting justice and accountability.[217] A settlement can offer nuance that is lacking in a verdict.[218] It offers the defendants an opportunity to speak about what they have done, to acknowledge the plaintiff's suffering, and to express remorse. A confidential settlement may actually increase the likelihood of such action although confidentiality imposes its own costs.

The *Salim* case highlights this aspect of settlement agreements. While the terms of the settlement were confidential, the parties issued both joint and separate statements. In their joint statement, both parties acknowledged that the plaintiffs had been subjected to coercive treatment while in CIA custody, "which

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214. Chowdhury v. WorldTel Bangladesh Holding, Ltd., 746 F.3d 42 (2d Cir. 2014) (affirming jury verdict on TVPA claims but reversing verdict on ATS claims). In *Arce v. Garcia*, a jury ruled in favor of the plaintiffs' ATS and TVPA claims and awarded them $54 million in damages. On appeal, the Eleventh Circuit reversed the jury verdict because it concluded the statute of limitations had expired. Arce v. Garcia, 400 F.3d 1340 (11th Cir. 2005), *vacated, and superseded by* Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006). Upon further review, the Eleventh Circuit vacated its earlier decision and reinstated the jury verdict.

215. Timothy Webster, *The Price of Settlement: World War II Reparations in China, Japan and Korea*, 51 N.Y.U. J. INT'L L. & POL. 301, 314 (2019) ("Settlements are also mutable, providing a bespoke set of solutions, and reaching where judicial decisions may not."); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 514 (1985).

216. Doe v. Unocal, 403 F.3d 708 (9th Cir. 2004). *See* Appellants' Unopposed Motion to Vacate District Court Opinion, Doe v. Unocal, No. 2:96-cv-06959-RSWL-BQR (9th Cir. 2005); Appellees' Notice of Joinder with Appellants' Request to Vacate District Court Opinion, Doe v. Unocal, No. 2:96-cv-06959-RSWL-BQR (9th Cir. 2005).

217. *See* Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 968 (2004); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L. Q. 787 (2001).

218. *See generally* Malvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Fishman, *supra* note 12, at 1455–56; Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663 (1995).

resulted in pain and suffering for them and their families."[219] As part of the joint statement, the defendants indicated it was "regrettable" that the plaintiffs had suffered these abuses.[220] And, in their separate statements, the defendants acknowledged that "certain individuals" had "performed acts on the plaintiffs" and that these acts "should not have occurred."[221] These statements are certainly not unequivocal in denouncing the horrific treatment perpetrated against the plaintiffs or acknowledging the profound suffering they experienced. Nor do they offer a meaningful acknowledgment of responsibility for the plaintiffs' suffering. But they are also not meaningless, and the *Salim* plaintiffs attached significance to them.[222] They noted how the case had resulted in tangible consequences for both the plaintiffs and defendants.[223] These points were also captured by their attorneys in a press release:

> Our clients secured multiple court decisions cementing the rights of torture survivors to seek justice from those responsible. They forced hundreds of pages of formerly secret documents into the light. For the first time ever, the psychologists and top CIA officials were made to answer questions, under oath, from attorneys representing torture survivors. Our clients' stories, and much of the broader CIA torture story, are in the public domain.[224]

In the *Wiwa* settlement, Shell issued a press release indicating the allegations against it were false and that it had taken no part in the violence that occurred.[225] It added, however, that the execution of Ken Saro-Wiwa and other Ogoni activists were "tragic events" and acknowledged that the "plaintiffs and others have suffered."[226] The *Wiwa* plaintiffs described the settlement as both the vindication and culmination of their long struggle for justice, and they were "gratified that Shell has agreed to atone for its actions."[227] In both *Wiwa* and *Salim*, the plaintiffs and their attorneys viewed the settlements as putting perpetrators of human rights abuses on notice that they would be held accountable for their actions.[228]

There are several reasons why settlements may not always include language from the defendants that acknowledges responsibility or expresses remorse.[229] Of

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219. Salim Press Release, *supra* note 143.

220. *Id.*

221. *Id.*

222. *Cf.* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1542 (2014) ("Those who consider ATS victories insignificant because they are 'merely' symbolic miss the importance of symbolism.").

223. Salim Press Release, *supra* note 143.

224. Dror Ladin, *After Years of Slammed Doors, Torture Survivors Finally End Impunity Streak*, ACLU (Aug. 17, 2017), https://www.aclu.org/blog/national-security/torture/after-years-slammed-doors-torture-survivors-finally-end-impunity [https://perma.cc/22J2-ZXJE].

225. Shell Press Release, *supra* note 108.

226. *Id.*

227. *Wiwa* Plaintiffs, *supra* note 101.

228. *Wiwa* Attorneys, *supra* note 104; Salim Press Release, *supra* note 143.

229. FELLAS, *supra* note 184, at §30.81.

course, the defendants in many cases simply do not believe they are responsible for the harms suffered by the plaintiffs.[230] In addition, human rights cases involve the most egregious violations of international law. There is a stigma to being accused of torture, genocide, slavery, and similar harms, and few defendants would ever agree to a settlement that described their actions in such terms.[231] For individual defendants, admissions of responsibility may generate criminal liability and adverse immigration consequences. Because of its impact on their reputations, corporate defendants are also unlikely to accept such labels about their behavior. This dynamic adds a complexity to the settlement process and places some limits on what plaintiffs can achieve through a negotiated agreement. This is most evident in the *Wiwa* settlement, where the corporate defendants offered financial compensation but no meaningful statements of responsibility or remorse.[232] In the *Khulumani* settlement, General Motors made a similar statement indicating its payment was made in good faith, but it did not represent any admission of wrongdoing.[233]

It is not surprising that most settlements involved corporate defendants and that most of these settlements were confidential. Corporations are more likely to settle for several reasons. They are particularly sensitive to adverse publicity, and the impact of litigation on their corporate reputation.[234] Corporations may also be responsive to shareholder concerns relating to the underlying harms attributable to their operations.[235] They also have the financial resources to pay for a settlement. For these reasons, corporations engage in strategic analysis to determine the efficacy of settlement more readily than private individuals with limited resources and shorter time horizons.[236]

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230. Nakashima & Tate, *supra* note 148.

231. *See, e.g.*, Christian Scheper, *"From Naming and Shaming to Knowing and Showing:" Human Rights and the Power of Corporate Practice*, 19 INT'L J. HUM. RTS. 737 (2015); Matthew Krain, *J'accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?*, 56 INT'L STUD. Q. 574 (2012); Michael Kelly, *Genocide: The Power of a Label*, 40 CASE W. RES. J. INT'L L. 147 (2007); *see also* Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689 (2008). *But see* Marcia Narine, *From Kansas to the Congo: Why Naming and Shaming Corporations Through the Dodd-Frank Act's Corporate Governance Disclosure Won't Solve a Human Rights Crisis*, 25 REGENT U. L. REV. 351, 394, 400 (2012) (acknowledging that corporations engage in a cost-benefit analysis for decisions that implicate reputational risk).

232. *Wiwa* Settlement Agreement, *supra* note 81.

233. Smith, *supra* note 68.

234. *See, e.g.*, Ingrid Weurth, *Wiwa v. Shell: The $15.5 Million Settlement*, AM. SOC. INT'L L. INSIGHTS (Sept. 9, 2009), https://www.asil.org/insights/volume/13/issue/14/wiwa-v-shell-155-million-settlement [https://perma.cc/EU2X-KDAT].

235. *See, e.g.*, Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431 (2006).

236. *See* John R. Crook, *Major Corporations Settle Alien Tort Statute Cases Following Adverse Appellate Rulings*, 103 AM. J. INT'L L. 592 (2009); Julie Macfarlane, *Why Do People Settle?*, 46 MCGILL L.J. 663 (2000); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

Any settlement involves a strategic calculation by the defendant that the costs of litigation, including the potential of an adverse judgment and corresponding negative publicity, justify a negotiated agreement.[237] For this reason, even nuisance suits may result in settlements.[238] Thus, defendants can always claim that a settlement does not reflect any level of responsibility.[239] They can also claim that settlements are humanitarian gestures, akin to *ex gratia* payments.[240] However, the larger the settlement, the less likely such claims will be believed. As scholars on civil litigation have noted, "when a defendant agrees to a large payout but professes innocence on the charges alleged, most people assume—correctly—that the defendant would not have settled had it not believed there was at least some evidentiary basis for the claim."[241] This phenomenon was evident in the *Wiwa* litigation. When the settlement was announced, a Nigerian activist stated, "n[o] company, that is innocent of any involvement with the Nigeria[n] military and human rights abuses, would settle out of court for 15.5 million dollars. It clearly shows that they have something to hide."[242] Of course, a $15.5 million settlement —such as the one offered by Royal Dutch Shell in the *Wiwa* litigation—might be interpreted differently for a defendant with annual corporate earnings of $12 billion in the year the settlement was made.[243]

These cases highlight a final consideration. Each settlement must be assessed on its own terms. Not all confidential settlements are completely confidential, and not all public settlements are truly public. While the *Unocal* and *XE Services* settlements were confidential, some of their terms were disclosed.[244] And even confidential settlements may result in the issuance of public statements by the parties. While the *Salim* settlement was confidential, the defendants did express regret for the harms suffered by the plaintiffs although they did not accept responsibility.[245]

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237. Van Schaack, *supra* note 53, at 317–19.

238. *See generally* David Rosenberg & Steven Shavell, *A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement*, 26 INT'L REV. L. & ECON. 42 (2006); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004).

239. LEORA BILSKY, THE HOLOCAUST, CORPORATIONS, AND THE LAW: UNFINISHED BUSINESS 114–15 (2017).

240. *See* Marian Nash Leich, *Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis*, 83 AM. J. INT'L L. 319 (1989); Harold G. Maier, Ex Gratia *Payments and the Iranian Airline Tragedy*, 83 AM. J. INT'L L. 325 (1989).

241. Issacharoff & Klonoff, *supra* note 16, at 1196.

242. Bruce Rettig, *Black Gold on the Ivory Coast: Part 3*, BRUCE RETTIG BLOG (Aug. 30, 2019), https://brucerettig.com/2019/08/30/black-gold-on-the-ivory-coast-part-3/ [https://perma.cc/GXW5-SZH9].

243. ROYAL DUTCH SHELL PLC, 2009 ANNUAL REPORT (Form 20-F) (Mar. 15, 2010).

244. Zucchino, *supra* note 160.

245. Salim Press Release, *supra* note 143.

III. SOLVING THE SETTLEMENT PUZZLE

Settlements in human rights cases raise difficult questions. To date, no formal standards exist to assess the legitimacy of settlements or the factors that plaintiffs should consider in deciding whether to settle. There are, in fact, five principles that should be considered by litigants and their lawyers as they consider the difficult questions arising from settlement.

A. ASSESS SETTLEMENTS THROUGH OBJECTIVE STANDARDS

Settlements in human rights cases should be assessed for both procedural and substantive fairness, which are the standards used to assess settlements in class action litigation.[246] This review would examine whether the settlement is fair, reasonable, and adequate.

Procedural fairness examines the role of counsel in the negotiating process.[247] Negotiations should be arms-length exchanges between the parties.[248] Counsel should be neutral. Contingency fee arrangements will place pressure on plaintiffs' counsel during negotiations because counsel will likely be covering case costs during the litigation process. These costs will increase as the litigation progresses. Defense counsel typically do not face the same financial pressures. Accordingly, they can use this disparity to their strategic advantage. At a minimum, financial pressures may impact the negotiations. At the extreme, they could give rise to collusive agreements between counsel.[249] When assessing procedural fairness, these issues must be considered. Moreover, the terms of any proposed award for attorneys' fees should be reasonable and should reflect work actually performed.[250]

Substantive fairness addresses a range of considerations, from the provisions of the actual settlement agreement to the strategic parameters of the underlying case.[251] Several factors should be considered: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the plaintiffs to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the

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246. *See generally* HENRY MILLER, ART OF ADVOCACY: SETTLEMENT § 9.11 (2019).

247. FED. R. CIV. P. 23(e)(2)(A)–(B).

248. FED. R. CIV. P. 23(e)(2)(B).

249. *See generally* Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859 (2013); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000).

250. FED. R. CIV. P. 23(e)(2)(C)(iii).

251. FED. R. CIV. P. 23(e)(2)(C) identifies four relevant factors for assessing settlement agreements in class action litigation:

> (1) the costs, risks, and delay of trial and appeal; (2) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (3) the terms of any proposed award of attorney's fees, including timing of payment; and (4) any agreement made in connection with the settlement.

FED. R. CIV. P. 23(e)(2)(D) (requires that "the proposal treat class members equitably relative to each other").

difficulties in establishing liability; (5) the risks of maintaining the litigation through the trial; (6) the ability of the defendants to pay a higher amount; (7) the reasonableness of the settlement in light of the best possible recovery; and (8) the reasonableness of the settlement in light of all the attendant risks of litigation.[252]

While financial considerations are certainly an important feature of any settlement agreement, other considerations may be even more significant in human rights cases. When assessing substantive fairness, several additional factors should be considered, including: (1) recognition of the harms suffered by the plaintiffs; (2) acknowledgment of responsibility by the defendants; (3) expression of remorse; (4) disclosure of information about the underlying human rights abuses; and (5) the creation of an historical record.[253] These are the primary reasons most plaintiffs pursue human rights litigation. Accordingly, they should be the primary considerations for assessing the substantive fairness of any settlements.

Implementation of these standards could occur in several ways. One approach would be to amend the Federal Rules of Civil Procedure to require greater judicial oversight of settlement agreements. For example, Rule 41, which governs voluntary dismissals,[254] could be amended to require judicial review or approval of dismissals in lawsuits premised on a settlement agreement. A legislative solution would be to amend the ATS and TVPA to require judicial review or approval of voluntary dismissals for cases filed under these statutes.[255]

Alternatively, federal judges could assert their inherent power over their dockets by reviewing any settlement agreement prior to voluntary dismissal.[256] In these situations, judges could even appoint an *amicus curiae* or guardian *ad litem* to provide an independent review of the proposed agreement. However, Rule 41 (a)(1) does not require judicial approval of a dismissal when it is pursuant to "a stipulation of dismissal signed by all parties who have appeared."[257] While the

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252. *See, e.g.*, *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 146–47 (E.D.N.Y. 2000) (examining procedural and substantive fairness of proposed class action settlement).

253. *See* Webster, *supra* note 215, at 315–16; Nathan Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 SETON HALL L. REV. 505, 506 (2016); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1265 (2006).

254. FED. R. CIV. P. 41(a).

255. FED. R. CIV. P 41(a)(1)(A) (states voluntary dismissal is not available to the parties if "any applicable federal statute" provides otherwise).

256. *See* David A. Rammelt, *"Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?*, 65 IND. L.J. 965 (1990); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986). *But see* Alexandra N. Rothman, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319 (2011); Jonathan Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 37 (2003) (expressing concern with excessive judicial involvement in settlement negotiations).

257. FED. R. CIV. P. 41(a)(1).

judge could arguably request a copy of the settlement and discuss it with the parties, it does not appear the judge could prevent dismissal of the lawsuit.[258]

A different approach for implementing these standards would be to focus on the lawyers. For example, the *Model Rules of Professional Conduct* impose a generalized duty on counsel to "exercise independent professional judgment and render candid advice" on legal matters.[259] This duty can certainly include raising these settlement factors with clients. While financial considerations are always relevant in deciding whether to accept a settlement, other considerations also matter in human rights cases. In fact, the *Model Rules* allow attorneys to incorporate "moral, economic, social and political factors" into the advice they provide their clients.[260] A more aggressive approach would require lawyers to notify their clients that they have the right to seek independent legal counsel to assess the legitimacy and propriety of accepting a settlement offer. The *Model Rules* already impose a referral requirement in other contexts.[261]

B. ACKNOWLEDGE SYSTEMIC HARMS

Many human rights cases involve systemic harms, meaning the harms suffered by the plaintiffs are reflective of similar harms experienced by a larger group of victims. In fact, systemic harms are regrettably common in human rights cases.[262] To maintain their power, abusive regimes typically engage in a consistent pattern of human rights abuses. Torture, summary execution, and forced disappearance become common tools for these regimes to control populations and punish dissent.[263] Cases involving war crimes, genocide, and crimes against humanity inevitably involve systemic harms. By their nature, these human rights abuses are committed as part of a broad campaign, and victims routinely number in the thousands.

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258. *See generally* Joan C. Williams, Jodi Short, Margot Brooks, Hilary Hardcastle, Tiffanie Ellis & Rayna Saron, *What's Reasonable Now? Sexual Harassment Law after the Norm Cascade*, 2019 MICH. ST. L. REV. 139 (2019); Bradley Scott Shannon, *Dismissing Federal Rule of Civil Procedure 41*, 52 U. LOUISVILLE L. REV. 265 (2014).

259. MODEL RULES R. 2.1.

260. MODEL RULES R. 2.1.

261. MODEL RULES 1.8(a)(2)

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless . . . the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; . . . .

262. *See, e.g.*, Doe v. Unocal, 395 F.3d 932 (9th Cir. 2002) (addressing human rights abuses committed against civilian population in Burma); *In re* South Africa Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (addressing human rights abuses committed in South Africa during the apartheid regime).

263. *See, e.g.*, Jeff McMahan, *Torture in Principle and Practice*, 22 PUB. AFF. Q. 91 (2008); Ruth Blakeley, *Why Torture?*, 33 REV. INT'L STUD. 373 (2007) (describing why governments use torture).

Systemic harms are a form of mass tort.[264] They involve a large number of victims who have suffered catastrophic injuries that were intentionally inflicted by the defendants.[265] There are, however, significant differences between mass tort cases and human rights cases. While financial redress is an important component of human rights litigation, it is rarely the primary goal. Instead, broader principles of accountability and justice motivate plaintiffs and their attorneys.[266] For these reasons, the strategic calculations that inform litigation decisions in most cases of mass torts may not be directly applicable in cases of systemic harms.[267]

Human rights cases involving systemic harms raise challenging issues.[268] In their complaints, the plaintiffs often refer to these systemic harms as part of their individual claims.[269] These harms are an essential part of the plaintiffs' stories because they add context and support to their claims. Indeed, proving systemic harms is necessary when plaintiffs allege genocide or crimes against humanity. Genocide requires acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious groups, as such."[270] Crimes against humanity require "a widespread or systematic attack directed against any civilian population."[271] These claims require plaintiffs to contextualize their individual harms within the harms suffered by the broader community. Thus, they must establish there are other victims in order to bring their individual claims. In other words, plaintiffs in systemic harm cases must rely on the harms suffered by other individuals to pursue their own cases.

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264. RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007); Cabraser, *supra* note 6, at 2216, 2228.

265. While some systemic harms are pursued as class action lawsuits, most of these cases are filed by individual victims. Van Schaack, *supra* note 53, at 282.

266. ACEVES, *supra* note 1, at 174–82.

267. *See, e.g.*, *In re* Syncor ERISA Litig., 516 F.3d 1095, 1101 (9th Cir. 2008) ("[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned."); Colella v. Univ. of Pittsburgh, 569 F. Supp. 2d 525, 530 (W.D. Pa. 2008) ("The strong public policy and high judicial favor for negotiated settlements of litigation is particularly keen 'in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'"). For a similar perspective in civil rights cases, see Robinson v. Shelby Cty. Bd. of Educ., 566 F.3d 642, 648 (6th Cir. 2009); Armstrong v. Bd. of School Directors of City of Milwaukee, 616 F.2d 305, 317–18 (7th Cir. 1980).

268. HELEN DUFFY, STRATEGIC HUMAN RIGHTS LITIGATION: UNDERSTANDING AND MAXIMISING IMPACT 259–61 (2018); Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 621 (2003). *Cf*. Francesca Parente, *Settle or Litigate? Consequences of Institutional Design in the Inter-American System of Human Rights Protection*, 17 REV. INT'L ORG. 39 (2022); Jorge Contesse, *Settling Human Rights Violations*, 60 HARV. INT'L L.J. 317, 370–71 (2019) (addressing the distinction between individual claims and structural claims before the Inter-American Commission on Human Rights).

269. Van Schaack, *supra* note 53, at 309–13.

270. Rome Statute of the International Criminal Court art. 6, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; *see* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW (2d ed. 2009).

271. Rome Statute, *supra* note 270, art. 7(1); *see* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat ed. 2011).

A related consideration arises when plaintiffs in systemic harm cases seek punitive damages.[272] Punitive damage awards are designed to punish and deter defendants.[273] These awards must assess the degree of reprehensibility associated with the defendant's conduct. While plaintiffs may not be awarded damages for the harms suffered by other victims, such awards may consider similar and repeated conduct by the defendant to assess the degree of reprehensibility.[274] As the U.S. Supreme Court has indicated, "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . ."[275]

Because systemic harm cases involve injuries inflicted on other individuals, plaintiffs should be encouraged to allocate a portion of any settlement or judgment to these other victims. As a general matter, compensatory damages should not be subject to reallocation. These damages are unique to the individual plaintiffs and provide them direct relief for their injuries. However, punitive damage awards should be subject to reallocation. In fact, the reallocation of punitive damage awards is not unique.[276] Some jurisdictions require the apportionment of punitive damage awards between the successful plaintiff and the state, and the reallocated funds are used to help other victims.[277]

In human rights cases, reallocation can take several forms and could be informed by the size of the punitive damage award, the nature of the systemic harms, and the number of total victims.[278] Distinguishing between compensatory and punitive damages is relatively easy when a judgment is issued by a jury or judge. These judgments typically distinguish between compensatory and punitive damages in the verdict form. This would be more complicated in cases that are settled because the distinction between compensatory and punitive damages is generally not made in settlement agreements. However, the plaintiffs could make their own allocation in the settlement agreement.

The reallocation of settlement awards raises several issues.[279] For example, how should recipients be selected?[280] This is particularly difficult when there are

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272. STEPHENS ET AL., *supra* note 1, at 526–28.

273. BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996).

274. *Id.* at 576.

275. Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007).

276. *See generally* Andrew F. Daughety & Jennifer F. Reinganum, *Found Money? Split-Award Statutes and Settlement of Punitive Damages Cases*, 5 AM. L. & ECON. REV. 134 (2003); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 372–80 (2003).

277. For example, Oregon requires any punitive damages awards to be allocated in the following manner: thirty percent to the prevailing party; sixty percent for deposit in the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section; and ten percent for deposit in the State Court Facilities and Security Account. OR. REV. STAT. § 31.735 (2017).

278. There are various ways to calculate damages. MARK S. GURALNIC, FORMULAS FOR CALCULATING DAMAGES (2d ed. 2019).

279. *See generally* Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 BYU L. REV. 1139 (1999); M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1108

hundreds or even thousands of victims. Even if all the victims could be identified, administering the distribution of settlement awards to such a large group would be difficult. How much should each victim receive? And, of course, the size of financial awards would decrease as the pool of eligible victims increases. Eventually, financial awards would be *de minimus* and would become purely symbolic payments. At this point, other forms of redress should be considered, such as public memorials, the establishment of educational programs, or even community funding.[281] Systemic harm cases thus require creative solutions.

The Kiisi Trust established in the *Wiwa* settlement provides an example of how settlements in cases of systemic harms can be used to benefit other victims.[282] In *Wiwa*, the plaintiffs allocated a significant portion of the settlement to other victims.[283] Rather than offer individual payments, the Trust was designed to provide support to the Ogoni community by funding education, health, and community development programs.[284] As noted by the *Wiwa* plaintiffs, "[w]e want the resolution of our individual claims to provide some benefits to the Ogoni community and thus agreed to the creation of The Kiisi Trust."[285]

To promote reallocation in cases of systemic harms, attorneys could include a provision in their retainer agreements that addresses how any settlement or judgment could be apportioned.[286] The final decision to settle remains with the client.[287] However, the client could agree that a certain percentage of any settlement or judgment would be allocated to other victims or to a charitable organization (or similar entity) that addresses human rights abuses in the country where the harms occurred. This provision could address numerous scenarios. If the case leads to a successful judgment with a punitive damage award, a specific percentage of that award could be allocated to other victims or a charitable organization. If the case leads to a settlement, the provision could propose a sliding scale that allocates amounts based on the total amount of the settlement: a low settlement

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(1999); Paul Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152, 1185 (2004).

280. Bazyler, *supra* note 198, at 343–49.

281. *Id.* at 349–52.

282. Class action litigation can also provide a model for such efforts. *See, e.g.*, Class Complaint for Injunctive Relief and Damages, Doe v. Apple Inc., No. 1:19-cv-03737 (D.D.C. Dec. 15, 2019) at 78–79.

> Ordering Defendants Apple, Alphabet, Dell, Microsoft and Tesla to create a fund, in an amount to be determined at trial, to fund appropriate medical care for Plaintiffs and members of the class who were injured while mining cobalt for Defendants, conduct medical monitoring for negative health impacts for Plaintiffs and members of the class who were exposed to cobalt and other toxic chemicals while mining cobalt for Defendants, and clean up the environmental impacts caused by Defendants' use of suppliers for cobalt that failed to take any steps to protect the environment where they were mining for cobalt . . . .

283. *See Wiwa* Settlement Agreement, *supra* note 81, at 3–4.

284. *Id.*

285. *Wiwa* Plaintiffs, *supra* note 101, at 1.

286. These challenges are not unique to human rights cases. NAGAREDA, *supra* note 264, at 219–49.

287. *See* MODEL RULES R. 1.2.

amount would result in a smaller allocation whereas a high settlement amount would result in a higher allocation. Any ethical concerns with such provisions would be mitigated by clear and specific language accepted by the client in the retainer agreement.[288] Another strategy to mitigate ethical concerns would be for the plaintiffs' attorneys to allocate a portion of any contingency fee award to other victims or groups. Such *ex ante* agreements would clarify the expectations for both litigants and their lawyers and would reduce potential conflicts during settlement negotiations.[289]

A different solution would be to pursue claims of systemic harms as class action lawsuits.[290] In fact, several human rights cases were filed as class actions, including *Doe v. Unocal*.[291] Class action proceedings address most of the concerns associated with systemic harm cases. Class counsel must be appointed by the court.[292] Settlements require judicial approval.[293] In fact, judges are provided a list of criteria under Rule 23 to consider in deciding whether to approve the settlement.[294] The advantages of class action litigation have often been cited as the principle reason for pursuing cases of systemic harms under Rule 23.[295] However, class action lawsuits are far more complicated to litigate, and few human rights cases have received class action certification.[296]

C. LIMIT CONFIDENTIAL SETTLEMENTS

Confidential agreements are often used to settle litigation.[297] There are several reasons for this. Confidentiality may be particularly important to defendants who deny liability and seek to prevent negative publicity that might arise from their

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288. Susan D. Carle, *The Settlement Problem in Public Interest Law*, 29 STAN. L. & POL'Y REV. 1, 27 (2018).

289. STEPHENS, *supra* note 1, at 443–47.

290. Van Schaack, *supra* note 53, at 280.

291. *Id.*; Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997).

292. FED. R. CIV. P. 23(g).

293. FED. R. CIV. P. 23(e).

294. FED. R. CIV. P. 23(e)(2).

295. *See, e.g.*, Margaret G. Perl, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 GEO. L.J. 773, 788 (2000) (arguing in favor of class action litigation); Boyd, *supra* note 279, at 1201–12 (arguing human rights cases should be pursued through class action framework). *But see* Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 10 MSU-DCL J. INT'L L. 205 (2001) (expressing concerns with the use of class action litigation in cases with foreign connections); Catharine A. MacKinnon, *Collective Harms Under the Alien Tort Statute: A Cautionary Note on Class Actions*, 6 ILSA J. INT'L & COMP. L. 567 (2000) (arguing that class action litigation may not be effective in cases of systemic harms).

296. *See, e.g.*, FED. R. CIV. P. 23(a) (requiring class action lawsuits to meet four requirements: numerosity, commonality, typicality, and adequacy).

297. *See generally* Orly Lobel, *NDAs are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/LP5Z-SNVP]; Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867 (2007); David Stasavage, *Open-Door or Closed-Door? Transparency in Domestic and International Bargaining*, 58 INT'L ORG. 667 (2004).

willingness to settle a lawsuit rather than defend on the merits.[298] Defendants may also be concerned about establishing a precedent to potential plaintiffs regarding the perceived value of litigation. A public settlement may reveal a defendant's preference to settle rather than litigate and may set a financial baseline for future compensation. There may also be instances where confidentiality is important to the plaintiffs and protects their privacy.[299] Some plaintiffs may be concerned that public disclosure of a financial settlement may lead to reprisals from the defendants' supporters or personal harm from criminal groups.[300] They may also be concerned that information about the settlement will generate animosity in their communities. In cases of systemic harms, settlements may even be seen as an unfair windfall to the plaintiffs, particularly when other victims are not compensated.

There are countervailing arguments against confidentiality.[301] While confidential settlements may provide valuable information to plaintiffs, such information is not shared with other victims or the broader community. Transparency may be particularly meaningful in cases of systemic harms, where other victims suffered similar injuries. Another consequence of confidential settlements is that they do not provide any meaningful precedent.[302] Positive legal rulings may be withdrawn or may never be issued because the case was settled.[303] The deterrent effect of a public judgment is also missed.[304] Because there is no clear financial cost associated with harmful behavior, there is no meaningful deterrent to other actors.[305] Finally, confidentiality allows a perpetrator to deny responsibility, reinforcing the perception that accountability is lacking. While these issues have always plagued confidentiality agreements, they became more pronounced with the emergence of the #MeToo movement.[306]

Several approaches have been taken to address confidential settlements in civil litigation. For example, New Jersey has adopted legislation to prohibit the use of confidential agreements in most cases of discrimination, retaliation, or

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298. Yves L. Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT'L 131 (1999); Harris, *supra* note 12, at 12–13.

299. Privacy concerns may be less pronounced in human rights cases where the plaintiffs are already identified in the complaint.

300. DUFFY, *supra* note 268, at 257.

301. Some of these concerns exist with other forms of settlement. *See* Contesse, *supra* note 268, at 361–66; Patricia E. Standaert, *The Friendly Settlement of Human Rights Abuses in the Americas*, 9 DUKE J. COMP. & INT'L L. 519, 539–40 (1999).

302. BILSKY, *supra* note 239, at 59.

303. A. Mitchell Polinsky & Daniel L. Rubinfield, *The Deterrent Effects of Settlements and Trials*, 8 INT'L REV. L. & ECON. 109 (1988); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

304. Andrew F. Daughety & Jennifer F. Reinganum, *Hush Money*, 30 RAND J. ECON. 661 (1999).

305. BILSKY, *supra* note 239, at 59, 62; Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 974 (2010).

306. Jessica Bradley & Katherine Nyquist, *#MeToo: How State and Federal Legislation Is Impacting the Use of Nondisclosure Agreements in Employment*, FED. LAW., Jan./Feb. 2019, at 54.

harassment.[307] New Jersey also prohibits non-disclosure provisions in employment contracts or settlement agreements involving discrimination, retaliation, or harassment, and considers such provisions to be "against public policy and unenforceable."[308] California has adopted narrower legislation, which only prohibits confidentiality agreements in cases of sexual harassment or discrimination.[309]

Another approach imposes financial costs on businesses that use confidential settlements. For example, the Internal Revenue Code allows businesses to claim a tax deduction for expenses incurred in settling disputes, including employment disputes.[310] This deduction became controversial when the #MeToo movement emerged and cast a negative light on the practice of using confidential settlements in sexual harassment cases.[311] By promoting a "culture of silence," confidential settlements enable perpetrators to continue their harassment hidden from view. Confidentiality also prevents other individuals from seeing the consequences of these actions and taking corrective action to prevent future harm.[312] Allowing businesses to claim a tax deduction for these agreements seems to incentivize their use.

In 2017, Congress adopted the Tax Cuts & Jobs Acts, which amended the Internal Revenue Code to impose limits on the ability to claim a tax deduction for certain sexual harassment settlements. Specifically, Internal Revenue Code section 162(q) now provides that no deduction shall be allowed as a trade or business expense for: (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement; or (2) attorney's fees related to such a settlement or payment.[313] This section was subsequently clarified by the Internal Revenue Service to provide that "recipients of settlements or payments related to sexual harassment or sexual abuse, whose settlement or payment is subject to a nondisclosure agreement, are not precluded by section 162(q) from deducting attorney's fees related to the settlement or payment, if otherwise deductible."[314] This clarification made clear that the recipients of these agreements were not subject to the limitations of section 162(q).

A different approach to curtail the use of confidential settlements involves corporate governance.[315] Corporations themselves can preclude the use of confidential

307. N.J. Stat. Ann. § 10:5-12.8(a) (West 2019).

308. *Id*.

309. CAL. CIV. PROC. §1001(a) (West 2019).

310. *See generally* 26 U.S.C. § 162(a).

311. Bradley & Nyquist, *supra* note 306.

312. Alison Lothes, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433 (2005).

313. 26 U.S.C. § 162(q).

314. Internal Revenue Service, *Section 162(q) FAQ* (June 28, 2019), https://www.irs.gov/newsroom/section-162q-faq [https://perma.cc/3XK2-4TF5].

315. *See generally* CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002); Erika George, *Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals*, 36 WIS. INT'L L.J. 298 (2019); David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability*

settlements, whether through revisions to their own corporate bylaws or by acceptance of corporate codes of conduct.[316] Such actions can be inspired by shareholders who demand change. They can also be compelled by states as a condition for incorporation.[317] The corporate social responsibility movement has grown in recent years, and efforts to limit confidential settlements seem consistent with this movement.[318] Apart from the ethical considerations that arise from the use of confidential settlements, there are also financial concerns. Confidential settlements do not allow shareholders to hold corporate officials responsible for malfeasance.[319]

If transparency and accountability are important values, confidential settlements in human rights cases should be discouraged.[320] At a minimum, perpetrators should be unable to claim a tax deduction for settlements that include a nondisclosure agreement or confidentiality requirement.[321] The most aggressive response would be to prohibit such agreements altogether as contrary to public policy.

D. LIMIT NON-DISPARAGEMENT CLAUSES

Even if a settlement agreement is not confidential, there are other provisions that can have a similar impact. For example, it is common for settlement agreements to include non-disparagement clauses. These clauses typically require both parties to refrain from making any negative statements about the opposing side.[322]

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under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory, 29 BERKELEY J. INT'L L. 334 (2011).

316. Lara Blecher, *Codes of Conduct: The Trojan Horse of International Human Rights Law?*, 38 COMP. LAB. L. & POL'Y J. 437 (2017). *But see* Ingrid Landau, *Human Rights Due Diligence and Risk of Cosmetic Compliance*, 20 MELB. J. INT'L L. 221 (2019); Nicholas Connolly, *Corporate Social Responsibility: A Duplicitous Distraction?*, 16 INT'L J. HUM. RTS. 1231 (2012).

317. *See, e.g.*, Lily Zheng, *We're Entering the Age of Corporate Social Justice*, HARV. BUS. REV. (June 15, 2020), https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice [https://perma.cc/TS8R-6GVG]; Dana L. Gold, *New Strategies for Justice: Linking Corporate Law with Progressive Social Movements*, 4 SEATTLE J. SOC. JUST. 225 (2005).

318. *See* Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. REV. 851, 853–55 (2021); Min Yan, *Corporate Social Responsibility Versus Shareholder Value Maximization: Through the Lens of Hard and Soft Law*, 40 NW. J. INT'L L. & BUS. 47 (2019).

319. *See* Michelle Chen, *Corporations Have Paid Out at Least $2.7 Billion in Civil-Rights and Labor Lawsuits Since 2000*, THE NATION (Feb. 1, 2019), https://www.thenation.com/article/corporations-lawsuits-civil-rights/ [https://perma.cc/AT6C-7RBN].

320. *See* Jan Frankel Schau, *#MeToo Where Confidentiality and Transparency Collide*, DISP. RES. MAG. (Winter 2019).

321. *Cf.* Jacqueline Lainez Flanagan, *Holding U.S. Corporations Accountable: Toward a Convergence of U.S. International Tax Policy and International Human Rights*, 45 PEPP. L. REV. 685 (2018).

322. *See generally* Nicole Dwyer, *When Telling the Truth Can Cost Millions: Non-Disparagement Clauses in Employment-Related Contracts*, 37 QUINNIPIAC L. REV. 807 (2019); Katie Benner, *Abuses Hide in the Silence of Nondisparagement Agreements*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/technology/silicon-valley-sexual-harassment-non-disparagement-agreements.html [https://perma.cc/K38C-AB23]; Bryan S. Hunt, *Non-Disparagement Clauses in an Online World: Why Businesses Should be Free to Contract for Silence*, 10 OHIO ST. BUS. L.J. 53 (2015).

Non-disparagement clauses in human rights cases are inevitably one-sided as they only benefit the defendants. The plaintiffs are victims. In some cases, the plaintiffs were targeted simply because of their race, religion, or nationality. In other cases, the plaintiffs were targeted because of their political beliefs. The situation is far different for defendants, who are accused of committing egregious human rights abuses.

In human rights cases, non-disparagement clauses impose a significant cost. The plaintiffs in these cases are effectively prevented from speaking adversely about the defendants. They would be unable to denounce the defendants' actions that gave rise to their own cases. The inability to speak is particularly troublesome in cases of systemic harms. Plaintiffs who sign non-disparagement clauses are effectively silenced and can no longer contribute to the broader discourse about the underlying conflict that gave rise to their injuries. They would presumably be unable to serve as witnesses in future civil cases involving the same defendants.[323] In fact, the impact of non-disparagement clauses is multiplied when the defendants are high-ranking government officials or senior military officers. When the defendant is a high-ranking government official, such as a president or defense minister, a non-disparagement clause could be used to prevent a plaintiff from criticizing any government policy or military action involving those individuals. Such criticisms could be interpreted as disparaging the leaders. Because of their impact, non-disparagement clauses should be subject to the same restrictions as confidential settlements. They should either be discouraged or prohibited.

Finally, defendants often seek to include other clauses in settlement agreements that are equally problematic. For example, some defendants attempt to prevent the plaintiffs' counsel from bringing similar claims on behalf of other clients against the defendants.[324] Such clauses are generally prohibited under the *Model Rules of Professional Conduct*, which provide that "[a] lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."[325] This prohibition should extend to any clauses which directly or indirectly seek to achieve a similar outcome.

E. REJECT SOME SETTLEMENTS

Not all human rights cases may be appropriate for settlement.[326] Whether some cases should never be settled cannot be answered in the abstract. There are simply

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323. However, non-disparagement clauses cannot not be used to prevent an individual from testifying in criminal proceedings. *See* D. Andrew Rondeau, *Opening Closed Doors: How the Current Law Surrounding Nondisclosure Agreements Serves the Interests of Victims of Sexual Harassment, and the Best Avenues for Its Reform*, 2019 U. CHI. LEGAL F. 583, 589 (2019).

324. *See generally* Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 GEO. J. LEGAL ETHICS 291 (2005); Yvette Golan, *Restrictive Settlement Agreements: A Critique of Model Rule 5.6(b)*, 33 SW. U. L. REV. 1 (2003).

325. MODEL RULES R. 5.6 (Restrictions on Rights to Practice).

326. *See* Michael J. Bazyler, *The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks*, 25 FORDHAM INT'L L.J. 64 (2001).

too many variables that inform these decisions. However, there may be some cases where plaintiffs should reject settlements in the absence of extraordinary circumstances: where the defendants may not face any other form of accountability for their actions; where a public trial may offer the only opportunity for victims to confront perpetrators; where information about human rights abuses will only emerge through a trial; or where a public precedent will have a significant impact in deterring future abuses. These scenarios may be sufficient to cause a plaintiff to reject any settlement. Of course, plaintiffs and their counsel must also weigh the consequences of an adverse judgment and whether the risks of such an outcome are justified.[327]

To be clear, settlements impose hidden costs. They represent lost opportunities that extend beyond extant cases.[328] In *Doe v. Unocal*, for example, the plaintiffs agreed to settle on the eve of oral argument before an *en banc* panel of the Ninth Circuit.[329] The plaintiffs' decision to settle the case before *en banc* review was criticized because this choice prevented the Ninth Circuit from issuing a legal decision that could have "benefitted all ATS plaintiffs."[330] In fact, a similar lawsuit against Unocal was also pending in California state court, and a trial date had been set in that case. Despite these criticisms, the plaintiffs stated they were "thrilled" with the settlement.[331]

These hidden costs are more pronounced in cases of systemic harms, where there are a larger group of victims.[332] In these cases, there are actually two sets of victims—the individual victims who brought the lawsuit, and the broader group of systemic harm victims. While both sets of victims may share the same goals of justice and accountability, their interests may diverge at the time of settlement. Plaintiffs may agree to accept a financial settlement that offers no redress to other victims. The settlement may allow the defendants to remain silent or to frame

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327. J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59 (2016); Jonathan D. Glater, *Study Finds Settling is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html [https://perma.cc/3DYA-UPKS]; Gross & Syverud, *supra* note 203.

328. Fiss, *supra* note 13, at 1086.

329. Anthony J. Sebok, *Unocal Announces it Will Settle Human Rights Suit: What is the Real Story Behind its Decision?*, FINDLAW (Jan. 10, 2005), http://supreme.findlaw.com/legal-commentary/unocal-announces-it-will-settle-a-human-rights-suit.html [https://perma.ccK2RS-GMYN].

330. STEINHARDT ET AL., *supra* note 1, at 1207.

331. Duncan Campbell, *Energy Giant Agrees Settlement with Burmese Villagers*, THE GUARDIAN (Dec. 14, 2004), https://www.theguardian.com/world/2004/dec/15/burma.duncancampbell [https://perma.cc/S8QM-DLFR].

332. *See generally* Christine Caulfied, *To Settle or Not to Settle: Lawyers Share Their Tips*, LAW360 (July 10, 2009), https://www.huntonak.com/files/News/236c18dd-fcb6-4486-a348-e96597a7062a/Presentation/NewsAttachment/4ef14289-8ad8-4aa1-b2e6-9af18a76a3a8/To_Settle_Or_Not_To_Settle_Law360.pdf [https://perma.cc/WY9S-UYPT]; Nancy, J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233 (2013); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 (1995).

their actions in a positive light. The defendants may not offer remorse or expressions of regret to other victims.

Some of these concerns arise in class action litigation, where victims number in the hundreds or thousands.[333] However, class action litigation is subject to the requirements of Rule 23, which includes a template for assessing settlement terms and a requirement of judicial approval.[334] As a result, some of these issues can be addressed by the legal process. No such mechanisms exist for other forms of human rights litigation.

While most of the Holocaust-era lawsuits were brought as class action lawsuits, they also highlight some of the challenges in cases of systemic harms.[335] The Holocaust-era lawsuits were brought on behalf of thousands of victims. This numerosity inevitably affected the allocation and distribution of settlement proceeds.[336] In some cases, it took several years before funds were disbursed, and many victims received settlement checks of $1,000.[337] For individuals who had experienced the most horrific suffering—from forced labor to the slaughter of their families—such dollar amounts were disappointing, if not offensive.[338] Often, litigation reveals its most basic flaws when it seeks to remedy the greatest harms.

> The pursuit of compensation invariably brings to light both the monstrous and the prosaic, the horrific and the petty. The nature of litigation is that it unearths much banality, in this case the banality of profit, the banality of bureaucracy, the banality of allowing human tragedy to be buried underneath mind-numbing legalese.[339]

To be fair, the Holocaust-era litigation posed numerous logistical and ethical challenges. Given the sheer magnitude of the atrocities committed, the number of victims, and the time that had transpired, it was perhaps inevitable that any settlement would be subject to criticism.[340] Thus, the payments were meant to be symbolic and were not intended to serve as compensatory relief for the harms suffered by victims.[341]

Even litigation involving a low number of plaintiffs may still give rise to disagreements on whether to settle the case. This dynamic occurred in the *XE Services* litigation, which involved sixty-four Iraqi plaintiffs.[342] While some

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333. Van Schaack, *supra* note 53, at 327–28.

334. FED. R. CIV. P. 23.

335. *See* BILSKY, *supra* note 239, at 2; Bazyler, *supra* note 326, at 64.

336. Anja Hense, *Limitation of Economic Damages as a 'Humanitarian Gesture': The German Foundation 'Remembrance, Responsibility and the Future'*, 46 J. CONTEMP. HIST. 407 (2011).

337. Bazyler, *supra* note 326, at 86.

338. *Id.* at 99–100.

339. Dubinsky, *supra* note 279, at 1166 (citations omitted).

340. BAZYLER, *supra* note 57, at 286–301.

341. Bazyler, *supra* note 198, at 340–43.

342. *In re* Xe Services Alien Tort Litigation, 665 F. Supp. 2d 569 (E.D. Va. 2009).

plaintiffs were pleased with the settlement, others were critical and demanded that it be rescinded or renegotiated.[343] Countless factors will affect how plaintiffs react to settlement negotiations or the final agreement: the actual terms of the settlement agreement; their personal belief that the settlement is just; their financial circumstances; the ability of their attorneys to effectively communicate the pros and cons of settlement; and the reaction of their community. This reality reflects the complexity of human rights litigation.[344]

The *Unocal* settlement highlights a related issue—the impact of individual cases on the broader human rights movement. Human rights litigation is a form of strategic litigation and can also be described as transnational law litigation.[345] This form of litigation "seeks to vindicate public rights and values through judicial remedies."[346] Lawsuits are carefully selected by attorneys, law firms, and public interest organizations for their potential impact on broader principles of social justice.[347] This creates a unique dynamic because individual cases—and the legal opinions they generate—can have an impact well beyond the immediate litigants.[348] The tension between the individual litigant and the broader human rights movement has been documented.[349] This tension also implicates the attorneys representing individual litigants, as the attorneys in the *Unocal* case experienced.[350] As one of the plaintiffs' attorneys noted as he described the settlement, "[e]thically speaking, it was easy to weigh the plaintiffs' interests against the movement's interest of having the legal precedent. The plaintiffs' interests trump

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343. Sly, *supra* note 157.

344. *See also* RICHARD L. MARCUS ET AL., COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 657–75 (6th ed. 2015); Howard Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005).

345. *See, e.g.*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1990); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

346. Koh, *supra* note 345, at 2347.

347. STEINHARDT ET AL., *supra* note 1, at 1207–10; STEPHENS ET AL., *supra* note 1, at 443; Shah, *supra* note 26, at 227–28.

348. This can raise significant concerns about human rights advocacy that does not prioritize the interests of the client. *See* Barbora Bukovska, *Perpetrating Good: Unintended Consequences of International Human Rights Advocacy*, 5 SUR: INT'L J. HUM. RTS. 7 (2008); Dina Francesca Haynes, *Client-Centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379 (2006).

349. *See, e.g.*, Dubinsky, *supra* note 279, at 1181–86; Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 3 MICH. ST. L. REV. 643 (2004).

350. STEINHARDT ET AL., *supra* note 1, at 1207. In *Tel-Oren v. Libyan Arab Republic*, the plaintiffs were criticized for seeking U.S. Supreme Court review of an adverse ruling by the D.C. Circuit because of fears it would generate negative precedent and harm existing law. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam) (Edwards, Bork, and Robb, JJ., concurring). In response, the plaintiffs' attorney stated that he only had "a duty to his client and no ethical responsibility for the favorable development of the law." David Weissbrodt, *Ethical Problems of an International Human Rights Practice*, 7 MICH. Y.B. INT'L LEGAL STUD. 217, 246 (1985). In fact, the plaintiffs' attorneys had already been criticized for appealing an adverse district court decision to the D.C. Circuit. *Recent Cases*, HUMAN RTS. ADVOC. NEWSLETTER, Apr. 1984, at 2–3.

the latter. Having said that, it was still not easy."[351] Another member of the plaintiffs' litigation team offered a different explanation for the settlement:

> It was always the plaintiffs' case and it was their decision to settle. I think people forget that these folks had been living in hiding for over 10 years, not knowing whether they would have to run the next day, not knowing where their next meal was coming from, not knowing whether their kids would be safe. Had they decided to go to trial (and it was a tough decision for them), even if we had won, Unocal would have appealed and we would have been in litigation for the next 5-7 years—that's 5-7 years of continued poverty, fear, inability to move on with their lives. So, it was easy for me (for example) to be like 'let's nail them in court' when I had a home, safety, security. Not so for our clients. People need to understand the conditions that they were living in to understand their decision.[352]

Human rights cases can create significant ethical challenges for attorneys.[353] The decision to settle is ultimately made by the client, and there may be good reasons to settle a case.[354] However, there may be cases where plaintiffs' counsel should advise against settlement.[355]

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This Article proposes five standards that can be used to assess the merits of proposed settlements—assess settlements through objective standards, acknowledge systemic harms, limit confidential settlements, limit non-disparagement clauses, and reject some settlements. These standards may be even more valuable if they are considered *ex ante* by lawyers and their clients. At the outset of litigation, plaintiffs' counsel should ask their clients what conditions would justify a settlement before trial. Would the plaintiffs accept a non-financial settlement if the defendants apologized? Would they accept a settlement that did not include details about the underlying human rights abuses? How important would it be for an apology to be public? While pre-litigation discussions between lawyers and their clients are always important, they are even more significant in human rights litigation, where non-monetary outcomes may be more meaningful to the plaintiffs.[356]

These issues could be raised in the complaint. In federal litigation, Rule 8 requires a complaint to include "a demand for the relief sought, which may

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351. SIMPSON, *supra* note 181, at 139–40 (statement of ERI attorney Tyler Giannini).

352. *Id.* at 140 (statement of ERI attorney Katie Redford).

353. *See, e.g.*, Michael J. Bazyler, *Suing Hitler's Willing Business Partners: American Justice and Holocaust Morality*, 16 JEWISH POL. STUD. REV. 3 (2004).

354. *See* Carrie Menkel-Meadow, *Ethics of Compromise*, *in* GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY, AND GOVERNANCE 2010 (Ali Farazmand ed., 2018).

355. A separate question involves whether an attorney could withdraw from representation if their client disagrees with their advice on settlement. *See* Moore, *supra* note 332, at 32–74; Jane Y. Kim, *Refusing to Settle: A Look at the Attorney's Ethical Dilemma in Client Settlement Decisions*, 38 WASH. U. J.L & POL'Y 383 (2012).

356. STEPHENS ET AL., *supra* note 1, at 443–47.

include relief in the alternative or different types of relief."[357] It is routine for plaintiffs to request compensatory and punitive damages, which would be determined at trial, as well as other "relief as the Court deems just and proper."[358] As part of their prayer for relief, the plaintiffs could request an admission of responsibility or an apology from the defendant.[359] Alternatively, the plaintiffs could seek a declaratory judgment that acknowledges the defendant's responsibility but does not request financial compensation.[360] If compensatory and punitive damages are not pursued, some defendants may be more receptive to accepting responsibility and expressing remorse for their actions. However, this option may not be available if defendants face criminal liability or adverse immigration consequences if they acknowledge responsibility for committing human rights abuses.

Finally, federal judges could raise these issues during litigation.[361] Pretrial settlement conferences offer judges the opportunity to raise multiple issues with litigants, including the possibility of settlement. While judges may not coerce litigants to accept a settlement, they are authorized by the federal rules to facilitate settlements.[362] They also have the authority to impose sanctions on parties who fail to participate at a pretrial conference or who do not participate in good faith.[363] The confidentiality of pretrial settlement conferences can promote candid discussions. Mediation can also be incorporated into the settlement process, which provides yet another opportunity for plaintiffs to reflect on the reasons why they brought their lawsuits and whether settlement can address their personal goals.[364]

CONCLUSION

Unlike most civil litigation, human rights cases are seldom about money. They are most often about justice, accountability, truth, and transparency. They are also about punishment, prevention, and deterrence. These values are even more pronounced in cases of systemic harms. And yet, victims of serious human rights abuses have often settled their cases without the defendants acknowledging responsibility or expressing remorse for their actions. Perhaps this reflects the

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357. FED. R. CIV. P. 8(a)(3).

358. *See, e.g.*, Complaint and Demand for Jury Trial at 81, Salim v. Mitchell, No. 2:15-cv-0286-JLQ (E.D. Wash. Oct. 13, 2015); Complaint at 58, Aguilar v. Imperial Nurseries, No. 3:07-CV-0193 (D. Conn. Feb. 8, 2007).

359. However, the First Amendment undoubtedly makes requests for apologies or other non-financial demands more difficult. White, *supra* note 253, at 1298–30.

360. 28 U.S.C. § 2201 (Creation of Remedy).

361. *See generally* William P. Lynch, *Why Settle for Less? Improving Settlement Conferences in Federal Court*, 94 WASH. L. REV. 1233 (2019); Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377 (2011); Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51 (2007); Marc Galanter & Mia Cahill, *"Most Cases Settle:" Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

362. FED. R. CIV. P. 16(a)(5).

363. FED. R. CIV. P. 16(f)(1).

364. *See generally* Peter N. Thompson, *Good Faith Mediation in Federal Courts*, 26 OHIO ST. J. DISP. RES. 363 (2011).

inherent limitations of law and legal institutions to remedy serious human rights abuses, a point Hannah Arendt made in assessing efforts to prosecute the atrocities of the Holocaust.[365] In fact, settlements seem to exacerbate these tensions. Regardless of its origins, the settlement puzzle in human rights litigation is real.

While this Article addresses human rights settlements in U.S. courts, its analysis and prescriptions extend well beyond this realm. They are present in all forms of strategic litigation.[366] Civil rights cases face similar considerations.[367] Other disputes, such as those involving sexual harassment or discrimination, raise comparable concerns.[368] Even international litigation—including proceedings before human rights tribunals—is subject to the settlement puzzle.[369]

When cases involve fundamental rights and individuals have suffered immeasurable wrongs, lawyers, litigants, and judges should know whether the costs of settlement are worth their price.

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365. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 294 (rev. ed. 1964). *See also* Mayo Moran, *The Problem of the Past: How Historic Wrongs Became Legal Problems*, 69 U. TORONTO L.J. 421 (2019); GERD OBERLEITNER, GLOBAL HUMAN RIGHTS INSTITUTIONS: BETWEEN REMEDY AND RITUAL 177 (2007).

366. *See* DUFFY, *supra* note 268, at 256–61; Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447 (2018); Carle, *supra* note 288, at 3–6; Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

367. Federal civil rights litigation offers some unique advantages that human rights litigation lacks, including the possibility of attorneys' fees. *See* 42 U.S.C. § 1988(b) (Proceedings in Vindication of Civil Rights).

368. *See, e.g.*, Elizabeth Tippet, *Non-Disclosure Agreements and the #MeToo Movement*, DISP. RES. MAG. (Winter 2019); Lesley Wexler & Jennifer K. Robbennot, *#MeToo and Restorative Justice*, DISP. RES. MAG. (Winter 2019); Vasundhara Prasad, *If Anyone is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507 (2018); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2005).

369. *See generally* Lea Brilmayer, *Understanding "IMCCs": Compensation and Closure in the Formation and Function of International Mass Claims Commissions*, 43 YALE J. INT'L L. 273 (2018); Emilie Hafner-Burton, Sergio Puig & David G. Victor , *Against Secrecy: The Social Cost of International Dispute Settlement*, 42 YALE J. INT'L L. 279 (2017); Lorna McGregor, *Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR*, 26 EUR. J. INTL L. 607 (2015); Patricia E. Standaert, *The Friendly Settlement of Human Rights Abuses in the Americas*, 9 DUKE J. COMPAR. & INT'L L. 519 (1999).

APPENDIX: HUMAN RIGHTS SETTLEMENTS (ATS AND TVPA)

CHRONOLOGICAL ORDER BASED ON SETTLEMENT DATE

Case	Statute	Cause of Action	Outcome
Salim v. Mitchell (2017)[370]	ATS	Torture; cruel, inhuman, or degrading treatment; non-consensual human experimentation; war crimes.	Confidential. However, both parties issued statements announcing the settlement.[371]
Garcia v. Chapman (2014)[372]	ATS; TVPA	Prolonged detention and torture.	Confidential.[373]
Luu v. Int'l Inv. Trade & Serv. Grp. (2014)[374]	ATS	Human trafficking.	Confidential.[375]

370. Case filed in 2015 and settled in 2017. *See* Complaint and Demand for Jury Trial, Salim v. Mitchell, No. 2:15-cv-0286-JLQ (E.D. Wash. Oct. 13, 2015) [https://perma.cc/U3B8-MC7Y]; Order Directing Entry of Judgment and Closing File, Salim v. Mitchell, No. 2:15-cv-0286-JLQ (E.D. Wash. Aug. 17, 2017) [https://perma.cc/G85X-R56Y] (stipulation of dismissal with prejudice pursuant to confidential settlement). *See generally* Salim v. Mitchell, 268 F. Supp.3d 1132 (E.D. Wash. 2017).

371. Press Release, ACLU, *CIA Torture Psychologists Settle Lawsuit*, ACLU (Aug. 17, 2017), https://www.aclu.org/press-releases/cia-torture-psychologists-settle-lawsuit [https://perma.cc/72SP-9H7V]; Sheri Fink, *Settlement Reached in CIA Torture Case*, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/us/cia-torture-lawsuit-settlement.html [https://perma.cc/X8FZ-ZB9D].

372. Case filed in 2012 and settled in 2014. *See* Complaint and Demand for Jury Trial, Garcia v. Chapman, No. 1:12-cv-21891-CMA (S.D. Fla. May 18, 2012) [https://perma.cc/73EM-9PEG]; Joint Stipulation of Dismissal with Prejudice, Garcia v. Chapman, No. 1:12-cv-21891-CMA (S.D. Fla. Dec. 4, 2014) [https://perma.cc/K82L-999P]; Administrative Order Closing Case, Garcia v. Chapman, No. 1:12-cv-21891-CMA (S.D. Fla. Oct. 16, 2014) [https://perma.cc/L9PB-JXEK] (stating that either party could reopen the case if they failed to complete the expected settlement). *See generally* Garcia v. Chapman, 911 F. Supp. 2d 1222 (S.D. Fla. 2012).

373. Jorge Ebro, *Chapman llega a un aceurdo extrajudicial tras demanda*, EL NUEVO HERALD (Nov. 17, 2014), https://www.elnuevoherald.com/deportes/article3987520.html (indicating case would be dismissed but the parties could reopen the case if they did not come to an agreement).

374. Case filed in 2011 and settled in 2014. *See* Plaintiffs' Original Complaint, Luu v. Int'l Inv. Trade & Serv. Grp., No. 3:11-CV-00182 (S.D. Tex. Apr. 13, 2011) [https://perma.cc/26XS-AUDA]; Order of Dismissal on Settlement Announcement, Luu v. Int'l Inv. Trade & Serv. Grp., No. 3:11-CV-00182 (S.D. Tex. Aug. 6, 2014) [https://perma.cc/KL5G-K4R2] (reflecting dismissal without prejudice because of settlement) [hereinafter *Luu* Dismissal Order].

375. *Luu* Dismissal Order, *supra* note 374, at 1.

Case	Statute	Cause of Action	Outcome
Smith v. Rosati (2014)[376]	TVPA	Assault; failure to provide medical services.	Public. Defendant agreed to $80,000 settlement.[377]
Hassen v. Nahyan (2013)[378]	TVPA	Torture.	Confidential. However, reports indicate defendant agreed to $10 million settlement.[379]
Al-Quraishi v. Nakhla (2012)[380]	ATS	Torture; cruel, inhuman, or degrading treatment; and war crimes.	Confidential. However, reports indicate defendant agreed to $5.28 million settlement.[381]

376. Case filed in 2010 and settled in 2014. *See* Inmate Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, Smith v. Rosati, No. 9:10-cv-01502-DNH-DEP (N.D.N.Y. Dec. 13, 2010) [https://perma.cc/5AHN-P4DL]; Stipulation and Order of Discontinuance, Smith v. Rosati, No. 9:10-cv-01502-DNH-DEP (N.D.N.Y. Jan. 7, 2014) [https://perma.cc/YS7Z-AYCV] (stipulation of dismissal with prejudice due to $80,000 settlement) [hereinafter *Smith* Stipulation].

377. *Smith* Stipulation, *supra* note 376, at 3.

378. Case filed in 2009 and settled in 2013. *See* Complaint and Demand for Jury Trial, Hassen v. Nahyan, No. 2:09-cv-01106-DMG-FMO (C.D. Cal., Feb. 13, 2009) [https://perma.cc/2DJ6-JAGG]; Joint Stipulation to Dismiss Action, Hassen v. Nahyan, No. 2:09-cv-01106-DMG-FMO (C.D. Cal., June 31, 2013) [https://perma.cc/S852-DK9P] (stipulation of dismissal with prejudice due to confidential settlement) [hereinafter *Hassen* Stipulation].

379. *Hassen* Stipulation, *supra* note 378, at 2; *see also* Ryan Grim & Alex Emmons, *Thanks to State Department Cables, a Torture Victim Won a Rare $10 Million Settlement*, THE INTERCEPT (July 13, 2017), https://theintercept.com/2017/07/13/thanks-to-state-department-cables-a-torture-victim-won-a-rare-10-million-settlement/ [https://perma.cc/6GMU-MBSR].

380. Case filed in 2008 and settled in 2012. *See* Complaint and Jury Trial Demand, Al-Quraishi v. Nakhla, No. 8:08-cv-01696-PJM (D. Md. June 30, 2008) [https://perma.cc/C4UX-ZCTV]; Notice of Voluntary Dismissal of Action, Al-Quraishi v. Nakhla, No. 8:08-cv-01696-PJM (D. Md. Oct. 10, 2012) [https://perma.cc/8FNY-V7UW] (noting dismissal with prejudice by all plaintiffs except for Zaid Ahmed Ajaj). *See generally* Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702 (D. Md. 2010).

381. Maureen Cosgrove, *Military Contractor Pays $5 Million Settlement in Lawsuits Alleging Torture at Abu Ghraib*, JURIST (Jan. 9, 2013), https://www.jurist.org/news/2013/01/military-contractor-pays-5-million-settlement-in-lawsuits-alleging-torture-at-abu-ghraib/ [https://perma.cc/MLH4-WRQX]; *U.S. Contractor to Pay $5.28 Million to Abu Ghraib Prisoners*, CBS NEWS (Jan. 8, 2013), https://www.cbsnews.com/news/us-contractor-to-pay-528-million-to-abu-ghraib-prisoners/ [https://perma.cc/N768-6ZMV].

Case	Statute	Cause of Action	Outcome
Rodriguez v. Mahony (2012)[382]	ATS	Rape and sexual abuse.	Confidential.[383]
M.C. v. Bianchi (2011)[384]	ATS	Human trafficking.	Confidential. However, reports indicate defendant agreed to $725,000 settlement.[385]
Estate of Marani Manook v. Unity Resources Group (2010)[386]	ATS	War crimes.	Confidential.[387]

382. Case filed in 2010 and settled in 2012. *See* Complaint and Demand for Jury Trial, Juan Doe 1 v. Mahony, No. 2:10-cv-02902-JLS-JEM (C.D. Cal. Apr. 20, 2010) [https://perma.cc/TD7C-EQLV]; Stipulation and Order for Entry of Dismissal with Prejudice, Rodriguez v. Mahony, No. 2:10-cv-02902-JLS-JEM (C.D. Cal. Sept. 7, 2012) (order of dismissal due to settlement agreement) [hereinafter *Rodriguez* Stipulation].

383. *Rodriguez* Stipulation, *supra* note 382, at 2.

384. Case filed in 2009 and settled in 2011. *See* Complaint for Intentional Tort in Violation of the Law of Nations and Jury Trial Demand, M.C. v. Bianchi, No. 2:09-cv-03240 (E.D. Pa. July 22, 2009) [https://perma.cc/D6QX-R2QU]; Notice of Voluntary Dismissal with Prejudice, M.C. v. Bianchi, No. 2:09-cv-03240 (E.D. Pa. June 14, 2011) [https://perma.cc/M8AQ-Z7Y6] (reflecting dismissal). *See generally* M.C. v. Bianchi, 782 F. Supp. 2d 127 (E.D. Pa. 2011).

385. E-mail from Plaintiff's attorney Sergiu Gherman, Gherman Legal, PLLC (Mar. 29, 2020) (on file with author) (confirming settlement in 2011).

386. Case filed in 2008 and settled in 2011. *See* Complaint and Jury Demand, Estate of Marani Manook v. Unity Resources Group, No. 1:08-cv-00096-PLF (D.D.C. Jan. 17, 2008); Order of Dismissal, Estate of Marani Manook v. Unity Resources Group, No. 5:10-cv-00072-D (4th Cir. Mar. 16, 2011) [https://perma.cc/Y4NH-B3E4] (order of dismissal acknowledging agreement between the parties). A companion case was filed by the family of another individual who was killed in the same incident. *See* Complaint and Jury Trial Demanded, Antranick v. Research Triangle Inst., Int'l, No. 1:08-cv-000595-PLF (D.D.C. Apr. 4, 2008). *See generally* Estate of Manook v. Research Triangle Inst., 759 F. Supp. 2d 674 (E.D.N.C. 2010); Estate of Manook v. Research Triangle Inst., 693 F. Supp. 2d 4 (D.D.C. 2010).

387. E-mail from Plaintiff's attorney Susan Burke (May 30, 2020) (on file with author) (confirming settlement in 2011).

Case	Statute	Cause of Action	Outcome
In re Xe Services Alien Tort Litigation (2010)[388]	ATS	War crimes; summary execution.	Confidential. However, reports indicate defendant agreed to pay $100,000 for death claims and $20,000-$30,000 for injury claims in settlement.[389]
Shiguago v. Occidental Petroleum Co (2010)[390]	ATS; TVPA	Torture; cruel, inhuman, or degrading treatment.	Confidential.[391]
Mainawal Rahman Bldg. & Constr. Co. v. Dyncorp Int'l LLC (2009)[392]	ATS	Cruel, inhuman, or degrading treatment.	Confidential.[393]
Aguilar v. Imperial Nurseries (2007)[394]	ATS	Human trafficking.	Confidential.[395]

388. Cases filed in 2009 and settled in 2010. *See* Civil Complaint and Jury Demand, *In re* Xe Services Alien Tort Litigation, No. 1:09-cv-00618-TSE-IDD (E.D. Va. June 2, 2009) [https://perma.cc/U337-X9MJ]; Order of Dismissal with Prejudice, *In re* Xe Services Alien Tort Litigation, No. 1:09-cv-00618-TSE-IDD (E.D. Va. Jan. 6, 2010) [https://perma.cc/NK4G-B9A4] (noting affidavit reflecting settlement agreement reached between the parties). There were five separate lawsuits involving multiple plaintiffs that were eventually consolidated. *See In re* Xe Services Alien Tort Litigation, 665 F. Supp. 2d 569 (E.D. Va. 2009). *See generally* Estate of Sa'adoon v. Prince, 660 F. Supp. 2d 723 (E.D. Va. 2009); Complaint and Jury Demand, Albazzaz v. Blackwater Lodge and Training Co., No. 1:09-cv-00616 (E.D. Va. June 2, 2009); Estate of Abtan v. Blackwater Lodge Training Center, 611 F. Supp. 2d 1 (D.D.C. 2009); Complaint and Jury Demand, Estate of Sabah Salman Hasoon v. Prince, No. 1:09-cv-618 (E.D. Va. June 2, 2009); Complaint and Jury Demand, Estate of Husain Salih Rabea v. Prince, No. 1:09-cv-645 (E.D. Va. October 28, 2009).

389. Sly, *supra* note 157; Jeremy Scahill, *Blackwater Settles Massacre Lawsuit*, THE NATION (Jan. 6, 2010), https://www.thenation.com/article/blackwater-settles-massacre-lawsuit/ [https://perma.cc/Z494-F6Q4]; *Blackwater Settles U.S. Export Violations*, REUTERS (Aug. 20, 2010), https://www.reuters.com/article/us-usa-blackwater-settlement/blackwater-settles-u-s-export-violations-report-idUSTRE67K09Q20100821 [https://perma.cc/WC9Y-277Y].

390. Case filed in 2006 and settled in 2010. *See* Complaint and Jury Demand, Shiguago v. Occidental Petroleum Co., No. CV 06-4982-ODW (CWx) (C.D. Cal. Aug. 10, 2006) [https://perma.cc/B5J9-NJ7H]; Order Granting Dismissal with Prejudice, Shiguago v. Occidental Petroleum Co., No. CV 06-4982-ODW (CWx) (C. D. Cal. Aug. 16, 2010) [https://perma.cc/U9RT-2SCP] (reflecting dismissal).

391. Confidential source on file with author; *see also* VIEW FROM LL2, *supra* note 27.

392. Case filed in 2008 and settled in 2009. *See* Complaint and Jury Trial Demand, Mainawal Rahman Bldg. & Constr. Co. v. Dyncorp Int'l LLC, No. l:08-CV-1064 (E.D. Va. Oct. 10, 2008) [https://perma.cc/2TGC-SW4N]; Stipulated Notice of Dismissal, Mainawal Rahman Bldg. & Constr. Co. v. Dyncorp Int'l LLC, No. l:08-CV-1064 (E.D. Va. June 1, 2009) [https://perma.cc/6ATB-PKRB] (stipulation of dismissal due to settlement between the parties).

393. Sample Representations, LAW OFFICE OF JOSEPH HENNESSEY, LLC, http://jahlegal.com/cases [https://perma.cc/PXQ9-S9HY] (last visited Nov. 5, 2021).

Case	Statute	Cause of Action	Outcome
Siswinarti v. Shien Ng (2007)[396]	ATS; TVPA	Human trafficking.	Confidential.[397]
Xiaoning v. Yahoo! Inc. (2007)[398]	ATS; TVPA	Torture; forced labor; and arbitrary detention.	Confidential. However, both parties issued joint stipulation disclosing selected terms of settlement.[399]
Abdullahi v. Pfizer, Inc. (2009)[400]	ATS	Non-consensual human experimentation.	Confidential. However, reports indicate defendant agreed to pay $35 million settlement.[401]

394. Case filed in 2007 and settled in 2008. *See* Complaint, Aguilar v. Imperial Nurseries, No. 3:07-CV-0193 (D. Conn. Feb. 8, 2007) [https://perma.cc/R5NG-4EFS]; Ruling Re: Plaintiffs' Motion for Default Judgment, Aguilar v. Imperial Nurseries, No. 3:07-CV-0193 (D. Conn. May 28, 2008) (granting plaintiffs' motion).

395. E-mail from Plaintiff's attorney Michael J. Wishnie, Yale Law School, (Jan. 9, 2020) (on file with author) (confirming settlement in 2007); *see also* Mark Spencer, *Settlement Ends Workers' Suit*, HARTFORD COURANT, June 26, 2007, at 6 (noting that Imperial Nurseries corporate parent agreed to provide plaintiffs with financial compensation).

396. Case filed in 2005 and settled in 2007. *See* Complaint, Siswinarti v. Jennifer Shien Ng, No. 2:05-cv-04171-PGS-ES2005 (D.N.J. Aug. 23, 2005) [https://perma.cc/8JTQ-PEWH]; Order of Dismissal, Siswinarti v. Jennifer Shien Ng, No. 2:05-cv-04171-PGS-ES2005 (D.N.J. Nov. 19, 2007) [https://perma.cc/AMK5-YDMD] (noting dismissal with prejudice unless settlement not consummated) [hereinafter *Siswinarti* Dismissal Order].

397. *Siswinarti* Dismissal Order, *supra* note 396, at 1.

398. Case filed in 2007 and settled in 2007. *See* Wang Xiaoning v. Yahoo! Inc., No. 4:07-cv-02151-CW (N. D. Cal. Apr. 18, 2007); *see* Joint Stipulation of Dismissal, Wang Xiaoning v. Yahoo! Inc., No. 4:07-cv-02151-CW (N.D. Cal. Nov. 28, 2007) [https://perma.cc/U294-9F63] (stipulation of dismissal with prejudice based on private settlement understanding among parties).

399. Theresa Harris, *Settling a Corporate Accountability Lawsuit without Sacrificing Human Rights*, 15 HUM. RTS. BRIEF 10 (2008); Eric Auchard, *Yahoo Settles Case Over Chinese Dissident E-Mails*, REUTERS (Nov. 13, 2007), https://www.reuters.com/article/us-yahoo-china/yahoo-settles-case-over-chinese-dissident-e-mails-idUSN1360603420071113 [https://perma.cc/6KVV-2JC4].

400. Case filed in 2001 and settled in 2011. *See* Complaint, Abdullahi v. Pfizer, Inc., No. 1:01-cv-8118-WHP (S.D.N.Y. Aug. 29, 2001); Order of Dismissal with Prejudice, Abdullahi v. Pfizer, Inc., No. 1:01-cv-8118-WHP (S.D.N.Y. Feb. 28, 2011) [https://perma.cc/384R-S2CE] (reflecting dismissal). *See generally* Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

401. This case was consolidated with *Adamu v. Pfizer* and was connected to a parallel lawsuit in Nigerian courts. Joe Stephens, *Pfizer Reaches Settlement Agreement in Notorious Nigerian Drug Trial*, WASH. POST (Apr. 4, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/04/03/AR2009040301877.html [https://perma.cc/9HWS-3UCR]; David Smith, *Pfizer Pays Out to Nigerian Families of Meningitis Drug Trial Victims*, THE GUARDIAN (Aug. 12, 2011), https://www.theguardian.com/world/2011/aug/11/pfizer-nigeria-meningitis-drug-compensation [https://perma.cc/9CBZ-V67G]; Bill Berkrot, *Pfizer Settles Remaining Nigeria, U.S. Trovan Suits*, REUTERS (Feb. 23, 2011), https://www.reuters.com/article/us-pfizer/pfizer-settles-remaining-nigeria-u-s-trovan-suits-idUSTRE71M18U20110223 [https://perma.cc/GKK3-ZBW6].

Case	Statute	Cause of Action	Outcome
In re South African Apartheid Litigation [*In re Motors Liquidation Company*] (2009)[402]	ATS	Torture, summary execution.	Public. Defendant agreed to pay $1.5 million settlement.[403]
Wiwa v. Royal Dutch Petroleum Company (2009)[404]	ATS; TVPA	Torture; cruel, inhuman, or degrading treatment; crimes against humanity; summary execution; arbitrary detention.	Public. Defendants agreed to pay $15.5 million settlement.[405]

402. Case filed in 2002 and settled in 2012. *See In re* South African Apartheid Litigation, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). Several cases were initially filed against multiple defendants, and these cases were subsequently consolidated. The lawsuit against General Motors was settled during bankruptcy proceedings and appears under a different name. *See generally In re* Motors Liquidation Company, et al., f/k/a General Motors Corp., et al., No. 09-50026-REG (Bankr. S.D.N.Y. Feb. 24, 2012) (approving agreement resolving claims).

403. David Smith, *General Motors Settles with Victims of Apartheid Regime*, THE GUARDIAN (Mar. 2, 2012), https://www.theguardian.com/world/2012/mar/02/general-motors-settles-apartheid-victims [https://perma.cc/UK7B-KKUL]; *see also GM Settles with S. Africa Apartheid Victims*, REUTERS (Mar. 1, 2012), https://www.reuters.com/article/ozatp-safrica-apartheid-gm-20120301-idAFJOE82007720120301 [https://perma.cc/7NJG-34VK].

404. Case filed in 1996 and settled in 2009. *See* Complaint, Wiwa v. Royal Dutch Petroleum Company, No. 96 CIV. 8386 (S.D.N.Y. Nov. 8, 1996) [https://perma.cc/CC6H-9ML4]; Settlement Agreement and Mutual Release, Wiwa v. Royal Dutch Petroleum Company, No. 1:04-cv-02665-KMW-HBP (S.D.N.Y. June 8, 2009) [https://perma.cc/W6S4-7EAS] (reflecting settlement agreement). *See generally* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

405. Ingrid Weurth, *Wiwa v. Shell: The $15.5 Million Settlement*, AM. SOC. INT'L L. INSIGHTS (Sept. 9, 2009), https://www.asil.org/insights/volume/13/issue/14/wiwa-v-shell-155-million-settlement [https://perma.cc/SE9E-NHHW]; Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES (June 8, 2009), https://www.nytimes.com/2009/06/09/business/global/09shell.html [https://perma.cc/CXZ2-KCRH]; Press Release, CTR. CONST. RTS., Settlement Reached in Human Rights Cases Against Royal Dutch/Shell (June 8, 2009), http://ccrjustice.org/newsroom/press-releases/settlement-reached-human-rights-cases-against-royal-dutch/shell [https://perma.cc/C9KF-8JYE].

Case	Statute	Cause of Action	Outcome
Abiola v. Abubakar (2008)[406]	ATS; TVPA	Torture; summary execution.	Public. Defendants agreed to pay $650,000 settlement.[407]
Doe v. Unocal (2005)[408]	ATS	Forced labor; crimes against humanity; torture.	Confidential. However, reports indicate defendant agreed to pay $30 million settlement.[409]
Rosner v. United States (2005)[410]	ATS	Confiscation of private property.	Public. Defendant agreed to pay $25.5 million settlement.[411]

406. Case filed in 2001 and settled in 2008. *See* Complaint, Abiola v. Abubakar, No. 01-cv-70714-BAF (E. D. Mich. Feb. 22, 2001); *see also* Joint Stipulation to Dismiss All Claims and Vacate the Court's Memorandum Opinion and Order Dated June 27, 2006, Abiola v. Abubakar, No. 02-cv-06093 (N.D. Ill. Jan. 14, 2008) [https://perma.cc/8LE7-DDM2] (reflecting settlement agreement between parties). *See generally* Abiola v. Abubakar, 435 F. Supp. 2d 830 (N.D. Ill. 2006); Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005); Abiola v. Abubakar, 267 F. Supp. 2d 907 (N.D. Ill. 2003).

407. Wale Akinola, *Nigeria: MKO Abiola's Death - FG Offers Family $650,000 Compensation*, ALLAFRICA (Nov. 25, 2007), https://allafrica.com/stories/200711250019.html [https://perma.cc/W7H8-4CSB]; TRIAL INTERNATIONAL (Apr. 27, 2016), https://web.archive.org/web/20160708023736/https://trialinternational.org/latest-post/abdulsalami-abubakar/ [https://perma.cc/8THZ-HW4M].

408. Case filed in 1996 and settled in 2005. *See* Complaint, Doe v. Unocal, No. 2:96-cv-06959-RSWL-BQR (C.D. Cal. Oct. 3, 1996) [https://perma.cc/8LZW-6DWD]; *see also* Stipulation for Dismissal of Actions in Their Entirety with Prejudice, Doe v. Unocal, No. 2:96-cv-06959-RSWL-BQR (C.D. Cal. May 13, 2005) [https://perma.cc/ZRD2-4AVU] (reflecting dismissal); Doe v. Unocal, 403 F.3d 708 (9th Cir. 2005) (*appeal dismissed en banc*). *See generally* Doe v. Unocal, 395 F.3d 932 (9th Cir. 2002). The companion case, *Nat'l Coal. Gov't of Burma v. Unocal*, was also dismissed in 2005.

409. Press Release, EarthRights International, Final Settlement Reached in Doe v. Unocal (May 10, 2005); Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES (Mar. 22, 2005), https://www.latimes.com/archives/la-xpm-2005-mar-22-fi-unocal22-story.html [https://perma.cc/73HV-HJE6]; Press Release, Unocal, Settlement Reached in Yadana Pipeline Lawsuit (Mar. 21, 2005).

410. Case filed in 2001 and settled in 2005. *See* Class Action Complaint, Rosner v. United States, No. 1:01-cv-01859-PAS (S.D. Fla. May 8, 2001) [https://perma.cc/K4XU-S9H9]; Final Order and Judgment, Rosner v. United States, No. 1:01-cv-01859-PAS (S.D. Fla. Oct. 3, 2005) [https://perma.cc/QQN6-B2SH] (dismissing case due to class action settlement agreement).

411. Rosner v. United States, 2012 WL 13066527 (S.D. Fla. Mar. 1, 2012) (confirming settlement reached between parties); s*ee also* Henry Weinstein, *U.S. Settles Holocaust Survivors Over Missing Loot*, SEATTLE TIMES (Mar. 12, 2005), https://www.seattletimes.com/nation-world/us-settles-holocaust-lawsuit-over-missing-loot/ [https://perma.cc/9WJT-9QHN].

Case	Statute	Cause of Action	Outcome
Doe v. Reddy (2004)[412]	ATS	Human trafficking.	Public. Defendant agreed to pay $8.9 million settlement.[413]
Does v. Gap, Inc. (2003)[414]	ATS	Forced labor.	Public. Defendant agreed to $20 million settlement.[415]
Jama v. Immigration and Naturalization Service (2005)[416]	ATS	Torture; cruel, inhuman, or degrading treatment.	Confidential.[417]

412. Case filed in 2002 and settled in 2004. *See* Notice of Removal of Action to Federal Court and Demand for Jury Trial, Doe v. Reddy, No. 3:02-cv-05570-WHA (N.D. Cal. Nov. 11, 2002) [https://perma.cc/K975-RALC] (containing a copy of Plaintiff's original complaint that was filed on Oct. 23, 2002 in state court); Stipulation Regarding Settlement and Order, Doe v. Reddy, No. 3:02-cv-05570-WHA (N.D. Cal. Nov. 23, 2004) [https://perma.cc/7XFS-DSGS] (reflecting settlement agreement).

413. Viji Sundaram, *How an Infamous Berkeley Human Trafficking Case Fueled Reform*, S.F. PUBLIC PRESS (Feb. 16, 2012), https://sfpublicpress.org/news/2012-02/how-an-infamous-berkeley-human-trafficking-case-fueled-reform [https://perma.cc/8KLD-BS8D]; *see also* Resume, Althsuler Berzon LLP, Victories: Miscellaneous (Apr. 2021), https://altshulerberzon.com/assets/firm-resume.pdf [https://perma.cc/XYL5-9C2S] (noting $11 million settlement).

414. Case filed in 2001 and settled in 2003. *See* Transfer-In of Case to Northern Mariana Islands, Doe I, et al. v. The Gap, Inc., et al., No. 1:01-cv-00031 (D.N. Mar. I. June 4, 2001) [https://perma.cc/2PWD-XGER] (reflecting original complaint was filed on Jan. 13, 1999, in the U.S. District Court for the Central District of California); Order and Final Judgment Approving Settlement and Dismissing Actions with Prejudice, Doe I, et al. v. The Gap, Inc., et al., No. 1:01-cv-00031 (D.N. Mar. I. Apr. 23, 2003) [https://perma.cc/98AN-SRD5] (acknowledging dismissal based on approval of settlement agreement).

415. Nancy Cleeland, *Firms Settle Saipan Workers Suit*, L.A. TIMES (Sept. 27, 2002), https://www.latimes.com/archives/la-xpm-2002-sep-27-fi-saipan27-story.html [https://perma.cc/464P-RJTQ]; *see also* Jenny Strasburg, *Saipan Lawsuit Terms OKd / Garment Workers to Get $20 Million*, S.F. CHRON. (Apr. 25, 2003), https://www.sfgate.com/business/article/Saipan-lawsuit-terms-OKd-Garment-workers-to-get-2620545.php [https://perma.cc/FNP8-V8BL] (noting $20 million settlement).

416. Case filed in 1997 against several defendants and resulted in both public and confidential settlements. *See* Complaint, Jama v. INS, No. 97 3093-DRD (D.N.J. June 16, 1997) [https://perma.cc/67KH-SJUR]; Stipulation and Order of Dismissal with Prejudice, Jama v. Esmor Correctional Services, Inc., No. 2:97-cv-03093-DRD-MAS (D.N.J. Aug. 9, 2010) [https://perma.cc/F9GN-H4VF] (stipulation of dismissal with prejudice due to confidential settlement agreement) [hereinafter *Jama* Stipulation]. *See generally* Jama v. INS, 334 F. Supp. 2d 662 (D.N.J. 2004); Jama v. INS, 343 F. Supp. 2d 338 (D.N.J. 2004). A related lawsuit, *Brown v. Esmor Correctional Services*, was filed as a class action complaint. Brown v. Esmor Correctional Services, Inc., No. CIV. 98-1282-DRD, 2005 WL 1917869 (D.N.J. 2005) (*Jama* and *Brown* were consolidated by the court for discovery purposes). A settlement was reached in *Brown* in 2005 for $2.5 million. *Id.*

417. *Jama* Stipulation, *supra* note 416, at 1; *see also Former Immigration Detainee Award $100,001 against CSC/Esmor, Plus $137,808 in Attorney's Fees and Expenses*, PRISON LEGAL NEWS (Sept. 15, 2008), https://www.prisonlegalnews.org/news/2008/sep/15/former-immigration-detainee-awarded-100001-against-cscesmor-plus-137808-in-attorneys-fees-and-expenses/ [https://perma.cc/TRL4-BWJ8].

Case	Statute	Cause of Action	Outcome
In re Holocaust Victim Assets Litig. (2000)[418]	ATS	War crimes; crimes against humanity; slave labor; genocide.	Public. Defendants agreed to pay $1.25 billion settlement.[419]
In re Nazi Era Cases against German Defendants Litigation (2000)[420]	ATS	Slave labor; forced labor; expropriation of property; human experimentation.	Public. Defendants agreed to pay $5.6 billion settlement.[421]
Eastman Kodak Co. v. Kavlin (1999)[422]	ATS	Arbitrary detention.	Confidential.[423]

418. Several class action complaints were originally filed in 1996 and were subsequently amended. *See, e.g.*, Complaint, Weisshaus v. Union Bank of Switzerland, No. CV 96 4849 (Oct. 1, 1996 E.D.N.Y.) The cases were refiled in July 1997 as four separate actions and eventually consolidated. Settlement was reached in 1998 and granted final approval in 2000.

419. *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000); *see also Judge Oks $1.25 Billion Settlement Between Nazi Victims, Swiss Banks*, CHI. TRIB. (July 27, 2000), https://www.chicagotribune.com/news/ct-xpm-2000-07-27-0007270385-story.html [https://perma.cc/68KX-QAGY]; Thomas Stephens, *When Swiss Banks Settled with Holocaust Survivors*, SWISSINFO (Aug. 12, 2018), https://www.swissinfo.ch/eng/twenty-years-ago_when-swiss-banks-settled-with-holocaust-survivors/44315844 [https://perma.cc/37VX-L7DN].

420. Fifty-three complaints were originally filed in 2000 and subsequently consolidated. Settlement was reached in 2000. *See generally In re* Nazi Era Cases against German Defendants Litigation, 198 F.R.D. 429 (D. N.J. 2000).

421. *In re* Nazi Era Cases against German Defendants Litigation, 213 F. Supp. 2d 439 (D.N.J. 2002); *In re* Nazi Era Cases against German Defendants Litigation, 198 F.R.D. 429 (D.N.J. 2000).

422. Case filed in 1996 and settled in 1999. *See* Complaint, Eastman Kodak v. Kavlin, No. 1:96CV02218 (S.D. Fla. Aug. 9, 1996); *see also* Order Staying Proceedings, Eastman Kodak v. Kavlin, No. 1:96CV02218 (S. D. Fla. Dec. 16, 1998) [https://perma.cc/5JUC-BSEF] (ordering a stay of proceedings because of proposed settlement); Order of Dismissal with Prejudice, Eastman Kodak v. Kavlin, No. 1:96CV02218 (S.D. Fl. Feb. 23, 1999) [https://perma.cc/S8WS-SWHD] (reflecting dismissal). *See generally* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997).

423. VIEW FROM LL2, *supra* note 27.

Case	Statute	Cause of Action	Outcome
In re Austrian and German Bank Holocaust Litigation (1999)[424]	ATS	Expropriation of property.	Public. Defendants agreed to pay $40 million settlement.[425]
Benisti v. Banque Paribas (1998)[426]	ATS	Expropriation of property.	Public. Defendants agreed to pay $2.75 million and $3.6 million in settlement. In addition, a separate settlement agreement by the French and U.S. governments totaled $172.5 million.[427]

424. Several class action complaints were originally filed in 1998 and subsequently consolidated. *See* Consolidated Class Action Complaint, *In re* Austrian & German Bank Holocaust Litig, No. 98 Civ. 3938 (S.D. N.Y. Mar. 17, 1999). Settlement was reached in 1999 and approved in 2000.

425. *In re* Austrian & German Bank Holocaust Litigation, 80 F. Supp. 2d 164 (S.D.N.Y. 2000); *see also* Henry Weinstein, *Austrian Bank Agreed to Pay $40 Million in Settling Holocaust-Related Lawsuit*, L.A. TIMES (Mar. 9, 1999), https://www.latimes.com/archives/la-xpm-1999-mar-09-mn-15545-story.html [https://perma.cc/3Z7Y-VJF7].

426. This case was filed as a class action lawsuit. It was consolidated by the federal district court with a similar lawsuit, *Bodner v. Banque Paribas*. *See* Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000). Because the plaintiffs in *Bodner* were U.S. citizens, federal jurisdiction in *Bodner* was not premised on the ATS.

427. BAZYLER, *supra* note 57, at 176–98. *See* Agreement between the Government of the United States of America and the Government of France Concerning Payments for Certain Losses Suffered During World War II, Jan. 18, 2001, U.S.-Fr., 2156 U.N.T.S. 281.