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INTRODUCTION

A wave of suits by victims of human rights abuses abroad suing large corporations in U.S. federal courts is affecting the normative and procedural development of domestic and international law. Corporations have become the defendants of choice for classes of foreign plaintiffs suing in U.S. courts for international law violations.[1] Large entities, including Unocal, Texaco, Degussa, Ford, Daimler-Chrysler, Volkswagen, and Swiss, German, French, and Austrian banks have all been targeted in international human rights suits in federal court by classes of plaintiffs alleging that their rights have been violated under customary international law ("CIL") and demanding large-scale monetary and injunctive relief.[2] The alleged of-

1. Many of the corporate entities are large transnational corporations. The definition of transnational corporations (TNCs) (also referred to as "multinational corporations" (MNCs) or "multinational enterprises" (MNEs)) according to the U.N. Draft Code of Conduct on TNCs, is an enterprise

> comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others.

Code of Conduct on Transnational Corporations, U.N. ESCOR, Organizational Sess. for 1988, Provisional Agenda Item 2, at 4, U.N. Doc. E/1988/39/Add. 1 (1988); *see also* PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 12-15 (1995) (defining "multinational enterprise" as an enterprise that engages in direct investment outside their home countries and including corporate groups based on parent-subsidiary relations alone).

2. *See, e.g.*, Iwanowa v. Ford Motor Co., No. 98-CV-959, 1999 WL 719888 (D.N.J. Sept. 14, 1999); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); Aguinda v. Texaco, Inc., 850 F. Supp. 282 (S.D.N.Y. 1994), *vacated sub nom.*, Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Aguinda v. Texaco, Inc. 1994 WL 142006 (S.D.N.Y. 1994) (mem.).; Class Action Complaint, Burger-Fischer v. Degussa AG, No. 98-3598, 1999 WL 717260

fenses take place in faraway places and often in faraway times. Moreover, the plaintiffs allege violations of international, not U.S., law. For example, families of Holocaust victims have filed class actions for abuses that occurred over fifty years ago in Europe when Swiss banks and other corporate entities cooperated with the Nazi government.[3] Convergence of the uniquely American class action procedure and the substantive international law of human rights not only affects the development of international human rights norms but may finally achieve the elusive goal of compliance with international norms.[4]

This new trend of "mass tort" transnational litigation is an

(D.N.J. Sept. 13, 1999); Complaint, Pollack v. Seimens AG, No. 98-CV-5499 (E.D.N.Y. filed Aug. 30, 1999); Complaint, Polgar v. Daimler Chrysler, No. 99-CV-02527 (E.D.N.Y. filed May 4, 1999); Complaint, Duveen v. Deutsche Bank AG, No. 99-CV-0388 (S.D.N.Y. filed Jan. 19, 1999); Complaint, Hirsch v. Fried. Krupp AG, No. 98-CV-4280 (D.N.J. filed Sept. 11, 1998); Complaint, Gross v. Volkswagen, No. 98-CV-4104 (D.N.J. filed Aug. 31, 1998); Complaint, Watman v. Deutsche Bank, No. 98-CV-3938 (S.D.N.Y. filed June 3, 1998); Amended Complaint, Bodner v. Banque Paribas, No. 97 Civ. 7433 (E.D.N.Y. filed Mar. 20, 1998); Complaint, Kor v. Bayer, 99-CV-0036 (S.D. Ind. filed Feb. 17, 1998) (claims by Holocaust survivors for injuries suffered from death camp experiments).

3. Several class action suits were brought (and settled) against Swiss banks (Union Bank of Switzerland, Credit Suisse, and Swiss Bank Corporation as joint defendants) by Holocaust survivors and the relatives of Holocaust victims in an effort to recover money deposited in Swiss bank accounts prior to and during World War II. Joined were Holocaust survivors who were forced by Nazis to engage in slave labor and Holocaust survivors and heirs of Holocaust victims who had property looted by Nazis. The "Holocaust Plaintiffs" claimed that Swiss banks actively financed and knowingly accepted profits derived from slave labor as well as looted assets. *See* Amended Complaint, World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switz., No. 97-CV-0461 (E.D.N.Y. filed July 1997); Amended Complaint, Friedman v. Union Bank of Switz., No. 96-CV-5161 (E.D.N.Y. filed Oct. 21, 1996); Amended Complaint, Weisshaus v. Union Bank of Switz., No. 96-CV-4849 (E.D.N.Y. filed Oct. 3, 1996), consolidated as Telling-Grotch v. Union Bank of Switz., No. 96-5161 (E.D.N.Y. filed 1996).

4. *See* Ralph G. Steinhardt, *The Internationalization of Domestic Law, in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 3-5 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) (describing the contemporary accounts of the law of nations stress the convergence of international and domestic law, or "intermestic" law, whereby domestic law has been internationalized and international law has been domesticated). Compliance with international law, and in particular human rights law, has been the subject, even obsession, of modern international lawyers and scholars. *See, e.g.*, ABRAM CHAYES ET AL., INTERNATIONAL LEGAL PROCESS (1968); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); HENRY J. STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS (4th ed. 1994). Enforcement measures such as use of international fact-finding, surveillance, and peacekeeping forces for aid in enforcement, collective nonrecognition of unlawful acts, and diplomatic pressures will not be discussed in this article. However, most governments are ambivalent about the enforcement of international law when it would disadvantage them. *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 245 (1991).

inevitable development both in human rights litigation in the U.S. and in the realm of international human rights law in general. While federal courts have long been the forum for litigation of private rights and economic disputes involving corporations, this "new wave" of class litigation involves public international norms in a new context.[5]

Private civil tort remedies have been available in the U.S. for almost twenty years since the Second Circuit ruled that the dormant Alien Tort Claims Act (ATCA) could be the basis of federal court subject matter jurisdiction over an action brought by an alien against a foreign government official for violations of CIL, or "violations of the law of nations."[6] However, only

5. Professors Abram and Antonia Handler Chayes describe the environment and human rights as part of "the 'third wave' issues that do not yield . . . readily to the calculus of power and interest, in contrast to the first and second wave preoccupation with physical and economic security, which have increasingly shouldered their way onto the international agenda." ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 123 (1995); *see generally*, GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 17-18 (1996) (describing the distinction between "public" and "private" international law); Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225, 236-37 (1995/1996) (comparing private international law and enforcement of economic rights by U.S. courts in order to protect capital markets and voluntary market exchange). "The fact that economic activity throughout the world has become so complex and interrelated has meant both more assertions of jurisdictional authority and more resistance to such assertions." SCHACHTER, *supra* note 4, at 252. Controversies in the U.S. in the past have been with:

> 1) The application of United States law to prohibit foreign companies abroad that are substantially owned or controlled by United States nationals from doing business with persons in countries deemed "enemies" of the United States (such as, at one time, China, Cuba, Iran and USSR). . . .
>
> 2) The application of United States antitrust laws to conduct outside the United States by non-nationals of the United States . . . when such conduct has a substantial and foreseeable effect on United States commerce [(the "effects doctrine")]. . . .
>
> 3) Orders by United States judicial or administrative authorities addressed to foreign firms or individuals for disclosure of documents located in another State for use in judicial or administrative proceedings in the United States without the permission of the State in which the persons or documents are located.
>
> 4) Withholding payments due to a foreign company or individual located abroad for the purpose of enforcing United States tax laws or restricting transfer of funds held in foreign branches of United States banks to persons subject to investigation or prosecution in the United States.

Id.

6. The Alien Tort Claims Act provides: "The district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1994); *see* Filàrtiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (holding ATCA provides federal court

since the case brought against Radovan Karadzic in 1996 have nongovernmental defendants been held liable under ATCA's jurisdiction, paving the way for class action suits against corporations whose international activity causes mass harm.[7]

With the globalization of the economy, corporations continue to move into expanding markets in Asia, Eastern Europe, and Latin America.[8] Ironically, corporations, as powerful international actors, play a dual role of enhancing basic human rights by eliminating poverty and misery in under-developed countries, while simultaneously pursuing profit at the expense of the weakest individuals.[9] Corporate activity, particularly in the form of investment, generates economic development, a necessary condition for achieving human rights.[10] Conversely,

jurisdiction for alien to sue for violations of customary international law).

7. *See* Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) ("[W]e hold that subject-matter jurisdiction exists, that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor, and that he is not immune from service of process.").

8. Transnational corporations differ from multi-location domestic enterprises in a number of ways, including their capacity to locate productive facilities across national borders, to exploit local factor inputs thereby, to trade across frontiers in factor inputs between affiliates, to exploit their know-how in foreign markets without losing control over it, and to organize their managerial structure globally according to the most suitable mix of divisional lines of authorities. These factors permit multinationals to affect the international allocation of productive resources. MUCHLINSKI, *supra* note 1 at 15; *see also* THOMAS DONALDSON, CORPORATIONS AND MORALITY (1982). The usual indicators of development are mainly industrialization, the growth of capital, and the application of technology and increase in GNP, which the entrance of multinationals to a country usually brings. In the 1950s and 1960s, a considerable shift in "development ideology" occurred. SCHACHTER, *supra* note 4, at 350. Resolutions of the U.N. recognized that economic growth alone was not enough, but that human welfare should be the focus. In the 1980s, a new "development ideology moved to the forefront," focusing on "reliance on the market, and skepticism about the ability of governments to achieve development." *Id.* at 350. The U.N. has recently proclaimed a "'human right to development' which many construe as imposing an obligation on the part of developed countries to assist the needy countries." *Id*. at 355.

9. There is a distinction between abusive economic corporate activity and activity which rises to the level of a violation of fundamental human rights or criminal activity; however, where that line is drawn is not always clear given the amorphous human rights standards. *See infra* Part II.B and accompanying notes; *see also* Jack Donnelly, *Human Rights and Development: Complementary or Competing Concerns?*, *in* 36 WORLD POLITICS 255 (1984); C.H. Schreuer, *The Impact of International Institutions on the Protection of Human Rights in Domestic Courts*, 4 ISR. Y.B. HUM. RTS. 60 (1974).

10. *See* David Kinley, *The Legal Dimension of Human Rights*, *in* HUMAN RIGHTS IN AUSTRALIAN LAW 6 (David Kinley ed., 1998) (noting the concern in developing nations that economic development is ahead of guaranteeing human rights); s*ee also Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR 3d Comm., 41st Sess., U.N. Doc. A/RES/41/128 (1987) (proclaiming the right to development to be a

such development often results in conditions that are inimical to human rights. Moreover, governments curtail human rights for the sake of economic development.[11]

Increasingly, the public has pressured U.S. companies to avoid marketing products produced by forced labor. Moreover, the companies have decided to restrict investments in countries known for human rights abuses (such as Burma and China).[12] These decisions reflect an increasing sensitivity toward corporate involvement in international law violations. Those victimized by corporate activity now seek private redress for alleged violations of public law norms, further evidencing a commitment to the idea that both the authority of State and the role of market, in principle, are limited by legal commitments to human rights.[13] Disagreement and debate about the role and sig-

universal and inalienable right, nonetheless stressing the fact that it is also integral part of fundamental human rights which are interrelated and interdependent (arts. 1(2) and 6(2)); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 163-202 (1989) (asserting that development strategies should seek to minimize the shortfalls of three common trade-offs: needs, equality, and liberty).

11. *See* Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997) (alleging that the government authorized and participated in forcing natives to relocate, subjected them to forced labor, death, or torture, and committed other human rights violations); Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006, at *6-7 (S.D.N.Y. Apr. 11, 1994) (alleging that Ecuador harmed the indigenous people who were living in the rainforest); *see also* Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations–Emergent International Rights and Wrongs*, 38 VA. J. INT'L L. 331, 353-54 (1998) (discussing multinationals link to environmental damage in sharp contrast to Transnational Corporations Code of Conduct).

12. *See* Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 157-58; s*ee also, e.g.*, 19 U.S.C. § 2432(a) (1994) (prohibiting grant of most favored nations status to countries with non-market economies that deny their citizens the rights or opportunity to emigrate); 22 U.S.C. § 2151(n) (1990) (Prohibition Against Foreign Assistance to Gross Violators of Human Rights, prohibiting economic aid to countries engaged in a "consistent pattern of gross violations of internationally recognized human rights"); *Report of the Fourth World Conference on Women, Beijing Declaration*, Annex I, at 5-8, U.N. Doc. A/Conf.177/20 (1995);.

13. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 434, 509 (1990) (defining "international responsibility" which relates both to breaches of treaty and other breaches of legal duty); *cf.* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (per curiam) (recognizing the growing pressure to extend liability to private actors but refusing to do so on the facts of the case); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D.Cal 1997); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987). In the absence of compulsory dispute resolution mechanisms, such disputes are often resolved through diplomatic exchange and negotiated settlement. *See id.*; *see also* Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?* 60 ALB. L. REV. 579, 588-89 (1997); *see generally*, STEPHEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (1997) (pointing out the erro-

nificance of companies in this geo-political realm is the backdrop of the new wave of class litigation.[14]

U.S. law has ample substantive theories and procedural mechanisms that permit the joinder of nongovernmental defendants who cooperate with and support governmental human rights abuses.[15] Unlike government officials, corporations with ties to the U.S., are more easily found for jurisdictional purposes.[16] Human rights plaintiffs' attorneys need not worry

neous assumption that international law never applies to non-state actors).

14. *See* International Rys. v. United Fruit Co., 373 F.2d 408 (2d Cir. 1967); DONALDSON, *supra* note 8, at 11-12; *see generally* RICHARD J. BARNET & RONALD E. MÜLLER, GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS (1974) (describing the global influence of multinational corporations); LOUIS TURNER, MULTINATIONAL COMPANIES AND THE THIRD WORLD (1973) (describing the economic, social, and political influence of multinational corporations on Third World countries).

15. *See* FED. R. CIV. P. 19, 20. As in the earlier human rights cases, plaintiffs allege that the corporate defendant joined in committing a "tort . . . in violation of the law of nations" in order for the ATCA to provide jurisdiction. *Unocal Corp.*, 963 F. Supp. at 890. For example, in the case against Unocal, the district court used theories of joint liability to find that Unocal acted under color of law with the military government, the SLORC, that was widely condemned for its 1988 crackdown and campaign of repression against the pro-democracy movement in Myanmar. *See id.* at 892. Unocal and its executives who violated international law were subject to suit under the ATCA.

> Although there is no allegation that SLORC is physically selling Burmese citizens to the private defendants, plaintiffs allege that, despite their knowledge of SLORC's practice of forced labor, both in general and with respect to the pipeline project, the private defendants have paid and continue to pay SLORC to provide labor and security for the pipeline, essentially treating SLORC as an overseer, accepting the benefit of and approving the use of forced labor.

Id.

> Unocal vigorously den[ied] these allegations . . . and point[ed] to the company's humanitarian projects in Myanmar, such as the construction of schools, animal-breeding farms, and hospitals. In a press conference . . . Assistant Secretary of State for Democracy, Human Rights and Labor John Shattuck stated that "I do not, I want to make very clear, have any information to suggest that Unocal itself uses forced labor. . . . I'm persuaded that [Unocal is] very much trying to avoid under any circumstances the use of forced labor."

Gregory J. Wallance, *Linked to Slavery* Doe v. Unocal *Asks Whether American Companies Should Be Held Responsible for the Human Rights Abuses of the Foreign Governments That Are Their Business Partners, in* PRACTICING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, PLI Order No. B0-001E (June-July 1998).

16.

> Jurisdiction to adjudicate has been generally based on territoriality or nationality . . . . Thus, the defendant's presence, or his conduct or ownership of property . . . within the territory have been considered sufficient for a court to adjudicate the case. . . . A defendant, whose conduct outside the State had a substantial and foreseeable effect within the State . . . has also been considered subject to judicial jurisdiction. . . . States may also adjudicate cases involving domestic law based on protective, universal or passive jurisdiction . . . provided the defendant is present

about governmental immunities.[17] Furthermore, plaintiffs can readily enforce their judgments because they can easily access the assets of transnational enterprises.

Not only are domestic theories of joint liability expanding concepts of private liability for international law violations in the new class suits, but the application of Rule 23 of the Federal Rules of Civil Procedure itself may also affect the development of the substantive human rights being asserted. Classes of human rights victims are asserting jurisdiction in federal court on the basis that their rights were violated as collective entities. Moreover, federal courts are being asked to find and interpret customary international norms, such as cultural and economic rights for groups, that earlier cases against governments and officials did not address. In this procedural posture, the adjudication of collective rights has pushed the margins of what has been considered "fundamental" or "universal" in human rights law.

In both international and domestic contexts, the procedural joinder mechanism is Rule 23. The application of Rule 23 to enforce collective claims expands and solidifies notions of amorphous substantive international human rights law. The result is a dynamic symbiosis of international and domestic law, whereby United States federal court procedure and substantive international law merge into domestic federal common law, which in turn establishes precedent for international tribunals and institutions.[18]

This article focuses on the procedural mechanism of the class action under Rule 23 and its substantive effect in transnational human rights litigation. In a general critique of the class litigation against former president of the Philippines Ferdinand Marcos, Professor Steinhardt summarily dismissed the class action device for mass human rights cases as compromising the autonomy of the human rights victims.[19] However,

in the State."

SCHACHTER, *supra* note 4, at 255-56.

17. *See* Doe v. Unocal Corp., 963 F. Supp. 880, 885-88 (C.D. Cal. 1997) (refusing to dismiss for act of state or Foreign Sovereign Immunities Act).

18. This is a clear example of the transnational public law litigation, described by Professor Koh, in which the transnational nature of the party and claim structure is as focused on obtaining judicial declaration of transnational norms as upon resolving past disputes. *See* Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2371 (1991).

19. *See* Ralph G. Steinhardt, *Fulfilling the Promise of* Filàrtiga*: Litigating Hu-*

there has been no in-depth analysis of the effects of class structure on the development or objectives of substantive or procedural international human rights law. More particularly, there has been no analysis of whether the gains to collective justice justify the sacrifice of autonomy in the class suit. This article attempts to establish the beginnings of an analytical framework, setting forth the practical and theoretical effects of class joinder on the enforcement of the substantive law of human rights.

Moreover, commentators have long questioned the proper function of U.S. courts in the international legal order.[20] Drawing from their history of class litigation, the federal courts' process of interpreting international norms is unique in the arena of international institutions.[21] This article explores the federal courts' role as standard-maker for international class suits within the transnational dialogue between international institutions and federal courts.[22]

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man Rights Claims Against the Estate of Ferdinand Marcos, 20 YALE J. INT'L L. 65, 93 (1995). Professor Steinhardt pointed out difficulties, such as confusion of causation issues and impairment of jury function, impairment of client-counsel relationship, and overreaching by judges during the pretrial and settlement phases. These are common criticisms by opponents of class actions in general. *See, e.g.*, STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV 213 (1990) (book review) [hereinafter Bone, *Personal and Impersonal Litigative Forms*]; Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992) [hereinafter Bone, *Rethinking*]; Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993) [hereinafter Bone, *Statistical Adjudication*]; David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987) [hereinafter Rosenberg, *Individual Justice by Collective Means*]; David Rosenberg, *Doing Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996) [hereinafter Rosenberg, *Individual Justice and Collectivizing*]; David Rosenberg, Comment, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695 (1989) [hereinafter Rosenberg, *Lessons from a Special Master*].

20. *See* Christenson, *supra* note 5, at 225; *see also* CHAYES & CHAYES, *supra* note 5, at 1-28.

21. *See* CHAYES & CHAYES, *supra* note 5, at 122 (interpretive process—applying general language of norm to concrete cases—is characteristic of all legal norms which in U.S. legal system the judiciary is major player while international system does "not have the benefit of much judicial assistance").

22. *See* Koh, *supra* note 18, at 2353 (resulting transnational body of law that blends domestic and international law, as opposed to dualistic view of law). "Robert C. Clark argues that parallel developments on the domestic scene have created a demand for the 'potentially enormous' contribution of law and lawyers in 'stabilizing expectations and reducing the transaction costs of later misunderstandings, conflicts and dispute resolution.' " CHAYES & CHAYES, *supra* note 5, at 123-24.

Part I of the article briefly describes the recent history of class action suits brought on behalf of human rights victims against corporations, exploring more closely how Rule 23's procedural mechanisms are applied to human rights plaintiffs as a practical matter. Part II identifies the role of class action suits in the evolution of human rights law from a focus on individual rights to a focus on collective rights, particularly the cultural and economic rights of groups. This part explores how the structure of the class suit provides a means for developing new substantive international law norms through the judicial pronouncement of class definitions. Part III discusses the collective remedies that are most appropriate for human rights classes and best satisfy the objectives of human rights law, such as developing collective rights upon which claims may be found and allowing victims a voice in the international community. Part IV reviews the lack of enforcement of human rights laws against corporations acting in the global economy and argues that compliance is achieved by permitting individuals access to transnational litigation through class action suits. Part V argues that, in practice and theory, the objectives of human rights law justify collective treatment of human rights claims. Collective adjudication does not compromise rights of class members under rights-based theories of participation, or under human rights law. This article concludes that the United States federal courts play a crucial role in the development of procedural and substantive international law, as well as in the enforcement of those norms through the class action litigation of international human rights violations against private corporations.

I. THE RISING ROLE OF THE CLASS ACTION IN HUMAN RIGHTS LITIGATION

A. Human Rights as a Source of Law in U.S. Courts

There is no requirement in international law that countries provide remedies for individuals whose rights have been violated.[23] Since 1980, however, private persons have sought re-

23. The general rule is that the States afford foreigners access to the courts—but not specifically for international law. *See* SCHACHTER, *supra* note 4, at 240-41. In some cases, a State is explicitly or implicitly obliged to provide legislation and/or remedies in domestic courts for individuals adversely affected by a treaty violation. *See id*. A

dress in U.S. federal courts for human rights violations.[24] Thus, the enforcement of international human rights law through private causes of action in U.S. courts is an exception to the basic postulate of international law that obligations run from the state to other states or organizations of states.[25]

Human rights law has revolutionized the field of international law.[26] In the nineteenth century, human beings were not recognized under international law; their rights were derived from the rights of states. What the state did to its own citizens within its own territory was a matter of "domestic jurisdiction," a private law concept.[27] After World War II, the idea of international human rights law was universally acknowledged, as evidenced by the ratification by forty-eight countries of the Universal Declaration of Human Rights in 1948.[28] Enforcement of

State may meet its obligation through executive or other non-judicial means. *See id*.

24. *See* SCHACHTER, *supra* note 4, at 240. It is more difficult to determine whether international CIL rules require domestic judicial remedies for individuals.

25. *See* JAMES L. BRIERLY, THE LAW OF NATIONS 1 (1996) (describing international law as a "body of rules and principles of action which are binding upon civilized states in their relations with one another"). An example is the Iran-U.S. arbitral tribunal in the Hague, created in 1981 as part of the settlement following the Tehran hostage crisis where U.S. nationals could bring claims against Iran without intercession by the U.S. government. *See* SCHACHTER, *supra* note 4, at 239-40.

26. There are three sources of international law: "1) international agreements, 2) CIL, and 3) general principles of law." *Statute of International Court of Justice*, Art. 38 (1). "In theory, these sources are of equal weight. . . . however, the best accepted sources of what is international law are international agreements. . . . International agreements [may include] treaties, conventions, concordants, and exchanges of notes." BORN, *supra* note 5, at 18. U.S. courts distinguish between self-executing and non-self-executing treaties as a source of private rights in federal law. *See id*. at 19. "A self-executing treaty has immediate legal effect within the contracting States, without the need for implementing legislation or regulations; a non-self-executing treaty is not intended to have direct legal effect, but instead contemplates domestic enabling legislation." *Id*. at 19-20; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3) & (4) & cmt. h (1987).

27. *See* Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After* Filàrtiga v. Peña-Irala, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 70-74 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999).

28. *See Universal Declaration of Human Rights*, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1 U.N. Doc. A/810 (1948); *Standard of Achievement* (visited Aug. 9, 1999) <http://www.udhr50.org/history/default.htm>. "The Universal Declaration was not intended as a binding instrument, and there is no persuasive argument that article 25 is CIL. However, similar provisions have become part of other instruments that are intended to be binding, most prominently the International Covenant on Economic, Social and Cultural Rights." Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1382 (1999).

international human rights law began with Nuremberg,[29] which recognized crimes against humanity and began a form of politics that favored intervention on behalf of individual rights, even when violations of those rights occurred within the boundaries of sovereign states.[30] The body of international human rights law since World War II has "established the principle that international law limits a State's treatment of its own nationals."[31] This international norm paved the way for detailed statements of internationally protected rights.[32]

There is great debate over whether human rights law become part of CIL.[33] This is, in part, because of the difficulty of even defining CIL and human rights. International human rights law has been subject to little judicial interpretation. Indeed, a precise definition of human rights in general is widely debated.[34] CIL is a dynamic body of law, evolving with the in-

29. The Nuremberg trials and the Genocide Convention effectively destroyed the earlier classic conception. *See* INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 61 (Anthony D'Amato and Kirsten Engel, eds., 1996).

30. *See* David Luban, *The Legacies of Nuremberg*, 54 SOC. RESEARCH 779, 787 (1987) (noting the counter pull toward statism); *see also* Ted Baggett, Recent Development, *Human Rights Abuses in Yugoslavia: To Bring an End to Political Oppression, the International Community Should Assist in Establishing an Independent Kosovo*, 27 GA. J. INT'L & COMP. L. 457 (1999) (discussing human rights as the impetus for intervention).

31. Stephens, *supra* note 13, at 588. *See also* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 58-89 (1996) (discussing seven international torts which fall under the ATCA).

32. *See Draft International Declaration of Human Rights*, U.N. Doc. A/777 (Dec. 7, 1948) [hereinafter *U.N. Declaration*].

33. SCHACHTER, *supra* note 4, at 335.

34. *See* Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976), *disavowed by* Filàrtiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) ("There has been little judicial interpretation of what constitutes the law of nations and no universally accepted definition of this phrase."); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (discussing the lack of precedent interpreting the ATCA, especially with respect to the term "law of nations"). The U.S. Supreme Court has not reviewed the modern use of ATCA as the basis for human rights liability. The First and Second Circuits accept the fluid definition set forth in *Filàrtiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) and *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). This is contrasted with the intra-circuit disagreement among three concurring judges in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779-80 (D.C. Cir. 1984) (per curiam). The Fifth Circuit dodged the issue of determining proper definition for law of nations in *Carmichael v. United Techs. Corp.*, 835 F.2d 109 (1988) (affirming dismissal of a British national's allegation under ATCA of torture and imprisonment in Saudi Arabia). The Ninth and Eleventh Circuits have not addressed the issue, although both courts seem to be on the *Filàrtiga/Kadic* sideline. *See In re* Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996).

ternational community and its consciousness.[35] The changing nature of CIL is in part due to its definition, which is both objective (State practice), as well as subjective (*opinio juris*, or the legal and moral expectations of society).[36] Finding sufficient evidence of State practice and *opinio juris* for a CIL norm requires courts to delve into nontraditional analysis. Courts consider whether the norm is incorporated in national constitutions and laws and whether it is frequently referred to in U.N. resolutions and declarations condemning specific human rights violations.[37] Statements by national officials criticizing other States for serious human rights violations, "dictum of the International Court of Justice that obligations erga omnes in international law include those derived 'from the principles and rules concerning the basic rights of the human person,' [and] some [international court] . . . decisions . . . that refer to the Universal Declaration as a source of standards for judicial decision[s]" are sufficient evidence of the existence of a CIL norm.[38]

Where domestic legal systems do provide remedies for violations of international law (either by their constitution or common or statutory law declaring CIL part of domestic law), international human rights law is said to be "internalized" or "incorporated" into domestic law.[39] Heated debate has erupted

35. *See* Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995) (discussing the importance of using "evolving standards of international law" when considering scope of ATCA's coverage); *Filàrtiga*, 630 F.2d at 887 (reasoning that jurisdictional questions " 'must be considered part of an organic growth—part of the evolutionary process' " (quoting Romero v. International Terminal Operating Co., 358 U.S. 354, 360 (1959)). *But see* Tel-Oren, 726 F.2d at 813 (Bork, J., concurring) ("[I]n 1789 there was no concept of international human rights."); *id*. at 789 (Edwards, J., concurring) (intimating a degree of judicial progressiveness by citing the Supreme Court's determination in 1887 that counterfeiting was a violation of the law of nations in *U.S. v. Arjona*, 120 U.S. 479 (1887), but not adopting the Second Circuit's views).

36. *See* SCHACHTER, *supra* note 4, at 338.

37. *See id*. at 336-37.

38. *Id*. at 336 (quoting 1970 I.C.J. 33). The U.N. Charter, to which virtually all States adhere, includes a "pledge" to act "for the achievement of *inter alia*, 'universal respect for, and observance of, human rights and freedoms for all without distinctions to race, sex, language or religion.' " *See id*. The Universal Declaration of Human Rights in 1948 was followed 20 years later by the two international covenants on human rights. *See id*. A body of law exists specifying human rights obligations in detail and providing means of "implementation" to bring about compliance; however, neither governments nor courts have accepted the Universal Declaration as an instrument with obligatory force. *See id*. at 337.

39. *See* Edward M. Morgan, *Internalization of Customary International Law: An Historical Perspective*, 12 YALE J. INT'L L. 63 (1987). With treaties, incorporation de-

over the very existence of international human rights law as part of federal common law, upon which human rights victims may ground their claims in U.S. courts.[40] The history of granting relief to alien plaintiffs under international human rights law in the United States began with the 1980 *Filartiga v. Peña-Irala* case. In *Filartiga*, the Second Circuit revived the two-hundred-year-old Alien Tort Claims Act (ATCA) to find federal court jurisdiction over a suit by an alien against a Paraguayan government official for torture committed in Paraguay.[41] The Second Circuit found that the plaintiffs could sue the official under ATCA because torture violated CIL.[42] After *Filartiga*, other human rights victims sued foreign governments and officials in U.S. courts for offenses such as genocide, torture, summary execution, and disappearances, all of which are considered violations of the "law of nations."[43] It became settled that

pends on whether the treaties are "self executing" and therefore readily capable of direct application by a court without legislation. *See* BORN *supra* note 5, at 19-20. Some countries' constitutions, such as Austria, Germany, and Italy's, expressly provide that CIL is part of domestic law "on the same footing as statutes," but subject to constitutional precepts. SCHACHTER, *supra* note 4, at 242; Blum & Steinhardt, *supra* note 27 (discussing the readiness of some courts (the U.S. courts specifically) to grant private rights of actions for international human rights).

40. *See* Curtis A. Bradley & Jack L. Goldsmith, *CIL as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter *Federal Courts*]; Ryan Goodman & Derek P. Jinks, Filàrtiga*'s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

41. *See* Filàrtiga v. Peña-Irala, 630 F.2d 876, 877-78 (2d Cir. 1980); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

42. *See Filàrtiga*, 630 F.2d at 884.

43. *See, e.g.*, Princz v. F.R.G., 26 F.3d 1166 (D.C. Cir. 1994) (dismissing a Holocaust survivor's suit for money damages pursuant to the Federal Sovereign Immunities Act); Xuncax v. Gramajo, 886 F. Supp 162 (D. Mass. 1995) (nine Gautemalan nationals brought suit against former general and defense minister for atrocities committed under his command); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) (dismissing claims for money damages sought by widow of political opponent of exiled President Jean-Bertrand Aristide of Haiti due to head-of-state immunity); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987) (including "(a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights"); *U.N. Declaration*, *supra* note 32; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221, 222; *American Convention on Human Rights*, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.K/XVI/1.1, doc. 65, rev. 1; *Conference on Security and Co-operation in Europe: Final Act*, Aug. 1, 1975, *reprinted in* 14 I.L.M. 1292 (1975); *American Declaration of the Rights and Duties of Man*, signed May 2,

foreign states and officials were bound by CIL, for which the Act provides jurisdiction.[44]

Since *Filartiga*, human rights plaintiffs have encountered substantial procedural obstacles in suits against corrupt governments or government officials, including immunity doctrines such as head-of-state and sovereign immunity,[45] the act of state doctrine,[46] forum non conveniens,[47] and the virtual im-

1948, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6.

44. *See* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); *In re* Estate of Ferdinand Marcos, 978 F.2d 493, 500 (9th Cir. 1992); s*ee also* Abebe-Jiri v. Negewo, 72 F.3d 844 (11th Cir. 1996); Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam) (discussing the debate among circuits over subject matter jurisdiction versus private right of action); *Federal Courts*, *supra* note 40, at 2262-67.

45. *See* 28 U.S.C. § 1330 (1994) (the Foreign Sovereign Immunities Act of 1976); Siderman de Blake v. Argentina 965 F.2d 699 (9th Cir. 1992) (action for torture and expropriation against Argentina based on commercial activity exception to FSIA and implied waiver of immunity); Doe v. Unocal Corp., 963 F. Supp. 880, 885-86 (C.D. Cal. 1997) (citing Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993)). The late Professor Lillich noted, "The courts repeatedly have rejected arguments that a 'human rights' or 'jus cogens' exception to the FSIA exists, most recently giving them an 'ignominious burial' " in *Princz v. F.R.G.* Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 27 (1995/1996); *see* Princz v. F.R.G., 26 F.3d 1166 (D.C. Cir. 1994) (discussing *jus cogens*); *see also* Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244-45 (2d Cir. 1996) (dismissing for lack of subject matter jurisdiction a suit brought by representative of victims of Pan American Flight 103 bombing against government of Libya). *But see* Hilao v. Estate of Marcos, 25 F.3d 1467, 1472 (9th Cir. 1994) (holding that state actors may not hide behind FSIA when their actions exceed scope of their authority); Hari M. Osofsky, *Foreign Sovereign Immunity From Severe Human Rights Violations: New Directions for Common Law Based Approaches*, 11 N.Y. INT'L L. REV. 35, 44-45 (1998); Jeffrey Rabkin, Note, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2132, 2152 (1995) (arguing both that the FSIA does not mandate dismissal of ATCA claims brought against individuals who have violated "fundamental norms of international law" regardless of whether individual is state actor and that *jus cogens* norms should serve as guide to what constitutes implied waiver under FSIA); Recent Cases, 108 HARV. L. REV. 513, 518 (criticizing the *Princz* court's decision as exceedingly narrow regarding federal jurisdiction over foreign sovereign).

46. *See* Philippines v. Marcos II, 862 F.2d 1355, 1360 (9th Cir. 1988); SCHACHTER, *supra* note 4, at 243-44 (the Act of State Doctrine in the U.S. "accords a conclusive presumption of validity to the foreign Act of State (excluding . . . exceptions . . .)" even if it contravenes CIL); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (rationale includes respect for sovereignty of States in matters over which they have territorial jurisdiction). Deference to sovereign acts of foreign States may not be defensible, however, where CIL clearly prohibits acts such as genocide, systematic racial discrimination, or arbitrary and discriminatory seizures of property. *See* Doe v. Unocal Corp., 963 F. Supp. 880, 894 (C.D. Cal. 1997) (stating in dicta that act of state doctrine would not preclude suit under 28 U.S.C. § 1350 given the high degree of international consensus that *jus cogens* norm violations are internationally denounced, undermining the defendant's arguments that SLORC and MOGE activities should be

possibility of enforcing judgments.[48] Domestic courts have also been reticent to give relief to private persons injured by acts of a government that contravened international obligations vis-à-vis sovereign states, such as those prohibiting use of force against another state or requiring compliance with mandatory decisions of the U.N. Security Council.[49]

However, U.S. courts for the most part have incorporated CIL into the federal common law.[50] The question, then, is to what extent the courts may participate in the development of substantive rights and obligations under CIL in their application of procedural rules. This article addresses this question.

B. Recognizing a Human Rights Class Action

Groups of human rights plaintiffs now stand to influence, and potentially benefit from, the development of federal court

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treated as acts of the state).

47. *See* Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 44-46 (1998); *cf.* Wiwa v. Royal Dutch Petroleum Co., No. 99-7223 (2d Cir. filed June 1, 1999) (citing "'Order' (AI-19)" S.D.N.Y. Sept. 25, 1998, which dismissed ATCA case against foreign corporations on grounds of forum non conveniens); Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Brief for Defendants-Appellees-Cross Appellants, Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 08386 (KMW) (S.D.N.Y. Nov. 8, 1996).

48. To address this problem, thirty-five countries have been negotiating the Convention on Jurisdiction and the Recognition of Foreign Judgments under the auspices of the Hague Conference on Private International Law since 1993. The Hague Conference must approve, and the United States must sign, the Convention. *See* Memorandum from Professor Andreas F. Lowenfeld to The Council through Professor Geoffrey Hazard Re: Proposal for Project on Jurisdiction and Judgments Convention 1 (Nov. 30, 1998), *available at* <http://www.ali.org/ali/1999_Lowen1.htm> (visited June 16, 1999) .

49. U.S. courts have concluded that these are political questions. *See* SCHACHTER, *supra* note 4, at 242-43; *see, e.g.*, U.S. v. Berrigan, 283 F. Supp. 336, 342 (D. Md. 1968).

50. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66 (New York, Harper & Bros. 1854) ("[T]he law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land."). In *Kadic*, the Court declined to extend 28 U.S.C. § 1331 jurisdiction to encompass all alleged violations of international law, therefore leaving an unresolved relationship between section 1331 and violations of "law of nations." *See* Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779-80 (D.C. Cir. 1984) (Edwards, J., concurring) (asserting that § 1331 requires an express or implied remedy from the law of nations but that §1350 provides jurisdiction over violations of the law of nations). The courts in *Filartiga* and *Kadic* dodged the issue by noting that since the ATCA apparently provided the appellants a remedy, there was no need to decide whether a non-statutory based claim of international law violations should be incorporated into U.S. law under § 1331. *See Kadic*, 70 F.3d at 246; Filàrtiga v. Peña-Irala , 630 F.2d 876, 887 (2d Cir. 1980).

class adjudication. For example, the class action brought on behalf of almost ten thousand human rights victims in the Philippines during martial law under Ferdinand Marcos resulted in a settlement of $1.2 billion in exemplary damages and $766 million in compensatory damages.[51] In the first phase of the jury trial, the representative plaintiffs established that Marcos was liable to the class for torture, summary executions, and disappearances through a statistical expert's testimony regarding the extent of the human rights violations based on a sampling of victims in the Philippines.[52]

Similarly, the Second Circuit held that Radovan Karadzic was liable as an individual to the class who brought an action against Karadzic for international wrongs, thus identifying non-state individuals as potential defendants in human rights class action suits.[53] In the case against Karadzic, Croat and Muslim citizens of Bosnia-Herzegovina brought suit under ATCA for genocide, war crimes, and other crimes against humanity, [54] alleging they were victims or survivors of victims of Karadzic's campaign of ethnic cleansing. After the Second Circuit held that Karadzic was subject to suit under ATCA in his private capacity, the district court on remand certified the class and has proceeded into discovery despite challenges to the class.[55]

Following *Kadic*, class actions against corporate entities for

51. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 772 (9th Cir. 1996).

52. *See generally*, Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545, 548-49 (1998).

53. *See Kadic*, 70 F.3d at 242-44 (stating that Bosnian-Serb leader may be found liable for genocide, war crimes, and crimes against humanity in his private capacity); Alan Frederick Enslen, Commentary, Filàrtiga's *Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claims Act with Its Decision in* Kadic v. Karadzic, 48 ALA. L. REV. 695 (1997); Lawrence Newman & Michael Burrows, *International Litigation: The Alien Tort Claims Act*, N.Y.L.J., Dec. 29, 1995, at 3. In 1988, the Fifth Circuit assumed, without deciding, that the ATCA conferred subject matter jurisdiction over private entities who conspired in official acts of torture by one nation against a citizen of another. *See* Carmichael v. United Tech. Corp., 835 F.2d 109 (5th Cir. 1988) (dismissing suit by British plaintiff against American employer for failure to show that employer had conspired with Saudi Arabia against him). The D.C. Circuit had previously held that the ATCA did not cover the conduct of non-state actors. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985); Tel-Oren, 726 F.2d at 775 (Edwards, J., concurring).

54. *See* Doe v. Karadzic, 176 F.R.D. 458, 460 (S.D.N.Y 1997).

55. *See* Doe v. Karadzic, No. 93 CIV. 0878, 1999 WL 6360 (S.D.N.Y. Jan. 7, 1999) (denying motion to certify decision to deny opt out rights for interlocutory appeal); Doe v. Karadzic, 182 F.R.D. 424 (S.D.N.Y. 1998) (denying plaintiff's motion to opt out of 23(b)(1)(B) class).

human rights abuses have been brought in two principle areas: 1) human rights violations related to environmental harm caused by multinational corporations acting with foreign governments;[56] and 2) human rights violations by foreign banks and corporations acting with the Nazi government during the Holocaust.[57]

In 1996, on the heels of Kadic, Burmese farmers brought a class action suit in federal court against Unocal, Total S.A., a French petroleum company, the Myanmar Oil and Gas Enterprise (MOGE), the State Law and Order Restoration Council (SLORC), and individual executives of Unocal.[58] Plaintiffs sought injunctive, declaratory, and compensatory relief for international human rights violations (forced labor, crimes against humanity, torture, violence against women, arbitrary arrest and detention, and cruel, inhuman, or degrading treatment) committed in furtherance of the defendants' Yadana gas pipeline project.[59]

Also in 1996, nearly 900,000 victims and survivors of the Holocaust filed a class action suit against the three largest Swiss banks alleging that the banks participated with the Nazi

56. *See e.g.*, Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 366, 369 (E.D. La. 1997) (on appeal) (involving leader of Indonesian tribe who brought suit against a subsidiary of a U.S. corporation that operates copper, gold, and silver mines in Irian Jaya, Indonesia, alleging human rights and international environmental law violations and violations by security personnel at Freeport's mine which included torture, execution, arrests and detentions, and international environmental torts); Aguinda v. Texaco, Inc. No. 93 Civ. 7527 (VLB), 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994), *dismissed*, 945 F. Supp. 625 (S.D.N.Y. 1996) (dismissing action based on international comity, *forum non conveniens*, and failure to join an indispensable party), *and vacated sub nom.*, Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998). The Amungme people also filed a class action suit in Louisiana district court alleging Freeport "engaged in human rights violations, cultural genocide, and environmental violations through its corporate policies and conduct at the Grasberg Mine, located in Irian Jaya, Indonesia." Alomang v. Freeport-McMoRan, Inc., No. 96-CA-2139, 1996 WL 601431, at *1 (E.D. La. Oct. 17, 1996). The federal district court dismissed the action for lack of subject matter jurisdiction, rejected the defendant's attempt to consolidate the action with *Beanal*, and remanded the action to state court. *See id*. at *9-*10.

57. *See supra* note 3.

58. Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997); *see* Eileen Rice, Doe v. Unocal Corporation: *Corporate Liability for International Human Rights Violations*, 33 U.S.F. L. REV. 153, 153-54 (1998).

59. Plaintiffs alleged that in building offshore drilling stations to extract natural gas, the defendants, through SLORC military, intelligence, and police forces, used violence and intimidation to relocate entire villages, enslave armies living in areas where the pipeline was to be installed, and stole farmers' property. Plaintiffs' claimed they had "suffer[ed] death of family members, assault, rape and other torture, forced labor, and the loss of their homes and property." *Unocal*, 963 F. Supp. at 883.

Regime in plundering the assets of the victims, concealed assets on deposit prior to 1945, and knowingly participated in maintaining profits from slave labor under the auspices of the Nazi Regime.[60] The case settled in late 1998 for $1.2 billion, and notice and distribution of the settlement proceeds to the class members continues today.[61] The class settlement in the Swiss bank cases involves worldwide notice to over 900,000 claimants making up subclasses of victims including Jews, Jehovah's Witnesses, gypsies, homosexuals, and the disabled.

Now new classes of plaintiffs have filed suits alleging they were targets of Nazi persecution and were forced by corporate defendants to perform slave labor during the Holocaust.[62] Other classes have filed similar actions, alleging that German

60. *See* Memorandum of Law Submitted by Burt Neuborne, *In re* Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. June 16, 1997) [hereinafter Neuborne Memorandum]; Letter from Cohen, Milstein Hausfeld & Toll to Potential Class Members of Holocaust-Related Litigation (Apr. 20, 1999) (on file with author). The Swiss banks were described by plaintiffs as the "principle means of the liquidation, disposal and conversion of that wealth into currencies usable by Nazi Germany to purchase its necessary war materials and conduct its extermination of the Jews." *Id.* Banks allegedly knowingly acted as receivers of looted property obtained in commission of "war crimes" and therefore permitted the final consummation of the plunder, knowing that it would be converted into foreign currency to buy war materials. *See* Transcript of Civil Cause for Oral Arguments, *In re* Holocaust Victims Assets CV-96-4849, CV-96-5161, CV-97-461 (E.D.N.Y. July 31, 1997).

61. *See* Settlement Agreement at 9, 13-14, *In re* Holocaust Victims Assets, No. CV-96-4849 (E.D.N.Y., Settlement Jan. 26, 1999).

62. For recent cases filed by Holocaust plaintiffs, see *supra* notes 2, 3. An estimated 8 to 10 million people worked as slave laborers in German factories of which approximately 700,000 are still alive. *See* John Authers et al., *Unsettled Business*, FIN. TIMES (London), Aug. 25, 1998, at 14; *German Ex-Slave Workers Plan Action*, AP ONLINE, Nov. 6, 1998, *available in* 1998 WL 22415808; Ian Traynor, *Schroder Tries to Hammer Out Settlement for Slave Labourers*, THE GUARDIAN (London), Oct. 23, 1998, at 19 (describing a campaign to sue German and Austrian firms that benefitted from slave labor during the Second World War, including: Siemens, BMW, Volkswagen, Daimler-Benz, MAN, and Phillip Holzmann, as well as two Austrian groups—Voest and Steyr-Daimler-Puch). It is estimated that the number of firms against whom allegations have been or will be filed may reach 100. *See* Class Action Complaint and Jury Demand at ¶ 35, Iwanowa v. Ford Motor Co., No. 98-CV-959 (D.N.J. filed Mar. 4, 1998) (class action on behalf of all persons who were compelled to perform forced labor in inhuman conditions for Ford Werke A.G. between 1941-1945); *Companies and The Holocaust: Industrial Actions*, ECONOMIST, Nov. 14, 1998, at 75. Plaintiffs seek disgorgement of all economic benefits that accrued to the defendants as a consequence of plaintiffs' forced labor and compensation for the reasonable value of plaintiffs' services and damages for inhuman conditions. Class Action Complaint and Jury Demand at ¶¶ 38-41, *Iwanowa*, No. 98-CV-959. Factual allegations include collaboration with the Nazis in safeguarding profits for Ford Company and supporting military operations with trucks; *cf.* Class Action Complaint, Pollack v. Siemens AG, No. 98-5499 (E.D.N.Y filed Aug. 30, 1999).

banks, including Deutsche Bank and Dresdner Bank, accepted their stolen money and property, handed over their assets to the Nazis, and financed the building of concentration camps and companies that employed slave labor.[63] Individual Germans, including Siemens, Krupp, Henkel, Degussa, and Volkswagen, have also been individually targeted for allegedly employing slave labor during the Nazi Regime.[64] Separate class actions have also been filed against Austrian and French banks, alleging that they accepted stolen assets from, and gave Jews' and others' assets to, the Nazis.[65] In addition, class action suits have been filed against foreign insurance companies. For example, one class action alleges that Assicurazioni Generali refused to pay on life insurance policies owned by victims of the Holocaust.[66]

This metamorphosis of the class action into a human rights law enforcement mechanism requires courts to examine Rule 23 on a deeper level.

C. Certifying Human Rights Classes under Rule 23(a)

Human rights plaintiffs sue corporate defendants as a class pursuant to the class action joinder device, which device is not available in other domestic courts.[67] The class action is an anomalous procedural mechanism that treats a large group of persons as a single unit for the purpose of litigation.[68] The

63. *See* Simon Wiesenthal Ctr. v. Deutsche Bank AG, BC-302420, (S.F. Sup. Ct. filed Mar. 31, 1999).

64. *See supra* notes 2-3 and accompanying text.

65. Settlements are currently pending with the French banks. *See* Frederic Bichon, *French Banks Craft Accord on Jewish Assets*, Agence France-Presse, Mar. 24, 1999, *available in* 1999 WL 2569848.

66. *See* Notice of Removal of Action, Friedman v. Assicurazioni Generali S.p.A., No. 98-5780, (C.D. Cal. filed July 17, 1998).

67. *See* Detlev F.Vagts, *Restitution for Historic Wrongs, the American Courts and International Law*, 92 AM. J. INT'L L. 232, 234 (1998) ("The American class action finds no counterpart in other countries and the mass judgments that result from the current actions will be seen as crude solutions to complex problems."); *see also* Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 280 (1992) (distinguishing the class action experiences in other countries "in which a public body or collective association activates the process and does not fully assert the rights of all members of the injured class as by 'fluid recovery' "); John G. Fleming, *Mass Torts*, 42 AM. J. COMP. L. 507, 521-24 (1994) (distinguishing class action models of joinder and consolidation in Canada, Australia, England, Switzerland, France, Germany, Belgium, and Greece, as not having binding effects on all parties).

68. *See* YEAZELL, *supra* note 19, at 8.

modern class action suit is a result of the creation of Rule 23 in the 1966 revision of the Federal Rules of Civil Procedure.[69] Rule 23(a) permits the joinder of parties as a class if: 1) the parties are too numerous to be joined individually (numerosity); 2) common questions of law or fact exist within the class (commonality); 3) the class representatives have claims typical of the class (typicality); and 4) the class representatives adequately represent the class's interests (adequacy of representation).[70] In addition to satisfying the above criteria, a class action must fall into one of the three categories defined in subsection (b) of Rule 23. Subsection (b) sets forth the type of class remedy most appropriate given the defendants' resources, the class's allegations of harm, and the plaintiffs' requests for relief.[71]

1. Numerosity

The numerosity requirement is usually satisfied when there are a large number of injured parties.[72] In both *Kadic* and *Marcos*, for example, tens of thousands of alleged victims were joined as a class because they claimed to have been targeted by a common defendant on a massive scale.[73] Similarly, in actions brought against foreign corporate activity, large numbers of plaintiffs alleged similar wide-spread harm.[74] The alleged harm

69. The drafters of the revised rule indicated that they had recast "in more practical terms the occasions for maintaining class actions." *See* FED. R. CIV. P. 23 (amended 1966) (West 1992).

70. *See* YEAZELL, *supra* note 19, at 1-2 (citing FED. R. CIV. P. 23(a) (West 1992)).

71. The first type of action defined in Rule 23(b)(1)(A) is a mass-production version of Rule 19, the necessary-parties rule. FED. R. CIV. P. 23(b)(1). Rule 23(b)(1)(B) allows for certification where there is a limited fund from which to compensate plaintiffs, and an individual member's recovery may preclude recovery for other members. *See id*. The bulk of the cases involves, and most of the controversy surrounds, the remaining two classifications. Rule 23(b)(2), which has accounted for the largest number of class actions, applies to situations in which primarily injunctive or declaratory relief is sought. FED. R. CIV. P. 23(b)(2). Rule 23(b)(3) is available if the case neither satisfies 23(b)(1) nor (b)(2) and the court, after determining whether the common interests of the members predominate over individual interests, concludes that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). The (b)(3) category is available to a class seeking money damages. *See id*.; YEAZELL, *supra* note 19, at 246-47. The types of remedies most appropriate for a class of human rights plaintiffs will be discussed further in Part III.

72. *See supra* notes 59-64 and accompanying text.

73. *See* Doe v. Karadzic, 176 F.R.D. 458, 461 (S.D.N.Y. 1997).

74. *See* Class Action Complaint and Jury Demand at ¶ 20, Snopczyk v. Volks-

often has an economic as well as physical element, such as when an entire indigenous group is displaced or prevented from enjoying the profits of the land due to environmental damage,[75] or an ethnic group is forced to work in corporate factories in subhuman conditions and denied profits or wages from the work.[76] Accordingly, the numerosity requirement should be satisfied in an action where the plaintiffs assert human rights abuses against a common defendant.

2. Commonality

In order to satisfy the commonality requirement of Rule 23(a), there must be a definable group alleging a campaign or policy of human rights abuses.[77] Classes of human rights plaintiffs share a common status as members of an ethnic minority group that has been the target of the alleged harm.[78] Their status as group members at the time of the harm is a common question of fact to all members of the class. Frequently, members of ethnic minorities bear two or more defining characteristics.[79] Objectively, the group at issue must constitute a "non-

wagen A.G., No. 99-CV-0472 (E.D. Wis. filed May 5, 1999) (alleging 350-400 children perished at defendant's *kinderheim*); Class Action Complaint and Jury Demand at ¶ 1, Hirsch v. Fried. Krupp A.G. Hoesch-Krupp, No. 98-DV-4280 (D.N.J. filed Sept. 11, 1998); Class Action and Complaint at ¶ 1, Iwanowa v. Ford Motor Co., No. 98-CV-959 (D.N.J. filed Mar. 4, 1998) (alleging thousands were compelled to perform slave labor).

75. *See* Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 382 (E.D. La. 1997) (the plaintiffs alleged that the corporation's practices "have resulted in environmental destruction with human costs to the indigenous people," but the court held that the allegations did not state an actionable environmental tort).

76. *See* Complaint at ¶¶ 1, 9-10, 21, *Hirsch*, No. 98-CV-4280; Complaint at ¶¶ 1-2, 8, 10, 12, *Iwanowa*, No. 98-CV-959; Complaint at ¶¶ 1, 53-55, 69; Complaint, Pollack v. Siemens AG, No. 98-CV-5499 (E.D.N.Y filed Aug. 30, 1999).

77. Steinhardt, *supra* note 19, at 65. The Marcos litigation was the "first class action to view human rights abuses in effect as mass torts, in which the plaintiffs establish that they are victims of a single orchestrated and illegal policy." *Id*. at 68. Steinhardt identified problems with human rights class actions and advocated the creation of an "international convention for the redress of human rights violations." *Id*. at 69.

78. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 987-88 (1996). The book addresses minority groups that are typically ethnic, racial, religious, linguistic, or national origin in character. "Ethnic" is used as a shorthand reference to all such minorities, whatever their distinctive characteristic. The "term embraces groups as diverse as Muslims of North African background in France, blacks and Jews in the United States, Gypsies in Hungary, Kurds in Iraq or Turkey, [and] Russians in Georgia." *Id*.

79. "No authoritative instrument . . . imposes a definition" of "minorities" within the discourse of international law, and to some degree it is politically disputed. *Id*. at 988.

dominant minority of the population . . . and its members must share distinctive characteristics such as race, religion or language. . . . *Subjectively*, members of this group must . . . evidence a sense of belonging to the group, and evidence the desire to continue as a distinctive group."[80]

The commonality requirement may be satisfied by a number of common questions of law or fact. Claims of international human rights abuses present a common question of law under the jurisdictional elements of the ATCA, the primary basis for subject matter jurisdiction for human rights abuses.[81] The ATCA requires a court to identify a CIL norm and determine whether a plaintiff has sufficiently pled a "tort," or violation of the identifiable human right norm. This determination is a question of law that is common to the human rights class.[82] Federal courts must wrestle with whether the alleged corporate conduct implicates, and ultimately violates, a CIL norm.[83] In *Karadzic*, for example, the common questions included whether the defendant violated CIL by instructing the troops to rape, murder, and abuse and whether he acted with intent to destroy an ethnic or religious group, thereby committing genocide, a clear violation of human rights law.[84]

Whether the corporation, as a private actor, is bound by the CIL norm is another common question of law.[85] Human rights

80. *See id*.

81. *See* Steinhardt, *supra* note 4, at 3-5.

82. The court must determine whether there is an applicable norm of international law, whether it is recognized by the U.S., what its status is, and whether it has been violated. *See* Doe v. Unocal Corp., 963 F. Supp. 880, 890 (C.D. Cal. 1997) (citing *In re* Estate of Marcos, 978 F.2d 493, 500-502 (9th Cir. 1992) (holding that official torture is a *jus cogens* norm)).

83. *See* SCHACHTER, *supra* note 4, at 335-38.

84. *See* Doe v. Karadzic, 176 F.R.D. 458, 461-62 (S.D.N.Y. 1997).

85. The legal issue of private actor liability for violation of international law has been addressed. *See* Sanchez Espinoza v. Reagan, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (dismissing plaintiffs' claims of torture and rape against Nicaraguan Contras because court was "aware of no treaty that purports to make the activities at issue unlawful when conducted by private individuals. As for the law of nations—so called 'CIL'. . . we conclude that this also does not reach private, non-state conduct of this sort."); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring) (stating that the PLO, as a non-state actor and not recognized as a member of the community of nations, had, at most, committed obscure violations of international law for which the PLO could not be held liable). The application of CIL to non-state actors has been discussed elsewhere and is beyond the scope of this article. *See, e.g.*, Justin Lu, *Jurisdiction over Non-State Activity Under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531 (1997); Steinhardt, *supra* note 4, at 7-12.

plaintiffs alleging that the ATCA has been violated by corporate defendants acting in concert with corrupt governments also present common questions of fact regarding whether the private actors' conduct violates CIL.[86] In *Kadic*, a common question of fact was whether the defendant, the self-proclaimed president of an unrecognized Bosnian-Serb entity, violated the law of nations with respect to all plaintiffs by engaging in genocide, war crimes, torture, and summary executions.[87]

The threshold requirement of commonality has been characterized as the "common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable."[88] Accordingly, where human rights plaintiffs allege that the defendant engaged in common course of conduct toward the plaintiffs, the commonality requirement should be satisfied. Moreover, slight differences in class members' positions should not defeat the commonality requirement.[89]

3. Typicality

The analysis of typicality overlaps with the commonality analysis in that it goes directly to the existence of a common question that makes combined litigation appropriate in the first place.[90] The typicality requirement of Rule 23(a)(3) inquires whether the named plaintiff is the right person to bring suit on behalf of the class.[91] The "class representative must . . .

86. *See* Class Action Complaint and Jury Demand at ¶ 32, Iwanowa v. Ford Motor Co., No. 98-CV-959 (D.N.J. filed Mar. 4, 1998) (citing common questions, including whether defendants compelled plaintiffs to perform forced labor; were unjustly enriched by their conduct; whether they violated law of nations; and whether Ford Motor Company is liable for wrongful conduct of Ford Werke A.G.). Finding corporate defendants liable under the ATCA has expanded the reach of international law. *See* Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liabile Under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT'L L. 927, n.157 (1998) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 (1987) ("International law . . . deal[s] with the conduct of states and of international organizations . . . as well as with some of their relations with persons, whether natural or juridical.")).

87. *See* Kadic v. Karadzic, 70 F.3d 232, 241-44 (2d Cir. 1995).

88. Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975).

89. *See In re* American Medical Systems, Inc., 75 F.3d 1069, 1084 (6th Cir. 1996) (stating that plaintiffs must allege a "single disaster or single course of conduct" to meet the commonality requirement) (quoting Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196-97 (6th Cir. 1988)).

90. *See* General Tel. of the Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982).

91. The underlying issue is what should be done if the plaintiff is not the right

'possess the same interest and suffer the same injury' as the class members."[92] Accordingly, characteristics of the class representative are important. Differences in the nature of the proof offered on the class claim and the representative's individual claim may lead to a determination that the typicality requirement is not met.[93] Where the plaintiffs' claims all arise from the same course of alleged corporate conduct, such as acting with a state in the extermination of a collective people, the typicality requirement should be satisfied, either directly or indirectly, by the demonstration of economic harm or slave labor.

Recent concerns of some courts that variations in state laws and causation issues undercut the commonality and typicality requirement do not apply to human rights classes.[94] Variations in state laws are not at issue in cases brought under the ATCA for international "torts."[95] An additional concern is that there may be several causes of harm in mass product liability cases and, thus, typicality may not be present merely because the plaintiffs allege a single source of harm. However, unlike typical mass product liability cases, though the degree and extent of harm inflicted on human rights victims varies from person to person, the proximate cause of all of the alleged harm is the same: the defendant's course of conduct, from Karadzic's policy of ethnic cleansing and the Swiss banks' looting of Holocaust assets to forced labor by World War II corporations and the destruction of indigenous cultures through joint venture pipeline projects with foreign governments.

4. Adequacy of representation

Finally, before the judgment is binding on all members of

person. One answer is to allow the court and plaintiffs' counsel to recruit a replacement. *See* Norman v. Connecticut State Bd. of Parole, 458 F.2d 497, 499 (2d Cir. 1972); MANUAL FOR COMPLEX LITIGATION § 30.16 (3d ed. 1995). The extent of that duty turns on the stage the litigation has reached; courts are less likely to authorize such a recruiting effort at the class certification stage than in cases where, after they have certified a class, it appears that there is something wrong with the named class representative. *See* Payne v. Travenol Lab., Inc., 673 F.2d 798, 812-13 (5th Cir. 1982).

92. *Falcon*, 457 U.S. at 156. The named representative personifies the class: she "plays client" both before and after trial. *See id.*

93. *See id.* at 159 n.15; *American Medical Systems*, 75 F.3d at 1082; *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1296-97 (7th Cir. 1995).

94. *See* Castano v. American Tobacco Co., 84 F.3d 734, 740-43 (5th Cir. 1996); *American Medical Systems*, 75 F.3d at 1085; *Rhone-Poulenc*, 51 F.3d at 1300.

95. *See Castano*, 84 F.3d at 742-43; *Rhone-Poulenc*, 51 F.3d at 1300-01.

the class, the court must determine that the class representative is "adequate."[96] This determination focuses on the "interests" of the class and serves to uncover conflicts of interest between named parties and the class they seek to represent.[97] "The adequacy inquiry tends to merge with the commonality and typicality criteria, which serve as guideposts" for determining whether the class action is economical and whether the named plaintiff's claim and the class claims are interrelated enough for the "interests of the class members to be fairly and adequately protected in their absence."[98] As in the commonality and typicality inquiries, intraclass conflicts may cut against finding there is adequate representation, although differences in strategy or preferences, such as the selection of remedies, will not defeat a finding of adequacy.[99]

The *Kadic* court found that the class representative was adequate since class counsel was qualified and the class mem-

96. Since *Hansberry v. Lee* was decided in 1948, the issue of adequate representation has been elevated to a constitutional safeguard of due process (replacing individual opportunity to be heard). *See* Hansberry v. Lee, 311 U.S. 32, 43-44 (1940); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997). Courts continue to rely on *Hansberry*'s due process principle that, with limited exceptions, one is not bound by a judgment in litigation to which he is not a party. *See* Ortiz v. Fibreboard Corp., 119 S.Ct. 2295, 2301 (1999); *Hansberry*, 311 U.S. at 40. *But see* Woolley, *supra*. In *Rethinking*, Professor Bone argues that the assumption that the American system has always given litigants their personal day in court, absent compelling reasons not to, is wrong. Rather, the American system of adjudication has historically recognized classes of cases in which individuals did not have a strong claim to participate. *See Rethinking*, supra note 19, at 206-31. Part IV will look more closely at how this constitutional safeguard squares with collective claims of human rights groups on a policy and theory level.

97. "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." Amchem Prods. v. Windsor, 521 U.S. 591, 625-26 (1997) (quoting East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)). Professor Yeazell argues that the distinct financial incentives driving (b)(2) and (b)(3) suits result in the two types having different social structures, which account for the different concepts of representation attached to (b)(2) and (b)(3) classes. *See* YEAZELL, *supra* note 19, at 249-66. "Rule 23(b) suggests that interest alone suffices to justify a class action brought under subsection (b)(2) but also requires consent of the class members in an action brought under subsection (b)(3)." *Id*. at 252.

98. *Amchem*, 521 U.S. at 621 (quoting *Falcon*, 457 U.S. at 157 n.13 (1982)). "Typicality appears to be a means to the end of adequate representation, while adequate representation of interests appears to be the end itself." YEAZELL, *supra* note 19, at 251.

99. *See* Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 898-900 (S.D.N.Y. 1975) (discussing conflicts between past and present class members, where those seeking injunctive relief instead of money damages did not overcome certification).

bers collectively sought to establish the defendant's liability.[100] This rather loose inquiry into adequacy did not focus on intraclass conflicts, even though class members claimed distinct injuries, including forced impregnation, rape, torture, and extrajudicial killings.[101] Commonly in human rights cases, defendants engage in a policy or scheme of sequential violations that may affect individuals to different degrees, potentially leading to class conflicts over issues such as the appropriate remedy. For example, in class actions alleging human rights violations related to environmental damage, subclassing could satisfy the elements of commonality, typicality, and adequacy where some victims have not yet manifested full-blown injury.[102] Likewise, in cases such as the Holocaust litigation, in which the defendant corporation may have targeted different groups for different abuses, intraclass conflicts may be resolved by dividing the group into subclasses that share like injuries.[103]

By finding that a human rights class satisfies the Rule 23(a) requirements, U.S. federal courts have recognized a defined class that may adjudicate as an entity and may be entitled to relief as well as bound by a final judgment.[104] In human rights litigation, the group will usually be defined by its common characteristic of ethnicity, religion, culture, or race, as well as by the common harm suffered by that group vis-à-vis the injury to members sharing in the common characteristic of the group.[105] To the extent that these classes seek to enforce

100. *See* Doe v. Karadzic, 176 F.R.D. 458, 462 (S.D.N.Y. 1997).

101. After *Amchem*, the required inquiry appears to be stricter. The Supreme Court found that discrepancies among asbestos-related injuries would lead to inadequate representation where the currently injured and the exposed-only plaintiffs were included in one class. *See* Leading Case, 111 HARV. L. REV. 349, 353 (1997).

102. *See Amchem*, 521 U.S. at 624-27; *see infra* notes 244-48 and accompanying text.

103. *See infra* Part III.D.

104. Class definition also identifies those entitled to notice in a Rule 23(b)(3) action. *See* MANUAL FOR COMPLEX LITIGATION § 30.14 (3d ed. 1995).

105. An example is Jews or Gypsies who claim systematic plundering of assets by corporate defendants on account of their ethnic heritage or indigenous tribes claiming harm to their culture caused by defendants' environmental activities. *See, e.g.*, *Karadzic*, 176 F.R.D. at 460 (defining class of Croat and Muslim citizens who allege they are victims and/or survivors of victims of campaign of terror led by defendant). The MANUAL FOR COMPLEX LITIGATION, warns against using subjective criteria or criteria that depends upon the merits, because "[s]uch definitions frustrate efforts to identify class members, [and] contravene the policy against considering the merits of a claim in deciding whether to certify a class." MANUAL FOR COMPLEX LITIGATION § 30.14 (3d ed. 1995) (citing Simer v. Rios, 661 F.2d 655 (7th Cir. 1981)).

the rights of a group, the class action is a powerful tool in the evolution of collective rights.

II. CLASS PROCEDURE AND THE SUBSTANCE OF HUMAN RIGHTS

A. Substantive Consequences of Class Procedure

This section discusses how the process of judicial certification of a human rights class shapes the substantive claims brought by plaintiffs.[106] The interplay of procedural rules and substantive norms in the area of class actions has been accepted in different contexts but has not been analyzed in the context of human rights law.[107]

Within the bounds of their rule-making authority, federal courts may participate in the process of developing CIL norms through the common law. Courts have significant rule-making authority in procedural matters, which is generally shared with the legislature.[108] Among Article III's proscriptions is the

106. *See* Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 860 (1995) (reasoning that "one need not read very far between the lines to find a substantive impulse underlying the federal courts' handling of mass tort litigation, and, in particular, class action innovations developed to cope with it").

107. The class action has been identified as the procedural cog in substantive tort reform efforts. *See id*. at 870. Large class settlements implement an alternative to the tort system that is responsive to the federal courts' substantive concerns about mass torts.

> [T]hey 1) abolish punitive damages; 2) abolish or curtail claims for fear of future harm; 3) substantially simplify issues of causation with regard to individual claims; 4) adopt categorical compensation formats to even out amounts of compensatory payments; 5) provide for further compensation for actual worsening of conditions; and 6) cap or define the tort litigation costs for defendants.

Id. at 870. "Asbestos litigation has been the prime area in which federal judges have used innovation to achieve essentially substantive goals." *Id* at 862; *see also* Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1332 (5th Cir. 1985) (case filed, but not certified, as a class action).

108. *See* The Rules Enabling Act, 28 U.S.C. § 2072(b) (1994) (requiring that rules of procedure "not abridge, enlarge or modify any substantive right"); s*ee also* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 613 (1997). Much has been written about the balance between judicial authority over "procedure" and legislative power over fashioning rights, obligations, and remedies. *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 951 n.108 (1998) (noting the scholarly debate on the proper scope of rulemaking power vested in Supreme Court under the REA). Scholars have noted the limits to rule-making, including the fact that rules cannot increase predictability but only serve to mask the exercise of discretion by decisionmakers. *See id*. at 948. Moreover, even if rules do confine discretion, such confinement may "serve to prevent just result by the over- or under-inclusiveness of the rules themselves, by their inability to forecast the infinite variety of problems that will arise

concept that the lawful function of judge-made procedural rules is to facilitate deciding cases or controversies.[109] Moreover, international law assumes that domestic courts may interpret substantive norms with a "margin of appreciation," taking into consideration peculiar domestic circumstances, such as the use of a class suit, without betraying the essence of the right in question.[110] As with class treatment of domestic claims, the question is where a court's authority to apply rules of procedure ends and the creation or modification of rights and remedies begins.[111]

The substance-procedure line is murky.[112] Many purely pro-

in their administration." *Id*. at 946.

109. *See* U.S. CONST. art. III, § 2, cl. 3.

110. The Universal Declaration of Human Rights' Preamble refers to the rights it guarantees as "common standard[s] of achievement," which are to be striven towards "by progressive measures." *Universal Declaration of Human Rights*, Premable, U.N. Doc. A/777 (Dec. 7, 1948). The International Covenant of Economic, Social, and Cultural Rights obliges States to recognize the rights in the Covenant "to the maximum of its available resources." *International Covenant of Economic, Social, and Cultural Rights*, G.A. Res. 2200A, 21 U.N. GOAR, 22d Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). Article 2 of the Convention on the Elimination of Discrimination Against Women allows for the use of essentially subjectively determined rules to protect and promote human rights by "appropriate" means. *See* The European Convention on Human Rights, 1953, 213 U.N.T.S. 221; Kinley, *supra* note 10, at 13-14; s*ee also* HOWARD C. YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 13 (1996).

111. *See* Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461 (1997).

112. *See* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281. Professors Hart and Wechsler have suggested that substantive, as opposed to procedural, rules of law are those "which characteristically and reasonably affect people's conduct at the stage of primary private activity." HENRY HART & HERBERT WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1953). However, this definition does not encompass various rules such as statutes of limitations, laws of immunity, elements of damages, and burdens of proof. *See* John H. Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 724 (1974) (proposing that the definition of "conduct" includes the "encouragement of actual activity, the fostering and protection of certain states of mind—for example, the feeling of release"). Professor Ely defined a procedural rule as a rule "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." *Id*. The substantive right "is a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process." *Id*. at 725; *cf*. Guy Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 403 (1977). Over 20 years ago, Professor Hazard observed the synergy between substance and procedure and that "[t]he necessary technique is one of circumspect consideration of the appropriate role of the judicial institution in shaping the substantive consequences of procedures such as those established in Rule 23." Geoffrey B. Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307 (1973).

cedural rules have substantive consequences.[113] The substantive consequences of class action adjudication in modern U.S. litigation are inescapable. Historically, the class action provided a vehicle for social change, aiding the plight of the oppressed.[114] The influence of the class action has been most prevalent in the areas of racial politics, consumerism, and environmentalism.[115] Concerns about racial discrimination and consumer and environmental injuries shared an affinity: victims asserted that "fundamental clogs in social processes would prevent traditional procedural mechanisms involved in individual litigation from naturally righting these wrongs."[116] Each plaintiff-initiated movement stressed the contrast between individual powerlessness and group strength, and each member of the movement looked to the courts for help in gaining redress, turning to group litigation as a means of achieving that redress.[117]

Federal courts clearly have the discretion to determine the grounds for class treatment, the prerequisites of notice and adequate representation, the limitations that should be imposed on the right to opt out, and the conditions under which settlements should be approved.[118] Each procedural inquiry must take into account the substantive "interests" of the group and, to a certain extent, the court's determinations regarding

113. *See* Ely, *supra* note 112, at 700. Also, legal nihilists deny the line exists at all. For a discussion of legal nihilism, see Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

114. *See* YEAZELL, *supra* note 19, at 1. Professor Yeazell locates the development of adjudicative representation in efforts by courts and commentators since at least the seventeenth century to assimilate "group litigation" defined as lawsuits on behalf of or against numerous persons conceived of as a litigating entity. *See id.*; *see also* Bone, *Personal and Impersonal Litigative Forms*, *supra* note 19, at 218.

115. *See* YEAZELL, *supra* note 19, at 244-66 (describing the ways these three social movements interacted with the doctrines of a new class-action rule.) Professor Bone challenges Yeazell's assertion that judicial concern with particular social groups and a persistent tension between "consent-based" and "interest-based" theories of representation have been at the core of representative suit and class action law throughout the modern period. *See* Bone, *Personal and Impersonal Litigative Forms*, *supra* note 19, at 218.

116. YEAZELL, *supra* note 19, at 244.

117. *See id.* at 240-43 (suggesting that if a lawsuit could achieve the same economies of scale as a manufacturer, it could counterbalance the manufacturer's advantages). The class action has been described as a "mass production remedy" for "mass production wrongs." Geoffrey C. Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307, 308 (1973).

118. *See generally*, The Rules Enabling Act, 28 U.S.C. § 2072(b) (1994). Opt-out rights are discussed *infra*, Part V.A.2.

advancement of that substantive interest. For example, a finding that common questions of law and fact do not predominate would effectively destroy (b)(3) treatment and the collective remedies flowing from it. Similarly, requiring individualized notice to all class members in (b)(2) actions may effectively prevent plaintiffs from proceeding because of cost alone.[119] A finding that the representative does not meet the requirement of adequate representation may also extinguish the substantive rights of individuals who are unable to bring claims apart from the class. While arguably a procedural device, the class action must employ substantive compromises, such as theories relaxing the causation requirements found in simple litigation, in order to be effectuated.[120] Class actions have offered a theoretical model for solving some of the more intractable problems of substantive tort law in mass tort litigation.[121]

B. Class Procedure and the Development of CIL

This section deals with the development of the legal aspects of human rights, which is comprised of two basic elements: 1) the legal expression, usually in the form of a legislative statement or judicial pronouncement; and 2) the backing of legal sanction, or the means by which human rights are enforced.[122] Accordingly, this section examines the evolution of human

119. Rule 23(b)(2) class actions do not require notice on the face of the rule, *see* FED. R. CIV. P. 23(b)(2); however, notice may be required by the judge's discretion. *See* FED. R. CIV. P. 23(c)(2).

120. *See* Rosenberg, *Individual Justice by Collective Means*, *supra* note 19, at 561 (describing class action as deviation from the private law adjudicatory ideal).

121. In mass torts, "there may often be a total lack of proof as to whose product affected which class member in the toxic tort case, and thus the most meaningful way of addressing the issue of exposure is with respect to the class as a whole." Shapiro, *supra* note 108, at 930; s*ee also* Marcus, *supra* note 106, at 860, 873-74; Neuborne Memorandum, *supra* note 60, at 19-21 (discussing Swiss bank market share theories); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 855-59 (1984) (proposing class action treatment as method of solving problems of proving causation). Substantive theories employed in class actions to deal with problems of proof are discussed *infra* Part III.C.

122. While the context here is the legal dimensions of human rights, it should be noted that human rights also possess non-legal dimensions, expressed in moral or ethical terms and obligations. Kinley, *supra* note 10, at 4. Professor Kinley identifies five features referred to as the "legal expression and enforcement continuum as it relates to human rights: the formulation of human rights[,] the articulation and definition of human rights[,] the implementation and application of human rights[,] the protection and promotion [of] human rights[, and] the determination of breaches and provision of means for obtaining redress." *Id*. at 18-19.

rights law toward collective rights adjudication, particularly in the recent class actions claiming cultural genocide and indigenous spoliation.

Class treatment, as a judicial expression of human rights norms, affects the alleged victims' substantive rights under international law by giving clout to claims of collective or group rights.[123] Judicial recognition of collective private rights under CIL, through class certification and implementation of class remedies, enables individuals to exercise rights that, due to costs, they would not otherwise enjoy.

Customary international law is expanding to protect previously unprotected rights.[124] The evolutionary and amorphous nature of the body of human rights law leaves the federal courts wide latitude in influencing norm identification. Nontraditional economic and property rights, environmental rights, as well as cultural and social rights of indigenous peoples are involved in the new wave of class actions against corporate entities.[125] In these cases, the judiciary's voice in enunciating collective rights norms through class definitions (as well as fashioning groups remedies) is even more authoritative given that the quest to define human rights in general has not resulted in a settled understanding of universality of collective human rights and leaves much territory to be charted by the court.[126]

123. *See* CHARLES A. WRIGHT ET AL., 19 FED. PRAC. & PROC. JURIS. 2d. § 4509 (1996).

124. For a discussion of the various rights now protected under CIL, see STEPHENS & RATNER, *supra* note 31, at 79-94. The developing body of human rights law now includes condemnation of violence against women and recognition of gender violence as violation of the laws of war, and willingness to recognize "domestic" violence as violation of international war. *See id.* at 88-89; *see also* Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984). "The rights to self-determination of peoples; the individual right to leave and return to one's country; [and t]he principle of non-refoulment of refugees may be regarded as CIL norms." SCHACHTER, *supra* note 4, at 339; *see also International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GOAR, 21st Sess., Supp. No. 16, at 32-38, U.N. Doc. A/6316 (due process rights). Several economic and social rights may be accepted as general international law, such as the right to basic sustenance and public assistance in health, welfare and basic education. ILO practice indicates that trade union rights, including freedom of association are widely accepted. Women's rights to full equality and protection against discrimination are also recognized.

125. *See* Philip Alston & Bruno Simma, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUS. Y.B. INT'L L. 82, 82-85 (1992); Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996).

126. *See generally* Jerome J. Shestack, *The Jurisprudence of Human Rights*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 69-105 (Thomas

The extent to which federal courts should participate in this evolution is debatable, but the fact is that they are currently participating by adjudicating human rights litigation.[127]

"In practice, civil and political rights have almost always been given precedence at both international and domestic levels."[128] However, economic, social, and cultural rights have not received such recognition.[129] In modern international human rights law, the concept of collective or group rights continues to evolve. The collective rights of society or "peoples" has been described as the "third generation" of human rights, based on "fraternity" and requiring new forms of international cooperation.[130] This generation follows behind "the 'first generation' of civil and political rights (based on the idea of 'liberty' and providing protection against state violations of the person), and the 'second generation' of economic and social rights (based on 'equality' and guaranteeing positive access to essential social and economic goods, services and opportunities)."[131] The argu-

Meron ed., 1984); Jerome J. Shestack, *The Philosophic Foundations of Human Rights*, 20 HUM. RTS. Q. 201 (1998). The concept of universality of human rights "flows from the notion that as a human being one is automatically entitled to respect for one's dignity" and constitutes the basis upon which the Universal Declaration of Human Rights was established in 1948. Kinley, *supra* note 10, at 4. Philosophical arguments justify that such rights inhere in the natural condition of being human and that they are part of a transcendental moral code that is necessary to maintain a base stratum of human dignity. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198-99 (1977) (Kantian theories); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 198-230 (1980) (natural law theories). However, claims to universality have been challenged by cultural relativists arguing that the potential existence of human rights is culturally dependent and expressly contingent on relevant legal order. *See, e.g.*, Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 595, 625 (1991) (feminist critique of universality, arguing that human rights impinge differently on women); Adamantia Pollis, *Cultural Relativism Revisited: Through a State Prism*, 18 HUM. RTS. Q. 316 (1996). The Critical Legal Studies movement claims that a state's provision for legal mechanism by which rights may be asserted is contingent on maintenance of whatever form of societal order that state takes. Rights operate as a means by which truly radical political or social change is deflected and deflated. *See, e.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1990). Finally, others advocate that the notion of universality does not mean that human rights are timeless, unchanging, or absolute; rather, any list or conception of human rights is historically specific and contingent. *See* DONNELLY, *supra* note 10, at 1; Diane Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COL. HUM. RTS. L. REV. 1, 5 (1997).

127. *See supra* note 5 and accompanying text.

128. Kinley, *supra* note 10, at 9.

129. *See* Philip Alston, *Economic and Social Rights*, *in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 151-54 (Louis Henkin & John L. Hargrove eds., 1994); *see also* STEINER & ALSTON, *supra* note 78, at 256-57.

130. DONNELLY, *supra* note 10, at 143.

131. *Id.*

ment for collective human rights is problematic, in that human rights are commonly understood to "derive from the inherent dignity of the human person."[132] If human rights are based solely upon one's status as a human being, any rights which arise from the solidarity of a community would not be human rights.[133] The notion of collective human rights therefore requires a radical redefinition of human rights.[134]

Currently, efforts to define collective human rights have not resulted in any concrete norms. At the international level, groups have exercised human rights based upon "international and domestic guarantees ascribed to individuals against discrimination on group-distinctive grounds."[135] For instance, the League of Nations attempted to incorporate into its system the protection of racial and ethnic minorities.[136] Early protection of minority groups, differing in race, language, or religion, sought to secure the right to peacefully coexist alongside the majority, while at the same time preserving the minority groups' distinct characteristics.[137]

The development of collective rights, however, was hindered by the belief that "observance by states of individually based norms would solve the historical problems of oppression and brutality that many minorities had confronted."[138] Based on that belief, the U.N. Charter, the Universal Declaration on

132. *Id*. at 143-44.

133. *See id*. at 144-45.

134. *Cf. id*. at 145, 147. Donnelly argues that collective rights should be "interpreted merely as the rights of individuals acting as members of social groups." *Id*. For example, the right of self-determination of peoples to determine their political status and path of development can be seen as a collective expression of the right to political participation. *See id*. Where people's rights are presented as prerequisites for other human rights, however, this concept is dangerous.

135. Kinley, *supra* note 10, at 10.

136. The Covenant of the League of Nations required "all new States to bind themselves as a condition precedent to their recognition as independent or autonomous States to accord to all racial or national minorities within their several jurisdictions exactly the same treatment and security, both in law and in fact, that is accorded the racial or national majority of their people." *Report of the Committee of Three (Japan, Spain and UK) instituted by the Council of the League of Nations pursuant to its Resolution of March 7, 1929*, LEAGUE OF NATIONS O.J. Spec. Supp. 73, at 42-64, 87 (1929), *reprinted in* LOUIS SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 213-251 (1973) (describing the incorporation of treaties protecting minorities into the League of Nations Guarantee).

137. *See generally Advisory Opinion of the Permanent Court of International Justice*, 1935 PCIJ (ser. A/B) No. 64, *reprinted in* SOHN & BUERGENTHAL, *supra* note 136 at 213-23.

138. STEINER & ALSTON , *supra* note 78, at 187.

Human Rights, and the International Covenant on Civil and Political Rights[139] paid scant attention to minorities as such or, subject to the major exception of self-determination clauses, to collective rights.[140] Since World War II, international decisions have been inspired by a different philosophy—the idea of general and universal protection of human rights and fundamental freedoms rather than protection only for minorities in certain countries.[141] The human rights movements did not produce a universal instrument dedicated to the problems and rights of minority groups until the Declaration on Minorities was adopted in 1992 by the General Assembly.[142] Today, some specific group rights are commonly provided for in international human rights instruments relating to cultural activities, minority languages, religious belief, and self-determination.[143]

Efforts have recently been directed toward developing additional and more detailed normative standards, with more effective and systematic procedures for implementing and enforcing minorities' rights.[144] Along with the work of the international

139. Article 27 of the Covenant on Civil and Political Rights provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." *International Comment on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 36, U.N. Doc. A/6316 (1966). "Article 27 is a limited provision. . . . [Q]uestions remain regarding . . . whether the right to enjoy 'culture' extends to land and resource rights, and whether it effectively establishes rights for human groups as such." Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481, 490 (1992), *reprinted in* PHILIP ALSTON, HUMAN RIGHTS LAW 498 (1996).

140. *See* STEINER & ALSTON, *supra* note 78, at 987.

141. *See id.*

142. *See id.*

143. For example, Articles 19 through 24 in the African Charter on Human and Peoples' Rights, which covers rights to equality, self-determination, property, development, security, and a safe environment, refer to "all peoples" rather than "everyone" or "all individuals," and declares that the rights are exercisable "individually or collectively." 21 I.L.M. 58, 62-63 (1982) The South African Bill of Rights protects the rights to property of a "person or community." S. AFR. CONST. § 25 (adopted May 8, 1996; amended Oct. 11, 1996).

144. "A Working Group of the United Nations Commission on Human Rights has, after many years of slow progress, . . . draft[ed] [a] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities for consideration by the U.N. General Assembly." Kingsbury, *supra* note 139, at 493. The General Assembly Resolution and Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities passed December 18, 1992. 32 I.L.M. 911 (1993). The General Assembly adopted the U.N. Declaration as a reaffirmation that a basic aim of the U.N. is "to promote and encourage respect for human rights and for

community, U.S. federal courts have the unique opportunity to participate in the evolution of CIL toward collective rights norms. Within the process of judicial expression and resolution of class claims, the evolution of collective rights continues.

C. Collective Rights Adjudication and Norm Enunciation

The recent wave of class suits both evidences and contributes to the idea that fundamental human rights may not only belong to individual persons but to classes as well.[145] Apart from recognition through international instruments, judicial recognition of classes grants substantive power to groups to define themselves as rights holders. Human rights claims by non-state groups are valid when articulated as claims by aggregates of individuals who are seeking vindication of the same rights enjoyed by other members of the local society.[146] Groups, such as indigenous tribes allegedly injured by environmental destruction or victims of certain nationalities or ethnic heritage, such as gypsies or Jews injured by the Nazi Holocaust, collectively exercise participation "rights" as they seek group remedies.[147] The judicial decision to define and certify the class of human rights victims confers a type of "property" right to such groups, in that they can aggregate their claims in order to

fundamental freedoms for all." *Id*. at 913; *see also* G.A. Res. 47/135, U.N. GAOR, 47th Sess., Agenda Item 97(b) (1993); Geer, *supra* note 11, at 355-69. "The Council of Europe is considering a European Charter for Regional or Minority Languages, and the European Commission for Democracy Through Law (the Venice Commission) in 1991 proposed that the Council of Europe adopt a European Convention for the Protection of Minorities, implementation of which would be supervised by a European Committee for the Protection of Minorities." Kingsbury, *supra* note 139, at 501 (citing Declaration on Principles Guiding Relations Between Participating States § VII, *reprinted in* 14 I.L.M. 1292, 1295 (1975)).

145. *See* Hari M. Osofsky, *Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 337-45 (1997) (arguing that environmental human rights of indigenous groups have been sufficiently developed to be used as a basis for suits under ATCA).

146. "More difficult problems arise with this domain of discourse [of human rights law] where the claim of the group is couched as something more than simply an aggregate of individual rights claims, or where the rights sought are not demonstrably identical with those enjoyed by the ambient population. In these and other situations . . . the non-state groups . . . may find their claims are opposed by others on human rights grounds." Kingsbury, *supra* note 139, at 502. For example, equality rights "may . . . provide grounds for upholding or for rejecting a particular group claim." *Id*.

147. *See* YEAZELL, *supra* note 19, at 1.

amass financial power.[148] Class status enables dispersed and politically unorganized individuals to present their claims as an organization, thereby dispensing with the costs of creating an organization.[149]

Plaintiff classes in the recent wave of human rights class litigation have the procedural power to allege and possibly enforce norms on the outer boundaries of established human rights. The term "norms" is used in this context in a "generic sense to include a broad class of generalized prescriptive statements— principles, standards, rules, and so on—both procedural and substantive."[150]

1. Cultural genocide and the rights of indigenous peoples

Cultural genocide is defined as harm which is aimed at a group's cultural characteristics.[151] Cultural genocide, or "ethnocide," of indigenous peoples is described as "any action which has the aim or effect of depriving them of their integrity as distinct peoples, or their cultural values of ethnic identities; any action which has the aim or effect of dispossessing them of their lands, territories, or resources; any form of population transfer which has the aim or effect of violating or undermining any of their rights; or any form of assimilation or integration by other cultures or ways of life" imposed upon them by legislative initiative.[152] The group is defined by the members' participation in the tribe or indigenous culture.[153] In such claims, each member's individual harm is subordinated to the group harm suffered by the tribe. Common questions among members as to the extent of the group harm fit well within the parameters of Rule 23's prerequisites for commonality and typicality, based on the defendant's common course of conduct.[154]

148. *See id*. at 6.

149. *See id*. at 248-49.

150. CHAYES & CHAYES, *supra* note 5, at 113. What brings both general and specific norms (for example, those codified in a treaty) "into a single generic category is that they carry[] a sense of obligation." *Id*.

151. *See, e.g.*, Doe v. Karadzic, 176 F.R.D. 458, 461-62 (S.D.N.Y. 1997) (plaintiffs alleging that defendant engaged in ethnic cleansing to rid the area of non-Serbs).

152. Geer, *supra* note 11, at 360.

153. *See Karadzic*, 176 F.R.D. at 460-61 (defining the class nationally, ethnically, religiously, and by fact of rights violations.).

154. Common questions of law may be to what extent the defendant's conduct caused destruction of the group through the attack on cultural characteristics of the

The concept of ethnocide presumes the existence of collective rights held by the group—rights to cultural values, ethnic identities, lands, and resources. "Ethnocide" does not exist in U.N. human rights instruments, although it may be understood as being closely associated with genocide which is outlawed by the Convention on the Prevention and Punishment of the Crime of Genocide.[155] Genocide, the intentional destruction of a group,[156] is considered a human rights violation in CIL, upon which plaintiffs may assert ATCA claims.[157] While the prohibition of genocide is considered a universal norm for which non-state actors may be liable, cultural genocide is more expansive and problematic in the context of corporate liability[158] because plaintiffs must prove scienter.[159] Given the existence of the corporate profit motive and the authorization of the corporate conduct by local governments, cultural genocide may be difficult to prove, but it is not impossible.[160] Corporate intent has been proven by presumptions in other domestic contexts in fed-

class. *See id*. at 462.

155. In Article III of the Draft Convention on the Prevention and Punishment of the Crime of Genocide, in the Report of the Ad Hoc Committee on Genocide,

> the following acts were considered as constituting the crime of 'cultural' genocide: (1) Prohibiting the use of the language of the group in daily intercourse or in schools . . . (2) Destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

SOHN & BUERGENTHAL, *supra* note 136, at 330-31 (quoting *Report of the Ad Hoc Committee on Genocide*, U.N. ESCOR, 7th Sess., Supp. No. 6, at 6, U.N. Doc. E/794 (1948)). During the debate of this article, "it was maintained that such acts would result in losses to humanity in the form of 'cultural contributions', for which it was indebted to the destroyed group." SOHN & BUERGENTHAL, *supra* note 136, at 330-31.

156. Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, entered into force January 12, 1951, provides: "genocide means any of the following acts committed with intent to destroy, in whole or in part a national, ethnical, racial or religious group, as such: a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, 1951, 78 U.N.T.S. 277, 280.

157. *See* Kadic v. Karadzic, 70 F.3d 232, 238-40 (2d Cir. 1996).

158. The court in *Beanal* looked to the Genocide Convention, Article 2(c) to determine if "cultural genocide" would raise the level of CIL and found that CIL did not include genocide of a culture but only the destruction of a group. *See* Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 372-73 (E.D. La. 1997).

159. Interpretation of genocide involves analysis of intent. *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, 1951, 78 U.N.T.S. 277; *see also Beanal* 969 F. Supp. at 373.

160. *See, e.g.*, Doe v. Unocal Corp., 963 F. Supp. 880, 896 (C.D. Cal. 1997).

eral court jurisprudence.[161] Borrowing from such precedent, courts could fashion a body of law under which plaintiffs may state a cause of action for cultural genocide against private corporate defendants.[162]

The notion of "cultural rights" is closely tied with collective rights of peoples. "Cultural rights refer to a community's 'way of life,' but not those aspects of the way of life regulated by other classes of human rights."[163] In a sense, "cultural rights" are a residual, but essential, category because "a community's distinctive way of life typically possesses an important value, at least for its members, and we do see participation in 'culture' as essential to a life of dignity."[164]

"Cultural land rights" of indigenous peoples also encompass collective ownership between tribal peoples and the living ecosystem of their habitat and are the "primary basis of cultural identification."[165] The international community recognizes that indigenous and tribal peoples have the right to exercise control over their destiny and provide the process of development, as it affects their lives, beliefs, institutions, spiritual well-being, and the lands they occupy or otherwise use.[166]

The recognition of group rights in international law stems from the notion that some human rights, such as the right to self-determination, can only be exercised collectively.[167] The

161. Scienter has been proven by inferring intent based on evidence that a corporation aided and abetted a primary wrongdoer. It requires showing the existence of "(1) an independent wrongful act; (2) knowledge by the aider and abettor [corporation] of the wrongful act; and (3) substantial assistance [by the corporation] in effecting that wrongful act." ROBERT C. CLARK, CORPORATE LAW § 8.10.3, n.20 (1986) (*citing* Rolf v. Blyth, Eastman, Dillon & Co., 570 F.2d 38 (2d Cir. 1978) (noting that recklessness satisfies the scienter requirement under 10(b)(5)).

162. The *Beanal* case is currently pending appeal in the Fifth Circuit.

163. DONNELLY, *supra* note 10, at 155.

164. *Id*.; *see also* SOHN & BUERGENTHAL, *supra* note 136, at 330 (describing the development of notion of culture: "[w]hereas race is strictly a question of heredity, culture is essentially one of *tradition* in the broadest sense").

165. Geer, *supra* note 11, at 349-50.

166. *See* Lee Swepston, *The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption*, *in* HUMAN RIGHTS OF INDIGENOUS PEOPLES 24-25 (Cynthia P. Cohen ed., 1998); *see also* Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992) (signed June 13, 1992) (clarifying that rights exist whenever lands have been traditionally occupied and setting forth, in articles 7 and 14, that rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized); *Stockholm Declaration on the Human Environment*, U.N. Doc. A/Conf. 48/14/Rev. 1 (U.N. Pub. E.73, II.A.14) (1973).

167. If a right is to be claimed—that of preserving one's language and culture—it will have to be attributed to the community. *See* Charles Taylor, *Human Rights: The*

class structure provides the mechanism to enforce such rights collectively and may be the only mechanism by which group rights may be enforced.[168]

Plaintiff classes in recent cases have included indigenous groups who have been injured by mining and oil exploration.[169] In *Beanal v. Freeport-McMoRan*, for example, the plaintiff, a leader of an Indonesian tribe, brought suit on behalf of his tribe against a subsidiary of Freeport, a U.S. corporation that operates copper, gold, and silver mines in Irian Jaya, Indonesia.[170] The complaint alleged violations of international environmental law[171] and, in particular, claimed that Freeport's abusive environmental practices resulted in the "demise of the culture of the indigenous tribal people," in other words, "cultural genocide."[172] Though cultural genocide has not traditionally been recognized as a human rights violation under CIL, the *Beanal* court did not dispute that evidence of environmental harm could be used to establish cultural genocide.[173]

Legal Culture in UNESCO, PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 49 (1986), *reprinted in* STEINER & ALSTON, *supra* note 78, at 173-76 (1996) (describing Romanticism's influence on the view of man as a "cultural being who develops his humanity through a language" and knowledge that is expressed in a culture); *International Covenant on Economic, Social, and Cultural Rights*, art. 1, 49 U.N. Doc A/6316 (1967) ("All peoples have the right to self-determination.").

168. *See* Rymn J. Parsons, *The Fight to Save the Planet: U.S. Armed Forces, "Greenkeeping," and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict*, 454 GEO. INT'L ENVT'L. L. REV. 441, 453-54 (1998) (contrasting civil remedies with the adjudicatory responsibilities of international tribunals).

169. *See* Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (oil exploration); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997); Aguinda v. Texaco, Inc., 850 F. Supp. 282 (S.D.N.Y. 1994), *vacated sub nom.*, Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998).

170. *See Beanal*, 969 F. Supp. at 362 (district court dismissed complaint under Federal Rule of Civil Procedure 12(b)(6) after agreeing that the ATCA creates a cause of action for violations of international law). *Beanal* was not considered a class claim because plaintiff failed to file for certification within the 90-day requisite time period. *See id.* at 367. The court in dicta indicated that Beanal had alleged insufficient facts to meet the adequacy of representation requirement. *See id.* at 368.

171. The complaint alleged, "[T]he mine itself has hollowed several mountains, rerouted rivers, stripped forest and increased toxic and non-toxic materials and metals in the river system." *Id.* at 382. In addition, the plaintiffs asserted claims for violations of accepted human rights norms, including violations by security personnel at Freeport's mines. *See id.* at 368-69. The plaintiffs asserted additional human rights claims based upon the environmental damages caused by the defendants. *See id.* at 382-84. Non-genocide human rights violations required state action, and Beanal failed to allege state action. *See id.* at 371.

172. *Id.* at 372.

173. In dicta, the court criticizes the plaintiffs for not connecting their facts with elements of the offense. *See id.* at 373. The plaintiffs in *Aguinda*, 850 F. Supp. at 282,

The international community is increasingly recognizing the special status of indigenous peoples in international law.[174] The second section of the Draft Declaration on the Rights of Indigenous Peoples affirms the right of indigenous peoples to life and existence and, in particular, condemns policies of ethnocide.[175] However, there are as yet no generally accepted definitions of "indigenous peoples" or even "minority" in the international community.[176] Indigenous populations have been disproportionately oppressed and victimized; their "habitats, both culturally and geographically, have tended to be far re-

and *Unocal*, 963 F. Supp. at 880, did not allege violations of international human rights norms related to indigenous groups or other collective rights probably due to the lack of precedent in ATCA litigation for claims of cultural genocide or violations of group rights. *See Beanal*, 969 F. Supp. at 372. However, the facts indicate that such claims could have been pled.

174. Indigenous peoples number over 300,000,000—roughly five percent of the world's total population. *See* Geer, *supra* note 11, at 346. For an overview of the U.N.'s work in the area of indigenous peoples, see Jose P. Kastrup, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 TEX. INT'L L.J. 97, 103 (1997); s*ee also* JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 48-49 (1991); Russell L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994) (discussing developments in international law recognition of indigenous peoples' identity); Markus Schmidt, Book Review, *Coming to Grips with Indigenous Rights*, 10 HARV. HUM. RTS. J. 341 (1997).

175. The U.N. Draft Declaration on the Rights of Indigenous Peoples Article 27 provides that Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used, or damaged without their free and informed consent. *See U.N. Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1993/29, Annex 1.

176. Geer, *supra* note 11, at 346 n.50 (citing *Preliminary Report on the Study of Discrimination Against Indigenous Populations, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 26th Sess., Provisional Agenda Item 10, at 19, U.N. Doc. E/CN.4/Sub.2/L.566 (1972)). Professor Geer adopts a working definition developed by a U.N. study on indigenous populations:

> Indigenous community, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present *nondominant* sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Id. at 346-47 (citing Jose R. Martiniz Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, at 29, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1987)).

moved from the 'corridors of power.' "[177] Therefore, where classes of indigenous peoples are defined as a litigative entity, power is granted to groups where little or none has existed.[178] By allowing a tribe or other group bound by common ethnic and cultural characteristics to enforce these cultural rights to group existence, U.S. courts effectively expand international concepts of collective rights violations.

2. The Holocaust cases and collective economic rights

Class action claims of other group rights, such as economic and property rights brought by the plaintiffs representing victims of the Holocaust, also allow for the expansion of substantive human rights. In claims brought by survivors of the Holocaust, Swiss banks were accused of collaborating with the Nazi government in looting and plundering property of the Jewish victims, accepting the laundered assets, concealing profits made from dormant accounts deposited by the victims, and knowingly financing the Holocaust through loans to the Nazi government.[179]

While economic rights have not traditionally been recognized as fundamental human rights,[180] indigenous spoliation may provide an actionable claim when brought in a class action because the exercise of universally accepted fundamental human rights of individuals depends upon the continued existence of the group that is threatened by indigenous spoliation.[181] Indigenous spoliation is defined as the destruction of a

177. Christian Bay, *Human Rights on the Periphery: No Room in the Ark for the Yanomani?*, *in* HUMAN RIGHTS IN THE WORLD COMMUNITY 124, 127 (Richard P. Claude & Burns H. Weston eds., 1992) (explaining that wide-scale ramifications of destruction of an indigenous people puts every individual's survival at stake when ethnocide is in progress by way of destroying the natural habitat or the religious faith or the needed privacy of an indigenous people for the purpose of "development").

178. *See* Geer, *supra* note 11, at 335-41.

179. *See supra* notes 60-61 and accompanying text.

180. *See supra* notes 80-83 and accompanying text.

181. However, alleging that "commercial" conduct rises to the level of a violation of CIL for the purposes of ATCA is a difficult position. Plaintiffs pointed to the trial of two bankers and industrialists for "commercial conduct" that aided the Nazis in committing genocide and concealing profits. *See* Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 413-14 (1998). The only private banker tried under the Nuremberg Charter, Karl Rasche, Chairman of Dresdner Bank, was tried and convicted at Nuremberg for war crimes and crimes against humanity. *See id.* at 414-17; *see also The Ministries Case*, *in* XIV TRIALS OF WAR CRIMINALS 621-22 (Rasche and Emil Puhl were tried jointly with 19 other defendants). The defendants in the Swiss bank cases argued that the sale of money or credit

state's endowment, the laying waste of the wealth and resources belonging by right to its citizens, or the denial of their group heritage.[182]

Judicial recognition of class status for groups of Holocaust survivors' and families' claims reinforces the concept that groups possess certain collective economic interests, without which the group's right to exist is threatened. Jewish and Gypsy victims seek relief for the demise of their heritage caused by the defendant's commercial conduct. In turn, their common ethnicity provides the basis of procedural requirements because the representative plaintiff partakes in the common characteristic of the group, which provides class status and may provide the power to claim such collective harm.[183] While merely alleging group harm does not automatically make such harm a violation of CIL, without the class structure the claims of systemic harm could not be brought at all.[184] Indeed, class claims of collective economic rights may allow for a more accurate assessment of systemic harm done to the group and actually provide remedies that better address the class-wide-injury.[185]

In sum, since the harm under the ATCA must be stated as

did not violate CIL, even where the financial institution knew that the recipient of these services was utilizing the services as part of an ongoing war crime or crime against humanity. *See* Defendants' Reply Memo in Support of Defendants' Motion to Dismiss the International Law Claims for Failure to State a Claim at 26, *In re* Holocaust Victim Assets, No. CV-96-4849 (E.D.N.Y. July 9, 1997). The banks also argued that the CIL norms in place in the 1930s or 1940s were not violated. It should be noted that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed." *Universal Declaration of Human Rights*, Art. 11(2) U.N. Doc. A/777 (1948); Walter J. Rockler, *Prosecuting Bloodless War Crimes*, 18 LITIG. VOL. 2, at 18-21, 59-60 (1992).

182. *See* NDIVA KOFELE-KALE, INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES 111-63 (1995) (characterizing indigenous spoliation as a breach of international customary law of fiduciary relations); Ndiva Kofele-Kale, *Patrimonicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 45, 56-61 (1995).

183. *See* Julia Collins, *Stuart Eizenstat: Taking on the Unfinished Business of the Twentieth Century*, HARV. L. BULL., Summer 1999, at 18 ("The restoration of communal property is providing infrastructure for the reawakening of Jewish and Catholic communities.").

184. *See* Beanal v. Freeport-McMoRan, Inc. 969 F. Supp. 362, 373 (E.D. La. 1997) (holding that without class certification, the named plaintiff had no standing to sue on behalf of the group and also dismissing the claim of cultural genocide).

185. *See* Rosenberg, *Individual Justice by Collective Means*, *supra* note 19, at 587-89.

a violation of CIL, courts have the unique opportunity to not only "find" that the human rights norms evidenced by state practice and *opinio juris* exist in a given case, but, in defining the rights holders, also participate in the development of the international society's consciousness regarding group rights. Thus, courts create *opinio juris*, the psychological component of international law.[186] When this component is added to the evolving practice of states, the combination of psychological and material elements arguably constitutes binding CIL.

As federal courts draw from CIL sources to define the validity of the class, one may question whether the collective rights being defined and adjudicated are "new" human rights or simply rights that grow out of traditional human rights norms. In any event, the dynamic nature of CIL allows domestic court procedure, through the certification of class actions, to become part of the transnational public law discourse through which international human rights norms are developed. When domestic courts are willing to give litigative status to collective claims of human rights, "utility, stasis, internalization, social pressure, moral compulsion, and fear of punishment," the courts may then contribute to the creation of new norms that carry a sense of legal obligation.[187] The interpretation, elaboration, application, and, ultimately, enforcement of international rules is accomplished through a process of (mostly verbal) interchange among interested parties. The federal courts participate in that process. The judicial interpretation of substantive human rights of groups through the process of class definition is, therefore, one aspect of the legal dimension of the developing human rights law.[188] Also present in class adjudication is the granting of a class remedy to enforce such rights, thus giving substantive teeth to the legal norm.

Class adjudication of human rights claims, both by recognition of the class status of claims holders and by the granting of

186. *See* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT 60 (1980) (arguing for the "presentation" of norms).

187. "In contrast to other norms, legal norms have a relatively high degree of formality [and are] often authoritatively stated in formal instruments." CHAYES & CHAYES, *supra* note 5, at 114. "The production of legal norms is linked to the apparatus of governments, and compliance often involves public coercive action," and almost all legal norms carry an obligation of obedience. *Id*. at 116; *see* FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISION: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL AFFAIRS 123-24 (1989).

188. *See* CHAYES & CHAYES, *supra* note 5, at 118-23.

relief to the group, expands the categories of international norms being developed in U.S. courts.[189] The next part will explore the class remedies available to persons whose human rights are violated by corporate conduct.

III. COLLECTIVE REMEDIES FOR COLLECTIVE RIGHTS

A. The Role of Remedy

The legal status of human rights groups represented by a plaintiff class depends upon the legal sanction granted to the class.[190] Enforcement of human rights has been the obsession of proponents in the twentieth century; some have questioned the existence of the rights altogether when there are no measures for enforcing them.[191] Indeed, it is well accepted in rights theory that where there is no remedy for a claim of right, the existence of the correlative right is tenuous at best.[192] The imposition of obligations within a legal framework therefore gives rights practical authority and places interests on a higher plane of legal prescription.[193] In a class action human rights case, once it is determined that international law binds the private corporate actor to respect human rights, then the granting of a remedy solidifies the corporation's legal duty. Accordingly, when a group remedy is enforced through the class action suit, the group's collective rights are grounded in a legal norm.[194]

Particularly where collective rights are being adjudicated, viewing the remedy procedurally as a remedy for the *group* seems more appropriate than viewing the remedy as addressing individual claims in the aggregate.[195] Treating the class as

189. *See, e.g*, *Beanal*, 969 F. Supp. at 362. In its analysis of the motion to dismiss for failure to state a claim, the court wrestled with the question of whether an identifiable human right to a clean environment exists as CIL. *See id*. at 383-84.

190. *See* Kinley, *supra* note 10, at 3.

191. *See generally* Rutti Teitel, *Human Rights Genealogy*, 66 FORDHAM L. REV. 301, 305-06 (1997).

192. *See* Kinley, *supra* note 10, at 15; *see e.g.*, WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 35-40, 56-60 (1964) (distinguishing between "true" rights (which are rights as "claims") and "privileges" (which are rights as interests or goods or even demands, which may operate at level of persuasion in policy debates)).

193. *See* Kinley, *supra* note 10, at 8.

194. *See* CHAYES & CHAYES, *supra* note 5, at 115-18 (defining legal norm).

195. The "entity model" views the entity as the litigant and the client and treats the class action not as an aggregation of individuals but rather as an entity in itself for the purposes of determining the nature of the lawsuit. *See* Shapiro, *supra* note 108, at

an entity "does not deny the class member the opportunity to seek private advice or to contribute in some way to progress," but it severely limits some aspects of individual autonomy, including the choice to move in or out of the class or be represented before the court by counsel of one's own choice.[196] This "entity model" fits the human rights case in which the litigant is a cohesive group possessing collective rights.[197]

B. Rule 23 Remedial Creativity

1. Rule 23(b)(1) and (b)(2) remedies

Rule 23 allows a wide range of creativity for collective remedies for entities.[198] Mandatory class actions under 23(b)(1) and (b)(2) best adhere to the entity model where the class as a whole is the litigant. Rule 23(b)(1) and (b)(2) actions are effective in assuring class recovery when plaintiffs are not adequately distinguishable from the class because the plaintiffs and procedural posture of the claims are too similar to allow opt out.[199]

Compensation through a mandatory (b)(1)(B) class is available where the class demonstrates that the fund available from the defendant is insufficient to satisfy the aggregate of all claims.[200] The process of allocating compensation from a "lim-

918-19. In contrast, the aggregation model "sees the various joinder devices . . . as essentially techniques for allowing individuals to achieve the benefits of pooling resources against a common adversary . . . and the individual surrenders as little autonomy as possible." *Id*. at 918. For example, the individual "retains his own counsel, retains the right to leave the group before, during, and after the litigation, and can insist on playing a significant role in operations of the group" if he decides to remain. *Id*.

196. *See id*. at 919.

197. Croat Muslims, an indigenous tribe, or Jewish victims of the Holocaust are examples of cohesive groups possessing collective rights. Given the opportunity, the members of the group of human rights victims would usually choose to be treated as an entity, with its consequent averaging devices such as class action adjudication, either by settlement or through an opt-in procedure for class trial. *See* Rosenberg, *Individual Justice and Collectivizing*, *supra* note 19, at 214-16 (pointing out that the concept of individual justice embraces a rational-choice notion of self-determination, wherein an individual confronting uncertainty prefers the process option that maximizes expected personal utility from tort liability).

198. *See generally* CHARLES A. WRIGHT ET AL., 7B FEDERAL PRACTICE AND PROCEDURE § 1784, at 78-79, 86-88 (2d ed. 1985) (arguing that federal courts have broad equitable power to devise novel remedial approaches in class actions).

199. *See, e.g.*, Doe v. Karadzic, 182 F.R.D. 424, 426 (holding class certified under Rule 23(d)(5) grant of narrow discretionary power).

200. *See id*. 182 at 426-27.

ited fund" must address any conflicting interests between members and assure that the claimants identified by a common theory of recovery are treated equitably among themselves.[201] Where such cohesion exists, subordinating individual rights to participate or opt out are justified.[202] For example, in *Doe v. Karadzic*, the court denied individual plaintiffs the right to opt out of the (b)(1)(B) mandatory class on the ground that the potential withdrawal would jeopardize potential class recovery.[203]

Rule 23(b)(2) suits are most suitable for the enforcement of public laws, including human rights law.[204] When the alleged human rights violations are widespread, the class action device provides an effective remedy. The court will have the power to monitor obviation of illegal conduct "in contrast to a mere declaration of abstract rights for an individual case, which is only binding as to the specific plaintiff and has, at best, a limited stare decisis effect."[205]

Rule 23(b)(2)—indicating that it is "appropriate" to grant final injunctive relief or corresponding declaratory relief with respect to the class as a whole where the party opposing the class has acted on grounds generally applicable to the class—underscores the idea that the legal system aspires to treat all similarly situated persons alike.[206] If an actor has treated a group of persons unlawfully, it is appropriate that, if required

201. *See* Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2316-19 (1999); *In re* Asbestos Litigation, 90 F.3d 963, 973-74 (5th Cir. 1996). *Fibreboard* was remanded by the Supreme Court in light of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). *See Fibreboard*, 119 S. Ct. at 2295.

202. *See infra* Part V.A.2 for a discussion of opt out rights.

203. *See Karadzic*, 182 F.R.D at 424-28 (denying motion for interlocutory appeal on issue of motion to opt out and stating that there is no due process right to opt out of (b)(1)(B) class). The court also rejected the moving plaintiffs' due process arguments. *See id*.

204. *See* YEAZELL, *supra* note 19, at 249.

205. 5 NEWBERG ON CLASS ACTIONS § 25.25 (3d ed. 1995) [hereinafter Newberg].

206. *See* YEAZELL, *supra* note 19, at 257; *see also* Doe I v. Unocal, No. CV 96-6959, 1999 WL 819698 (C.D. Cal. 1999) (denying class certification on the ground that plaintiffs had no Article III standing). In *Unocal*, the plaintiffs sought class-wide relief in the form of a Rule 23(b)(2) injunction ordering the corporate defendants to cease payments to the military government and to cease their participation in the joint enterprise until the resulting human rights violations ceased. *See id.* at *6. The plaintiffs also sought an injunction "preclud[ing] Unocal from selling its shares to a corporation which [would] not waive any objections to th[e] court's exercise of personal jurisdiction or prohibit the transfer of Unocal's interest to any entity which [would] not agree to be bound by the terms of the Court's injunction." *Id*. The plaintiffs also suggested "that Unocal might be ordered to disgorge its profits from the pipeline." *Id*.

to mend his ways, he must mend them as to all.[207] Where corporate defendants have caused harm to a group of similarly situated persons—similar because of their common ethnicity or minority status, location at the time of the abuses, or type of harm suffered—then class injunctive relief is appropriate. In considering (b)(2) certification of the human rights class action against Unocal, the court found that the group of residents from the Tenasserim region of Burma which made up the punitive class were so similarly situated because they sufficiently showed that they were suffering the adverse effects of the alleged human rights abuses.[208] The court also found that the plaintiffs could be subject to a "credible threat" of future injury due to the alleged ongoing human rights abuses caused by the corporation.[209] Particularly where the corporate defendant possesses the means to remedy the harm as to all the members, for example, by environmental clean-up, the (b)(2) class structure is well suited.[210]

The representatives of the proposed class must demonstrate standing to seek the requested injunctive relief even prior to the determination of Rule 23's requirements.[211] The district court rejected the plaintiffs' argument in *Unocal* that they automatically had standing to seek injunctive relief because they had standing to pursue claims for damages.[212] The class representatives must demonstrate that a causal link exists between the group's injury in fact and the alleged conduct of the defendant.[213] Moreover, the scope of the injunctive relief must redress the group harm; where class-wide relief requires additional parties not within the court's jurisdiction in order to redress the harm caused by the human rights violations, injunc-

207. YEAZELL, *supra* note 19, at 257; *see also* Bone, *Statistical Adjudication*, *supra* note 19, at 569 n.20 (stating that a (b)(2) class action may be used for structural relief, such as a school or institutional reform suit). *But see* Deborah L. Rhode, *Class Conflict in Class Actions*, 34 STAN. L. REV. 1183, 1188-91 (1982) (stating that although liability issues may be common to the class in structural relief cases, there can be serious class conflict at the remedy stage).

208. *See Unocal*, No. CV 96-6959, 1999 WL 819698, at *4-*5.

209. *Id*. at *4.

210. Aguinda v. Texaco, Inc., 850 F. Supp. 282, 283 (S.D.N.Y. 1994).

211. *See Unocal*, No. CV 96-6959, 1999 WL 819698, at *2. *But see* Ortiz v. Fibreboard Corp., 119 S.Ct. 2295, 2307 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997) (holding it is appropriate to reach Rule 23 requirements first if they are logically antecedent to Article III concerns).

212. *See Unocal*, No. CV 96-6959, 1999 WL 819698, at *5.

213. *See id*. at *2.

tive relief may not be appropriate.[214] The (b)(2) class requires a strongly homogenous unit, since the remedy is a single, unitary injunction that directly benefits the class.[215]

Where plaintiffs seek recovery under CIL, the (b)(2) class provides a procedural means for such a goal. For human rights victims seeking relief as a group, finding a single "voice" is, at times, more important than any monetary compensation.[216] Few fora offer an institutionalized pronouncement of legal norms as does the (b)(2) class remedy. Moreover, where the deterrence of harm by corporate defendants and corrective justice for the victims provides greater benefit than the preservation of individual rights to participate, which likely will not be exercised on a practical level, there is a strong case for collectivization of human rights claims.[217] Particularly where the right to individualized adjudication will not exist practically for victims, given the choice, the reasonable human rights plaintiff would choose the aggregate claim treatment.[218]

2. Rule 23(b)(3) class remedies

Subsection (b)(3) classes provide for monetary relief and require heightened scrutiny of whether intraclass conflicts exits between members' interests.[219] Homogeneity between interests in the (b)(3) class is more difficult to achieve at the damage calculation stage; however, many innovative collective remedies, such as fluid recovery, sampling, and averaging of damage awards, have been applied to (b)(3) classes to, in effect, structure a group remedy to fit the group right being enforced.

Rule 23(b)(3) provides for class certification when the damages sought are primarily monetary and common questions of law or fact predominate, as in the Holocaust survivors' suits for disgorgement of profits and compensation for slave labor.[220] Where there are many victims seeking monetary compensation

214. *See id.* at *7 (finding that if an injunction were issued to enjoin Unocal, other companies not parties to the suit would resume Unocal's enjoined activities).

215. *See* Bone, *Statistical Adjudication*, *supra* note 19, at 569 n.20.

216. *See supra* notes 169-73 and accompanying text.

217. *See infra* Part V.B.2. for discussion on deterrence.

218. *Cf.* Rosenberg, *Individual Justice and Collectivizing*, *supra* note 19, at 252-53.

219. *See* Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997) (stating that the predominance factor requires more than shared experience).

220. *See* FED. R. CIV. P. 23(b)(3).

for human rights abuses in the past, such as in indigenous spoliation claims, a (b)(3) class may be the best procedural posture for the class members.[221]

Again, as in (b)(2) classes, the calculation of damages becomes procedurally less difficult when the (b)(3) class is viewed as an entity seeking a group remedy rather than individual relief. Where there are discrepancies between injuries to the individual members, the class structure provides sampling and averaging. Courts are authorized to use creative methods for calculating damages for the group when individualized consideration is impractical.[222]

Fluid recovery is one form of collective monetary relief that may be used in human rights class actions. Fluid recovery distributes damages in class actions involving small individual claims, where the small amounts at stake make it administratively impractical to distribute damages on an individual basis.[223] Fluid recovery simplifies the class action by aggregating damages suffered by a class in suits where "the [injured] individuals are unlikely to prove their claims individually or cannot be given notice."[224] Also, where there may be a surplus of

221. Rule 23(b)(3) classes are usually used where there has been a "mass tort in which there are a large number of victims, all of whom have suffered, or are threatened with, substantial injury as a result of the defendant's conduct and who would be likely (if the class action format did not exist) to bring individual actions seeking redress." Shapiro, *supra* note 108, at 926-27.

222. *See* MANUAL FOR COMPLEX LITIGATION § 30.47 (3d ed. 1995) (stating that the creations of funds and schedules of compensation are determined by aggregate procedures); *see, e.g.*, Lindsey v. Dow Corning Corp., 174 F.3d 203 (11th Cir. 1999) (disease compensation program that provides compensation according to a specified schedule operated by a Claims Administrator who may in turn hire claims officers); *In re* Silicone Gel Breast Implant Prods. Liab. Litig., CV92-P-10000-S, CV-94-P-1158-S, MDL No. 926, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) (holding class certified as a 23(b)(3) class); Breast Implant Settlement Agreement §§ III.C, VI.A, *In re* Silicone Gel Breast Implant Prods. Liab. Litig., CV92-P-10000-S, CV94-P-1158-S, MDL No. 926 (N.D. Ala. Sept. 1, 1994).

223. *See generally* 2 NEWBERG, *supra* note 205, §§ 10.16-10.19; WRIGHT ET AL., *supra* note 198, § 1784, at 82-85 (discussing fluid recovery); Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Act*, 80 COLUM. L. REV. 299, 299-302 (1980) (noting that small-claimant class actions serve deterrence rather than compensation goals).

224. Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 721 n.265 (1999). The Supreme Court has not passed on the fluid recovery issue. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172 n.10 (1974). Congress on the other hand has appeared to be sympathetic to fluid recovery in certain situations. *See* The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c-15d (providing that state attorneys general may sue for "aggregate damages" sustained by citizens of

money recovered, fluid recovery concepts would allow for the creation of a fund earmarked to further agreed-upon goals of the human rights litigation.[225] Fluid recovery is consistent with the objectives of human rights litigation—deterrence of corporate abuse,[226] disgorgement of profits,[227] and compensation.[228]

Sampling is another innovative method for apportioning damages to human rights groups. Sampling applies statistical distribution to a large population of similarly situated cases.[229] The members of the class receive average outcomes, yet their allegations raise issues that vary among group members.[230] In a sense, sampling bears some resemblance to the mandatory class action under Rule 23(b)(1), in that both respond to a necessity for aggregate treatment. Rule 23(b)(1), however, seeks to avoid the unfairness associated with certain types of remedial externalities, whereas sampling is designed to achieve judicial economy gains and facilitate lawsuits by reducing transaction and delay costs. [231] The use of a "special master" provides another creative means for dealing with a group's large damage awards.[232]

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their states based on "reasonable system of estimating aggregate damages").

225. *See* CAL. CODE CIV. P. § 384 (West 1999) (providing that "unpaid residuals in class action litigation are to be distributed, to the extent possible, . . . in a manner designed either to further the purposes of the underlying causes of action, or . . . to promote justice for all Californians").

226. *See infra*, Part V.B.2.

227. *See* Iwanowa v. Ford Motor Co., No. 98-CV-959, 1999 WL 719888 (D.N.J. Sept. 14, 1999); Complaint, Pollack v. Seimens AG, No. 98-CV-5499 (E.D.N.Y. filed Aug. 30, 1999); Complaint, Hirsch v. Fried. Krupp. AG, No. 98-CV-4280 (D.N.J. filed Sept. 11, 1998); Complaint, Gross v. Volkswagen, No. 98-CV-4104 (D.N.J. filed Aug. 31, 1998); Class Action Complaint, Burger-Fischer v. Deguss AG, No. 98-CV-3958 DRD (D.N.J. filed Aug. 21, 1998); Neuborne Memorandum, *supra* note 60, at 3, 11-12.

228. *See* Simer v. Rios, 661 F.2d 655, 676 (7th Cir. 1981) (stating that the acceptability of fluid recovery must be determined on a case-by-case basis while holding that it could not be applied on these facts).

229. *See, e.g.*, Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998) (upholding the use of sampling to determine damages).

230. *See* Bone, *Statistical Adjudication*, *supra* note 19, at 564, 605 (squaring sampling with rights-based theory).

231. Sampling was effectively used in the Marcos human rights litigation. *See generally* Hilao v. Estate of Marcos, 103 F.2d 767, 782-84 (9th Cir. 1996).

232. A special master has also been appointed in the Swiss Bank Settlement to manage distribution of damages. *See* Swiss Bank Settlement, *In re* Holocaust Victims Assets, No. CV 96-4849 (E.D.N.Y., Settlement Jan. 26, 1999); Letter from Cohen, Milstein, Hausfeld & Toll, *supra* note 60 (Judah Gribetz has been appointed special master by the court in order to work out the fairest plan of allocation of settlement funds); Marilyn Henry, *Swiss Banks to Notify Potential Recipients*, JERUSALEM POST, May 27, 1999, at 5. Judah Gribetz has scheduled a "fairness hearing" for November 29, 1999, at

While sampling and fluid recovery may have a skewed effect on damages because they imperfectly allocate the total damage figure by distributing damages based upon averages, these creative remedies realize effective deterrence goals.[233] Sampling complements collective human rights claims[234] and, by treating substance and procedure as a single mechanism, enforces the human rights that CIL is meant to advance.[235] Sampling does not violate anyone's rights if the outcomes it produces are consistent with the moral theory that supports the substantive law, such as corrective justice theories of tort law, because it focuses on restoring the moral equilibrium that existed between the corporate wrongdoer and the human rights victim before the wrong occurred.[236]

C. Class Action Solutions for Problems of Proof

Problems of proof often prevent plaintiffs in international human rights cases from obtaining relief. The class action model provides solutions for problems of proof that may arise in mass human rights cases.[237] For example, without the class action device, corporate activity designed to conceal evidence may prevent adequate discovery for the framing of issues.[238]

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which any survivors may comment on allocation of funds. Public forums will also be held in Israel, the United States, Europe, South America, and Australia to solicit comments. *See* Marilyn Henry, *Swiss Banks Reparations Only Expected in One Year*, JERUSALEM POST, June 6, 1999, at 3.

233. *See* Bower v. Bunker Hill Co., 114 F.R.D. 587, 596 (E.D. Wash. 1986) (recognizing the potential benefits of the aggregate damages approach); *see also* Bone, *Statistical Adjudication*, *supra* note 19, at 572 (noting that the use of sampling can provide small-claimant class actions with deterrent effect). *But see In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298-99 (7th Cir. 1995) (reasoning that such deterrence measures may be too effective, forcing parties who may not be guilty to settle).

234. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 786 (9th Cir. 1996) (noting the advantages that sampling provides to plaintiffs and holding that sampling does not violate due process).

235. *See* Bone, *Statistical Adjudication*, *supra* note 19, at 605 (arguing that under moral rights theory sampling does not interfere with litigants' rights).

236. *See id*; *infra* Part V.B.1 (discussing corrective justice).

237. *See* Rosenberg, *supra* note 121, at 855-59, 890 (1984) (proposing class action treatment as a method of solving problems of proving causation).

238. The Holocaust plaintiffs had difficulty framing claims against Swiss banks who they claimed retained their family's money for over 50 years, given the lack of documentary evidence, the time-gap between the claims and events, and the actions of the defendants in concealing assets over the years. *See* Ramasastry, *supra* note 181, at 350-51. Holocaust plaintiffs espoused two arguments: first, that defendants engaged in "a conspiracy . . . to, at a minimum, deny, block, and/or obstruct access to, or knowledge concerning, deposited and looted assets and profits derived from slave labor" and sec-

Domestic theories used in mass product liability cases, such as the "fraud on the market" theory, were employed by the Holocaust plaintiffs in the case against the Swiss banks. Using collective liability theories from domestic law, plaintiffs claimed that the Swiss banks together owned 75-80% of market share, based on the size of the banks.[239] The plaintiffs also contended that the level of specificity required in pleading was reduced by this alternative liability theory.[240] Plaintiffs argued that it was too difficult to determine which Swiss Bank accepted, cloaked, or looted assets, and that the "problems of proof related directly to defendant banks' actions since they 'negligently failed to maintain and/or purposefully concealed proofs which exist or may have existed and affirmatively obstructed access to such proofs.' "[241] In litigating human rights class claims, other legal presumptions could be used to avoid requiring individual proof of causation where the defendant's duplicitous conduct made it difficult or impossible for alleged victims to discover the cause or source of harm. So long as there is proof of defendant's illegal activity and injury to the group, individual proof should not

ond, that the defendants are liable under "market share liability." Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss for Lack of Standing, Failure to State Claims Upon Which Relief Can be Granted, Failure to Join Indispensable Parties, and Motion to Strike Punitive Damages at 5, *In re* Holocaust Victims Assets, No. CV-96-4849 (E.D.N.Y. June 16, 1997).

239. *See* Ramasastry, *supra* note 181, at 380-81. Relying on New York law, the plaintiffs argued (1) that problems unique to the case made it impracticable to prove which defendant caused the injury; (2) that all defendants engaged in tortious conduct; (3) that the problems of proof were related to the conduct itself; and (4) that there was no other effective remedy. *See* Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1329 (E.D.N.Y. 1996) ("Collective liability provides both a basis for establishing a defendant's liability where proof of causation is impossible and a method of apportioning damages between liable codefendants."); Neuborne Memorandum, *supra* note 60.

240. Under New York law, "liability here is based upon chance, not upon the fair assessment of the acts of defendants." *See* Hymowitz v. Eli Lilly, 73 N.Y.2d 487, 513 (1989).

241. Ramasastry, *supra* note 181, at 380 (citation omitted). The defendants' responded that collective liability merely eased plaintiffs' burden of proof, but plaintiffs must still produce evidence that each defendant was engaged in the alleged wrongdoing. *See* Defendant's Reply Memorandum in Support of Defendants' Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim at 15 n.45, *In re Holocaust Victims Assets*, No. CV-96-4849 (E.D.N.Y. July 9, 1997). Also, "in order to seek disgorgement of assets due to unjust enrichment, plaintiffs must be able to trace assets directly that relate to their injuries and connect their claims to individual defendant[s]." Ramasastry, *supra* note 181, at 380. However, the plaintiffs argued that the banks' commingling of assets made it impossible to extricate the identification of individual property that was looted and disposed of by the banks. *See id*.

be required.[242]

As courts draw from domestic mass litigation to simplify the adjudication of mass human rights torts, they create more precedent for the expanded interpretations of CIL and collective rights adjudication.[243] Even class actions that settle before a full trial on the merits have the power to affect the substantive development of human rights law.

D. Settlement and Subclassing

The reality of mass tort litigation, including human rights litigation, is that most cases will end in settlement. The Supreme Court in *Amchem Products, Inc. v. Windsor*, however, made it clear that courts, even in settlement classes, must determine whether all of Rule 23(a)'s requirements are met.[244] Where class members have suffered different harm as a result of the corporate defendant's conduct, implicating the commonality and typicality requirements, the court may divide the class into subclasses pursuant to 23(c)(4)(B).[245] By dividing a class, a judge may be able to redefine the responsibilities of class attorneys and named plaintiffs in terms of the interests of distinct and relatively unified portions of a class. For example, in the Swiss Bank settlement, the plaintiffs' class was divided into five subclasses based upon the type of injury alleged: Deposited Assets Class, Looted Assets Class, Slave Labor Classes I and II (divided into groups of victims of Nazi persecution who actually performed slave labor and all other individuals who

242. *See* Blackie v. Barrack, 524 F.2d 891, 904 n.19 (9th Cir. 1975). Similarly, courts grapple with the propriety of generalized proof of impact in antitrust class actions, which are concerns not present in human rights litigation.

243. Such transformations of CIL principles have occurred in other human rights litigation. For example, in *Doe v. Unocal*, the court determined that the Burmese plaintiffs had sufficiently stated a claim by alleging that Unocal participated in acts of forced labor, which was enough like slave trading to constitute a violation of the law of nations for ATCA jurisdiction. *See* Doe v. Unocal Corp., 963 F. Supp. 880, 892 (C.D. Cal. 1997).

244. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 619-28 (1997) (finding that no commonality or adequate representation existed among the class because the claimants had different levels of exposure, different severities and types of diseases, and came from states whose laws varied widely on several issues); Walker v. Liggett Group, 175 F.R.D. 226, 228 (S.D. W. Va. 1997) (denying class certification in light of *Amchem*); Leading Case, *supra* note 101, at 350.

245. *See Amchem*, 521 U.S. at 626 (emphasizing subclassing as means for dealing with predominance problems).

performed slave labor), and Refugee Class.[246] The necessity for ranking of class interests by the parties may therefore diminish while the likelihood that diverse absentee interests will be presented to the court increases due to subclassing. Subclassing, however, is possible only if different class members coalesce into discrete, identifiable groups. Often, differences among class members will not divide along clearly defined lines.[247] The litigation for each subclass is treated as a separate lawsuit, applying the same rules of class definition discussed above.[248]

Class action settlement in human rights litigation offers unique opportunities for increased dialogue between international actors, including nongovernmental organizations and public interest groups.[249] Greater dialogue on compensation schemes, terms of settlement for injunctive relief that involves changes in corporate and government policies, and public acknowledgment of wrongs promote one of the key objectives of the plaintiffs' classes: to have broad statements of rights acknowledged on the international level. Moreover, it is currently

246. *See* Swiss Bank Settlement, *In re* Holocaust Victims Assets, No. CV 96-4849 (E.D.N.Y., Settlement Jan. 26, 1999). The refugee class consists of victims or targets of Nazi persecution who sought entry into Switzerland to avoid Nazi persecution and who actually, or allegedly, either denied entry into Switzerland or were deported, detained, abused, or mistreated, after gaining entry. *See* Marilyn Henry, *Victims of Omission*, JERUSALEM POST, July 23, 1999, *available in* 1999 WL 9006150. The refugee class also includes the

> individuals' heirs, executors, administrators, and assigns, who have or at any time have asserted, assert, or may in the future seek to assert, claims against any (Swiss bank, enterprise or institution) for relief of any kind whatsoever relating to . . . the alleged denial of entry, deportation, detention, abuse, or other mistreatment.

Id. The defendant banks agreed to the inclusion of the refugee class as a condition of the settlement at the insistence of the Swiss government, as the refugees made no claims against the banks directly. *See id*.

247. *See Developments in the Law – Class Actions*, 89 HARV. L. REV. 1318, 1479-82 (1976).

248. There must be a proper class representative for each subclass, and all other requirements of Rule 23 must be satisfied. *See* Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981).

249. *See Holocaust Payout Plan is Ready: Cash Next Year for Victims, Relatives*, INDIANAPOLIS STAR, June 29, 1999, at A04; *Netanyahu Holds Summit Over Share-Out of Nazi-Era Assets*, AGENCE FRANCE-PRESSE, Aug. 31, 1998, *available in* 1999 WL 16589428 (both articles mentioning involvement of public interest groups as part of discussion over Swiss Bank settlement); *see also* Beth Gardiner, *Survivors Upset Over Swiss Bank Case*, AP ONLINE, Aug. 24, 1999, *available in* 1999 WL 22036918 (mentioning opinion of a party to the Swiss bank settlement regarding amounts of plaintiffs' claims). The dialogue between the Swiss banks and the Swiss government resulted in the inclusion of the Refugee class. *See* Henry, *supra* note 232.

accepted that collective remedies may actually be a more accurate means for just compensation than many individual cases.[250] As discussed, current class action procedure offers creative group remedies to address widespread harm to ethnic minority groups, thereby giving teeth to evolving notions of collective human rights.

IV. CLASS PROCEDURE AND CORPORATE COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS

A. Achieving Compliance

Enforcement of human rights law has been problematic from its inception.[251] Large corporations, while global actors on economic levels, are rarely accountable for transnational harm to human rights.[252] In fact, multinationals have operated in a virtual legal and moral vacuum.[253] Public international law has failed "to address the post-World War II emergence of [multinationals] as a major international force."[254] Moreover, the narrow view of international law as relations between states allows large corporations to evade accountability at the domestic level by shifting production between sites. The absence of in-

250. *See* Rosenberg, *Individual Justice and Collectivizing*, *supra* note 19, at 215-16 (1996); Michael J. Saks & Peter D. Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992); *see also* Bone, *Statistical Adjudication*, *supra* note 19, at 577 ("Professors Saks and Blanck "argued that the average of sample case verdicts is likely to be more accurate than an individual trial verdict for many mass tort cases." (citing Saks & Blanck, *supra*)).

251. Victims can report to international and domestic governmental and nongovernmental organizations but cannot count on them to stop an ongoing violation, punish the wrongdoer, or order compensation. *See* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 8 (1991). Regional human rights bodies are somewhat more effective than U.N. human rights bodies. *See id*. at 591. The Inter-American Commission issues decisions that are only recommendations. *See id*. at 592.

252. *See* Frey, *supra* note 12, at 153-54, 157 (1997) (constructing a continuum of governmental, nongovernmental, private, transnational corporations to protect human rights according to the corporation's level of activity in the country).

253. *See* THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 31 (1989) ("[W]ith the exception of a handful of nation-states, multinationals are alone in possessing the size, technology, and economic reach necessary to influence human affairs on a global basis.").

254. Geer, *supra* note 11, at 335-37 (mapping the context for international legal rights analysis and the role of multinational oil corporations in the ethnocide of indigenous groups in Amazonia).

ternational standards increases corporations' ability to avoid responsibility.[255] Multinationals are not legally accountable in any system except their host country.[256] Furthermore, the problem with such limited accountability is that the alleged violations often involve the collusion of corporate entities and governments.

Some human rights covenants do place limitations on individual or corporate actions when defining fundamental rights.[257] However, these covenants do not expressly hold corporations responsible for affirmatively protecting human rights or taking steps to prevent others from violating those rights. International legal liability, therefore, does not usually apply to corporations but rather to the governments that regulate them.[258]

Since the 1970s, there has been some increased pressure to regulate the behavior of non-state actors in the realm of human rights within the U.N. system, with the fairly recent push for corporate codes of conduct.[259] These codes originally sought to "prevent interference with the internal politics of host coun-

255. *See id.*

256. *See id*; *see also* Sacharoff, *supra* note 86, at 927 (1998). Many host countries have self-protection regulatory measures such as ownership restrictions for foreign investment. *See* Amy Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 289 & n.491, 290-91 (1995).

257. *See Universal Declaration of Human Rights*, U.N. GAOR, 3d Sess., Annex, Art. 29-30, U.N. Doc. A/777 (1948); *Civil and Political Covenant*, Res. 2200A, 21 U.N. GAOR, Supp. No. 16 art. 5(1), U.N. Cov. A/6316 (1966).

258. *See* Frey, *supra* note 12, at 163. *See generally* FRANK C. NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS LAW, POLICY AND PROCESS 5-17 (2d ed. 1996) (stating that U.N. documents bind governments not non-state actors).

259. *See Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, at 527, 528, U.N. Doc. A/9559 (1974) (recognizing the rights of the state to control the activities of transnational corporations acting within its borders and calling for a code of conduct that would prevent economic exploitation of host countries); E.S.C. Res. 1913, U.N. ESCOR, 57th Sess., Supp. No. 1, at 3, U.N. Doc. 5570/Add. 1 (1975) (establishing the U.N. Commission on transnational corporations comprised of members from 48 states to formulate a code of conduct); E.S.C. Res. 1908, U.N. ESCOR, 57th Sess., Supp. No. 1, at 13, U.N. Doc. E/5570 (1974); *Development and International Economic Co-Operation: Transnational Corporations*, U.N. ESCOR, 2d Sess., U.N. Doc. E/1990/94 (1990) (attempting to strike balance between competing interests of regulating corporate conduct and setting standards for nondiscriminatory host government behavior towards corporations); *see also* Daniel B. Magraw, *Introduction to United Nations ECOSOC Draft Code of Conduct on Transnational Corporations*, *in* 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 533-38 (Stephen Zamora & Ronald A. Brand eds., 1990) (describing the history and purpose of the U.N. MNC Code of Conduct effort).

tries and, to limiting [sic] the adverse effects of TNC [transnational corporations] activities on national economic objectives."[260] The economic and political conditions that gave rise to the initial calls for a universal corporate code have changed because developing countries are now faced with an acute shortfall of investment.[261] The new goal is to "reintegrate developing countries into the global economy in a manner that ensures inflows of new investment capital."[262] Recently, the relationship between multinationals and host countries has shifted. "TNCs are no longer seen as suspicious intruders . . . but rather, as welcome and wealthy guests."[263] Host countries are now more open to inward foreign investment and the activities of transnational corporations.[264] In 1993, the U.N. abandoned its fifteen-year effort to create a code of conduct for transnational corporations.[265] The history of the draft code represents growing compromise by those states advocating multinational control of their original objectives. Consequently, corporations have enormous influence, both positive and negative, both in home countries and abroad, without any international human rights law that applies to them.[266]

Moreover, there have been few successful domestic legislative efforts to specifically regulate corporations on human

260. Frey, *supra* note 12, at 158, 165-67. *See also* SIDNEY DELL, THE UNITED NATIONS AND INTERNATIONAL BUSINESS 24-26 (1990) (describing focus on regulating restrictive business practices); *id.* at 73-74 (discussing environmental exploitation, antitrust issues, and truth in business dealings) ; MUCHLINSKI, *supra* note 1, at 457, 593-94; Mark Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?,* 24 U. MIAMI INTER-AM. L. REV. 399, 411 (1992-93) (noting the purposes of private codes of conduct and assessing their usefulness).

261. *See* Frey, *supra* note 12, at 160 ("Due to world economic and ideological shifts, there has been a retreat from the international control model that was in vogue in the 1960s and 1970s regarding [transnational corporations]. States once critical of [transnational corporations] now find themselves competing for the benefits of foreign direct investment from multinational companies.").

262. MUCHLINSKI, *supra* note 1, at 596; *see also* Frey, *supra* note 12, at 158.

263. Frey, *supra* note 12, at 167.

264. In 1994, the Commission on Transnational Corporations became the Commission on the International Investment and Transnational Corporations. *See id.* at 167 n.75 (citing *Transnational Corporations Report*, U.N. Doc. TD/B/42(1)/4 (1995), at 4 ("Within today's globalized world economy, characterized by increased interplay between investment, trade, technology and services, member States placed increased emphasis on the contribution that transnational corporations could make to growth and development.").

265. *See* Geer, *supra* note 11, at 353 n.74.

266. *See* MUCHLINSKI, *supra* note 1, at 8-10; Frey, *supra* note 12, at 159-60.

rights issues.[267] Economic sanctions have been sporadically used as a tool to punish offending governments, which may directly impact corporations doing or seeking business in these countries.[268] Executive action seeking to encourage self-regulation by the corporations has also had limited success.[269]

Finally, self-regulation appears to occur only in response to the pressure of legal sanctions.[270] In the case of the Holocaust class actions, companies such as Daimler-Chrysler, Deutsche Bank, Siemens, Volkswagen, Hoesct, Dresdner Bank, Krupp, Alliance BASF, Bauer, BMW, and Degussa have announced plans to participate in a $1.3-1.7 billion government fund proposed by German Chancellor Schroeder and created to compensate Holocaust victims and their heirs. The fund is to be established on condition that the class suits against the companies be dropped.[271] Also, U.S. and European insurance commissioners finally created a $90 million fund to redress wrongs alleged

267. *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 101 *passim*, 91 Stat. 1494 (1977) (barring American companies from bribing officials of foreign governments). The most comprehensive legislative response to human rights was the Anti-Apartheid Act in 1986 (Comprehensive Anti-Apartheid Act of 1996, Pub. L. No. 99-440, § 101 *passim*, 100 Stat. 1086 (1986) (repealed 1993)), which contained a code of conduct that required protection of human rights. *Id*. § 208, 100 Stat. 1097-98. Legislation introduced in 1995 by Senator Mitch McConnell proposed to ban U.S. investment in, and trade with, Burma. The Burma Freedom and Democracy Act, modeled after the Anti-Apartheid Act, sought to prohibit investments that supported the abusive Burmese military governments. S*ee, e.g.*, Janelle M. Diller & David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663 (1997); Frey, *supra* note 12, at 169-73 (discussing the limited legislative efforts to regulate multinationals on human rights issues and the executive initiatives regarding the Model Business Principles). *See generally* 141 CONG. REC. § 211; *see also* the Child Labor Deterrence Act of 1995, § 706, 104th Cong. (1995) (prohibiting the importation of goods produced abroad with labor of children under fifteen years old).

268. *See, e.g.*, Foreign Assets Control Regulations, 31 C.F.R. pt. 500 (1995) (regulating economic sanctions against North Korea and other countries in the areas of sales, purchases, specifically designated nationals, sending gifts); Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 101 *passim*, 110 Stat. 1541 (1996) (requiring the President to commence diplomatic efforts with U.S. allies to establish multilateral trade sanctions); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. § 6032 (1994) (urging the President to apply sanctions against countries assisting Cuba); Frey, *supra* note 12, at 168-69.

269. Self-regulation was proposed by the Clinton Administration in the form of Model Business Principles. *See* Frey, *supra* note 12, at 158-59, 171-73; Baker, *supra* note 260.

270. *See* Geer, *supra* note 11, at 353 n.74. *See generally* Matthew Lippman, *Multinational Corporations and Human Rights*, *in* HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 392-401 (Richard Claude & Burns H. Weston eds., 1992); Sacharoff, *supra* note 86, at 935-37.

271. *See* Letter from Cohen, Milstein, Hausfeld & Toll, *supra* note 60.

by the class action plaintiffs, such as refusing to pay premiums of policyholders in concentration camps and "requiring nonexistent death certificates of the murdered policyholders."[272]

Therefore, because the enforcement of human rights has been problematic, class action suits offer a means for deterring corporate activity harming large groups of victims.

B. Forum Access for the Human Rights Class

1. Sovereignty and enforcement of international human rights law in domestic forums

Enforcement of human rights law against corporations has been difficult in part due to notions of sovereignty which constrain the application of domestic law extraterritorially. Thus, victims of human rights abuses often lack access to courts.[273]

To preserve world order, courts and governments must cooperate to create legal systems that protect both international human rights and transnational capitalist interests.[274] Specifically, as a participant in the international community, the United States is obligated to provide remedies for victims of international atrocities.[275] The rule of law cannot be achieved without access to the courts. The principle that mandates that civil claims be capable of submission to a judge "ranks as one of the universally 'recognised' fundamental principles of law; the

272. Collins, *supra* note 183, at 18. *See also* Winters v. Assicurazioni Generali S.p.A., No. 98-CV-09186 (S.D.N.Y. filed Dec. 30, 1998); Drucker Cornell v. Assicurazioni, No. 97-CV-02262 (S.D.N.Y. filed Mar. 31, 1997).

273. *See infra* note 274 and accompanying text.

274. The alternative would be primitive systems of self-help and sanctions often through mercenaries (gangs or illicit mobs, illegal drug cartels, and global conspiracies run by enterprises) to enforce bargains and social norms through private customs and informal codes. *Cf.* Christenson, *supra* note 5.

275. The right to a remedy contained in Article 8 of the *Universal Declaration of Human Rights* affirms that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." *Universal Declaration of Human Rights*, art. 8, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1 U.N. Doc. A/810 (1948); *see* Jordan Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA*, 8 HOUS. J. INT'L L. 49 (1985); Vienna Convention on International Treaties, May 23, 1969, 1155 U.N.T.S. 331, *in* 8 I.L.M. 679 (imposing obligation on signatory states "to refrain from acts which would defeat the object and purpose of a treaty"); *cf.* LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 153 (3d ed. 1993) (international law imposes obligations on nations, but does not regulate how nations treat these obligations).

same is true of the principle of international law which forbids the denial of justice."[276]

When providing remedies for victims of human rights abuses, compliance with international norms is achieved through the internalization, or incorporation, of CIL into domestic law. When domestic courts adjudicate international class action claims, their judicial interpretation and application of substantive human rights norms reinforce CIL principles at the international level.[277]

The evolution of CIL raises concerns of whether this internationalization of domestic law undermines the executive sovereignty and whether a judicially internationalized law of nations threatens the normative structure within which the interaction among sovereigns takes place.[278] However, courts have traditionally supplemented—not replaced—executive action through transnational litigation for the protection of transnational corporations.[279] Private enterprises demand that courts and administrative agencies safeguard investment and provide reasonable regularity in transnational business dealings and risk.[280] U.S. federal courts have internalized international law to affirmatively support transnational production and exchange based upon free markets, trade, and investment whenever the political branches or common law give the slightest grounds for incorporating these expectations as federal law.[281] To hold, then, that the protection of universal human rights is beyond the purview of judicial power without political direction—either affirmatively by public entitlements or nega-

276. Golfer v. United Kingdom, 18 Eur. Ct. H.R. (ser. A), ¶¶ 34-35 (1975), *reprinted in* R. LILLICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 563, 570-71 (1979).

277. *See* Steinhardt, *supra* note 4, at 46.

278. *See* Morgan, *supra* note 39, at 67.

279. *See id*. at 74-83; *see also* Koh, *supra* note 41, at 24-25, 39, 43, 54, 60; Edward M. Morgan, *Act of Blindness, State of Insight*, 13 B.U. INT'L L.J. 1, 22-23, 32 (1995).

280. *See* Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT'L L. & POL'Y, 405, 427, 429-30 (1997).

281. For example, merchant law, maritime law, and prize law from the law of nations is incorporated as rules of decision. *See* Societe Nationale Industrielle Aerospatiale v. District Court, 482 U.S. 522 (1987) (dealing with pre-trial discovery); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (involving refugee status); Steinhardt, *supra* note 4, at 11 (citing Chan v. Korean Airlines, 109 S. Ct. 1676 (1989)) (stating that private parties routinely use domestic courts to enforce international rules governing investment, trade, civil aviation, pre-trial discovery, banking, commercial transactions, and refugee status). *See generally* Christenson, *supra* note 280.

tively by restraining abuses of public and private power—is misguided.

2. Internalizing international human rights law creates precedent

On the flip side of internalizing international law into domestic law is the transporting of domestic precedent from ATCA jurisprudence to other domestic and international fora.[282] In class adjudication of human rights, U.S. courts participate in CIL enforcement through judicial pronouncement of norms and enforcement of class remedies.[283] U.S. courts have traditionally been reluctant to extend domestic law extraterritorially unless a U.S. interest was directly involved; however, the rapid rise of international trade and investment and the appearance of multinationals is weakening adherence to this principle.[284] The extension of *universal* CIL, on the other hand, should be less problematic as CIL is, by definition, accepted by states, as evidenced by their practices and their psychological acquiescence.[285] Therefore, sovereignty concerns diminish when applying CIL to foreign conduct.[286] The judicial expression of CIL principles concerning collective rights is then available as precedent in international and other domestic fora.[287]

282. *See supra* note 274 and accompanying text.

283. *See supra* Parts II & III.

284. *See, e.g.*, Strassheim v. Daily, 221 U.S. 280, 285 (1911) (Holmes, J.) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if [a defendant] had been present at the effect, if the State should succeed in getting him within its power.").

285. *See supra* INTRODUCTION.

286. *See* Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET"*, 73 MINN. L. REV. 1023, 1024-34 (1989).

287. In recent decisions, the International Tribunal and the House of Lords have cited domestic law as precedent. *See* Regina v. Bartle, 37 I.L.M. 1302, 1324 (H.L., Nov. 25, 1998) (United Kingdom House of Lords: Regina v. Bartle and the Commission of Police for the Metropolis and Others Ex Parte Pinochet, citing *Filàrtiga v. Peña-Irala*, 630 F.2d 876 (1980) as precedent that torture has *jus cogens* status in international law); UK High Court of Justice, Queens Bench Division, *In re* Pinochet Ugarte, 38 I.L.M. 68, 84 (Oct. 28, 1998) (citing *Marcos* and *Filàrtiga* as precedent); Prosecutor v. Tadic, Case IT-94-1-T, International Criminal Tribunal for the Former Yugoslavia, 36 I.L.M. 908, 945, 946, 953 (May 7, 1997) (citing *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (liability for non-state actors), *R. v. Finta*, 1 S.C.R. 701, 222 n.167 (1994) (Canadian case regarding requisite mental element for crime against humanity), and *Quinn v. Robinson*, 783 F.2d 776, 799-801 (9th Cir. 1986) (grouping war crimes with crimes against humanity).

In essence, the federal courts, in applying their domestic class procedures to international human rights claims, not only internalize international human rights norms into domestic law but also participate in a dialogue with international institutions by establishing precedent for international human rights norms.[288] Given the dearth of federal choice of law rules for transnational litigation,[289] courts may now create an ad hoc mixture of situs law for determining the definition of tortious conduct under CIL and compensatory damages.[290] In addition, the possibility that a federal court adjudicating a transnational case may find that remedies such as punitive damages are available under international law provides parties suing under CIL a remedy unavailable to foreign plaintiffs suing under other theories.[291] Transnational choice of law rules applied in U.S. federal courts may allow punitive damages, subjecting "deep-pocket" corporate defendants to U.S.-style discovery of their financial worth, which would be unavailable in other international fora.[292] Plaintiffs can then arguably demand such discovery be available to enforce their international rights in a non-U.S. forum.

Beyond expanded remedies, the nature of transnational plaintiffs' rights under international law is expanded.[293] Foreign plaintiffs should be able to draw upon this newly developed body of law to enforce their rights in other fora. Such a dialogue is key to global corporate actors' compliance and the enforcement of international human rights.

288. *See* Koh, *supra* note 18, at 2353-54, 2371, 2374.

289. *Cf.* Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991).

290. *Id.* at 3; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3) & (4) & cmt. H (1987).

291. In the absence of a federal statute, the law governing choice of law is state law. RESTATEMENT OF CONFLICT OF LAW § 6 (1971). *See also* Christenson, *supra* note 280, at 446, 515; Steinhardt, *supra* note 19, at 93-96 (stating that rules of decision may defer to place in which alleged abuse occurred, international law for determining jurisdiction under § 1350 and punitive damages and the forum law for procedural issues such as abatement).

292. *Cf.* Kurt Riechenberg, *The Recognition of Foreign Privilege in United States Discovery Proceedings*, 9 NW. J. INT'L L. & BUS. 80, 92-93, 136 (noting the lesser discovery privileges available in international tribunals).

293. *See supra* Part II.

V. CLASS ACTION PROCEDURES AND HUMAN RIGHTS IN THEORY AND PRACTICE

In domestic civil procedure, many commentators have argued in favor of collectivized class treatment of mass tort claims, while others have posited that class treatment threatens individual autonomy and the concept of each individual's right to a "day in court."[294] In the human rights context, similar arguments may be made.[295] However, when viewed in light of human rights policies, the criticism of class procedure is neither theoretically nor practically justified.

A. Autonomy Versus Collective Justice

Class actions have been problematic since the Advisory Committee's admonition that mass tort actions were largely unsuitable for class treatment.[296] Some problems have arisen because class actions are an exception to the deeply ingrained rule that a person is bound by judicial proceedings only if he or she is a party.[297] Inherent in the prolific discourse surrounding

294. *See* Shapiro, *supra* note 108, at 923; s*ee also* C. WRIGHT, LAW OF FEDERAL COURTS (5th ed. 1994). In other mass tort contexts, courts have recently exercised caution with the class action, perhaps in reaction to more aggressive attempts to aggregate cases under Rule 23 and the lack of careful analysis of its requirements; courts have refused to certify broad classes or have overturned certification by district courts. In denying class certification, courts have reiterated the potential for prejudice inherent in class certification. *See, e.g.*, *In re* American Med. Sys., Inc., 75 F.3d 1069, 1078-79 (6th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299-1304 (7th Cir. 1995); Arch v. American Tobacco Co., 175 F.R.D. 469, 475-76 (E.D. Pa. 1997); Castano v. American Tobacco Co., 160 F.R.D. 544, 555 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996). Futures classes and the issues they present have been the subject of substantial judicial attention. *See, e.g.*, Georgine v. Amchem Prods., Inc., 83 F.3d 610, 617 (3d Cir. 1996), *aff'd sub nom*., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624 (1997); *In re* Asbestos Litig., 90 F.3d 963, 975 (5th Cir. 1996), *vacated sub nom*., Ortiz v. Fibreboard Corp., 521 U.S. 1114 (1997). "Judges and scholars have assessed and debated questions such as how to ensure that absent class" members are adequately represented, especially when those members are truly passive as with a futures class. Mollie A. Murphy, *The Intersystem Class Settlement: Of Comity, Consent, and Collusion*, 47 U. KAN. L. REV. 413, 414 (Jan. 1999). *See also id*. at 413 n.2.

295. Indeed, the only analysis of class treatment of mass human rights claims warned that class treatment may threaten the autonomy of individual litigant victims suing under the ATCA. *See* Steinhardt, *supra* note 4.

296. Murphy, *supra* note 294, at 413 n.1; *see* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1149 (1998) ("Class actions occupy an uneasy place in American jurisprudence."); *see, e.g.*, *In re* Federal Skywalk Cases, 680 F.2d 1175, 1183 (8th Cir. 1982); Mertens v. Abbott Lab., 99 F.R.D. 38, 40 (D.N.H. 1983).

297. *See* Martin v. Wilks, 490 U.S. 755, 762 (1989) (describing general " 'deep-

class actions is the debate between the advocates of individual autonomy in litigation and the proponents of collective justice.[298] The modern class action challenges ideas of individual autonomy by allowing a representative of the group to make decisions affecting the group's rights and remedies.[299]

1. Collective justice

Advocates of the class action as a means toward collective justice reason that the aggregation of claims through the class action is the most efficient way of promoting individual justice.[300] Heeding efficiency considerations in class treatment results in better substantive outcomes for class members than if they were to litigate in a series of individual actions.[301] These advocates argue in favor of collectivized treatment based on economies of scale such as pooling of resources and information and reduced counsel costs. In addition to saving resources, the distributional equities that "flow from a system that allocates compensation to victims on the basis of expected average harm, as compared to the vastly greater expense and 'luck of the draw' that play a role in the outcome in each of a series of indi-

rooted historic tradition that everyone should have his own day in court' ") (quoting CHARLES A. WRIGHT ET AL., 18 FEDERAL PRACTICE & PROCEDURE § 4449, at 417 (1981)); *see also* YEAZELL, *supra* note 19, at 12-13; Monaghan, *supra* note 296, at 1149.

298. The topic and controversy of class actions is significantly in the forefront of legal and academic discourse. *See* Shapiro, *supra* note 108, at 913 n.2 (listing the more important legal works on the subject of class actions).

299. The modern class action is an exception to the individualistic tradition of Anglo-American law, political theory, and philosophy. *See* YEAZELL, *supra* note 19, at 2. The apparent undermining of individual autonomy inherent in Anglo-American legal tradition spurred controversy around the class action among the general public and within the legal profession. *See id*. at 8-9. *See also* Rosenberg, *Individual Justice and Collectivizing*, *supra* note 19, at 212 ("Criticism of collectivized resolution of mass-tort cases proceeds from the standard universalist conception of individual justice that holds sway in civil procedure discourse."); *Mass Torts Problems & Proposals*, *in* REPORT ON MASS TORT LITIGATION 3, App. C, Feb. 15, 1999 (containing the report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and to the Judicial Conference of the United States).

300. *See* Shapiro, *supra* note 108, at 916 n.4; Rosenberg, *Individual Justice and Collectivizing*, *supra* note 19, at 210-16. *But see* JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1995).

301. *See* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994); Bone, *Statistical Adjudication*, *supra* note 19; Rosenberg, *Individual Justice by Collective Means*, *supra* note 19, at 563-73; Rosenberg, *Justice and Collectivizing*, *supra* note 19, at 236-52; Shapiro, *supra* note 108, at 928.

vidual adjudications," weigh in favor of collective treatment.[302] Moreover, it is arguable that the "day in court" ideal does not actually give participants control over litigation as a practical matter.[303]

Collective justice arguments may also be made in favor of class treatment of human rights claims. Given the difficulty of litigating CIL claims under the ATCA, in which alien plaintiffs sue multinational or foreign defendants for offenses that occurred abroad, the costs of most human rights cases are exorbitant, and aggregate treatment is, therefore, justified.[304] Most plaintiffs who have been victimized by mass human rights violations lack the financial or political capability to initiate individual adjudication and would choose aggregate recovery over none at all.[305] Also, given the political and economic power of corporate defendants, the aggregation of claims and the possibility of collective remedies in class actions may be the only hope to deter mass human rights violations.[306]

2. Preserving autonomy

While I have suggested that in collective rights claims remedial procedures should address the class as an entity, traditional class action mechanisms, such as notice, opt out, and individual trials on damages or common questions of liability, in Rule 23(b)(3) classes are still available.[307] For instance, where discrepancies in the types and levels of injuries among human rights victims[308] undermine class cohesion and make the pre-

302. Shapiro, *supra* note 108, at 928.

303. *See* Rosenberg, *Individual Justice by Collective Means*, *supra* note 19, at 582-83, n.86 ("[T]here is no reality to the notion that claimants have significant personal influence or involvement, let alone control regarding the course of litigation and settlement, other than wielding some degree of ultimate veto power over the settlement price.").

304. *Cf.* Jack B. Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833, 836 (1997).

305. *See supra* Part II.B.

306. *See infra* Part V.B.2. (on deterrence goals); *supra* Part III (on collective remedies).

307. *See* Swiss Bank Settlement, *In re* Holocaust Victim Assets, No. CV 96-4849, (E.D.N.Y. Settlement, Jan. 26, 1999). The class was given option of timely request to opt out. The Settlement specified that the court had discretion to request members to describe the nature and amount of any claims that the member may wish to assert in the future.

308. For example, often victims do not manifest injuries from exposure to environmental contamination at the same time other victims do. *See* Leading Case, *supra*

dominance requirement difficult to meet, such as when some class members have not yet manifest injuries from exposure to environmental contamination,[309] individual trials may be conducted in the country where the majority of plaintiffs reside.[310]

Rule 23's built-in procedural safeguards address and satisfy autonomy concerns. For example, inherent in the class procedure to safeguard individual autonomy is the representation requirement, which grows out of the assumption that every individual has a right to strategic choice in all cases.[311] This requirement ensures that a court will inquire into the interests of the individual class members.

Under *Hansberry v. Lee*, the determination of whether the named plaintiff represents the interests of the class is actually an inquiry into individually expressed desires to enforce rights.[312] Where the class interests are collective in nature, each plaintiff's claim is based upon harm done to the group, so individual interests are uniform. Therefore, the representation inquiry ensures that class members' interests are represented.[313] Thus, where intraclass conflicts are minimal due to claims under CIL being based upon harm done to the group, the representative plaintiff (so long as they belonged to the group at the time of the harm) will be adequate to safeguard the interests of each member.

In addition, the notice requirement helps preserve individual autonomy in class cases. Notice to the Rule 23(b)(3) class allows unnamed plaintiffs to: 1) monitor performance of class representatives and class counsel; 2) object to a proposed settlement in 23(e) settlement cases; and 3) enter appearance through counsel. Also, notice enables class members to opt out

note 101, at 354.

309. *See id*.

310. Paul A. Volcker, *Dormant Accounts in Swiss Banks: The Independent Committee of Eminent Persons*, 20 CARDOZO L. REV. 513, 515-17 (1998).

311. This assumption has been questioned by scholars advocating the collectivization of claims and broader preclusion rules. *See supra* Parts III.A & III.B.1; Bone, *Rethinking*, *supra* note 19, at 198-200, 236-37 (noting that some commentators equate participation with representation); Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN L. REV. 655, 678-79 (1980).

312. Ironically, the consent requirement is present only in (b)(3) actions in which interests are less socially ambiguous than in mandatory class action suits that do not require individual consent. *See* YEAZELL, *supra* note 19, at 255-61.

313. Moreover, subclassing under Rule 23(c)(4), wherein a representative is assigned for each subclass, will ensure that the interests are uniform among members and adequately represented by the named plaintiff.

of the class and pursue individual remedies.[314] Adequate notice may be accomplished even if some class members cannot be identified.[315] Courts have fashioned elaborate notice schemes that meet constitutional requirements,[316] even for class members outside the U.S.[317] Such schemes are being used in current human rights litigation and effectively preserve procedural rights of the human rights plaintiffs.[318] In the Swiss Bank settlement, the court mandated that notice be sent to dozens of countries and in various languages by mail and in newspaper advertisements to nearly 900,000 potential beneficiaries of the $1.2 billion settlement. Approximately $25 million will be taken from the settlement proceeds to cover notice costs, thus raising policy concerns that such elaborate notice schemes are counter-productive.[319]

While notice attempts to preserve the participatory rights of the individual members of a (b)(3) class, the logic behind the notice requirement has been questioned by scholars and, indeed, its efficacy in human rights classes may be doubted.[320] Particularly when the collective rights of the group as an entity are being adjudicated, the case for strict adherence to notice seems less compelling.[321] The "right" to notice in human rights cases should be reexamined in light of the real costs and benefits involved. Arguments for viewing the class as a litigant may call for more selective notice so long as an adequately represen-

314. *See* FED. R. CIV. P. 23(c)(2).

315. *See* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 317 (1950); Vancouver Women's Health Collective Soc'y v. A.H. Robins Co., 820 F.2d 1359, 1364 (4th Cir. 1987) (approving publication as a procedure by which A.H. Robins would give worldwide notice of its bankruptcy proceedings); *In re* Johns-Manville Corp., 68 B.R. 618, 626 (Bankr. S.D.N.Y. 1986) (holding that in bankruptcy proceedings, notice by publication is constitutionally adequate "to those beneficiaries whose interests are either conjectural or future").

316. *See* Philips Petroleum Co. v. Shutts, 472 U.S. 797, 812-13 (1985).

317. The notice scheme in *Amchem Products, Inc. v. Windsor* included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. 521 U.S. 591, 640 (1997) (Breyer, J., dissenting); *see also In re* "Agent Orange" Prods. Liab. Litig., 818 F.2d 145, 155 (2d Cir. 1987) (notice by media).

318. *See* Swiss Bank Settlement, *In re* Holocaust Victim Assets, No. CV 96-4849 (E.D.N.Y., Settlement Jan. 26, 1999).

319. *See* Marilyn Henry, *Swiss Banks to Notify Potential Recipients*, JERUSALEM POST, May 27, 1999, at 5.

320. *See* YEAZELL, *supra* note 19, at 247-48.

321. *See* Shapiro, *supra* note 108, at 936.

tative group is notified.[322] "[V]iewing the class as the sole litigating party does not undermine the value of requiring individual notice to all those who can be identified with reasonable effort, so long as the cost is not so high as to sound the death knell of the action."[323] In addition, costs will likely be a problem for human rights plaintiffs because generally poverty or disenfranchisement lie at the heart of their claims, and many classes of human rights victims rely on public interest counsel.[324] Accordingly, in these cases, there is a strong argument that where the probabilities of plaintiffs' success are great, the defendant should be directed to pay costs of notice.[325]

The opt out provision can also protect individual autonomy in class actions. Rule 23(c)(4) mandates that (b)(3) class members be given the opportunity to opt out if they wish to pursue individual claims or to forgo claims altogether.[326] For collective rights adjudication of human rights claims, a limited opportunity to opt out may be more appropriate than traditional opt out rights. When a class seeks both monetary and injunctive relief or in cases where the substantive law mandates, a class would be treated as a (b)(2) rather than a (b)(3) class.[327] The concerns of class adjudication that may form the basis of a

322. *See id*.

323. *Id*; *see* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 162 (1974).

324. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 27-28 (1991) (noting the costs of notice to named plaintiffs).

325. The Supreme Court has rejected this approach. *See Eisen*, 417 U.S. at 156. *But see* Shapiro, *supra* note 108, at 936 n.59.

326. *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), appeared to constitutionalize this requirement. *See* Shapiro, *supra* note 108, at 937-38 (discussing the need for reconsideration of opt out rights). In early class action jurisprudence, adequacy of representation was all that was needed to satisfy due process requirements; notice to the class and opportunity to opt out were not required. *See* Hansberry v. Lee, 311 U.S. 32, 44-46 (1940); *see also* Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 362 (1921).

327. *See* Doe v. Karadzic, 182 F.R.D. 424, 426-27 (S.D.N.Y. 1998) (involving plaintiffs who moved to opt out of (b)(1)(B) action under 23(d)(5) grant of narrow discretionary powers; however, the court denied plaintiffs' motion on grounds that withdrawal would jeopardize the potential class recovery and the moving plaintiffs were not adequately distinguishable from the class). There have also been attempts to opt out of the Swiss Bank Settlement by named plaintiffs in the class, based upon a disagreement with the amount of attorneys' fees awarded. These attempts to opt out illustrate the possible harmful effects of unlimited opt out rights. *See* Beth Gardiner, *Survivors Upset Over Swiss Bank Case*, AP ONLINE, Aug. 24, 1999, *available in* 1999 WL 22036918; *cf. Holocaust Suit Parties Withdraw*, THE RECORD (Northern New Jersey), Aug. 24, 1999, *available in* 1999 WL 7111633.

class member's desire to opt out could be addressed through other means, such as caps on attorneys' fees or punitive damages.[328] Encouragement to remain in the class may be accomplished by a variety of creative means, such as providing that limited individual claims may go forward in fora with concurrent jurisdiction, so long as the class recovery amount is offset by any individual recovery amounts.[329]

To the extent that human rights plaintiffs' classes are treated as an entity with substantive rights founded in CIL principles of collective rights, opting out would undermine such interests and therefore may not be warranted, so long as it is not constitutionally mandated.[330] In general, procedures such as opt out and notice designed to preserve individual autonomy are less compelling in the adjudication of collective human rights where shared interests are a prerequisite to the collective rights claims. Moreover, when balanced with considerations of corporate deterrence of human rights abuses through group remedies, a policy toward disallowing opt out rights is justified.

Given the difficulties in obtaining individual justice at the international level, class procedures do not compromise victims' individual rights to participate. Unlike domestic litigation, rights to participate in the international judicial process are not widely acknowledged, likely due to the lack of civil redress

328. *See* Rosenberg, *Individual Justice by Collective Means*, *supra* note 19, at 594 (advocating opt out for noncommon issues); Shapiro, *supra* note 108, at 938 (calling for conditional or limited opt out rights). For an in-depth discussion of the numerous ethical considerations for attorneys representing classes, including the issue of attorneys' fees, see generally, Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

329. In the Swiss Bank Settlement, for example, the settlement agreement incorporated provisions allowing plaintiffs to pursue claims with the Independent Claims Resolution Foundation, chaired by Paul A. Volcker, which was established to oversee a streamlined process for resolving claim to dormant accounts, so long as the claims tribunal recovery was offset in the settlement recovery. *See* Swiss Bank Settlement at Art. 4, *In re* Holocaust Victim Assets, No. CV 96-4849 (E.D.N.Y., Settlement Jan. 26, 1999). Such provisions would obviously cut down on plaintiffs opting-out of the class because they wished to pursue claims before the international tribunal.

330. The court in *Karadzic* dismissed the plaintiffs' due process arguments. *See* Doe v. Karadzic, 182 F.R.D. at 428-29; s*ee also* Doe v. Karadzic, No. 93 Civ. 0878, 1999 WL 6360, at *3-4 (S.D.N.Y. Jan. 7, 1999) (motion for interlocutory appeal on issue of motion to opt-out denied on ground that there is no due process right to opt out of (b)(1)(B) class); Shapiro, *supra* note 108, at 954-55 (suggesting that the opt-out rule is not constitutionally mandated, and if the entity model is validated by substantive law, the author suggests that the substantive interests of the class would be undermined if individual members could opt out at will).

for individuals at the international level.[331] The class model, however, presents a limited way for groups or associations to bring legal claims in international fora.[332] Non-state groups face additional obstacles because procedural rules are usually not well-developed. These procedural limitations are a result of the historically interstate character of the international legal system. More effective procedural norms are beginning to appear, due in part to the increasing transnationalization of the international legal system.[333] However, "international bodies remain cautious when handling major claims by nonstate groups" partly because they "seek to maintain a universalist view of their practice," thus avoiding setting precedent which may be inapplicable later due to political consequences.[334] U.S. courts should be less wary of their precedent being binding internationally and more concerned about being one voice in the dialogue between international bodies.[335]

B. Human Rights Objectives and Class Adjudication

Collective adjudication of human rights claims is a means of implementing human rights objectives, promoting corrective justice for groups of victims through compensation for harm, and increasing compliance with norms by deterring violative corporate behavior.

1. Corrective justice

Classic rights-based theories underlying the domestic tort system and international human rights law may further justify

331. However, there are some opportunities for individuals to petition specific international tribunals. For example, Art. 25(1) of the ECHR refers to competence of persons, groups of individuals, and non-governmental organizations to lodge petitions alleging violation of Convention-protected rights. *European Convention on Human Rights*, 1953, 213 U.N.T.S. 221, art. 25(1).

332. The European Commission on Human Rights has accepted petitions from trade unions and private associations as well as corporations. *See* TOM ZWART, THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS 46-47 (1994). The right to an individual petition under Article 1 of the First Optional Protocol to the ICCPR is a right only for individuals. The Human Rights Committee has declared group petitions inadmissible. *See Report of the Human Rights Committee, Communications Nos. 360/1989 and 361/1989*, U.N. GAOR, 44th Sess., Supp. No. 40, at 307-10, U.N. Doc. A/44/40 (1989).

333. *See* AMERICAN LAW INSTITUTE, TRANSNATIONAL RULES OF CIVIL PROCEDURE (DISCUSSION DRAFT) (1999).

334. *See* Kingsbury, *supra* note 139, at 518.

335. United States judicial precedent may be instructive to international bodies. *See supra* note 287 and accompanying text.

class actions for enforcement of human rights plaintiffs' claims against corporations.[336] Theories of corrective justice are based upon the axioms that "the value of individual entitlements to personal security should be protected against . . . wrongful or nonconsensual invasions . . . and that [human rights] victims should be made whole."[337] Both the tort system and the system of human rights law secure personal rights, including compensating victims after-the-fact and "policing the behavior of would-be violators to prevent wrongful infliction of incompensable losses."[338] Collective adjudication protects personal security of the groups at issue by developing and enforcing universal norms regarding group rights.[339] Civil litigation by groups of human rights victims engages courts in a moral dialogue, which contributes to more effective reasoning about international human rights.[340]

Practically speaking, without the opportunity to be represented in a class action in U.S. courts, the members of a human rights class will be unable to seek redress for violations of collective or individual rights.[341] Rights-based theories, holding that the dignity of individuals should be protected by the judicial process, could therefore also apply to human rights classes.[342] Rights-based theories assume that by not guarantee-

336. *See* Rosenberg, *Individual Justice by Collective Means*, *supra* note 19, at 567, 579-86 (discussing rights-based theories justifying class treatment).

337. *Id*. at 580.

338. *Id*. at 581.

339. Outcome-based participation theories hold that participation of the individual members of the class is good only to the extent that it facilitates sound public norm creation. Bone, *Rethinking*, *supra* note 19, at 201; *see also* Owen M. Fiss, *The Supreme Court, 1978 Term– Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1978).

340. *See* Koh, *supra* note 18, at 2374. "Outcome-oriented theory evaluates participation for what it adds to the quality of the outcome," most conventionally, "the final judgment, consisting of the legal remedy and the determination of legal and factual issues." Bone, *Rethinking*, *supra* note 19, at 201 (examining process-oriented (sometimes called intrinsic) and outcome-oriented theories of participation (sometimes called instrumental) and arguing that the extent of a nonparty's right to relitigate claims or issues should vary with type of case).

341. *See* Frank Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights – Part I*, 1973 DUKE L.J. 1153, 1170-77 (discussing the use of litigation access fees and noting that the civility of our law rests on its recognition of individual entitlements and responsibilities).

342. *See* JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 177-80 (1985) (discussing the dignitary process theory and arguing that direct participation has intrinsic value in promoting individual dignity); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988) ("[G]rant[ing] to the individuals or groups against whom government decisions operate the chance to participate in the processes

ing each litigant a day in court individual dignity is compromised.[343] At the heart of rights theory is the concept of "moral harm"—"the special injustice someone suffers when one of her rights is wrongly denied"; this type of harm will inevitably occur when there is no forum at all for the adjudication of victims' rights violated by international corporate activity.[344]

In international law, the inherent good of participation in the creation of legal norms through the political process is the "possibility of self-realization through development of the social self."[345] Where ethnic or minority groups seek to enforce international human rights in the collective, the self-realization and dignity of the individual members as participators in the judicial process is at stake only to the extent that the group's interests are enforced.[346] Accordingly, class adjudication, where the class interests are reinforced through deterrence mechanisms such as class injunctive and compensatory remedies, enhances, rather than compromises, the inherent dignity of individual absentee members of the class.

2. Deterrence

Utilitarian theories also justify class treatment in actions against large corporations engaged in risky behavior by creating optimal incentives for firms to take due care. Such incentives may deter corporate joint ventures with corrupt governments in mass victimization of plaintiffs' rights under CIL.

Deterrence, in the view of some, remains the primary justi-

by which those decisions are made . . . expresses their dignity as persons."); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* NOMOS XVIII: DUE PROCESS 126-27 (J. Roland Pennock & John W. Chapman, eds., 1977) ("They attach value to the individual's *being told why* the agent is treating him unfavorably and to his *having a part in the decision*."); *see also* Jerry L. Mashaw, *Dignitary Process; A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433, 439-43 (1987) (advocating natural rights approach to due process based on liberal democratic values).

343. Rights-based adjudication theory "perhaps . . . assumes that, by not guaranteeing litigant autonomy" individual dignity is compromised. Bone, *Rethinking*, *supra* note 19, at 256-57.

344. *See id.* at 260.

345. *See* Henry Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 105 (1988). International human rights law does include the individual's right to participate in general in the state's legal process, which has been an essential basis of human rights law, despite being defined by vague norms and having disputed meanings in the international community. *See id*.

346. *See supra* Part II.B.

fication for a civil tort system in small claims cases.[347] Human rights claims, even where great harm is alleged, may be analogized to small claims classes where there are severe disincentives to individually litigate the claims. However, even when a class of claims is litigated, deterrence may not be effective if the cost of litigation is less than the cost of altering unlawful practices and may require the computation of litigation costs to include the costs of avoiding injury.[348]

By certifying and adjudicating human rights class actions, courts create a more even playing field for victims challenging corporate defendants.[349] The corporation is the traditional model for collective litigation,[350] enjoying its privileged status by virtue of the state's grant of corporate status.[351] Due to the deterrent effect of sizable class remedies, class actions may provide a workable means for holding corporations accountable to international human rights standards.

Given the nature of the claims being enforced in human rights class actions, neither the theories underlying rights to participation nor the practical objectives of enforcement of human rights for groups justify denying class treatment on autonomy grounds.[352] The class structure facilitates generalized policies of reform, deterrence, and corrective justice and provides a forum for making broad statements of accountability for human rights abuses on an international scale.[353] Class adjudication provides the means by which the voice of human rights victims in the international community is heard when joined by the voice of the group within which the victim has

347. One of the justifications of the consumer class action is "that it is more important to deprive the defendant of ill-gotten gains than to deliver compensation to victims." Marcus, *supra* note 106, at 889.

348. *See* Bone, *Individual Justice by Collective Means*, *supra* note 19, at 570-71; Rosenberg, *supra* note 121, at 878-79; Shapiro, *supra* note 108, at n.44.

349. *See generally*, Collins, *supra* note 183, at 18-19.

350. *See* Shapiro, *supra* note 108, at 919 (stating that defendant classes with a pre-existing coherence were often litigants in the early stages of class action development, but today, defendant class actions are rare).

351. Organizational liability for violations of international human rights law is an under-developed area and is beyond the scope of this article.

352. Procedural rules such as Rule 23 may also fulfill the objectives of distributional justice. *See* Robert A. Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 905, 908-18.

353. *See* Koh, *supra* note 18, at 2349 n.11; Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291, 1298-1302 (1976).

suffered. Justice occurs when these voices are heard at the international level.[354]

VI. CONCLUSION

Federal courts play a crucial role in providing a unique forum for groups aggrieved by the adverse consequences of international global corporate activity. In its application of class procedures, courts can participate in the interpretation of international norms and expand and modify rights that would not be available to individuals, absent the ability to enforce them collectively. In class actions against private enterprises, plaintiff classes may finally be the key to deterring corporate violations of human rights.[355]

Implementation of class action rules in the area of human rights litigation may achieve a greater good than simply achieving one of the rule's purely procedural objectives of minimizing individual claims. The rules solidify legal rights by providing meaningful remedies to deter violations. The virtual absence of international accountability for corporate complicity with government violations of human rights has allowed many international offenders to escape liability. Class actions are the tool necessary to institute real change.[356] Class actions do so by preventing corporate entities from hiding behind defenses that would ordinarily protect them against individual plaintiffs.[357]

The class action is an appropriate means for achieving the behavioral, cultural, political, and societal policies underlying Rule 23 at the international level.[358] When evaluated in light of human rights policies, the class action is necessary because individual litigation fails to further the search for fairness or jus-

354. *See* Collins, *supra* note 183, at 19 (Eizenstat, referring to the Holocaust survivors' and families' litigation, stated the following: "But of the hundreds of survivors I've met, the great bulk are pleased all this is happening. Even though what they will get back is a pittance, at the end of their lives at least the world finally recognized the plight they endured.").

355. *See generally* Morgan, *supra* note 39.

356. *See* Collins, *supra* note 183, at 18 (Eizenstate stated: "[I]t took Judge Korman and the threat of sanctions to get the banks over the top.").

357. *See* Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 166-67 (1998).

358. *See id.* at 159-60, 170 (acknowledging that the Advisory Committee created the rule with the vision of allowing vindication of a person's rights who may not otherwise find justice).

tice sought by our judicial process.[359] In sum, human rights class action litigation 1) crystallizes international norms for collective rights; 2) provides collective remedies; 3) allows the federal court to participate through transnational public law litigation in international legal development and enforcement of legal norms; 4) deters international actors; and 5) provides justice for victims.

359. *See id*. at 158.