

11-2004

Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System

Elizabeth J. Cabraser

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Civil Law Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Elizabeth J. Cabraser, Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System, 57 *Vanderbilt Law Review* 2211 (2019)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol57/iss6/5>

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System

By *Elizabeth J. Cabraser**

I.	INTRODUCTION	2211
II.	THE HUMAN RIGHTS/MASS TORT PRECURSORS TO THE HOLOCAUST LITIGATION	2217
III.	DOING JUSTICE BY BEARING WITNESS.....	2228
IV.	THE HUMAN RIGHTS/MASS TORT JURISPRUDENCE FEEDBACK LOOP	2234
V.	CONCLUSION: MAKING A RECORD AND PROMOTING AN INTERNATIONAL RULE OF LAW	2235

I. INTRODUCTION

On July 26, 2000, final approval was granted to a landmark \$1.25 billion settlement of the claims of an international class of Holocaust victims against Swiss Banks that engaged in massive looting and misappropriation of assets entrusted to them by hundreds of thousands of Jews and other groups¹ imprisoned, murdered, and

* Partner, Lief, Cabraser, Heimann & Bernstein, LLP (New York/San Francisco), Visiting Professor, Columbia University School of Law (Spring 2003/Spring 2004). Lief Cabraser served on the court-appointed plaintiffs' Executive Committee in the *Swiss Banks* and *Nazi-Era* litigations. Contact: ecabraser@lchb.com.

1. This settlement was designed to benefit persons recognized as targets of systematic Nazi oppression on the basis of race, religion, or personal status. "Accordingly, at the initiative of plaintiffs' Executive Committee, the settlement was explicitly designed to benefit Jews, homosexuals, Jehovah's Witnesses, the disabled, and Romani [Gypsies]—groups recognized by the United Nations as having been the targets of systematic Nazi persecution . . ." *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 143 (E.D.N.Y. 2000) [hereinafter *Swiss Banks*].

dislocated by the Nazi regime.² The *Swiss Banks* complaints linked the actions of Swiss financial institutions to the Nazi regime and its program of genocide.³

The *Swiss Banks* litigation was brought and settled under federal class action rules⁴ in the United States District Court for the Eastern District of New York. The class action was brought on behalf of five plaintiff classes,⁵ whose members resided in over fifty countries

2. *Id.* at 141, 167. Other decisions authored by Judge Korman, who granted preliminary and final settlement approval to the *Swiss Banks* settlement that address various aspects of the amendment, allocation, and implementation of the *Swiss Banks* settlement, are reported at: No. CV-96-4849, 2004 U.S. Dist. LEXIS 10011 (E.D.N.Y. Feb. 19, 2004); 302 F. Supp. 2d 59 (E.D.N.Y. 2004); 302 F. Supp. 2d 89 (E.D.N.Y. 2004); 256 F. Supp. 2d 150 (E.D.N.Y. 2003); 2003 U.S. Dist. LEXIS 20686 (E.D.N.Y. Nov. 17, 2003); 270 F. Supp. 2d 313 (E.D.N.Y. 2002); 2000 U.S. Dist. LEXIS 15644 (E.D.N.Y. Aug. 9, 2000); 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. Nov. 22, 2000).

3. The court summarized the allegations and legal theories of the *Swiss Banks* litigation as follows:

Plaintiffs alleged that, before and during World War II, they were subjected to persecution by the Nazi regime, including genocide, wholesale and systematic looting of personal and business property and slave labor. Plaintiffs alleged that, in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labor, Swiss institutions and entities, including the named defendants, collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide. Plaintiffs also alleged that defendants breached fiduciary and other duties; breached contracts; converted plaintiffs' property; enriched themselves unjustly; were negligent; violated customary international law, Swiss banking law and the Swiss commercial code of obligations; engaged in fraud and conspiracy; and concealed relevant facts from the named plaintiffs and the plaintiff class members in an effort to frustrate plaintiffs' ability to pursue their claims. Plaintiffs sought an accounting, disgorgement, compensatory and punitive damages, and declaratory and other appropriate relief.

Swiss Banks, 105 F. Supp. 2d. at 141-42.

4. FED. R. CIV. P. 23(a), (b)(3), (e).

5. While the \$1.25 billion settlement was, as described above, designed to benefit specific populations targeted by the Nazis for oppression or annihilation, the plaintiff settlement classes themselves were defined objectively and functionally, as class action practice prescribes. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.222 (2004) ("The definition must be precise, objective, and presently ascertainable. . . . The order defining the class should avoid subjective standards (e.g., plaintiff's state of mind) or terms that depend upon resolution of the merits (e.g., persons who were discriminated against).") Accordingly, the five plaintiffs' settlement classes were officially defined as follows:

1. Deposited Assets Class: The Deposited Assets Class consists of victims or targets of Nazi persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from deposited assets or any effort to recover deposited assets.

2. Looted Assets Class: The Looted Assets Class consists of victims or targets Of Nazi persecution and their heirs, successors, administrators, executors, affiliates and assigns who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from looted assets or cloaked assets or any effort to recover looted assets or cloaked assets.

and spoke over thirty languages.⁶ Most of the court-appointed class counsel either served without fee in the five-year prosecution and settlement of the litigation or donated their court-awarded fees to international human rights endeavors.⁷

On December 5, 2000, a second court, the United States District Court for the District of New Jersey, approved an international diplomatic/legal agreement creating a foundation titled "Remembrance, Responsibility and the Future," (the "Foundation"), funded with DM \$10 Billion (approximately \$5 billion U.S.D.). The

3. Slave Labor Class I: Slave Labor Class I consists of victims or targets of Nazi persecution and their heirs, executors, administrators and assigns who actually or allegedly performed slave labor for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through, releasees, and who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from the deposit of such revenues or proceeds or cloaked assets or any effort to obtain redress in connection with the revenues or proceeds from slave labor or cloaked assets.

4. Slave Labor Class II: Slave Labor Class II consists of individuals and their heirs, executors, administrators and assigns who actually or allegedly performed slave labor at any facility or work site, wherever located, actually or allegedly owned, controlled or operated by any corporation or other business concern headquartered, organized or based in Switzerland or any affiliate thereof, and who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee other than settling defendants, the Swiss National Bank, and other Swiss banks for relief of any kind whatsoever relating to or arising in any way from such slave labor or cloaked assets or any effort to obtain redress in connection with slave labor or cloaked assets.

5. Refugee Class: The Refugee Class consists of victims or targets of Nazi persecution and their heirs, executors, administrators and assigns who sought entry into Switzerland in whole or in part to avoid Nazi persecution and who actually or allegedly either were denied entry into Switzerland or, after gaining entry, were deported, detained, abused or otherwise mistreated, and who have or at any time have asserted, assert or may in the future seek to assert claims against any releasee for relief of any kind whatsoever relating to or arising in any way from such actual or alleged denial of entry, deportation, detention, abuse or other mistreatment.

Swiss Banks, 105 F. Supp. 2d. at 143-44.

6. The prosecution and settlement of the *Swiss Banks* litigation is described in detail by Morris A. Ratner, *The Settlement of Nazi-Era Litigation Through the Executive and Judicial Branches*, 20 BERKELEY J. INT'L L. 212 (2002) (analyzing the procedures utilized to effectuate the worldwide settlement of class claims in *Swiss Banks* and comparing this formal Rule 23, court-approved settlement procedure with the alternate approach utilized shortly thereafter to resolve related claims in the *Nazi-Era* litigation). Morris A. Ratner was a member of the *Swiss Banks* court-appointed plaintiffs' Executive Committee. See *id.* at 212 n.a1.

7. "Numerous lawyers, including plaintiffs' lead settlement counsel, have waived all attorneys' fees. Those relatively few members of the Plaintiffs' Executive Committee who are seeking fees personally have agreed to limit their fee applications to the traditional 'civil rights' standard of lodestar for time actually expended that materially advances the litigation, and all fees are capped at no more than 1.8% of the settlement fund, with discretion to award a lower sum." *Swiss Banks*, 105 F. Supp. 2d. at 146. The Court's consideration and rulings on attorneys' fees are chronicled in the *Swiss Banks* decisions published at 311 F. Supp. 2d 363 (E.D.N.Y. 2004); 302 F. Supp. 2d 89, 117-20 (E.D.N.Y. 2004); 314 F. Supp. 2d. 155 (E.D.N.Y. 2004); and 270 F. Supp. 2d 313, 319-26 (E.D.N.Y. 2002).

funding for the Foundation was contributed in equal shares by the German government and German industry, to compensate those who worked as slave or forced laborers for the Nazi regime in German factories, were subjected to medical experimentation, were held in *Kinderheims* (children's homes)⁸ or whose property or assets were misappropriated.⁹ Again, this litigation was brought, and its claims were settled, on behalf of an international class of Holocaust victims, survivors, and their families. A small set-aside fund paid notices, administrative costs, and all attorneys' fees.¹⁰

The *Nazi-Era* cases were a series of actions brought before the Judicial Panel on Multi-District Litigation ("MDL Panel") and transferred by the MDL Panel for coordinated proceedings before Judge Bassler of the District of New Jersey, pursuant to 28 U.S.C. Section 1407.¹¹ The plaintiffs were former "slave laborers" and "forced laborers" who suffered at the hands of the Nazi regime and the German companies who assisted it during the Nazi era.¹² The fifty-

8. Some of the German manufacturers who assisted the Axis war effort maintained "Kinderheims" (literally, "children's homes") where infants born to the company's forced laborers, and often to forced laborers working on surrounding farms, were taken. These children received minimal care, at best, and usually died. For example, approximately 350 to 400 Polish and Russian children were, between 1943 and 1945, placed in VW's Kinderheim. Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in the United States Courts*, 34 U. RICH. L. REV. 1, 257 (2000). Both Nazi and Allied reports reveal that the babies were kept in deplorable conditions; towards the end of the war, their mortality rate reached 100%. *Id.* The Kinderheim scandal led to an early Holocaust-related lawsuit. In May 1999, Anna Snopczyk, an elderly Polish national, sued VW in Wisconsin federal court for infanticide. *Id.* It appears that over 300 Kinderheims were operated in Germany under the Third Reich, including those run by Ford and Krupp. *Id.* at 258.

9. *In re Nazi-Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 430 (D.N.J. 2000) [hereinafter *Nazi-Era*].

10. See Ratner, *supra* note 6, at 229.

11. 28 U.S.C. § 1407 (2005).

12. Victims of the Nazi regime suffered two major forms of enslavement. Some were forced to work under conditions that were unimaginably harsh but still allowed them to survive the war. The second category were prisoners who were taken from the concentration and death camps, who were worked to death, and who were then replaced. Benjamin Ferencz, an American prosecutor at Nuremberg, describes these two categories as follows:

The Jewish concentration camp workers were less than slaves. Slave masters care for their human property and try to preserve it; it was the Nazi plan and intention that the Jews would be used up and then burned. The term "slave" is used in this [book] only because our vocabulary has no precise word to describe the lowly status of unpaid workers who are earmarked for destruction.

MICHAEL J. BAZYLAR, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* 60 (2003) (quoting BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* xvii (1979)) [hereinafter *HOLOCAUST JUSTICE*]. The Holocaust litigation court documents typically distinguish between "slave laborers" and "forced laborers," defining slave laborers as concentration camp inmates earmarked for extermination, and forced laborers as conquered civilian population and prisoners of war. Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 *Berkeley J. Int'l L.* 11, 27 n.71

three actions coordinated by the MDL Panel asserted claims against German companies, including banks, insurance companies, and manufacturers (collectively referred to in the litigation as the “German Industry”), arising from the conduct of the defendants occurring during the Nazi era.¹³ The cases were transferred by the MDL Panel to facilitate the international settlement agreement, described by Judge Bassler as “the result of a collaboration among American plaintiffs’ attorneys, representatives of German Industry, numerous foreign governments including the United States, Germany, and Israel, and other non-governmental organizations.”¹⁴ The Foundation established to embody and distribute the \$5 billion settlement was, in the words of the court, “designed to provide some compensation to the many surviving victims of the Nazi era whose claims rest on the conduct of German Industry during that period. In exchange for receiving this compensation, victims agree to provide German Industry with legal peace.”¹⁵

The *Swiss Banks* and *Nazi-Era* litigations were anything but “litigation as usual.” Both cases were extraordinary, in great part due to the force and commitment of the personalities who played irreplaceable roles in both. These include Professor Burt Neuborne, of New York University Law School, who served as lead class counsel in the *Swiss Banks* litigation, as well as in a special master role vis-à-vis Judge Korman, and who played a similarly central role in the *Nazi-Era* litigation, and Stuart Eizenstat, initially in his role as United States Undersecretary of State, and later as Deputy Secretary of Treasury. Other key negotiators and organizations—of which there

(2002). According to Bazylar, the Nazis themselves did not make such a distinction, instead using the term “Zwangsarbeiter” (forced laborers) to describe all their involuntary workers. BAZYLAR, HOLOCAUST JUSTICE, *supra*, at 61. Others point to a distinction in Nazi attitude, with a different rationale and treatment of Jewish slave laborers and Eastern European forced laborers, with the former expressly targeted for extermination as members of a hated “racial” group, and the latter, spoils of war. Stephen Whinston, *Can Lawyers and Judges Be Good Historians? A Critical Examination of the Siemens Slave-Labor Cases*, 20 Berkeley J. Int’l L. 160, 165 (2002). It is estimated that almost 1.25 million of these former slave or forced laborers are alive today.

13. These entities included Volkswagen AG, Bayer AG, Siemens AG, Bayerische Motoren Werke (BMW) AG, Fried Krupp AG, Daimler/Chrysler AG, Ford Motor Co., Commerzbank AG, Nordstern Art Insurance Corp., and the Republic of Austria. A complete list of appearances for defendants in the fifty-three actions that were coordinated as *In re Nazi Era Cases Against German Defendants Litigation* is set forth at 198 F.R.D. 429, 448-451 (D.N.J. 2000).

14. *Nazi Era*, 198 F.R.D. at 430.

15. *Id.*

were many—are named and described in the judicial decisions approving the settlements.¹⁶

These Holocaust cases exemplified the most idealistic use of class action procedure, the recognition of the federal common law incorporation of international human rights principles, and the accessibility of United States federal courts as a forum for international claims against governmental entities and private businesses with a United States nexus. As demonstrated by the heartfelt testimony of the class members themselves at the final approval hearing in the *Swiss Banks* litigation, the utilization of group action in a judicial tribunal to obtain recognition and compensation of claims may be unique to American law.¹⁷

16. See, e.g., *Nazi Era*, 198 F.R.D. 429, 431-436, describing the history of the negotiations and the role of the United States in the negotiations, including the declaration of Stuart E. Eizenstat and the letter of President William J. Clinton. The *Nazi Era* negotiations also included the governments of Germany, Austria, Israel, Belarus, Poland, Russia, Ukraine, and the Czech Republic. The Conference on Jewish Material Claims Against Germany, an umbrella organization representing many international Jewish non-governmental organizations, was also involved. 198 F.R.D. at 431-432. The *Swiss Banks* settlement approval decision likewise lists the key players, including Stuart Eizenstat and former Senator Alfonse D'Amato. Other organizations playing important roles in the *Swiss Banks* settlement are listed at 105 F. Supp. 2d 139, 147-149 (E.D.N.Y. 2000). For one point of view on the negotiations, from a survivor/journalist perspective, see generally John Authers & Richard Wolffe, *THE VICTIM'S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST* (2002).

17. As stated by Israel Singer, Executive Director of the Conference on Jewish Material Claims Against Germany:

Let me raise one point and with that I'll close. I ask you to consider one fact and one fact above all. As a result of this case, 5.4 million names of persons who died in the Holocaust came to light, names of the people, the places which they were killed in. This has changed history, because people can no longer claim that people didn't die. Holocaust revisionists can no longer claim that people didn't pass from the scene. This historic point changes the way the picture of history plays out and the way the future will play itself out. We did that as a result of the efforts of this trial, which turned out to be a settlement, because we found those names as a result of the fact that we wanted to know which people had accounts.

In re Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 143 (E.D.N.Y. 2000) (No. CV-96-4849) (on file with the author) [hereinafter *Fairness Hearing Transcript*]. As class member Judith Hager testified at the same hearing:

Again, I want to thank United States for this great opportunity she gave people to speak out. It's not a matter of how much pennies or how much dollars or how much millions you have; it's the great opportunity to speak out, even 55 years later, and I think that even 1,000 years later, our generations to come will continue to speak and to value it . . . and to continue in the path of helping each other.

Id. at 112:21-113:4.

II. THE HUMAN RIGHTS/MASS TORT PRECURSORS TO THE HOLOCAUST LITIGATION

The Holocaust cases were not entirely *sui generis*. The way for the court-sponsored resolution of the Holocaust cases was paved by a notable precursor, *In re Estate of Marcos Human Rights Litigation*, a multinational class action brought under the Alien Tort Claims Act¹⁸ (“ATCA”), certified under Federal Rule of Civil Procedure 23, tried to a verdict on a classwide basis, and affirmed on appeal.¹⁹

The *Marcos* litigation was prosecuted on behalf of approximately ten thousand victims who suffered torture, disappearance, or summary execution at the hands of the Marcos regime.²⁰ Judge Manuel Real of the United States District Court for the Central District of California served as MDL transferee judge in this consolidated litigation, which was transferred for pretrial proceedings and trial to the District of Hawaii.²¹

In *Hilao v. Estate of Marcos*,²² the Ninth Circuit affirmed the district court’s judgment approving the jury verdicts in a three-phase trial structure that determined the liability of the estate of Ferdinand Marcos to a class of ten thousand persons tortured, summarily executed, or “disappeared” while in military custody during the fourteen year period of Marcos’ dictatorial regime.²³

The district court ordered the issues of liability and damages tried separately.²⁴ In September 1992, a jury trial was held on liability, and the jury reached a verdict against the estate. The district court then ordered the damage trial bifurcated into one trial on exemplary damages, to be followed by a separate trial on compensatory damages. Before these trials commenced, the court gave notice to the class and set a proof-of-claim deadline. A total of

18. 28 U.S.C. § 1350 (2004) [hereinafter ATCA] (“The district courts shall have original jurisdiction of 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.”). The ATCA was enacted in 1789, as part of the first Judiciary Act.

19. 910 F. Supp. 1460, 1464 (D. Haw. 1995), *aff’d sub nom* Hilao v. Estate of Marcos, 103 F.3d 767, 770 (9th Cir. 1996).

20. 910 F. Supp. 1460, 1462-64.

21. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1460, 1463.

22. 103 F.3d 767 (9th Cir. 1996).

23. *Id.* at 774.

24. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1460, 1461; *Hilao*, 103 F.3d at 767, 772.

10,059 verified claim forms were returned. In the end, 9,541 of these claims were found valid.²⁵

In February 1994, the same jury that had heard the liability phase of the trial heard evidence on exemplary damages and returned a verdict against the Marcos estate in the amount of \$1.2 billion.²⁶ The district court appointed a Special Master to examine the claims that had been submitted by class members, interview a sample of claimants, and make a report and recommendation to the jury in connection with the third, compensatory damages trial phase.²⁷ In January 1995, the jury reconvened for the third time. After a seven-day trial, the jury returned a compensatory damage award in the aggregate amount of over \$766 million for the class.²⁸

The procedure utilized to obtain data and present evidence on compensatory damages is described in greater detail in the district court's opinion, in which Judge Real upheld the propriety of using aggregate procedures, including the random sampling of claims and the use of inferential statistics and extrapolation to calculate damages for each member of the class.²⁹ The utilization of these techniques, under the particular circumstances presented by the *Marcos* litigation, was upheld by the Ninth Circuit.³⁰

To obtain classwide damages data, the court-appointed head Special Master (Sol Schreiber, a well-recognized retired federal magistrate judge) supervised the taking of formal depositions of 137 randomly selected claimants. The Special Master then reviewed the claim forms and depositions of the class members in the sample and recommended the amount of damages to be awarded to each of the 131 claimants in this sample whose samples were determined to be valid. The Special Master applied Philippine, international, and American law on damages, using a valuation protocol that included specific factors for consideration in each case. These factors included the occurrence or absence of physical torture, the duration of any torture, the length of detention, mental abuse, the victim's age, and actual losses, including medical bills.³¹

25. The procedural background of the district court litigation, and the trial and notice procedures are summarized at *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1460, 1461-1464, 1466-1469; and at *Hilao*, 103 F.3d at 767, 782-785.

26. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1464; *Hilao*, 103 F.3d at 772.

27. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1464; *Hilao*, 103 F.3d at 767, 772.

28. *Id.* at 772.

29. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1464-65.

30. *Hilao*, 103 F.3d at 784-87.

31. *Id.* at 783.

For the summary execution and disappearance claims, the Special Master considered the presence or absence of torture prior to death or disappearance, the actual killing or disappearance, the mental anguish suffered by the victim's family, and lost earnings.³² Any monetary loss was computed according to a formula established by the Philippine Supreme Court and converted into American dollars.³³

This procedure enabled the Special Master to recommend damages for the entire sample by multiplying the average claim in each category by the number of claimants in that sample. From there, the Special Master extrapolated each sample award to reach an aggregate award for each of the three types of claims (torture, summary execution, and disappearance) as well as an aggregate amount for the entire class.³⁴ The Special Master recommended a total compensatory damage award of \$767,491,493.³⁵

The jury trial on compensatory damages included the expert testimony of a statistician regarding the validity of the methodology used to select the random sample. The expert opined "that the procedures followed conform to the standards of inferential statistics, and that the injuries of the random sample claimants were representative of the class as a whole."³⁶ The jury considered the testimony of the 137 random-sample claimants, as well as the Special Master's testimony regarding his report and recommendations, which were supplied to the jury.³⁷

The jury was instructed that it could accept, modify, or reject the Special Master's recommendations and that it could independently, on the basis of the evidence presented by the random-sample claimants, reach its own judgment as to the actual damages of those claimants, as well as the actual damages of the class as a whole.³⁸ The jury deliberated for five days, ultimately reaching a verdict that adopted the Special Master's recommendations in most, but not all, instances.³⁹

In approving the three-phase trial structure and the use of both random sampling and extrapolative techniques to calculate class

32. *Id.*

33. *Id.*

34. *Id.* at 783.

35. *Id.* at 783-84.

36. *Id.*

37. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1464.

38. *Hilao*, 103 F.3d at 784.

39. *Id.*

damages, Judge Real articulated a compelling interest in avoiding the cost, waste, delay, and inconsistency of ten thousand individual trials:

In a case such as this one, where there are 9,541 class members, most of whom live in other areas of the world, a balancing of interests must occur to obtain justice to the parties. A due process analysis must weigh defendant's claim to the right to trial in each individual case against judicial economy and manageability by use of a valid statistical procedure. . . . Due process is not necessarily limited to the traditional sense as argued by defendants, 'but should encompass the impact on plaintiffs and even the obvious societal interests involved.' . . . Here, individual trials for each of the 9,541 plaintiffs would take decades. Most of that time would be wasted since the nature of the injuries would be similar, if not identical, the testimony would be largely duplicative. Utilizing the procedure employed by the Court the injuries could be accurately categorized, and the source of the injuries would be identical. . . . This Court believes, the aggregate trial is, in some vital respect, superior to the individual trial and does not violate the substantive or procedural due process rights of either the plaintiffs or the defendant.⁴⁰

Judge Real adopted his due process analysis from that utilized by then-Chief Judge Robert M. Parker of the Eastern District of Texas in a non-human rights context—the management of thousands of similar asbestos personal injury cases consolidated in the Eastern District of Texas.⁴¹ The *Marcos* statistical sampling methodology borrowed from and refined that developed in *Cimino*. Ironically, *Cimino* itself did not fair as well on appeal as did *Marcos*: years after Judge Parker certified the *Cimino* class and endorsed the statistical methodology (and after Judge Parker himself was elevated to the Fifth Circuit Court of Appeals), the Fifth Circuit reversed much of the *Cimino* decision.⁴²

The Ninth Circuit, however, endorsed Judge Real's rationale, stating that:

the time and judicial resource required to try the nearly 10,000 claims in this case would alone make resolution of [plaintiffs'] claims impossible. . . . The similarity in the injuries suffered by many of the class members would make such an effort, even if it could be undertaken, especially wasteful, as would the fact that the district court found early on that the damages suffered by the class members likely exceed the total known assets of the estate.⁴³

The district court concluded, and the Ninth Circuit confirmed, that the use of inferential statistics and aggregate procedures did not deny defendants their constitutional due process right to a one-on-one trial.⁴⁴ Both *Marcos* decisions performed the balancing test set forth

40. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1467 (citations and footnotes omitted).

41. *Cimino v. Raymark Indus.*, 751 F. Supp. 649, 665-66 (E.D. Tex. 1990).

42. *Cimino v. Raymark Indus.*, 151 F.3d 297, 319-20 (5th Cir. 1998).

43. *Hilao*, 103 F.3d at 786.

44. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1467; *Hilao*, 103 F.3d at 786.

by the Supreme Court in *Mathews v. Eldridge*⁴⁵ and *Connecticut v. Doe*⁴⁶ to determine that the three-phase trial procedure utilized by the district court, including the determination of an aggregate punitive damages award prior to the compensatory damages trial and the use of sampling, extrapolative, and aggregate techniques, did not violate due process.⁴⁷

The Ninth Circuit took comfort from the care with which the sampling and calculation procedure was designed, the integrity of the process as implemented, the deduction for invalid claims, and from the fact that the proof-of-claim forms “the district court required each class member to submit in order to opt into the class required the claimant to certify under penalty of perjury that the information provided was true and correct.”⁴⁸

In weighing and balancing the defendant’s claimed right to a jury trial in each individual case against the judicial economy and manageability of a phased class trial utilizing valid statistical procedures, both *Marcos* courts concluded that only the aggregate techniques protected the due process rights of *both* sides.⁴⁹ Had the trial court reverted to individualized trials, most class members either would have died before the inception of their trial or would have had their day in court only after the exhaustion of the assets of the estate. As the district court observed, invocation of the Seventh Amendment to insist on multiple jury trials and thus “to deny relief to persons who have suffered significant damage simply based of the number of persons a single tort feisor has hurt is unconscionable.”⁵⁰

Thus, as the district court concluded, “the aggregate trial is, in some vital respects, superior to the individual trial and does not violate the substantive or procedural rights of either the plaintiffs or

45. 424 U.S. 319, 335 (1976) (“[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

46. 501 U.S. 1, 10-11 (1991) (applying the *Mathews* factors).

47. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1467-69; *Hilao*, 103 F.3d 785-87.

48. *Hilao*, 103 F.3d at 786.

49. *See In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1467: “This Court believes ‘the aggregate trial is, in some respects, superior to the individual trial’ and does not violate the substantive or due process rights of either the plaintiffs or the defendant.”; *see also Hilao*, 103 F.3d 767, 786-787.

50. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1468 n.19.

the defendant.”⁵¹ The Ninth Circuit similarly observed that the plaintiffs’ interest in the use of the statistical method was “enormous, since adversarial resolution of each class member’s claim would pose insurmountable practical hurdles. The ‘ancillary’ interest of the judiciary in the procedure is obviously also substantial, since 9,541 individual adversarial determinations of claim validity would clog the docket of the district court for years.”⁵²

The *Marcos* litigation provides the first example of the design, implementation, and affirmance on appeal of a multi-phase class trial structure that incorporated statistical sampling and extrapolative techniques that generated a monetary judgment favorable to the class. Appellate courts have since considered the *Marcos* sampling methodology in other class action contexts.⁵³

Satisfaction of the approximately \$2 billion *Marcos* verdict, reduced to final judgment in 1995, has proved elusive: collection efforts against the *Marcos* defendants continue, and the assets remain beyond reach in (ironically) Swiss banks. The plaintiff class members and their counsel remain unpaid.⁵⁴ Nonetheless, the *Marcos* litigation established Rule 23 as a feasible procedural device to unite the claims of thousands, or hundreds of thousands, of victims of human rights violations, allowing effective representative litigation in United States courts. It also legitimized the utilization of statistical sampling techniques to extrapolate classwide damages from a valid sample of the class, thus facilitating the use of class actions in more mundane mass torts and other class actions.

The *Marcos* litigation proved widely influential on mass tort and other class actions without human rights dimensions. Courts

51. *Id.* at 1467 (quoting Michael J. Saks & Peter David Blank, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in Mass Torts*, 44 STAN. L. REV. 815, 827 (1992)).

52. *Id.*

53. For example, in *Bell v. Farmers Insurance Exchange*, 115 Cal. App. 4th 715 (Cal. App. 2004), the California Court of Appeal upheld the propriety of statistical sampling to determine the aggregate damages of a certified “wage and hour” employee class action (in which employees claimed to have been required to work substantial — yet varying — amounts of unpaid overtime), after the issue of liability had been decided on summary judgment in the trial court. As the *Bell* court held, *inter alia*, “the use of random sampling and extrapolation for the determination of aggregate classwide damages was proper. The proof of aggregate damages for time-and-a-half overtime by statistical inference reflected a level of accuracy consistent with due process.” 115 Cal. App. 4th at 747-752.

54. The Banks successfully reversed the district court’s assets freeze orders in *Credit Suisse v. U.S. District Court*, 130 F.3d 1342 (9th Cir. 1997). In the most recent chapter of the *Marcos* saga, the Philippine National Bank successfully petitioned the Ninth Circuit for writ of mandamus vacating the district court’s contempt and discovery orders regarding the Bank’s transfer of assets to the Republic of the Philippines, under the act of state doctrine. *Philippine Nat’l Bank v. U.S. Dist. Ct.*, 397 F.3d 768 (9th Cir. 2005).

searching for manageable structures within which to conduct phased, classwide trials in “routine” mass tort and employment litigation looked to the example set by the *Marcos* litigation. For example, the California state courts used a variation of the statistical sampling technique described in *Marcos* in the trial of an employees’ wage and hour class action against an insurance company. The classwide trial is described, and was affirmed, by the California Court of Appeal in *Bell v. Farmers Insurance Exchange*.⁵⁵ In granting nationwide class certification to a plaintiffs’ class of cigarette smokers suffering from diagnosed tobacco-related diseases, for purposes of a unitary adjudication of their punitive damages claims against the tobacco companies in the group of cases known as the *Simon* litigation, Judge Weinstein of the U.S. District Court for the Southern District of New York cited from *Marcos* in addressing the use of statistics to determine the level of classwide harm caused by a specific list of diseases.⁵⁶

Are the *Swiss Banks*, *Nazi-Era*, and *Marcos* cases prototypes or precursors of a new wave of hybrid human rights mass torts litigation that merges the law of nations and common law as its substantive content and utilizes the class action procedures and expansive jurisdiction presently available in U.S. courts to create a new body of compensatory litigation? It may be that the success of these cases (pragmatically defined here as substantial court-approved or endorsed settlements, or substantial jury verdicts affirmed on appeal) owe as much, or more, to the political climate of their time, and to the judicial philosophies of the judges who presided over them, than to the “objective” merit of the claims or their cognizance as legal claims *per se*. The active support and involvement of the federal government surely was critical to the resolution, rather than the dismissal, of the Holocaust cases. Where such support is not forthcoming, or where the attitude of the government is neutral or openly hostile, courts may not

55. 9 Cal. Rptr. 3d 544, 721-24 (Cal. Ct. App. 2004), *reh’g denied*, Civ. Act. Nos. A096721, A097810, A098799, 2004 Cal. App. LEXIS 298 (Cal. Ct. App. Mar. 9, 2004).

56. *In re Simon II Litig.*, 211 F.R.D. 86, 151 (E.D.N.Y. 2002). The *Simon II* class certification decision is currently on appeal, pursuant to FED. R. CIV. P. 23(f), to the Second Circuit. The class certification decision itself was preceded by precedent of a comprehensive decision approving on choice of law, *Simon v. Philip Morris, Inc.*, 124 F. Supp. 2d 46 (E.D.N.Y. 2000), and a decision of an appropriate multiclass trialtime structure for the case. *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21 (E.D.N.Y. 2001). The *Simon II* decision, despite its own uncertain destiny, has articulated principles that have proved influential on other courts: the California Supreme Court cited it for the proposition that aggregate proof in class actions (such as had been pioneered in *Marcos*) is consistent with defendants’ constitutional rights. *Sav-On Drug Stores, Inc. v. Supreme Court*, 34 Cal. 4th 319, 333 n.6 (2004); as did the California Court of Appeal in *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 752 (2004). *Sav-On Drug Stores* and *Bell* are “wage and hour” employment class actions.

be as bold in sustaining claims long enough to allow other forces to gain sufficient leverage to press for compensatory settlements or survive to the point of jury trials.

For example, cases brought on behalf of other World War II era victims have not fared as well as the Holocaust cases: class actions filed by Japanese slave laborers, for example, have been dismissed on various grounds. In *Deutsch v. Turner Corp.*, for example, the Ninth Circuit affirmed the judgment of the U.S. District Court for the Northern District of California dismissing actions brought against numerous Japanese corporations for damages for lost wages and for atrocious injuries suffered in the course of their forced labor during the Second World War.⁵⁷ This litigation involved claims brought under a California statute, California Civil Procedure Code Section 354.6,⁵⁸ which was determined by the federal court to be an unconstitutional intrusion by the state on the federal government's exclusive power to make and resolve war, including the procedure for

57. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153, 1160 (N.D. Cal. 2001), *aff'd sub nom. Deutsch v. Turner Corp.*, 317 F.3d 1005, 1030 (9th Cir. 2003).

58. CAL. CIV. PROC. CODE § 354.6 (West 2004):

(a) As used in this section:

(1) "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies or sympathizers.

(2) "Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) "Compensation" means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation.

(b) Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

the resolution of war claims.⁵⁹ California's Section 354.6 was enacted in 1999 to extend statutes of limitations on claims by victims of Nazi persecution for forced or slave labor.⁶⁰ The statute itself was not limited to victims of Nazi persecution, but referred to all Second World War forced labor victims.⁶¹ The statute was declared unconstitutional in the federal courts and received a mixed reception in California state courts.⁶²

Divorced from the context of wartime atrocity, a variety of cases claiming injuries from pharmaceutical experiments on non-consenting subjects, from environmental depredations, and for violations of the ATCA, have been dismissed by federal courts on *forum non conveniens* grounds.⁶³ The ATCA itself was at risk, in the 2003-2004 Supreme Court Term, in *Sosa v. Humberto Alvarez-Machain*,⁶⁴ as business interests who feared accountability in U.S. courts for their overseas torts sought to restrict its historically broad (and long unappreciated and underutilized) reach.

The ATCA has been invoked rarely. As Justice Souter wrote for the majority in *Sosa*, " 'no one seems to know whence it came' . . . and for over 170 years after its enactment it provided jurisdiction in

59. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1176.

60. CAL. CIV. PROC. § 354.6(c) (West 2005).

61. § 354.6(a)(1)-(2).

62. *Compare* *Taiheiyo Cement Corp. v. Superior Court*, 129 Cal. Rptr. 2d 451, 459, 461, 470 (Cal. Ct. App. 2003) *vacated*, *Taiheiyo Cement Corp. v. Superior Court*, 117 Cal. App. 4th 380, 398 (Cal. Ct. App. 2004) (holding that Section 354.6 satisfies the due process clause as applied to claims against a Japanese corporation by a Korean national and the claim is not preempted under the supremacy clause or the federal purposes and policies embodied in the Treaty of Peace with Japan, entered into on September 8, 1951), *with* *Mitsubishi Materials Corp. v. Superior Court*, 6 Cal. Rptr. 3d 159, 163 (Cal. Ct. App. 2003) (holding that Section 354.6 is unconstitutional under the supremacy clause). The *Taiheiyo* case has been depublished and is under California Supreme Court review.

63. *See, e.g.*, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2nd Cir. 2002) (claims of environmental damage and personal injuries brought by citizens of Peru and Ecuador against a United States oil company dismissed on *forum non conveniens* grounds).

64. 124 S. Ct. 2739 (2004). The case has a long, convoluted history, beginning in 1985 when Drug Enforcement Administration (DEA) agent Enrique Camarena-Salazar was captured on assignment in Mexico, taken to Guadalajara, tortured and interrogated for two days, then murdered. *Id.* at 2746. DEA officials charged Mexican physician Umberto Alvarez-Machain with acting to prolong agent Camarena's life in order to extend his interrogation and torture. *Id.* To bring Alvarez to justice, the DEA hired petitioner Jose Francisco Sosa to abduct Alvarez and bring him to Texas, where he was arrested. *Id.* The case was tried in 1992, and ended in a directed judgment of acquittal. *Id.* Thereafter, Alvarez sued Sosa, the United States, several DEA agents, and others, under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1), and sued Sosa under the ATCA. *Id.* at 2747. In *Sosa*, the Supreme Court reversed judgments upholding the availability of remedies for Sosa himself under the FTCA and the ATCA but did not categorically invalidate the use of either of these statutes by aliens under other factual or legal circumstances. *Id.* at 2753, 2761-62.

only one case.”⁶⁵ In *Sosa*, the Supreme Court delineated the scope of the ATCA, rejecting the argument that “the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action.”⁶⁶ While the ATCA is, in its terms, only jurisdictional, the Supreme Court concluded that, at the time of its enactment, the jurisdiction established by the ATCA empowered federal courts “to hear claims in a very limited category defined by the law of nations and recognized at common law.”⁶⁷ The *Sosa* decision gathered the existing jurisprudence and commentary on the history of the ATCA, the historical and political context from which it emerged, and the various academic and legal positions regarding its scope and application. International human rights advocates have cause to be cautiously encouraged by the *Sosa* decision, which does not categorically foreclose the prosecution of international law violations as torts in the United States courts. The specific violations that will support an ACTA claim in the wake of *Sosa* were generally described, but not themselves specified, in the *Sosa* decision: this jurisprudence has yet to fully evolve.

The *Sosa* decision provides general guidance on the types of international law violations that will qualify as ATCA torts. The key to the Supreme Court’s approach in *Sosa* is the development of historical knowledge regarding “the interaction between the [ATCA] at the time of its enactment and the ambient law of the era.”⁶⁸ At its founding, the United States recognized the law of nations as it then existed. According to the historians and commentators whose views were credited by the Supreme Court in *Sosa*, the late eighteenth Century “law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other . . . [and the] second, more pedestrian element, . . . [the] body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.”⁶⁹

This second element, essentially an international mercantile common law or “law merchant emerged from the customary practices

65. 124 S.Ct. at 2755 (quoting Judge Friendly in *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)). Judge Friendly also described the ATCA as a “legal Lohengrin.” *IIT*, 519 F.2d at 1015.

66. 124 S. Ct. at 2754.

67. *Id.*

68. *Id.* at 2755.

69. *Id.* at 2756.

of international traders. . . .”⁷⁰ As *Sosa* notes, “the sparse contemporaneous cases and legal materials referring to the AT[CA] tend to confirm . . . that some, but few, torts in violation of the law of nations were understood to be within the common law.”⁷¹ One historical example recounted in *Sosa* is the 1795 opinion of Attorney General William Bradford, who had been asked whether criminal prosecution was available against Americans who had taken part in the French plunder of the British slave colony in Sierra Leone.⁷² The Supreme Court summed up its decision in *Sosa* by holding that, although the ATCA is a jurisdictional statute that creates no new causes of action, the reasonable inference from its historical context is that the ATCA was intended to have practical effect the moment it became law. “The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”⁷³ Yet the problem remains as to how to apply this formula to violations of a law of nations that has evolved greatly since 1789. On this, *Sosa* strikes a note of caution: “We think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-Century paradigms we have recognized.”⁷⁴

Thus, while the incidents that gave rise to the *Sosa* litigation involved detention, torture, and killing (which *Sosa* notes are categories of conduct clearly violative of established international law), the circumstances of these particular episodes, which were not proven to compromise formally sanctioned, governmentally organized, systematic and long term policies, were held to fall short of the “paradigms” *Sosa* requires.⁷⁵ In short, the outer bounds of the

70. *Id.*

71. *Id.* at 2759.

72. *Id.* (quoting Bradford’s opinion, 1 Op. Att’y Gen. 57, 59 (1795), which indicated the availability of the federal courts for the prosecution of tort litigation arising from the episode: “that there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . .” (emphasis in original)).

73. *Id.* at 2761.

74. *Id.* at 2761-62.

75. The *Sosa* discussion of this distinction is illuminating:

the Restatement (Third) of Foreign Relations Law of the United States (1987), says in its discussion of customary international human rights law that a ‘state violates international law if, as a matter of state policy, it practices, encourages, or

offenses the United States courts would and should accept as violations of established international law and which “in the present, and perfect world . . . expresses an aspiration that exceeds any binding customary rule having the specificity we require”⁷⁶ remains to be tested as human rights violations cases proceed in the courts.⁷⁷

III. DOING JUSTICE BY BEARING WITNESS

The *Marcos*, *Swiss Banks*, and *Nazi-Era* cases were, essentially, tort cases seeking compensatory and punitive damages for the personal injuries, wrongful deaths, false imprisonments, and economic losses of the plaintiffs. Tort claims for damages were asserted because injunctive, equitable, or prophylactic relief could not, as a practical matter, be obtained. Thus, these cases embody a poignant paradox: when it came time to settle the *Swiss Banks* and *Nazi-Era* cases, the class representatives and their counsel knew that they could not, in good conscience, present the proposed settlements as fulfilling the requirement of Federal Rule of Civil Procedure 23(e) that the settlements be “fair, adequate and reasonable.”⁷⁸ No amount of compensation, even damages measured in the billions, could serve as a “fair,” “adequate,” or “reasonable” measure of justice in light of the genocidal wrongs committed.⁷⁹ Indeed, critics claimed the prosecution of the suits themselves dishonored the victims or trivialized their suffering by attempting to translate moral wrongs into monetary

condones . . . prolonged arbitrary detention.’ . . . Although the Restatement does not explain its requirements of a ‘state policy’ and of ‘prolonged’ detention, the implication is clear. Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority. Even though Restatement’s limits are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone’s three common law offenses. In any event, the label would never fit the reckless policeman who botches his warrant, even though that same officer might pay damages under municipal law.

Id. at 2768-69 (citations omitted).

76. *Id.* at 2769.

77. Plaintiffs seeking redress for human rights abuses have invoked other U.S. statutes as well. In June 2004, for example, a class action was filed against U.S. civilian contractors on behalf of alleged torture and abuse victims at the now notorious Abu Ghraib Prison. The lawsuit, *Sami Abbas Al Rawi v. Titan Corporation*, Case No. 04-CV-1143 (S.D. Cal. June 2004) asserts Civil RICO claims as well as ATCA claims, violations of the Geneva Conventions, and common law torts.

78. MANUAL OF COMPLEX LITIGATION (FOURTH) § 21.634 (2004) (quoting *In re Gen. Motors Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995)).

79. FED. R. CIV. P. 23(e)(1)(C) (“The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.”).

claims.⁸⁰ The proponents of these settlements acknowledged their fundamental inadequacy.⁸¹ They emphasized, instead, the necessity of obtaining, through compensation, that measure of recognition that the law could achieve. In wise and anguished decisions, cited above, the district courts approved these settlements, thus empowering the victims as agents of justice and anointing the American courts as places of hope.

The members of the five settlement classes certified in the *Swiss Banks* litigation were dispersed throughout the world.⁸² A uniquely ambitious and creative plan of notification was called for, both as a practical matter and to fulfill the due process requirements inherent in the American class action mechanism.⁸³ The worldwide class required worldwide notice. The notice plan, described by Judge Korman in his *Swiss Banks* final settlement approval decision⁸⁴ holding that the plan “satisfied due process requirements and Federal Rule of Civil Procedure 23(c),”⁸⁵ was implemented by four notice administrators (some of whom donated a substantial portion of their services).⁸⁶ The plan utilized direct mail to all known potential class

80. See Authers & Wolfe, *supra* note 16, at 350-352.

81. Rabbi Morris Schmidman, a class member, spoke thus at the Fairness Hearing:

The words fair, just, reasonable, equitable have no real meaning when applied to the Holocaust. There needs to be a new terminology, a new set of words, a new definition that could adequately comport to what the Holocaust meant to our time and to the history of mankind. But until that is created, having to live with the terminology that exists, we endorse this proposal as being real, even if it is not the ideal.

Fairness Hearing Transcript at 59:25-60:7. Another class member, Alice Fisher, said:

so this is not a fair deal, considering for how many people they did it. Anyhow, as you heard here, this is not just a material issue; this is a moral issue. And the moral side of it is that at least this hearing is a part of the moral side of it. This puts the Holocaust on the map against all the denials. So with this, I am satisfied, at least, that my parents and brothers' memory will not be assaulted like they were.

Fairness Hearing Transcript at 119:8-16.

82. 105 F. Supp. 2d 139, 144-145.

83. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-319 (1950) (due process). The requirements of “best practices” in the settlement context are discussed in MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004) §§ 21.312 and 21.633. Federal Rule of Civil Procedure 23(e)(1)(B) requires the Court to “direct notice in a reasonable manner to all class members who would be bound by a proposed settlement....” Methodologies may include mailed notice when feasible, print publication, posting in public places, and internet notice. MANUAL, § 21.311. The *Swiss Banks* notice plan is described and endorsed in the MANUAL at page 287, n.881.

84. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 144-145 (E.D.N.Y. 2000).

85. *Id.* at 144.

86. The notification firms of Poorman Douglas Corporation, Hillsoft Communications, Kinsella Communications, and AB Data implemented the international notice program, donating a substantial part of their services to secure the success of this uniquely ambitious project. Fairness Hearing Transcript 5:9-7:25.

members, worldwide publication in national, regional, and local media, public relations (including television and radio interviews), the internet, and grassroots community outreach. More than 1.4 million copies of the notice package were mailed directly to potential class members in at least forty-eight countries.⁸⁷ Judge Korman held two sessions of fairness hearings: the first in his courtroom in Brooklyn, New York, on November 29, 1999 and the second in Israel on December 14, 1999.⁸⁸ Judge Korman conducted and presided over the supplemental fairness hearing in Israel by electronic hookup, which was open to a random sampling of Israelis who had submitted Initial Questionnaires in response to the notice.⁸⁹ The proposed settlement garnered the overwhelming support of the class. In comparison to the over 550,000 Initial Questionnaires that were received, the court received a mere 243 communications that could be characterized as objections to the settlement and only 401 opt-out requests, some of which were later withdrawn, and others of which were turned in by persons who were not class members.⁹⁰ A wide array of Jewish and Holocaust survivors' organizations likewise endorsed the settlement.⁹¹ As Judge Korman noted, the President of the Polish Association of Roma, Roman Kwiatkowski, appeared at the settlement fairness hearing specifically to express his appreciation for the fact that "this time, nobody forgot about us."⁹²

87. *Swiss Banks*, 105 F. Supp. 2d 139, 145.

88. *Id.*

89. The settlement plan relied upon class members to return Initial Questionnaires to provide information and recommend proposals for allocation of the settlement fund. Over 550,000 class members returned these Initial Questionnaires. *Swiss Banks*, 105 F. Supp. 2d at 147.

90. *Id.*

91. *Id.* (listing some of these entities).

92. *Swiss Banks*, 105 F. Supp. 2d 139, 147. The Transcript of Fairness Hearing Transcript states in detail:

During the Holocaust, half a million Romas lost their lives. Although they were wanderers, they also were owners of their properties. We received information from the media that the Romas were included in the settlement. In connection with that, we invested plenty of effort to inform all of the Roman areas about this case. We are very happy to know that this time, nobody forgot about us. Thank you.

Fairness Hearing, November 29, 1999 Transcript at 144-45. The Third Reich singled out the Romani peoples ("Roma" or "Sinti," colloquially termed "gypsies") for early extermination. The Nazi genocide against the Roma and Sinti people has gone essentially unreported. The *Swiss Banks* litigation recognized the equal stature of the Roma victims of the Nazi persecution and gave them separate settlement class status in recognition. This recognition, in turn, led to activism by, and on behalf of, the Roma people in ongoing Holocaust-related legislation. There is Roma-initiated litigation against IBM in Switzerland, the site of the company's European headquarters, alleging that IBM machines enabled Adolph Hitler to identify and send 600,000 Roma to their deaths. BAZYLER, HOLOCAUST JUSTICE, *supra* note 12, at 302-03. The Bazylar book details the allegations that IBM techniques and technology facilitated Nazi genocide. *Id.*

The Clinton Administration's Justice and State Departments actively participated in settlement negotiations and supported the Holocaust settlements. Judge Korman duly noted the participation and endorsement of the United States government in his *Swiss Banks* settlement approval decision as follows:

The United States, which participated actively in settlement discussions over a period of many months, through Deputy Treasury Secretary Eizenstat, has expressed its "unqualified support for the parties' class action settlement" and endorsed it "as fair, reasonable and adequate and unquestionably in the public interest." Transcript of Fairness Hearing (Nov. 29, 1999) at 27 (comments of James Gilligan, U.S. Department of Justice, on behalf of the United States). Mr. Gilligan continued as follows:

"The United States supports approval of the settlement the parties have reached. It is fair and just and promotes the public interest, as expressed in the policy that the United States government has pursued for the past four years. Because the parties reached for common ground rather than prolong their difference[s], the elderly victims of the Holocaust will receive the benefits of this settlement in their lifetime and much more quickly than would have been possible had the litigation continued.

But of equal importance, the United States regards this settlement as an excellent example of how cooperation and the will to fulfill a moral obligation can lead to voluntary resolution of disputes over Holocaust-era claims."⁹³

The Clinton Administration viewed additional Holocaust litigation settlements as in the best interests of the United States and as matters for active pursuit rather than mere acquiescence. Indeed, the United States openly expressed its opinion and prediction that approval of the *Swiss Banks* settlement would lead to an equally massive, or even larger settlement, in the related *Nazi Era* cases.⁹⁴ As Judge Korman acknowledged:

The government anticipates that the settlement here, by force of its example, will promote the U.S. policy of negotiated settlement in other cases and countries where Holocaust victims' claims for restitution have not yet been resolved. In particular, the United States is hopeful that this settlement will add a sense of urgency and possibility

Whether or not those specific allegations are ultimately proven, the recognition of the Roma and Sinti people as a persecuted victim class in the *Swiss Banks* litigation demonstrates the moral and historical value of human rights litigation in creating and preserving an official and public record that bears durable witness to atrocities, so that neither the atrocities themselves nor their human victims shall ever be forgotten.

93. *In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 148 (E.D.N.Y. 2000).

94. *Id.* (quoting James Gilligan, U.S. Department of Justice, Transcript of Fairness Hearing Hearings Transcript at 27:

The government anticipates that the settlement here, by force of its example, will promote the U.S. policy of negotiated settlement in other cases and countries where Holocaust victims' claims for restitution have not yet been resolved. In particular, the United States is hopeful that this settlement will add a sense of urgency and possibility to resolving the pending class action claims of slave and forced laborers who can no longer wait for years for justice to be done.).

to resolving the pending class action claims of slave and forced laborers who can no longer wait for years for justice to be done.

Mr. Gilligan's prediction that the present settlement would serve as a catalyst for a negotiated agreement of the claims of slave and forced laborers has proven accurate. On March 23, 2000, a final agreement was reached concerning the allocation of an even more substantial settlement fund—approximately \$5 billion—in a related litigation on behalf of victims of Nazi slave and forced labor policies, some of whom are also members of the slave labor classes here.⁹⁵

The *Swiss Banks* case settled despite the legal hurdles it faced, through a miraculous confluence of political, historical and human forces, catalyzing a recognition of moral responsibility to do all that was politically and judicially possible to rectify an unspeakable wrong. Had this confluence not occurred, the *Swiss Banks* litigation could well have faced defeat. As another federal judge stated in her opinion granting final approval to a smaller, related Holocaust settlement that same year observed:

It goes without saying that the events which form the backdrop of this case make up one of the darkest periods of man's modern history. Those persecuted by the Nazis were the victims of unspeakable acts of inhumanity. At the same time, however, it must be understood that the law is a tool of limited capacity. Not every wrong, even the worst, is cognizable as a legal claim.⁹⁶

The prosecution and settlement of the *Swiss Banks* and *Nazi-Era* litigations focused public attention on the atrocities committed during the Nazi regime and informed or reminded Americans and the world that many of the victims of these Nazi atrocities had been left forgotten, ignored, and uncompensated by the various reparations, programs, and treaties implemented since the end of World War II. As Judge Bassler, not given to hyperbole, described the Nazi regime:

[t]he German National Socialist ('Nazi') era of the 1930's and 1940's will forever be remembered for its virtually unparalleled systematic brutality and inhumanity. Complicit in this bureaucratic barbarism, committed at the time by a modern industrialized state, were numerous German companies and businesses who employed slave and forced labor, appropriated private property, and committed other wrongs against individuals.⁹⁷

The litigation also bore witness and paid tribute to the sufferings of the victims, attesting that they were not forgotten. The settlement approval process itself enabled class members to tell their stories in court, in formally reported proceedings, with permanent transcripts. Their personal stories became matters of permanent public record, accorded the dignity and weight of court testimony.

95. *Id.* (citations omitted).

96. *In re Austrian and German Holocaust Litig.*, 80 F. Supp. 2d 164, 177 (S.D.N.Y. 2000).

97. *In re Nazi-Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 430 (D.N.J. 2000).

This, in itself, was of tremendous value to many Holocaust survivors and their family members. It was not the primary purpose of the litigation, but it became a memorable and valuable benefit of the lawsuits. We often assume that the function of our civil justice is just that: to dispense justice. But justice is not done in tribunals; both criminal and civil litigation operate, at best, to provide limited retribution or compensation for injustices already done. Justice, or injustice, is what we do to each other every day. The opportunity for victims and their families to speak out about the injustices done to them was, perhaps, the most effective justice that any court system could provide. Those who spoke, and those whose stories were told, in open court, in the briefs, and in the pleadings filed in the *Swiss Banks* and *Nazi-Era* litigations can never be forgotten. Their witness is a refutation and proof of victory over the regime whose overarching goal was to annihilate and silence them forever. It has been often observed that "the place of justice is a hallowed place."⁹⁸ Our courts are truly hallowed by the merits of the claims entrusted to them for adjudication or resolution, and they become anointers as well as anointed when their procedures, such as the class action mechanisms utilized to effectuate the *Swiss Banks* settlement, promote justice by bearing witness.⁹⁹

A stunning contemporary example of this phenomenon is that of ongoing pretrial proceedings in the *Presbyterian Church of Sudan Litigation*.¹⁰⁰ This litigation accuses a Canadian energy company,

98. See, e.g., *Myers v. George*, 271 F.2d 168, 172 (8th Cir. 1959) (quoting Bacon's essay on Judicature); *Fisher v. McDaniel*, 64 P. 1056, 1058 (Wyo. 1901) (same). The phrase is also attributed to Blackstone: "the very hallowed place of justice," cited in *Commonwealth v. Falkenhan*, 452 A. 2d 750, 756 (Pa. Super. Ct. 1982). The epigram is carved into the pediment of the United States Justice Department's headquarters in Washington, D.C.

99. Judge Korman was, for example, well aware of the high degree of moral scrutiny and expectation applied to every aspect of the *Swiss Banks* litigation. In denying the Motion for Reconsideration of the settlement allocation to a disability advocacy group, Judge Korman characterized the due process challenge to the class action notice, made by the group as a means to obtain reconsideration of its allotted share, as "frivolous." *In re Holocaust Victim Assets Litigation*, 314 F. Supp. 155, 165 (E.D.N.Y. 2004). Delivering this judgment, the Court sternly intoned:

There is a line from Deuteronomy that reads, 'Justice, justice shall you pursue, that you may thrive.' *Deuteronomy* 16:20. Commentators speculate as to why the word justice is repeated. The answer that I find most appealing is that the repetition serves as a reminder that, even in the pursuit of a just cause, just means must be used. See Etz Hayim; TORAH AND COMMENTARY, 1088-89 (David L. Lieber ed., The Rabbinical Assembly 2001). While [applicant's] cause may be just, its means are not.

Id. at 169.

100. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 331, 341 (S.D.N.Y. 2003) (defendant's motion to dismiss class claims for lack of personal jurisdiction and on grounds of *forum non conveniens* denied); No. 01 CIV. 9882 (DLC), 2004 U.S. Dist. LEXIS

Talisman Energy, Inc., of actively assisting the Sudan's Muslim government in its "ethnic cleansing"¹⁰¹ campaign against non-Muslim African peoples (primarily practitioners of Christian and indigenous religions) in southern Sudan. Talisman is alleged to have facilitated the government's genocidal policy in exchange for valuable oil concessions, which recently netted it \$700 million.¹⁰²

In a comprehensive and evidently well-researched decision, issued shortly before his death in March 2003, Judge Schwartz recounted the tortured history of Sudan, its political divisions and religious strife, and the hardships that have befallen those African peoples residing in the southern region of the country.¹⁰³ His decision, as a ruling on motions to dismiss, did not constitute a formal factual finding, and indeed, the legal standard on such motions requires a complaint's allegations to be presumed true rather than determined on the merits.¹⁰⁴ Yet it is clear from the context of the decision, which features apparently the original scholarship and research by the court, that in the judicial view, these claims merit ongoing discovery, potential class certification, and adjudication in the United States courts.¹⁰⁵

IV. THE HUMAN RIGHTS/MASS TORT JURISPRUDENCE FEEDBACK LOOP

Practitioners and courts in human rights litigation have had no option but to innovate, test, and stretch the boundaries of procedural and substantive law in just pursuit of their just causes. When the compensation sought as a remedy is understood to symbolize a deeper justice than the law's limited response to unlimited or unfathomable

17030, at *8 (S.D.N.Y. Aug. 30, 2004) (defendant's motion to dismiss for lack of personal jurisdiction denied).

101. According to Honorable Allen G. Schwartz, who authored the comprehensive 2003 decision denying defendant Talisman's motion to dismiss the southern Sudanese allegations, the term "ethnic cleansing" emerged from the recent warfare in the former Yugoslavia, and is a translation of the Serbo-Croatian term "etniko cis enje." *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 296 n.2. It is, the court found, "commonly understood to be a euphemism for genocide" but, unlike genocide, is not (yet) a legal term of art. *Id.*

102. *Id.* at 296.

103. *Id.* at 297-302.

104. *Albright v. Oliver*, 510 U.S. 266, 268 (U.S. 1994) (In ruling on a 12(b)(6) motion to dismiss, the court "accept[ed] the well-pleaded allegations of the complaint as true.").

105. Judge Schwartz's decision is amply footnoted and itself provides a rich source of information for those interested in the unfolding tragedy in Sudan. While acknowledging that this and other information "is presented solely to place the allegations set forth in the amended complaint in context," the court expressly justifies its "judicial notice" of them, citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147 (2d Cir. 2002) ("on a motion to dismiss, a court may consider [. . .] matters of which judicial notice may be taken [. . .]"). *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 297 n.6.

atrocities, explicit or implicit authorization to experiment and to expand is the result. The beneficiaries are not only the plaintiffs and class members in these human rights cases but also, at least indirectly, the courts and litigants who face the challenges that arise when mass injuries or damages are caused by negligence, mistake, lack of judgment, or averous—rather than intentional—atrocities.

Thus, the *Marcos* litigation has served as a model for the design of trial structures and proof methodologies in a variety of cases, and the class certification and class notice orders in *Swiss Banks* have been cited by other courts addressing the claims of foreign or international classes. More mundane international mass tort litigation will continue to contribute to the jurisprudential foundation upon which future human rights cases can build. A recent example is an otherwise typical “mass accident” case, arising out of a single-incident disaster, in this case, on foreign soil: a tragic tunnel fire that killed scores of passengers on an Austrian ski train in late 2000.¹⁰⁶ Tort claims were brought as class actions on behalf of the victims in the U.S. District Court for the Southern District of New York. Most, but not all, of the 155 passengers and crew members killed were Europeans, but some of the manufacturers whose components were used in the train’s construction were American, or had American offices or assets. In a series of rulings, Judge Shira Scheindlin, the transferee judge in the resulting MDL litigation has determined the propriety of jurisdiction over the parties and certified an “opt-in” plaintiff class of the victims.¹⁰⁷

V. CONCLUSION: MAKING A RECORD AND PROMOTING AN INTERNATIONAL RULE OF LAW

Litigation that alleges violations of international law and pursues tort claims for damages and equitable relief¹⁰⁸ on behalf of groups victimized by genocide, ethnic cleansing, and other atrocities fulfills a unique role in creating and sustaining an official record of crimes against humanity. As with the case of the gypsy victims of the

106. Background information on the ski train tragedy and resulting American litigation is contained in *Kern v. Osterreichische Elektrizitaetswirtschaft AG*, 178 F. Supp. 2d 367 (S.D.N.Y. 2001).

107. See *In re Ski Train Fire in Kaprun Austria* on November 11, 2000, 220 F.R.D. 195, 211 (S.D.N.Y. 2003) (conditionally certifying an opt-in class); 2003 U.S. Dist. LEXIS 22139, at *31 (S.D.N.Y. Dec. 9, 2003) (finding lack of personal jurisdiction over one of the defendants); 67 Fed. App. 24 (2d Cir. 2003).

108. Such equitable relief may include restitution and disgorgement.

Nazi regime, it is all too easy for history to omit, and the public to forget, the details, or even the existence, of egregious genocidal episodes. The record created by published opinions, transcripts, and clerk's dockets assures, at the least, that there will be a permanent record—immune from expungement, spoliation, or revision by interested or implicated governments or perpetrators—of these events.¹⁰⁹

*Presbyterian Church of Sudan v. Talisman Energy, Inc.*¹¹⁰ stands as an exemplar of the “witness” function of federal civil litigation to assure remembrance of human rights violations, as well as a “paradigm”¹¹¹ human rights tort that fulfills the newly articulated Supreme Court ATCA criteria in *Sosa*. This case has already, while in its incipient pleading stages, advanced—or at least protected from deprecation—substantive law principles that are essential to plaintiffs’ success in an array of international tort cases.¹¹² In *Presbyterian Church of Sudan*, defendant Talisman Energy, Inc., a Canadian corporation with American and overseas subsidiaries and assets, argued with a straight face (but fortunately without success) that “corporations are legally incapable of violating the laws of nations.”¹¹³ Talisman mustered academic support for this dangerous theory. It presented affidavits “by two renowned international law

109. Speaking at the settlement Fairness Hearing in *Swiss Banks*, Plaintiffs’ counsel Professor Burt Neuborne concluded:

I make one final observation, because I think it’s an observation that we shouldn’t lose sight of. The Nazi evil is one of the great human catastrophes of history, and its effect on the Jewish people is one of the stories of dread that will be repeated for as long as there is history. But it was a universal evil that harmed others than Jews. And class counsel, in order to recognize that, insisted that Jehovah’s Witnesses, the disabled, gays and the Romany will share in the settlement as well.

Fairness Hearing Transcript at 36:25-37:9.

110. 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

111. *Sosa v. Humberto Alvarez-Machain*, 124 S. Ct. 2739, 2762 (2004).

112. One current example of the multinational impact of mass production and international mass marketing is that of the incipient international tort litigation faced by Merck & Co., Inc. over the September 30, 2004 withdrawal of its arthritis prescription drug Vioxx off the market. 2003 sales of Vioxx totaled over \$2.7 billion in the United States, and the recall announcement stripped \$27 billion from the market value of Merck shares. See John Greenwood, *Merck Plummets As Drug Pulled*, FINANCIAL POST (Canada), Oct. 1, 2004, at 1. News reports reflect that Merck’s Vioxx was sold not only in the United States and Canada, but across Europe and South America as well. Litigation already has commenced, in the wake of the recall, in the United States and Canada, and foreign victims claiming Vioxx-related injuries will undoubtedly seek to pursue their claims in the United States’ federal courts.

113. 244 F. Supp. 2d at 308. Talisman argued “that international law applies to states and in some cases to individuals, but that ‘the law of nations simply does not encompass principles of corporate liability.’” *Id.*

scholars,” James Crawford and Christopher Greenwood.¹¹⁴ The court was unpersuaded.¹¹⁵

This corporate immunity argument seems absurd, in light of the fact that the Supreme Court’s sole ATCA decision, before the issuance of *Sosa* in 2004, was brought by a corporation against the Argentine government.¹¹⁶ Yet the fact that it was seriously put forward augers for its repeated appearance.

It is to be expected that any defendant in a civil action, even one in which the tort amounts to genocide, will muster any and all conceivable arguments to obtain dismissal. Nonetheless, the serious effort to establish a doctrine of international corporate immunity has ominous implications. This doctrine might gain credence with courts in a purely commercial mass tort context, where the wrongdoing may constitute strict liability, negligence, or even fraud, but human rights violations are not at issue. One favored—an increasingly successful—strategy of corporate defendants in consumer class actions or mass injury litigation, such as those arising from the recall of a dangerous drug or other product, is to argue that the Seventh Amendment to the U.S. Constitution demands individualized trials of each plaintiff’s claims, regardless of recurring common questions relating to the defendant’s product, knowledge, conduct, and duty—thereby insisting on retail adjustments of a wholesale wrong. Insistence on disaggregation of claims in a mass tort may deny due process to most litigants, who cannot afford the cost—or the delay—of obtaining their own trials. A few courts have seen through, and castigated defendants for, such cynical sophistry.¹¹⁷ Yet it is perceived more clearly as an attempt or occasion by which multinational corporations may advance their ability to conduct business as they see fit, beyond effective regulation or enforcement, when human rights on international norms are threatened. Human rights class actions, such as *Presbyterian Church of Sudan*, stand thus in the protective

114. *Id.*

115. *Id.* (“Both scholars, consulting a variety of international sources, concluded there is no basis in existing international law for the liability of corporations. Nonetheless, a considerable body of United States and international precedent indicates that corporations may be liable for violations of international law, particularly when their actions constitute *ius cogens* violations.”).

116. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). As Judge Schwartz noted, “nothing in that case addresses the potential liability of a corporate defendant in a claim under the ATCA, although the Court did note that the ATCA ‘by its terms does not distinguish among classes of defendants.’” *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 309 (citations omitted).

117. *See, e.g., Klay v. Humana, Inc.*, 382 F.3d 1241, 1300 (11th Cir. 2004) (rejecting the view that multiple juries should be required to decide common issues repeatedly, the court stated, *inter alia*, “we find such reasoning unpersuasive and contrary to the ends of justice”).

vanguard of international tort litigation. *Presbyterian Church of Sudan* illustrates the role of human rights litigation in unmasking and defeating the subliminal arguments advanced by multinational corporations to avoid liability for tortious conduct, by enabling the courts to evaluate the newly advanced theories of corporate immunity in a context in which the harm resulting from such insulation stands in stark relief.

The federal courts of the United States are likely to continue as the *fora* of first choice by international victims of atrocities in pursuit of monetary compensation, punishment, and deterrence for corporate and governmental torts. These human rights mass torts will, in return, contribute new ideas, exemplars of innovative trial structures, and creative settlement provisions to enrich the entire field of mass torts jurisprudence.