Comments on the European Commission Staff’s Working Document:
“Towards a Coherent European Approach to Collective Redress,”
Submitted by the Section of International Law
of the American Bar Association

The views expressed herein are presented on behalf of the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Section of International Law (the “Section”) of the American Bar Association respectfully submits the following comments to questions posed by the European Commission Staff in its Working Document (“Document”) entitled, “Towards a Coherent European Approach to Collective Redress.” These comments address the questions raised in the Document as they relate to human rights litigation, specifically drawing on the U.S. experience. Human rights class actions in the United States serve a valuable purpose by increasing access to justice, and information concerning U.S. class actions in the human rights context could help the European Commission as it determines its approach to collective redress.

These comments discuss illustrative human rights class actions in the United States to address the European Commission’s questions regarding the “added value [of] the introduction of new mechanisms of collective redress (injunctive and/or compensatory) . . . for the enforcement of EU law (Q1)” related to the protection and promotion of fundamental rights;  

1 The Section of International Law has earlier submitted, together with the Section of Antitrust Law, comments in response to this consultation that are focused on class actions in the context of antitrust and competition law.

2 In 1970 the European Court of Justice recognized that “[r]espect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community.” Case 228/69, Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle Getreide und Futtermittel, 1970 E.C.R. 01125. By 1999, the European Council proposed a body of representatives—the European Convention—that would draft a fundamental rights charter. The European Parliament, the Council of Ministers, and the European Commission solemnly proclaimed the Charter of Fundamental Rights of the European Union in December 2000, and the Charter in its present form entered into force...
the value of extending “the Commission’s work on compensatory collective redress to other areas of EU law besides competition and consumer protection (Q33),” including human rights; and “safeguards in [the United States that are] successful in limiting abusive litigation (Q 20)” in the human rights context. Specifically, these comments discuss human rights class actions in the United States that have resulted (or appear likely to result) in monetary or other redress via court order or settlement for victims of egregious human rights abuses and environmental degradations committed by governmental officials or corporations. Given the principles of protection and promotion of fundamental human rights embodied in the Charter of Fundamental Rights of the European Union, such a discussion of U.S. class actions in the human rights field may be helpful to the European Commission.

Human rights class actions in the United States are part of a longstanding body of U.S. Supreme Court and lower court class action jurisprudence in the areas of social justice and public benefits, including, for example, housing discrimination, employment discrimination, medical...
assistance benefits,\textsuperscript{8} school segregation,\textsuperscript{9} and social welfare and social insurance.\textsuperscript{10} Many human rights class actions in the United States are brought under federal laws designed to vindicate violations of customary international law norms,\textsuperscript{11} including \textit{jus cogens} norms,\textsuperscript{12} and are rooted in a court’s ability to punish those who deviate severely from international norms of acceptable behavior so as to become “an enemy of all mankind.”\textsuperscript{13} For example, the Alien Tort Claims Act (“ATCA”),\textsuperscript{14} often used in conjunction with the Torture Victim Protection Act (“TVPA”),\textsuperscript{15} provides that “district courts shall have original jurisdiction of any civil action by

\begin{itemize}
  \item \textsuperscript{6} See, e.g., \textit{Havens Realty Corp. v. Coleman}, 455 U.S. 363 (1982).
  \item \textsuperscript{7} See, e.g., \textit{Zipes v. Trans World Airlines, Inc.}, 455 U.S. 385 (1982).
  \item \textsuperscript{9} See, e.g., \textit{Brown v. Bd. of Educ.}, 347 U.S. 483 (1954).
  \item \textsuperscript{11} “Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm.” \textit{Siderman de Blake v. Republic of Argentina}, 965 F.2d 699, 715 (9th Cir. 1992).
  \item \textsuperscript{12} \textit{Jus cogens} “embraces customary laws considered binding on all nations” and “is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations. . . . Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting \textit{jus cogens} transcend such consent.” \textit{Id.} at 715 (citation omitted).
  \item \textsuperscript{13} \textit{Filártiga v. Peña-Irala}, 630 F.2d 876 (2d Cir. 1980).
  \item \textsuperscript{14} Alien Tort Claims Act, 28 U.S.C. § 1350 (2006). The issue of whether this statute allows class actions against corporations is being litigated in the United States, and the U.S. Supreme Court will decide the issue. On October 17, 2011, the U.S. Supreme Court granted certiorari on the question “Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held” in \textit{Kiobel v. Royal Dutch Petroleum}, Order No. 10-1491, 565 U.S. – (2011)(questions presented set out at http://www.supremecourt.gov/qp/10-01491qp.pdf).
  \item \textsuperscript{15} Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 (2006) ("An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.").
\end{itemize}
an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

The U.S. Supreme Court has recognized that class actions are “peculiarly appropriate” in cases where the “issues involved are common to the class as a whole” and “turn on questions of law applicable in the same manner to each member of the class.” Human rights cases can be appropriate for resolution via a class action lawsuit because they frequently involve widespread and systematic abuse—often consisting of crimes against humanity or genocide—against groups of people lacking in social or economic power. In this context, class actions allow individuals with minimal resources to bring lawsuits for egregious human rights violations while preserving courts’ resources.


17 Califano v. Yamasaki, 442 U.S. 682, 701 (1979); see also Ortiz v. Fibreboard Corp., 527 U.S. 815, 860 (1999) (“One great advantage of class action treatment . . . is the opportunity to save the enormous transaction costs of piecemeal litigation[.]”); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (“Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . . [M]ost of the plaintiffs would have no realistic day in court if a class action were not available.”); Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 339 (1980) (holding that class actions are necessary to prosecute small claims on behalf of consumers “[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages”).

18 See Rome Statute of the International Criminal Court art. 7(1), July 17, 1998, 37 I.L.M. 999, 1004-05, 2187 U.N.T.S. 90 (“[C]rime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”).

19 See Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280 (“[G]enocide 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; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”).

20 These comments in no way promote the use of class actions to the exclusion of private individual lawsuits.
Examples of Class Actions Enabling Redress for Human Rights Abuses:

- **Hilao v. Marcos:**
  Citizens of the Republic of the Philippines, their heirs and beneficiaries, suing on behalf of approximately 10,000 individuals, brought a class action lawsuit under the ATCA and the TVPA against Ferdinand E. Marcos, former president of the Philippines. Between 1972 and 1986 these individuals were tortured, summarily executed, or disappeared while in custody of the military or paramilitary groups. A jury awarded more than 766 million USD (558 million EUR) in compensatory damages and 1.2 billion USD (880 million EUR) in exemplary damages in 1995. Both the U.S. District Court for the District of Hawaii and the Ninth Circuit Court of Appeals upheld the award of damages. In January 2011, the U.S. District Court for the District of Hawaii approved the distribution of 7.5 million USD (5.5 million EUR) to settle the lawsuit, providing victims the first opportunity to collect funds since they sued in 1986.

- **Doe v. Unocal:**
  Burmese peasants who suffered a variety of egregious human rights abuses associated with the Unocal pipeline project in Burma brought a class action lawsuit under the ATCA. Unocal contracted with the notorious military junta in control in Burma to provide security for construction of its Yadana gas pipeline. The junta used rape and murder to compel local citizens to work clearing the way for the pipeline. In 1997, the U.S. District Court for the Central District of California dismissed the case, concluding that Unocal did not participate or cooperate in the forced labor practices. The Ninth Circuit Court of Appeals reversed the district court’s decision, however, concluding that Unocal knew or should have known that its conduct would assist or encourage the military’s use of forced labor. In 2003, the Ninth Circuit Court of Appeals decided to reconsider the appeal while sitting as a full court (en banc), but the case settled on September 13, 2004, one day before the Ninth Circuit Court of Appeals was due to hear the appeal. Although the specific terms of the settlement remain confidential, Unocal agreed to compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education, and protect the rights of people from the pipeline region.

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22 *Hilao* does not provide an “economic incentive to bring abusive claims,” (¶ 22), in light of the resulting settlement of 7.5 million USD (5.4 million EUR) and class counsel’s advancement of $1.6 million USD (1.17 million EUR) in costs. See Walter Wright, Four Groups Seek Marcos Money, Honolulu Advertiser, Feb. 24, 1994, at A3 (quoting Melvin Belli, Sr., one of the victims’ lawyers, referring to *Hilao* as “the biggest personal injury verdict in the world”); Memorandum in Support of Class Counsel’s Joint Motion for an Interim Award of Attorneys’ Fees and Reimbursement of Expenses at 11 *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992) (MDL No. 840) (D. Haw. Nov. 18, 2010).


• **Wiwa v. Royal Dutch Petroleum Co.**  
In one of a series of cases, victims of abuses by the government of Nigeria brought a class action lawsuit under the ATCA and the TVPA. In the early 1990s, residents of the Ogoni region began to protest the environmental degradation and harm to local communities associated with the company’s large-scale extraction of oil. The government of Nigeria used violent means to quell the protests, resulting in the death of and injury to activists, and ultimately in the arrests of several people, including Ken Saro-Wiwa, the leader of the movement, who was tried before a special tribunal and hanged on November 10, 1995. Family members, along with other residents of the Ogoni region involved in the protests, sued the company, alleging that they acted in concert with the Nigerian government’s conduct, including torture, cruel inhuman and degrading treatment, summary execution, arbitrary arrest and detention, and crimes against humanity. The U.S. District Court for the Southern District of New York granted the companies’ motion to dismiss on *forum non conveniens* grounds in 1998. The Second Circuit Court of Appeals reversed, however, in September 2000, noting the interests of the United States in furnishing a forum to litigate claims of violations of human rights. In 2009, the U.S. District Court for the Southern District of New York upheld its jurisdiction over the victims’ claims of crimes against humanity. The case settled on the eve of trial in June 2009 for a disclosed settlement of 15.5 million USD (11.3 million EUR) to compensate the injuries to the plaintiffs and the deaths of their family members, as well as create a trust for the benefit of the Ogoni people.  

• **In re South African Apartheid Litigation**  
A group of South African victims of human rights abuses such as extrajudicial killings, torture, rape, exile, and arbitrary detentions brought a class action lawsuit under the ATCA against 20 banks and corporations for conducting business in South Africa during apartheid. The victims alleged that the companies both directly furthered segregation and provided instrumental support to the apartheid regime. The U.S. District Court for the Southern District of New York granted the companies’ motion to dismiss in November 2004. In October of 2007, the Second Circuit Court of Appeals reversed the lower court’s dismissal and sent the case back to
the lower court for further proceedings. The South African Truth and Reconciliation Commission filed a brief with the Second Circuit Court of Appeals, stating that companies charged with participating in apartheid had never pleaded for amnesty and that they could still be held legally accountable as a matter of civil law.29 In April 2009, the U.S. District Court for the Southern District of New York upheld various aiding and abetting claims, noting that “[c]orporate defendants accused of merely doing business with the apartheid Government of South Africa have been dismissed” and “[c]laims that a corporation that aided and abetted particular acts could be liable for the breadth of harms committed under apartheid have been rejected.” The judge urged that the “much narrower cases” before it “move toward resolution.” The South African government has subsequently indicated its view that “the US court is an appropriate forum to hear these matters.”30

• In re Chiquita Brands International Inc. Alien Tort Statute & Shareholder Derivative Litigation:31 Citizens and residents of Colombia who are the family members of individuals tortured and killed by the Autodefensas Unidas de Colombia (“AUC”), a paramilitary organization operating in Colombia, began filing lawsuits under the ATCA in 2007 against Chiquita Brands International, Inc. and Chiquita Fresh North America LLC (“Chiquita”) for aiding and abetting AUC in its paramilitary activities to ensure the company’s profits. AUC routinely engaged in death threats, summary executions, torture, rape, kidnapping, forced disappearances, looting, and large-scale attacks on civilian populations. In June 2011, the U.S. District Court for the Southern District of Florida refused to dismiss the plaintiffs’ ATCA claims for torture, extrajudicial killing, war crimes, and crimes against humanity, as well as the plaintiffs’ TVPA claims for torture and extrajudicial killing, allowing the case to move forward to trial. In 2007, the United States had fined Chiquita 25 million USD (18.2 million EUR) as part of a settlement for making payments to a designated terrorist organization.32

Examples of Class Actions Enabling Redress for Environmental Degradations:

• Aguinda v. Texaco & Ashanga v. Texaco (consolidated in Jota v. Texaco):33 A class action lawsuit was brought on behalf of 30,000 indigenous citizens of Ecuador against

30 Id.
Texaco in 1993 related to Texaco’s alleged toxic spill and other pollution, unlawful and harmful disposal of hazardous waste, and spoliation of the rain forest habitat and plaintiffs’ property. A companion class action lawsuit was filed in 1994 on behalf of 25,000 additional indigenous citizens of Ecuador filed a companion class action. The U.S. District Court for the Southern District of New York dismissed the parties’ ATCA claims, in part on *forum non conveniens* and international comity considerations. On a consolidated appeal of the two cases, the Second Circuit Court of Appeals vacated the dismissals and remanded the cases because Texaco had not consented to jurisdiction before an Ecuadorian court. Texaco subsequently unambiguously agreed to be sued on these claims in Ecuador. In February 2011, a court in Ecuador ordered Chevron (which merged with Texaco in 2001) to pay 18 billion USD (13.1 billion EUR) in damages.\(^\text{34}\)

- **Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984.**\(^\text{35}\) Perhaps one of the most notorious examples of international litigation related to an environmental disaster, this case concerned the release of methyl isocyanate within the Indian village of Bhopal, which ultimately left over 3,000 citizens dead and over 200,000 injured. The U.S. District Court for the Southern District of New York and the Second Circuit Court of Appeals dismissed the class action lawsuit brought under the ATCA on *forum non conveniens* grounds subject to the condition that Union Carbide submit to the jurisdiction of courts in India and not assert limitations defenses. (Following litigation in India, the Supreme Court of India directed a civil settlement of 470 million USD (332 million EUR).\(^\text{36}\) In addition, a court in India found Union Carbide and seven executives of the company guilty of criminal negligence, requiring the company to pay a fine of 10,870 USD (7,674 EUR) sentencing each individual to two years in prison in addition to an individual fine of 2,175 USD (1,535 EUR).\(^\text{37}\))

- **Exxon Valdez Oil Spill Litigation:**\(^\text{38}\) In March of 1989, the oil tanker known as the “Exxon Valdez” ran aground, spilling approximately eleven million gallons of oil into Prince William Sound in Alaska. The class action lawsuit that ensued was brought on behalf of 32,000 commercial fishermen, Alaska natives, landowners, and others whose livelihoods and cultural landscape were gravely affected by the disaster. Following a

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\(^{35}\) 634 F. Supp. 842, 867 (S.D.N.Y. 1986), *aff’d*, 809 F.2d 195, 199-201 (2d Cir. 1987). Victims have pursued additional class actions in U.S. courts related to this disaster that have not survived class certification. *See, e.g.*, *Bano v. Union Carbide Corp.*, 198 Fed. App’x 32 (2d Cir. 2006); *Sahu v. Union Carbide Corp.*, No. 04 CIV. 8825 JFK, 2010 WL 5158645 (S.D.N.Y. Dec. 20, 2010).


multi-phase damages trial took place in 1994, a jury awarded 287 million USD (209 million EUR) in compensatory damages to the commercial fisherman,\(^\text{39}\) and five billion USD (3.6 billion EUR) in punitive damages. In December 2006, the Ninth Circuit Court of Appeals reduced the punitive damages award to 2.5 billion USD (1.8 billion EUR) in consideration of Supreme Court jurisprudence. Subsequently, the U.S. Supreme Court reduced the punitive damages award to 507.5 million USD (358.2 million EUR), an amount equal to the compensatory damages.

Increasing Access to Justice in Human Rights Class Actions:

“Class actions serve an important function in [the U.S.] system of civil justice” by resolving matters affecting many individuals in a single lawsuit.\(^\text{40}\) Aside from providing a means of enforcing substantive human rights, class actions strengthen procedural rights by increasing access to justice for individuals who would not otherwise bring valid claims before a court. Victims of egregious human rights violations often lack the financial means to bring individual claims against government officials or corporations.\(^\text{41}\) Class actions in the human rights context “can restore the ‘balance of power’ between plaintiffs and defendants by holding human rights violators accountable for a fuller range of the harm caused than an individual action might,” “allow[] a group of victims to preserve their collective memory through the public airing and recording of the stories of a community of victims,” “place[] victims of human rights abuses in a powerful litigation posture that may enable the class to operate on a corporate or diplomatic level with a degree of political power generally unavailable to individual claimants,”

\(^{39}\) The Native Alaskans settled for approximately $22.6 million (16.5 million EUR), and the landowners’ claims settled before the damages trial.


\(^{41}\) *See also* William J. Aceves, *Actio Popularis? The Class Action in International Law*, 2003 U. Chi. Leg. F. 353, 354 (2003) (“In human rights cases, atrocities are often committed against hundreds or even thousands of victims. Many of these victims are impoverished and isolated, with little access to a just legal system in their own countries. Class action designation in the United States allows these victims to seek redress in a single proceeding, reducing transaction costs and promoting efficiency in litigation. In light of the often extensive and complex nature of each individual claim, class action lawsuits may provide the only realistic option for redress. Class action designation also provides a degree of anonymity to victims who might otherwise face repercussions from the defendants for filing individual lawsuits.”).
and “allow individuals who may fear violent retaliation (against themselves or their loved ones) to participate in the legal process, without having to assume a public or prominent role in the litigation.” As the U.S. Supreme Court has noted, the benefits of class actions extend beyond providing victims with their day in court by simultaneously offering “the opportunity to save the enormous transaction costs of piecemeal litigation.”

Limiting Potential for Abuse in Human Rights Class Actions:

The European Commission stated in its Document that “[m]any stakeholders have expressed concern that they wish to avoid certain abuses that have occurred in the US with its ‘class actions’ system.” (¶ 21.) The European Commission further stated that it believes that perceived economic incentives for parties to bring non-meritorious cases, including the “availability of punitive damages,” “absence of limitations regarding standing,” “possibility of contingency fees for attorneys,” and “wide-ranging discovery procedure for procuring evidence” will “increase the risk of abusive litigation to an extent which is not compatible with the European legal tradition.” (Id.)

In the United States, the risk of abusive litigation for human rights class actions is limited. In addition to the regular limitations on class actions under Federal Rule of Civil Procedure 23, human rights class actions are further limited because they often involve foreign plaintiffs and often assert human rights violations by foreign government officials or other entities. Therefore, U.S. courts take into account principles of law limiting the courts’ willingness to exercise jurisdiction over such cases—including forum non conveniens, comity among nations, and the

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44 See, e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir. 1987).
political question doctrine—as well as other U.S. legal principles restricting the courts' ability to consider certain issues related to foreign sovereigns—including sovereign immunity and the act of state doctrine. In addition, individuals regularly opt to pursue individual lawsuits as opposed to class actions in the human rights context.

Conclusion:

Class actions in the human rights context are necessary to protect fundamental rights. When dealing with egregious human rights abuses or environmental harms with far-reaching impact, class actions allow disempowered groups to seek redress for harms suffered. Class action litigation serves valuable purposes beyond the recovery of damages, bringing public attention to human rights atrocities and environmental disasters that would otherwise go unnoticed, provoking necessary changes in the law, publicly shaming human rights abusers, enabling neutral factual investigations, providing a constructive context for victims to “tell their story,” and encouraging consumer boycotts, among other benefits. Human rights class actions

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46 See, e.g., Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004).

47 See, e.g., Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011) (determining that jurisdiction is appropriate for claims by Argentinian residents against company under ATCA and TVPA alleging collaboration with state security forces to kidnap, detain, torture, and kill the plaintiffs and/or their relatives during Argentina's “Dirty War.”).

48 See supra notes 42-43.


50 See Catherine A. Rogers, Proposals to Expel Palestinians from the Occupied Territories as Catalyst for a Civil Adjudication Campaign, 7 J. GENDER RACE & JUST. 167, 186 (2003) (citations omitted); Morris A. Ratner, Factors Impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview, 58 N.Y.U. ANN. SURV. AM. L. 623, 648 (2003) (“Attorneys [in international human rights class actions] often utilize litigation as part of an overall strategy that includes media coverage to complement the political activities and grass roots activism.”).
bring attention to these egregious violations of fundamental rights in the hopes of preventing human rights violations in the future.