

## MODULE 6

### Introduction

Friendly settlements can be defined as “voluntary, confidential, non-contentious and quasi-judicial procedure[s] with a view to achieving peaceful and amicable resolution of disputes.” Methods of reaching friendly settlement include negotiation (direct engagement between the parties), mediation (including a third party to moderate the discussion), inquiry, conciliation, and arbitration.

Before deciding to settle a specific case on behalf of a victim of torture, it is important to consider a number of things. The nature of torture *can* make some friendly settlement in the human rights arena inappropriate or counterproductive in some circumstances. Torture is a criminal offence, and its prohibition a **peremptory norm of international law** or ***jus cogens*** (see *Module 2: UNCAT and the Definition of Torture*).

- States have a duty to **prevent** and **prohibit** torture under domestic law.
- States are obligated to **investigate** torture allegations, and **prosecute, punish, or extradite individuals accused of torture**.
- States have a duty to **provide redress** to victims of torture.

Any settlement in relation to a torture case should ensure the State commits to fulfilling these obligations to the extent possible.

There are also strategic considerations regarding out of court settlements for torture:

- The overall impact of settlements can be more limited than that of an eventual decision by a human rights organ or judicial body, but can sometimes be broader.
- Settlements for torture can be viewed as a buy-out by the perpetrator or State, especially where the wrongdoing is not explicitly recognised in the settlement agreement, or if the State is not willing to investigate and redress.
- Settlement proceedings are usually confidential, and negotiations cannot be used by parties in subsequent court proceedings. This prevents any form of publicity or public advocacy around the case.
- Settlements can be difficult to implement, especially if there have been government changes in the State since the settlement was entered and there is lack of political will.

Perhaps the biggest advantage of a settlement is the potential **empowerment** of the victim: it gives the victim the **chance to be heard and directly engage with the State or perpetrator** without the rigid structures of court proceedings. This also means the victim has the opportunity to control the outcome. They have more ownership and agency over and direct involvement in the final outcome, instead of having to wait for a court’s decision.

Additionally, settlements can be faster than a legal claim, and can be more appropriate when the evidence of a claim is not strong and the State shows political will to acknowledge the facts, among other circumstances.

### Considering settlement for torture cases

The meaning of justice varies from survivor to survivor. As a lawyer, it is important **to consult with the client throughout the process**, and talk to them about their preferred avenue/s for justice. This entails making clear the **pros and cons of a court judgement versus a settlement**.

In the case of Laparra-Martinez v. Mexico (arbitrary arrest and torture by the authorities of a man and his wife and children to extract a confession of murder), the victim's highest priority was a declaration of innocence and restoring his and his family's name. In this case, this was possible through a reparations scheme agreed upon through a settlement.

The final decision should be made **only with the explicit consent** of the client and following their wishes. Relevant factors include:

- *Circumstances of the victim and the case.* Are there any medical issues or legal needs that could impact the desirability of litigation? E.g. Will the client's mental and physical state allow them to go through what could be *years* of legal proceedings and uncertainty?
- *Revictimization.* Clients need to be made aware (and prepared) that in both processes there is a risk of revictimization. This risk might be bigger in court proceedings as the process is adversarial and the questioning by the defence team or even judges and prosecutors can be aggressive and accusatory. On the other hand, court proceedings can have a reparative aspect to them, allowing the victim to face the perpetrator, to tell their own account and to have their story recognised as truth and a perpetrator officially blamed and punished.
- *Sensitivity.* Court proceedings and settlements can happen behind closed doors but can sometimes be public. When a victim is ashamed, risks stigma, rejection, or retaliation, or when sensitive issues (such as SGBV) are discussed, a victim might prefer the option that is more private and confidential. Options such as closed sessions in proceedings should be discussed with the client.
- *Length.* Court proceedings can take significantly more time and energy than settlements.

Always be realistic and honest with the client about what they can expect from court cases and settlements. Do not promise things you cannot be sure of.

### Power imbalance in settlement negotiations

During negotiations preceding settlements, the victim will talk either directly or through their lawyer with a representative of the State/perpetrator. In this process, a power imbalance may exist, which may recall the power imbalance during the act of torture, even in the absence of the perpetrator during the negotiation process.

This means that:

- Negotiations might be complicated because of the risk of **fear and distrust**;
- The power imbalance has to be tailored in the negotiation process, to protect the client and to **prevent retraumatization**;
- If a mediator is involved, they need to be **well-trained and sensitised** to the trauma caused by torture and other violations.

Factors that can help redress this power imbalance are:

- Outside pressure: E.g., through advocacy campaigns around the case. However, victims and their representatives should be cautious not to breach any duty of confidentiality, as this may adversely affect the settlement procedure and the admissibility of the application.
- Commitment of the government: This establishes a baseline of trust in the negotiation process. Commitments can be shown by adopting some preliminary measures that could be symbolic (for example, an apology) prior to signing the agreement.

A strong negotiation strategy is key. Think about the minimum the victim wants to get out of the negotiation process and alternatives in case negotiations or mediation fail.

### Settlements under regional or domestic systems

The possibility of an ‘amicable’ or ‘friendly’ settlement is offered within the African, Inter-American and European human rights systems. Settlements have included cases of torture. The First Optional Protocol to the ICCPR and UNCAT do not provide for friendly settlements in relation to individual complaints. However, an individual complaint will not be admissible if the same matter is being or has been examined by a settlement procedure.

In the **Inter-American system**, the Commission has discretion to decide whether a settlement would be appropriate in the circumstances of each case. The parties **can accept or reject the initiation** of a friendly settlement. The parties may request settlement at any time in the proceedings. The Commission will reject a settlement if it is not compatible with the object and purpose of the American Convention on Human Rights. If the parties opt for settlement but do not reach a timely agreement, the Commission will issue a merits decision, after which it might still proceed to submit the case to the court. This may incentivise States to consider a settlement. Such settlements are also possible before the IACtHR. If this is the case, the IACtHR will rule on the admissibility and juridical effect of such a settlement “at the appropriate procedural time” (Rule 63 of the RoP).

In the **European system**, settlement is offered when a case is communicated to the respondent State (Rule 62(1) of the Rule of the Court). While the Court sets time limits, it is flexible to extend them to ensure settlement is a real possibility. The settlement proceedings are confidential, and the Court is actively involved; it can strike out an application if an

applicant 'unreasonably' rejects a settlement proposal. The Court may also reject a settlement where it is not satisfied that both parties have unambiguously consented to its terms. The Court can decide to hear a case despite a friendly settlement where "respect for human rights as defined in the Convention or the Protocols thereto requires an examination on the merits."

The **African Commission** can initiate friendly settlements (Rule 109) but does not often do so in practice. Where it has done so, the ACHPR has been criticised for showing little regard to human rights. Parties before the African Court may also engage in amicable settlement procedures (Rules 56 and 57). This procedure has however had little success. Negotiations between the parties are treated as confidential and cannot be used in subsequent court proceedings. As such, the court can set aside settlement – even as negotiations are ongoing – if it considers the importance of the matter justifies it.

**Domestic proceedings** for torture can also involve out of court settlements, depending on the domestic system. In the United States, for instance, the Salim v. Mitchell settlement was reached between two psychologists hired by the CIA to design and implement torture techniques as part of the US rendition program, and three torture survivors. The settlement was considered a **victory** because it was the first time the CIA or its contractors were held accountable for torture, with the psychologists acknowledging their involvement. However, full confidentiality of the agreement meant **full secrecy**, while a legal claim could have declassified information that is relevant to society as a whole.

### Further Reading

Victor Oluwasina Ayeni and Tajudeen Ojo Ibraheem, "Amicable Settlement of Disputes and Proactive Remediation of Violations under the African Human Rights System", 2019, *Beijing Law Review*.