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Recommended Citation
Aceves, William J. ( ) "Actio Popularis - The Class Action in International Law," University of Chicago Legal Forum: Vol. 2003: Iss. 1, Article 9.
Available at: http://chicagounbound.uchicago.edu/uclf/vol2003/iss1/9

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Actio Popularis? The Class Action in International Law

William J. Aceves

Since the Second Circuit's 1980 landmark ruling in Filartiga v Pena-Irala, plaintiffs have used human rights litigation in the United States to seek redress for serious violations of international law committed in other countries. Several of these lawsuits have been pursued as class action lawsuits. Some of these class actions have resulted in significant damage awards, including Hilao v Estate of Marcos and Kadic v Karadzic. Other lawsuits have resulted in negotiated settlements between the parties.

1 William J. Aceves is a Professor of Law and the Director of the International Legal Studies Program at California Western School of Law. This Article is based on remarks prepared for the 17th Annual Legal Forum Symposium at the University of Chicago Law School: Current Issues in Class Action Litigation. John Noyes and Beth Van Schaack provided helpful comments on early drafts. Sandra Hart and Jennifer Lane provided excellent research assistance. All errors remain my own.


6 Consider Detlev Vagts and Peter Murray, Litigating the Nazi Labor Claims: The Path Not Taken, 43 Harv Intl L J 503 (2002) (discussing the forced labor and slave labor cases that resulted from World War II Nazi practices); Michael Bazyler, Holocaust Restitution: Reconciling Moral Imperatives with Legal Initiatives and Diplomacy, 25 Fordham Intl L J 64 (2001); Michael Bazyler, Nuremberg in America: Litigating the Holocaust in
Class action designation in human rights cases provides plaintiffs with several advantages. The class action lawsuit is an efficient mechanism for pursuing large-scale litigation in cases where individual plaintiffs are unlikely to bring their own claims. 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.

To date, studies of class action litigation in human rights cases have focused primarily on the U.S. legal system. Most commentary has been positive, although some critics have voiced concerns about the nature and scope of this litigation. It is also intriguing, however, to consider whether this form of group litiga-
This Article examines the status of class action litigation in international law. Specifically, it explores the possibility of bringing group litigation in three prominent international institutions: the United Nations Human Rights Committee, the European Court of Human Rights, and the Inter-American Commission on Human Rights.

The Article focuses on these institutions for several reasons. First, these institutions were established primarily to protect human rights. Presumably, they would facilitate individual action designed to seek redress for large-scale violations of international law. For example, the Human Rights Committee specifically provides a forum for individuals who have been victimized by state actors:

The humblest and most remote peasant who has been deprived of rights under the [International Covenant on Civil and Political Rights] can secure a remedy (or at least a view suggesting a remedy) [in the Human Rights Committee]. This is indeed a striking vision, a deep aspiration of the human rights movement—though not the deepest, which would have the states themselves respect rights so

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12 "Many countries have procedures that permit, in certain circumstances, standing to sue in the place of others, aggregation of similar claims, or suits filed in some kind of representative capacity." Edward F. Sherman, Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions, 52 DePaul L Rev 401, 402 (2002).

13 This Article focuses on class action litigation in the context of human rights violations. It does not address other forms of injury.

14 The term "institutions" refers to the various committees, commissions, and courts described in this Article.


16 See Andrew Byrnes and Jane Connors, Enforcing the Human Rights of Women: A Complaints Process for the Women's Convention, 21 Brook J Intl L 679, 698 (1996) ("The existence of a wide variety of communications procedures can play an important role in bringing about the more effective enjoyment of internationally guaranteed human rights.").

17 See id at 696-701.
as to make recourse to international procedures unnec-
sary.\textsuperscript{18}

Second, individuals may bring claims directly before these insti-
tutions. This right of individual action is rare in international law
because most international institutions limit the right of petition
to state actors.\textsuperscript{19} Third, these institutions have the authority to
review state compliance with treaty obligations and to issue find-
ings of compliance or noncompliance.\textsuperscript{20} Indeed, they may even
make recommendations involving declaratory relief, payment of
compensation, or other remedial action.

Preliminary observations reveal that class action litigation
faces significant hurdles before these (and other) international
institutions. Such claims are often dismissed at the admissibility
stage. In general, these institutions have held that the individual
applicant must be the direct victim of the purported violation.
Thus, efforts by individual applicants seeking to represent the
interests of a broader group or class have generally proven un-
successful, even though the traditional criteria for class action
designation in the United States (numerosity, commonality, typi-
cality, and adequacy of representation) may have existed.\textsuperscript{21} These
efforts are often referred to as actio popularis.\textsuperscript{22}

In Roman law, an actio popularis was an action that could be
brought by an individual on behalf of the public interest.\textsuperscript{23} It ap-
pears to have entered the formal lexicon of international law in
Judge Winiarski’s dissenting opinion in South West Africa
(Ethiopia v South Africa; Liberia v South Africa) (Preliminary
Objections),\textsuperscript{24} where he noted that the actio popularis seemed
diary to international law and a novelty to international rela-

\textsuperscript{18} Henry Steiner, Individual Claims in a World of Massive Violations: What Role for
the Human Rights Committee?, in Philip Alston and James Crawford, eds, The Future of

\textsuperscript{19} Consider Albrecht Randelzhofer and Christian Tomuschat, eds, State Responsibility
and the Individual: Reparations in Instances of Grave Violations of Human Rights (Mar-
tinus Nijhoff 1999).

\textsuperscript{20} See, for example, Rules of Procedure of the Human Rights Committee, UN Doc
CCPR/C/3/Rev.6 (2001), at Rules 66 and 68, available online at <http://www.unhchr.ch

\textsuperscript{21} See FRCP 23.

\textsuperscript{22} See Egon Schwelb, The Actio Popularis and International Law, 2 Israel Yearbook
Hum Rts 46, 47 (1972). Consider Ian Brownlie, Principles of Public International Law
466–73 (Cavendish 4th ed 1999); Christine Gray, Judicial Remedies in International Law

\textsuperscript{23} Schwelb, 2 Israel Yearbook Hum Rts at 47 (cited in note 22).

\textsuperscript{24} 1962 ICJ Reports 335.
This position was affirmed by the International Court of Justice four years later in *South West Africa (Second Phase)*, when it held that Ethiopia and Liberia had no legal right or interest to challenge South Africa’s purported noncompliance with the League of Nations mandate for South West Africa. In its ruling, the Court indicated that the *actio popularis* was “not known to international law as it stood at present: and the Court was unable to regard it as imported by the ‘general principles of law’ referred to in Article 38, paragraph 1(c), of its Statute.” Thus, the Court refused to accept the “right resident in any member of a community to take legal action in vindication of a public interest.”

In *Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain) (Second Phase)*, however, the International Court of Justice appeared to breathe new life into the possibility of an *actio popularis*, although it did so under the guise of obligations *erga omnes*. According to the Court, some international obligations concern all states. These include the rules involving basic rights of the human person, such as the prohibitions against genocide, slavery, and racial discrimination: “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

While the concept of obligations *erga omnes* has received significant commentary and increased recognition by jurists and commentators, its application to individuals has not. International law remains reluctant to expand *locus standi* for individuals in international institutions, even in cases involving viola-

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25 Id at 452–53.
26 1966 ICJ Reports 6.
27 Id at 51.
28 Id at 47.
29 Id.
30 1970 ICJ Reports 3.
31 Id at 32.
32 Id. But see 3 Shabtai Rosenne, *The Law and Practice of the International Court, 1920–1966* 1203 (1997) (noting that the International Court of Justice “has not introduced the conception of . . . *actio popularis* into international law, even for the protection of what are sometimes regarded as obligations *erga omnes*”).
tions of obligations *ergo omnes.* These efforts are often labeled as *actio popularis* and are summarily dismissed.

This Article posits that international law should expand *locus standi* requirements to allow class action designation for individuals in international institutions. Despite some similarities, there are profound differences between class action litigation and an *actio popularis.* For example, class action litigation requires commonality—the proposed class must raise common questions of law or fact. It requires typicality—a nexus between the applicant and the underlying class. It requires adequacy of representation—a competence of counsel, as well as a lack of actual or potential conflicts between the class representative and class members. An *actio popularis* requires none of these features.

By applying the criteria of Federal Rule of Civil Procedure 23 ("Rule 23") to group litigation, international institutions can take advantage of the rigors and efficiencies of class action litigation without resorting to the liberal *locus standi* of an *actio popularis.* Moreover, adopting the Rule 23 requirements could remedy the profound disparities in power that exist between states and individuals in international law. Such disparities can be traced, in part, to assumptions about the state and its relationship with the individual.

Under traditional international law the individual has no *locus standi,* on the theory that his rights will be championed by his government. But how can his government be his champion when *ex hypothesi* it is the offender? What is necessary, therefore, is to give the individual access to an international organ which is competent to afford him a remedy even against the government of his national State.

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35 At least one international institution has expressed approval of the *actio popularis.* The American Commission on Human and Peoples' Rights has indicated that the right of *actio popularis* is recognized by the African Charter on Human and Peoples' Rights. See Dinah Shelton, *International Decisions: Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v Nigeria),* 96 Am J Intl L 937, 937 (2002).
36 See FRCP 23(a)(2).
37 See FRCP 23(a)(3).
38 See FRCP 23(a)(4).
While the Human Rights Committee, European Court, and Inter-American Commission do, in fact, provide *locus standi* to individuals, disparities in power remain. Class action litigation may provide one mechanism for redress.

I. THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

The International Covenant on Civil and Political Rights ("ICCPR") was adopted by the United Nations ("U.N.") in 1966 and entered into force in 1976. Arguably the most significant human rights instrument of the twentieth century, the ICCPR traces its origins to the United Nations Charter and the Universal Declaration of Human Rights. It recognizes a set of civil and political rights that "derive from the inherent dignity of the human person." Some provisions address bodily integrity. For example, Article 6 provides that "[e]very human being has the inherent right to life" and that "[n]o one shall be arbitrarily deprived of his life." Article 7 provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Other provisions address such rights as freedom of religion, freedom of expression, and fair trial rights.

To monitor state compliance, the ICCPR established the Human Rights Committee. The Committee is an independent institution, although it functions within the organizational structure of the United Nations. It consists of eighteen experts selected every four years by member states.

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41 Id at preamble.
42 Id.
43 Id at art 6 (1).
44 *ICCPR*, 999 UNTS 171, at art 7 (cited in note 40).
45 See id at art 18.
46 See id at art 19.
47 See id at art 9.
50 *ICCPR*, 999 UNTS 171, at art 28 (cited in note 40). These experts function in their individual capacity, not as government representatives. According to their oath of office, members of the Committee "undertake to discharge their duties impartially and conscientiously." *Rules of Procedure*, UN Doc CCPR/C/3/Rev.6, at Rule 16 (cited in note 20). The Committee meets three times a year in three-week sessions, alternating between Geneva and New York.
The Human Rights Committee has several responsibilities.\(^{51}\) First, the Committee reviews reports issued by member states describing their compliance with the ICCPR.\(^{52}\) Pursuant to Article 40, member states are obligated to submit reports to the Committee on the measures they have adopted that give effect to the rights recognized in the ICCPR and on the progress made in the enjoyment of those rights.\(^{53}\) The Committee is required to study these reports and submit its evaluation of these reports to member states. Second, the Committee issues General Comments interpreting specific provisions of the ICCPR. These General Comments assist states in fulfilling their reporting obligations.\(^{54}\) The Committee has issued twenty-nine General Comments since 1981.\(^{55}\) Third, the Committee may consider state communications raising violations of the ICCPR.\(^{56}\) Pursuant to Article 41, a member state may recognize the competence of the Committee “to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant.”\(^{57}\) The right of state communication is subject to several conditions. Most significantly, state communications “may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee.”\(^{58}\) In other words, a State Party must consent before the Committee may consider any state communications that are submitted against that State Party. Finally, the Committee may consider individual communications raising violations of the ICCPR. The right of in-

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\(^{52}\) See *ICCPR*, 999 UNTS 171, at art 40 (cited in note 40).

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) Id.


\(^{57}\) See *ICCPR*, 999 UNTS 171, at art 41(1) (cited in note 40).

\(^{58}\) Id.
individual communication is set forth in the Optional Protocol to
the ICCPR ("Optional Protocol").

Despite its extensive jurisprudence, the Human Rights
Committee's Comments and views have no binding force. That
is, member states are not legally obligated to comply with the
Committee's findings. However, these findings are considered
persuasive authority for ICCPR interpretation.

A. The Right of Individual Communication

The Optional Protocol was adopted in 1966 and entered into
force in 1976. The Optional Protocol was established to further
"achieve the purposes of the Covenant" and the "implementation
of its provisions." Specifically, it was designed to enable the
Human Rights Committee "to receive and consider ... communica-
tions from individuals claiming to be victims of violations of
any of the rights set forth in the Covenant."

Individual communications are initially submitted to the
Special Rapporteur on New Communications. The communication
must contain the following information:

(1) name, address, age, and occupation of the author;

(2) name of the State Party against which the communi-
cation is directed;

(3) provision of the ICCPR alleged to have been violated;

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59 Optional Protocol to the International Covenant on Civil and Political
Rights, 999 UNTS 171, art 2 (1966), available online at <http://www.unhchr.ch

60 See Kirsten A. Young, The Law and Process of the U.N. Human Rights Committee
176 (PAIL Inst 2002); Fausto Pocar, Legal Value of the Human Rights Committee's Views,

61 Nowak, U.N. Covenant 710–11 (cited in note 51). However, the Committee has
increasingly sought to portray its jurisprudence as binding on member states. See Scott
Davidson, Intention and Effect: The Legal Status of the Final Views of the Human Rights
Committee, in Grant Huscroft and Paul Rishworth, eds, Litigating Rights: Perspectives
from Domestic and International Law 305 (Hart 2002); Michael O'Flaherty, Human Rights

62 Optional Protocol, 999 UNTS 171 (cited in note 59). As of March 1, 2003, there were
104 member states. See Status of Ratifications (cited in note 40).


64 Id.
(4) facts of the claim;

(5) steps taken by the author to exhaust domestic remedies;

(6) object of the communication; and

(7) extent to which the same matter is being examined under another procedure of international investigation or settlement. 65

Following receipt of an individual communication, the Special Rapporteur conducts a preliminary examination and prepares a draft recommendation. 66 This recommendation is then forwarded to the Working Group on Communications, which consists of several members of the Human Rights Committee. 67 The Working Group must determine, by unanimous vote, whether the communication is admissible. 68 If unanimity is not reached, the communication must be submitted to the full Human Rights Committee for a determination on admissibility. 69

The individual communication is subject to several admissibility requirements. First, the communication must be submitted by an individual or individuals; it cannot be submitted by a non-governmental organization ("NGO"), corporation, political party, or similar entity. 70 In addition, anonymous communications are not recognized. 71 However, a communication may be submitted by an individual's representative or on behalf of an alleged victim if the alleged victim is unable to submit the communication personally. 72 In these cases, the representative must have a "sufficient

66 Young, The Law and Process 150 (cited in note 60); Anne F. Bayefsky, How to Complain to the UN Human Rights Treaty System 58 (Kluwer 2002).
67 See Rules of Procedure, UN Doc CCPR/C/3Rev.6, at Rule 89(1) (cited in note 50).
68 See id at Rule 87(2).
69 The ICCPR provides that decisions of the Human Rights Committee are made by majority vote. ICCPR, 999 UNTS 171, at art 39(2)(b) (cited in note 40). In practice, however, decisions are made by consensus although dissenting opinions may be added to the Committee's rulings.
70 Rules of Procedure, UN Doc CCPR/C/3/Rev.6, at Rule 90(a) (cited in note 50).
71 Id.
72 Id at Rule 90(b).
link” to the alleged victim that would justify this status. Family members or legal representatives are often found to possess a sufficient link.

While the Human Rights Committee considers each communication on its own merits, the Committee’s Rules of Procedure allow the Committee to join cases that share common features. Rule 88(2) provides that “[t]wo or more communications may be dealt with jointly if deemed appropriate.” While joinder is permissible, each individual communication must comply with the admissibility requirements.

Second, the petitioner must claim to be a victim of an ICCPR violation. In general, the victim requirement necessitates a direct and immediate injury:

It is a matter of degree how concretely this requirement should be taken. However, no individual can in the abstract, by way of an actio popularis, challenge a law or practice claimed to be contrary to the Covenant. If the law or practice has not already been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the alleged victim’s risk of being affected is more than a theoretical possibility.

On occasion, the victim requirement has been extended to include individuals who experienced suffering caused by harm to other persons. However, this requirement necessitates a close rela-
tionship between the petitioner and the victim, such as that of a family member. 79

Under the Committee's Rules of Procedure, the petitioner must present claims of injury that are "sufficiently substantiated." 80 A petitioner must make a prima facie showing of injury in his submission. 81 While petitioners are not required to fully document their claims at the admissibility stage, they are expected to provide more than mere assertions. 82 As noted by a former member of the Human Rights Committee:

[D]etailed substantiation of claims will only occur at the merits phase. At the same time, the Committee has been able to weed out cases which are nothing but empty assertion, mere allegation, not supported even in outline by reference to facts or relevant legal principle. 83

Third, the same matter cannot be under examination by another international investigatory body or settlement procedure. 84 This requirement precludes only concurrent proceedings. 85 It does not preclude examination when the same matter has already been examined and resolved by another international mechanism. Moreover, this requirement only applies if the victim is actually participating in the other international proceedings. In this respect, the Committee has indicated that the concurrent proceedings must include "the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body." 86

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79 Id.
80 Rules of Procedure, UN Doc CCPR/C/3/Rev.6, at Rule 90(b) (cited in note 50).
81 Young, Law and Process 156 (cited in note 60).
82 Rules of Procedure, UN Doc CCPR/C/3/Rev.6, at Rule 90(b) (cited in note 50).
85 Rules of Procedure, UN Doc CCPR/C/3/Rev.6, at Rule 80(1)(g) (cited in note 50) (prohibiting consideration of claims "being examined" by other international bodies).
Fourth, the individual must have exhausted all available domestic remedies. As noted by the Committee in *T.K. v France*:

The purpose of article 5(2)(b) of the Optional Protocol is, *inter alia*, to direct possible victims of violations of the provisions of the Covenant to seek, in the first place, satisfaction from the competent State party authorities and, at the same time, to enable State parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring, before the Committee is seized of the matter.

This requirement does not apply if the application of such remedies is unreasonably prolonged. Similarly, it does not apply if it would be futile for the claimant to pursue domestic remedies.

Finally, a communication must not constitute an abuse of the right of submission, nor may it be otherwise incompatible with the provisions of the ICCPR. Frivolous or vexatious claims are often found to constitute an abuse of submission. Claims of wrongs not covered by the text of the ICCPR are deemed incompatible with the provisions of the ICCPR.

To date, 104 countries have accepted the Optional Protocol. Since 1976, there have been approximately 1,132 individual communications submitted to the Human Rights Committee. Of these cases, the Committee has issued opinions in approximately 435 cases. Despite the nonbinding nature of the Human Rights Committee's jurisprudence, the individual communication mechanism has been referred to as “the most effective human

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89 Id at para 8.3.


93 *Young, Law and Process* 162 (cited in note 60).

94 Id at 163.

95 The remaining cases either are pending (259), were deemed inadmissible (344), or were withdrawn (164). Consider Statistical Survey of Individual Complaints Dealt With by the Human Rights Committee, available online at <http://www.unhchr.ch/html/menu2/8/stat2.htm> (visited Oct 7, 2003).
rights complaints system at the universal level. Some commentators have argued, however, that the Committee could be strengthened through institutional reform, including changes to its voting process and decision-making structure.

B. Relevant Cases of the U.N. Human Rights Committee

The right to file a class action complaint is not formally recognized in the ICCPR, the Optional Protocol, or the Human Rights Committee's Rules of Procedure. Still, the Human Rights Committee has considered several cases involving elements of group litigation.

In *E.H.P. v Canada*, the petitioner submitted an individual communication on her own behalf and, as Chairperson of the Port Hope Environmental Group, on behalf of present and future generations of Port Hope, including 129 Port Hope residents who had specifically authorized the petitioner to act on their behalf. The communication alleged that Canada had failed to properly address the existence of large quantities of radioactive waste within the confines of Port Hope. Accordingly, "the current state of affairs is a threat to the life of present and future generations of Port Hope, considering that excessive exposure to radioactivity is known to cause cancer and genetic defects." For these reasons, the communication argued that this constituted a violation of Article 6(1) of the ICCPR, which provides that "[e]very human being has the inherent right to life" which "shall be protected by law.

The Human Rights Committee indicated that the petitioner had standing to submit the communication, both on her own behalf and also on behalf of those residents of Port Hope who specifically authorized her to do so. In contrast, the Committee treated the petitioner's reference to "future generations" as an "expression of concern purporting to put into due perspective the importance of the matter raised in the communication." Thus,

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99 Id at para 1.3.

100 ICCPR, 999 UNTS 171, at art 6(1) (cited in note 40).

101 *E.H.P.*, UN Doc CCPR/C/OP/1 at 20, at para 8(a) (cited in note 98).
the question as to whether a communication can be submitted on behalf of “future generations” was not resolved by the Committee. Ultimately, the Committee deemed the petitioner’s communication inadmissible for failure to exhaust available domestic remedies in Canada.

In Disabled and Handicapped Persons in Italy v Italy, a group of associations for the defense of the rights of disabled and handicapped persons (referred to as the Coordinamento), as well as representatives of the individual associations, brought a communication against Italy before the Human Rights Committee. The representatives claimed action on their own behalf, as well as on behalf of all disabled and handicapped persons in Italy. The communication alleged that recent changes to Italian employment law significantly reduced the number of jobs available to disabled or handicapped persons. As a result, Italy had violated Article 26 of the ICCPR, which prohibits discrimination and entitles all people to equal protection of the law.

The Human Rights Committee found the communication to be inadmissible although it provided different reasons for each petitioner. With respect to the Coordinamento, the Committee noted that the Optional Protocol only provides individuals with the right to submit a communication; organizations and corporations have no right of submission. “To the extent, therefore, that the communication originates from the Coordinamento, it has to be declared inadmissible because of lack of personal standing.” With respect to the representatives of the Coordinamento who were also acting on their own behalf, the Committee indicated that “the author of a communication must himself claim, in a substantial manner, to be the victim of a violation by the State party concerned.” In this case, the authors of the communication had not demonstrated that they themselves were actually and personally affected by the Italian law. In such cases, it was

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102 On this point, Canada had argued that the Optional Protocol did not confer the right to submit a communication on behalf of future generations. Id at para 4.1.
104 Id at para 1.
105 Id at para 2.
106 ICCPR, 999 UNTS 171, at art 26 (cited in note 40).
107 See Disabled and Handicapped Persons, UN Doc CCPR/C/OP/2 at 47, at para 5 (cited in note 103).
108 Id.
109 Id at para 6.2.
110 Id.
not the task of the Committee "to review in abstracts national legislation as to its compliance with obligations imposed by the Covenant." Therefore, the Committee held that the authors could not claim to be victims within the meaning of the Optional Protocol. The communication was, therefore, held to be inadmissible.

In *Lubicon Lake Band v Canada,* Chief Bernard Ominayak of the Lubicon Lake Band of Cree Indians brought an individual communication against Canada before the Human Rights Committee, acting on behalf of tribe members. The communication alleged that Canada had allowed the provincial government of Alberta to expropriate the territory of the Lubicon Lake Band for economic exploitation. This violated the Lubicon Lake Band's right of self-determination and ability "to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence." Therefore, the communication charged that Canada had violated the Lubicon Lake Band's right of self-determination as recognized by Article 1 of the ICCPR.

The Human Rights Committee determined that the ICCPR "recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights." It added, however, that Chief Ominayak, as an individual, could not claim to be a victim of a violation of the right of self-determination enshrined in Article 1, "which deals with rights conferred upon peoples, as such." In contrast, the facts as submitted might raise issues under other articles of the ICCPR, including Article 27. Article 27 provides that persons belonging to ethnic, religious, or linguistic minorities "shall not be denied the right, in community with the other

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111 See Disabled and Handicapped Persons, UN Doc CCPR/C/OP/2 at 47, at para 6.2 (cited in note 103).
112 Id.
113 Id at para 7.
115 Id at para 2.1.
117 Lubicon Lake Band, UN Doc CCPR/C/OP/2 at 47, at para 13.3 (cited in note 114).
118 Id.
members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Thus, insofar as Chief Ominayak and other members of the Lubicon Lake Band were adversely affected by Canada’s actions, “these issues should be examined on the merits in order to determine whether they reveal violations of Article 27 or other articles of the ICCPR.” Accordingly, the Committee deemed the communication to be admissible to the extent that it raised issues under Article 27 or other provisions of the ICCPR.

In subsequent proceedings, the Human Rights Committee reiterated the viability of Chief Ominayak’s communication despite the large number of purported victims. While the Optional Protocol provides a procedure for individual communications, “[t]here is ... no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.” Thus, the Committee appeared to recognize the status of Chief Ominayak as the lawful representative of the Lubicon Lake Band.

In *E.W. v The Netherlands,* 6,588 Dutch citizens brought a communication against the Netherlands before the Human Rights Committee. They alleged that the Netherlands had violated the right to life provisions of Article 6 of the ICCPR because it had agreed to the deployment of cruise missiles fitted with nuclear warheads on Dutch territory. In support of this argument, the communication referenced the Human Rights Committee’s General Comment Number 14, which indicated that the production, testing, possession, deployment, and use of nuclear weapons should be prohibited and recognized as crimes against humanity. The communication also noted that even though “thousands of individuals complain collectively about violations of their rights [that] does not turn the communication into an *actio popularis,* since the very nature of the alleged violation affected all the authors simultaneously.” Indeed, the counsel representing the petitioners noted that the communication was submitted on behalf of individuals, each of whom claimed to be a victim of human rights violations: “To consider the communication inadmissible as

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110 ICCPR, 999 UNTS 171, at art 27 (cited in note 40).
111 Lubicon Lake Band, UN Doc CCPR/C/OP/2 at 47, at para 13.4 (cited in note 114).
112 Id at para 32.1.
114 Id at para 3.2.
115 Id at para 3.6.
an actio popularis, because many individuals claim to be similarly affected by a violation, would render the Covenant meaningless for the consideration of large-scale violations of its provisions.\textsuperscript{126}

In its decision, the Human Rights Committee noted that nothing precludes large numbers of people from bringing a case. Indeed, the mere fact that a large number of petitioners have initiated the communication does not render it an actio popularis. Thus, the communication does not fail on this ground. However, the authors must be victims within the meaning of the Optional Protocol:

For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State Party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.\textsuperscript{126}

In this case, the issue was “whether the preparation for the deployment or the actual deployment of nuclear weapons presented the authors with an existing or imminent violation of their right to life, specific to each of them.”\textsuperscript{127} The Committee found that the preparation for the deployment or the actual deployment of nuclear weapons did not “place the authors in the position to claim to be victims whose right to life was then violated or under imminent prospect of violation.”\textsuperscript{128} Thus, the Committee held that the authors could not claim to be victims within the meaning of the Optional Protocol.\textsuperscript{129}

II. THE EUROPEAN COURT OF HUMAN RIGHTS

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”) was adopted by the Council of Europe in 1950 and entered into force

\textsuperscript{125} Id at para 5.3.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id at para 7(a).
in 1953.\textsuperscript{130} In addition, thirteen Protocols supplement and revise the European Convention.\textsuperscript{131}

The European Convention recognizes an extensive array of civil and political rights.\textsuperscript{132} It is based, in part, on the Universal Declaration of Human Rights and seeks to promote the collective enforcement of certain rights in the Universal Declaration.\textsuperscript{133} Article 1 recognizes the nature and scope of the European Convention by noting that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."\textsuperscript{134} Section I contains an extensive list of rights and freedoms, including civil and political rights.

The original provisions of the European Convention created two institutions: the European Commission on Human Rights and the European Court of Human Rights.\textsuperscript{135} These institutions were established "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention."\textsuperscript{136} In 1998, these institutions underwent significant revisions pursuant to Protocol Number 11.\textsuperscript{137} Perhaps the most significant revision was the elimination of the European Commission and the transfer of its functions to the European Court.\textsuperscript{138} In addition, Protocol Number 11 authorized the European Court to


\textsuperscript{133} See European Convention, 213 UNTS 222, at preamble (cited in note 130).

\textsuperscript{134} Id at art 1.

\textsuperscript{135} Id.

\textsuperscript{136} See id at art 19. The original version of Article 19 referenced both the European Court and the European Commission.

\textsuperscript{137} Id.


\textsuperscript{139} At present, the European Court of Human Rights consists of forty-four judges, one from each member state. European Convention, 213 UNTS 222, at art 20 (cited in note 130). Judges sit on the Court in their individual capacity (not as state representatives) and are elected every six years. Id at arts 21(2) and 23(1).
consider individual applications directly and without the need for prior authorization from the affected High Contracting Party.¹³⁹

When a complaint is submitted to the Court, a Judge Rapporteur is assigned to examine the application.¹⁴⁰ The complaint must contain the following information:

(1) name, address, age, and occupation of the applicant;

(2) name of the Contracting Party against which the application is directed;

(3) provision of the European Convention or the Protocols alleged to have been violated;

(4) facts of the claim;

(5) steps taken by the author to comply with the admissibility criteria; and

(6) the object of the application.¹⁴¹

After reviewing the complaint, the Judge Rapporteur submits his findings to a three-judge committee, which also considers the admissibility of the complaint.¹⁴² Decisions on the inadmissibility of individual applications require a unanimous vote of the committee.¹⁴³ If the decision on inadmissibility is not unanimous, the application is forwarded to a Chamber of seven judges, which rules on the admissibility and merits of individual applications.¹⁴⁴ Such decisions are made by majority vote.¹⁴⁵ A Grand Chamber, consisting of seventeen judges, may review the decision of a Chamber if the case “raises a serious question affecting the inter-

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¹³⁹ Id at art 34.
¹⁴¹ Id at Rule 47(1).
¹⁴² Id at Rule 49.
¹⁴³ European Convention, 213 UNTS 222, at art 28 (cited in note 130). See also Rules of Court at Rule 53(3) (cited in note 140).
¹⁴⁴ See Rules of Court at Rules 53(3) and 53(4) (cited in note 140).
¹⁴⁵ Id at Rule 56(1).
pretation or application of the Convention or the protocols thereto, or a serious issue of general importance.\footnote{146}

The decisions of the European Court are binding, and the High Contracting Parties undertake to abide by a final judgment in cases to which they are parties.\footnote{147} To promote compliance, a final judgment is transmitted to the Committee of Ministers, which then supervises the execution of judgments.\footnote{148} The Committee also publishes resolutions describing the extent to which states have complied with the Court’s judgments.\footnote{149}

A. The Right of Individual Application

According to Article 34 of the European Convention, the European Court may receive applications from a person, NGO, or group of individuals claiming that one of the Parties to the Convention violated one of the rights set forth in the Convention or its protocols.\footnote{146} No prior consent is required by the High Contracting Parties; the Court has automatic jurisdiction over these cases. In addition, the European Court maintains its authority to consider interstate cases, where a High Contracting Party refers to the Court any alleged breach of the Convention or the protocols by another High Contracting Party.\footnote{151} In both situations, “[t]he High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”\footnote{152}

Petitioners must comply with several requirements in order to bring an application before the European Court.\footnote{153} First, the

\begin{footnotes}
\footnote{146}{See \textit{European Convention}, 213 UNTS 222, at art 43(2) (cited in note 130). The Grand Chamber also has the authority to consider certain cases in lieu of a Chamber.}
\footnote{147}{Id at art 46(1).}
\footnote{148}{Id at art 46(2). The Committee of Ministers is the decision-making body for the Council of Europe. It monitors compliance with all Council of Europe agreements, including the European Convention. See Council of Europe Website, \textit{About the Committee of Ministers}, available online at <https://wcm.coe.int/rsi/CM/index.jsp> (visited Oct 13, 2003).}
\footnote{150}{\textit{European Convention}, 213 UNTS 222, at art 34 (cited in note 130).}
\footnote{151}{Id at art 33.}
\footnote{152}{Id at art 46(1).}
\footnote{153}{Consider Jessica Simor and Ben Emmerson, \textit{Human Rights Practice} (Sweet & Maxwell 2002); Philip Leach, \textit{Taking a Case to the European Court of Human Rights} (Blackstone 2001); Tom Zwart, \textit{The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee} (Martinus Nijhoff 1994).}
\end{footnotes}
application must be submitted by a person, NGO, or group of individuals.\textsuperscript{154} NGOs can include corporate bodies, political parties, and trade unions. However, local or central government bodies or other public authorities may not bring complaints.\textsuperscript{155}

All persons, NGOs, and groups of individuals may present applications themselves or through a duly authorized representative.\textsuperscript{156} When a NGO or a group of individuals submits an application, those persons competent to represent that organization or group must sign it.\textsuperscript{157} In these cases, the European Court will generally require a signed letter of authority or other evidence that the applicant wishes the representative to act on her behalf.\textsuperscript{158} Anonymous applications may be submitted in exceptional cases.

Pursuant to Rule 43 of the European Court's Rules of Court, a Chamber "may, either at the request of the parties or of its own motion, order the joinder of two or more applications."\textsuperscript{159} Moreover, "[t]he President of the Chamber may, after consulting the parties, order that the proceedings in applications assigned to the same Chamber be conducted simultaneously, without prejudice to the decision of the Chamber on the joinder of the applications."\textsuperscript{160}

A related procedural mechanism is third party intervention. Article 36(2) of the European Convention allows the President of the Court to invite any party or individual concerned to participate in the proceedings.\textsuperscript{161} Unlike joinder, third party intervention does not authorize an interested person to join the proceedings as a party. Rather, third party intervention allows an individual or organization the opportunity to bring particular arguments or materials to the Court's attention. For example, human rights

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\textsuperscript{154} European Convention, 213 UNTS 222, at art 34 (cited in note 130).

\textsuperscript{155} In Guerra v Italy, for example, the European Court accepted the admissibility of an application filed by forty inhabitants of an Italian town. 26 EHRR 357, 357 (1998). See Balmer-Schafroth v Switzerland, 25 EHRR 598 (1998) (accepting admissibility of application filed by ten Swiss nationals).

\textsuperscript{156} Rules of Court at Rule 36(1) (cited in note 140).

\textsuperscript{157} Id at Rule 45(2).

\textsuperscript{158} See id (requiring the signature of the applicant on an individual communication filed by a representative).

\textsuperscript{159} Id at Rule 47(3) (allowing anonymity when the President of the Chamber authorizes it).

\textsuperscript{160} Rules of Court at Rule 43(1) (cited in note 140). See, for example, East African Asians v United Kingdom, App No 4403/70 (1973), 78A Eur Commn Hum Rts Dec & Rep 5, 8 (1994) (joining thirty-one cases in a single proceeding).

\textsuperscript{161} Rules of Court at Rule 43(2) (cited in note 140).

\textsuperscript{162} European Convention, 213 UNTS 222, at art 34 (cited in note 130).
organizations often submit materials to the Court regarding subjects on which they have experience and expertise.\textsuperscript{163}

A second requirement for submission demands that the applicant be a victim of a violation of the European Convention or its Protocols.\textsuperscript{164} The victim requirement has been interpreted somewhat broadly. For example, the European Court has recognized that an individual has standing to raise claims of a potential or threatened harm, provided that the harm was sufficiently real.\textsuperscript{165} This could include, for example, individuals who face the risk of criminal prosecution,\textsuperscript{166} or who might be adversely affected by government restrictions.\textsuperscript{167} In addition, the European Court has recognized the status of the indirect victim—an applicant may claim to have suffered an injury as a result of a violation of the rights of another person.\textsuperscript{168}

Third, an individual application cannot address the same matter that has already been examined by the European Court or that has already been submitted to another procedure of international investigation or settlement.\textsuperscript{169} One exception to this requirement exists. If new and relevant (and previously unavailable) information arises, the Court may consider a repetitive submission.\textsuperscript{170}

Fourth, the individual applicant must have exhausted all available domestic remedies.\textsuperscript{171} In addition, applications must be introduced within six months from the date on which a final decision was taken at the domestic level.\textsuperscript{172} This exhaustion of domestic remedies requirement has several conditions. For example, domestic remedies must be accessible and not subject to undue delay.\textsuperscript{173} Moreover, applicants are only required to exhaust do-

\begin{footnotesize}
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\item \textsuperscript{163} Leach, Taking a Case 37 (cited in note 153).
\item \textsuperscript{164} European Convention, 213 UNTS 222, at art 34 (cited in note 130).
\item \textsuperscript{165} Simor and Emmerson, Human Rights Practice 20.024 (cited in note 153). See also Soering v United Kingdom, 11 EHRR 439 (1989).
\item \textsuperscript{166} See Dudgeon v United Kingdom, 4 EHRR 149 (1982).
\item \textsuperscript{167} See Open Door and Dublin Well Woman v Ireland, 15 EHRR 244 (1993).
\item \textsuperscript{168} Simor and Emmerson, Human Rights Practice 20.057 (cited in note 153). See also Chahal v United Kingdom, 23 EHRR 413 (1997); McCann v United Kingdom, 21 EHRR 97 (1995).
\item \textsuperscript{169} European Convention, 213 UNTS 222, at art 35(2)(b) (cited in note 130).
\item \textsuperscript{170} See id.
\item \textsuperscript{171} See id at art 35(1).
\item \textsuperscript{172} Id.
\item \textsuperscript{173} European Convention, 213 UNTS 222, at art 35(1) (cited in note 130) (noting that domestic remedies should be exhausted in accordance with principles of international law in order for an individual communication to be admissible).
\end{itemize}
\end{footnotesize}
mestic remedies that are likely to provide effective relief.174 Therefore, the European Court can absolve an applicant from exhausting domestic remedies in appropriate cases.175

Finally, the application must not be "incompatible with the provisions of the Convention, manifestly ill-founded, or an abuse of the right of petition."176 This can include: applications raising alleged violations that occurred before a Contracting Party ratified the Convention; applications raising alleged violations that are not covered by the Convention; or applications raising alleged violations that did not occur within a state's jurisdiction or control.177

Between 1955 and 1999, over 63,000 individual applications were submitted to the European Court and its predecessor the European Commission.178 While relatively few petitions were submitted within the first thirty years, these numbers increased dramatically in the 1980s and 1990s.179 In 2000 alone, the European Court received 10,486 applications—about 17 percent of the historical total.180 The surge in applications resulted, in part, from the success of the European Court in protecting human rights and its increased legitimacy within Europe. It also resulted from the increasing number of states that have ratified the European Convention.181

B. Relevant Cases of the European Court

Relatively few cases involving elements of class action litigation have been brought before the European Court or European Commission. A brief overview of the cases, however, reveals distaste for the actio popularis form of group litigation in the Court.

In Becker v Denmark,182 a German citizen and director of the advocacy group Project Children's Protection and Security International ("CPSI") submitted an application against Denmark to

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175 Akdivar v Turkey, 23 ECHR 143 (1997).
176 European Convention, 213 UNTS 222, at art 35(3) (cited in note 130).
177 See Leach, Taking a Case 87–92 (cited in note 153).
179 The European Court of Human Rights, available online at <http://www.echr.coe.int/Eng/TDocs/HistoricalBackground.htm#judgments> (visited Oct 7, 2003).
180 Information Note (cited in note 178).
181 European Court (cited in note 179).
the European Commission on Human Rights. The application concerned the pending repatriation of 199 Vietnamese children from Denmark to Vietnam. According to the application, there was a serious danger that the children would be killed or persecuted because of their race, language, and ethnic characteristics if they were sent back to Vietnam. Thus, the repatriation would constitute a violation of Article 3 of the European Convention, which prohibits torture and inhuman or degrading treatment or punishment. In addition, repatriation would contravene the prohibition of collective expulsion of aliens set forth in Protocol Number 4 of the European Convention.

In its decision, the European Commission noted that the applicant did not claim that he himself was the direct victim of a violation of the European Convention. Rather, it was the children who were the proper applicants and potential victims. However, the court also found that the children relied on the applicant: “For the purpose of lodging this application he may accordingly be considered as an indirect victim in that he has a valid personal interest in the welfare of the children.”

The Commission ultimately found the application inadmissible, however, because it found no manifest violations of the European Convention.

In X v Austria, an Austrian national sought to challenge Austrian legislation that legalized abortion under certain conditions. The applicant argued that “every citizen of Austria is concerned by the new legislation because of its effect for the future of the nation and for the moral and legal standard of the nation.”

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183 Id at 216.
184 Id.
185 Id at 221.
186 European Convention, 213 UNTS 222, at art 3 (cited in note 130).
188 Becker, App No 7011/75 at 232 (cited in note 182).
189 Id.
190 Id.
191 Id at 235.
193 Id at 87. Compare Open Door and Dublin Well Woman v Ireland, 14 EHRR 231 (1992) (finding that two women who belonged to a class of women of child-bearing age were not seeking to challenge in abstracto the compatibility of Irish law with the European Convention).
In addition, the applicant agreed to be nominated as a "curator to act on behalf of the unborn in general."\textsuperscript{195} The Commission declared the application inadmissible.\textsuperscript{196} According to the Commission, the European Convention authorizes a person to bring an application only if he claims to be a victim of the violation:

However respectable the applicant's motives may be, his above-mentioned arguments do not show that he can claim to be affected by the new legislation in another way than any other citizen of Austria. They rather tend to prove that it is his intention to bring an actio popularis against the provisions concerning the impunity of certain cases of abortion.\textsuperscript{197}

In \textit{Lindsay v United Kingdom},\textsuperscript{198} six British subjects living in Northern Ireland sought to challenge an election system established by the United Kingdom in Northern Ireland pursuant to the Northern Ireland Act of 1996.\textsuperscript{199} The purpose of the Act was to establish a forum for promoting a dialogue on the political situation in Northern Ireland.\textsuperscript{200} The functions of the forum were purely deliberative in nature and had no executive, legislative, or administrative functions.\textsuperscript{201} The applicants claimed to represent "more than one million people in Northern Ireland who are qualified to vote in [these elections]."\textsuperscript{202} The application alleged violations of Article 3 (prohibition against torture and inhuman or degrading treatment), Article 10 (right to freedom of expression), Article 11 (right to freedom of assembly and association), and Article 14 (prohibition against discrimination) of the European Convention, as well as the free election provisions of Protocol Number 1.\textsuperscript{203}

\textsuperscript{195} Id.
\textsuperscript{196} Id at 89.
\textsuperscript{197} Id.
\textsuperscript{199} Id at 199.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Lindsay, App No 31699/96, at 199 (cited in note 198).
\textsuperscript{203} Id at 200. Article 3 of Protocol No 1 provides that "[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." \textit{Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms} (1950), 213 UNTS 262, available online at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> (visited Oct 12, 2003).
In considering the application, the European Commission noted that the European Convention does not provide individuals with the right of *actio popularis*. "Alleged violations of the Convention can be examined only so far as they could possibly affect the individual rights of the applicants." Accordingly, the application was incompatible *ratione personae* with the provisions of the European Convention to the extent that the applicants claimed to act on behalf of other individuals. While the Commission found that the application could proceed with respect to the individual claims of the six applicants, it ultimately found the application inadmissible because there was no manifest violation of the European Convention.

One of the critical issues in European Convention jurisprudence involves the concept of the individual victim. The European Court's jurisprudence on the concept of the individual victim is instructive in clarifying the scope of the victim requirement.

In *Ilhan v Turkey*, Abdullatif Ilhan was apprehended by police in Turkey and seriously injured while in police custody. His brother submitted an application to the European Commission on Human Rights, which found violations of Articles 2, 3, and 13 of the European Convention. Subsequently, the European Court decided to consider the case.

Turkey challenged the proceedings on several grounds, including the incompatibility *ratione personae* of the application. According to the Turkish government, the victim's brother could not himself claim to be a victim of the alleged violations. Turkey argued that to allow the brother to pursue this application would widen the category of persons who can lodge applications, seeking compensation for themselves.

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204 See Lindsay, App No 31699/96, at 200 (cited in note 198).
205 Id.
206 Id.
207 Id.
208 Lindsay, App No 31699/96, at 200 (cited in note 198).
209 See Ovey and White, European Convention 405 (cited in note 132); Simor and Emerson, Human Rights Practice 20.052 (cited in note 153); Leach, Taking a Case 68 (cited in note 153).
210 Ilhan v Turkey, 34 EHRR 869 (2002).
211 Id at 878.
212 Id at 937.
213 Id at 922–23.
214 Ilhan, 34 EHRR at 922–23.
215 Id.
The European Court acknowledged that the system of individual petition set forth in the Convention excludes applications by way of actio popularis. "Complaints must [] be brought by or on behalf of persons who claim to be victims of a violation of one or more of the provisions of the Convention."\(^{216}\) Moreover, such persons must show that they were directly affected by the alleged violation.\(^{217}\) In cases where the actual victim is unable to act, an application that names the injured person as the applicant and includes a letter of authority indicating who can act on his or her behalf is permissible.\(^{218}\) "This would ensure that the application was brought with the consent of the victim of the alleged breach and avoid any application actio popularis."\(^{219}\) In light of the victim's purported incapacity, it was appropriate for his brother to introduce the application on his behalf.

In his dissenting opinion, Judge Golcuklu noted that an individual petition should not function as an actio popularis. Judge Golcuklu argued that only victims have standing to bring individual petitions, and that the Convention does not give a victim the power to delegate standing to anyone else.\(^{220}\) In Judge Golcuklu's view, all a victim can do is appoint a legal representative once he has lodged a complaint with the Court.\(^{221}\) As the Convention does not recognize the notion of "victim by proxy," Judge Golcuklu argued that the Court should have declared the application inadmissible.

III. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

In 1948, the American Declaration on the Rights and Duties of Man ("American Declaration") was adopted by the Ninth International Conference of American States.\(^{222}\) The American Declaration was the first human rights instrument of the postwar era, preceding the Universal Declaration of Human Rights by several months and the European Convention by two years.

While the American Declaration set forth an extensive catalog of human rights (and obligations), it did not establish any ac-

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\(^{216}\) Id at 922.

\(^{217}\) Id.

\(^{218}\) Ilhan, 34 EHRR at 923.

\(^{219}\) Id.

\(^{220}\) Id at 939–40 (Golcuklu dissenting).

\(^{221}\) Id at 940.

companying institutional mechanisms.\textsuperscript{223} The Organization of American States ("OAS"), established at the same conference as the American Declaration, was a political organization; it did not have the competence to accept or consider individual petitions alleging human rights violations.\textsuperscript{224} The institutional component of the Inter-American human rights system came in 1960, with the establishment of the Inter-American Commission on Human Rights ("Inter-American Commission").\textsuperscript{225} During its early years, however, the Inter-American Commission had only limited powers; its primary responsibility was to make recommendations to the governments of the member states.\textsuperscript{226} In 1965, the Second Special Inter-American Conference authorized the Inter-American Commission to consider individual petitions charging OAS member states with violating certain provisions of the American Declaration.

In 1969, the American Convention on Human Rights ("American Convention") was adopted at the Inter-American Specialized Conference on Human Rights.\textsuperscript{227} The American Convention codified the substantive rights set forth in the American Declaration. It also reaffirmed the status of the Inter-American Commission and established a second regional institution, the Inter-American Court of Human Rights ("Inter-American Court").\textsuperscript{228} Pursuant to the American Convention, these two institutions "shall have competence with respect to matters relating to


\textsuperscript{225} The Inter-American Commission consists of seven individuals who function in their personal capacity and represent all the members of the OAS. \textit{American Convention on Human Rights}, OASTS No 36, 1144 UNTS 123, at art 34–36, available online at <http://www1.umn.edu/humanrts/oasinst/roas3con.htm> (visited Oct 7, 2003). They are elected to four-year terms by the OAS General Assembly. Id at art 37.


\textsuperscript{228} \textit{American Convention}, 1144 UNTS 123, at art 33 (cited in note 225).
the fulfillment of the commitments made by the States Parties to the Convention.\textsuperscript{229}

The Statute of the Inter-American Commission indicates that the Commission was created to protect human rights—specifically, those rights set forth in both the American Convention and the American Declaration—and to consult with the OAS on human rights issues.\textsuperscript{230} To accomplish these goals, the Commission was granted several functions and powers.\textsuperscript{231} It has the authority to conduct studies on human rights and make recommendations to member states.\textsuperscript{232} It is also authorized, subject to certain restrictions, to accept petitions alleging violations of the American Convention.\textsuperscript{233} For example, the Commission has the authority to consider a petition filed by a State Party alleging violations of the Convention by another State Party.\textsuperscript{234} However, the Commission only has this authority if the State Party has recognized the competence of the Commission to receive and examine such communications against it.\textsuperscript{235} In addition, any person, group of persons, or nongovernmental entity may lodge a petition alleging violations of the Convention by a State Party.\textsuperscript{236} No prior consent or authorization is required by the State Party that is the subject of the petition.

While individuals may submit petitions to the Inter-American Commission, they have no such right before the Inter-American Court.\textsuperscript{237} Only member states and the Inter-American Commission are authorized to submit cases to the Court.\textsuperscript{238} Moreover, the Court may only hear cases against states that have accepted the Court's jurisdiction on matters relating to the interpretation or application of the American Convention, whether by special declaration or by special agreement.\textsuperscript{239} Thus, claims involving human rights violations must be brought on behalf of the victim by the Inter-American Commission or a member state.

\textsuperscript{229} Id.


\textsuperscript{231} See American Convention, 1144 UNTS 123, at art 41 (cited in note 225).

\textsuperscript{232} See id at art 41(c).

\textsuperscript{233} See id at art 41(f).

\textsuperscript{234} Id at art 45.

\textsuperscript{235} See American Convention, 1144 UNTS 123, at art 45(1) (cited in note 225).

\textsuperscript{236} Id at art 44. The NGO must be legally recognized within an OAS member state.

\textsuperscript{237} See id at art 61(1).

\textsuperscript{238} See id.

\textsuperscript{239} American Convention, 1144 UNTS 123, at art 62 (cited in note 225).
While individuals have no direct right of participation before the Inter-American Court, victims or their representatives may submit arguments and evidence at the reparations stage of the proceedings.\textsuperscript{249}

A. The Right of Individual Petition

The American Convention on Human Rights provides that any person, group of persons, or nongovernmental entity may lodge petitions with the Inter-American Commission alleging violations of the Convention by a State Party.\textsuperscript{241} No prior consent or authorization by the State Party is required.

Petitions are submitted to the Executive Secretariat, who carries out the initial processing.\textsuperscript{242} The Secretariat is responsible for verifying that the petition complies with the requirements of the American Convention and the Rules of Procedure.\textsuperscript{243} Among other things, the petition must contain the following information:

- (1) name, nationality and signature of the person or persons making the denunciation;
- (2) whether the petitioner wishes that his or her identity be withheld from the State;
- (3) an account of the act or situation that is denounced;
- (4) if possible, the name of the victim and of any public authority who has taken cognizance of the fact or situation alleged;
- (5) the State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognized in the American Convention on Human Rights and other applicable instruments;

\textsuperscript{241} American Convention, 1144 UNTS 123, at art 44 (cited in note 225).
\textsuperscript{242} Rules of Procedure, at art 29 (cited in note 240).
\textsuperscript{243} Id at art 26.
(6) any steps taken by the author to exhaust domestic remedies, or the impossibility of doing so; and

(7) an indication of whether the complaint has been submitted to another international settlement proceeding. 244

The right of individual petition is subject to several requirements. First, any person, group of persons, or nongovernmental entity legally recognized in an OAS member state may lodge a petition with the Inter-American Commission. 246 In appropriate cases, a petition may be filed by a third party acting on behalf of a victim. While anonymous petitions are not permitted, a petitioner's identity may be withheld from the accused State. 246

In addition, the Commission's Rules of Procedure recognize the permissibility of joinder. 247 They also recognize the possibility that multiple claims may appear in a single petition. If a petition sets forth distinct facts, or refers to more than one person, or alleges unconnected violations, Article 29(1)(c) authorizes the division and separate processing of the claims. 248

Second, the petition must allege a violation of the American Convention "in relation to the States Parties thereto" or a violation of the American Declaration "in relation to the other member states." 249 While various actors, including nongovernmental entities, may lodge a petition, the petition itself must address the violation of a human right. Thus, the Commission may not consider petitions submitted on behalf of legal entities, such as corporations or NGOs. 250

The victim requirement contains four elements: (1) a human person suffers an injury in fact to a protected right; (2) the injury is proximately caused by an illegal act; (3) the act is imputable to...
the State; and (4) the act breaches an international obligation.  

Unlike proceedings before the U.N. Human Rights Committee and the European Court of Human Rights, the violation need not have occurred in the Inter-American system.  The petition process, however, is not without limits:

The liberal standing requirement of the inter-American system should not be interpreted, however, to mean that a case can be presented before the Commission in abstracto. An individual cannot instigate an actio popularis and present a complaint against a law without establishing some active legitimation justifying his standing before the Commission. The applicant must claim to be a victim of a violation of the Convention, or must appear before the Commission as a representative of a putative victim of a violation of the Convention by a state party. It is not sufficient for an applicant to claim that the mere existence of a law violates her rights under the American Convention, it is necessary that the law have been applied to her detriment. If the applicant fails to establish active legitimation, the Commission must declare its incompetence ratione personae to consider the matter.

Third, the subject matter of the individual petition cannot be pending in another international proceeding or settlement, nor may it duplicate a petition that is pending or that has already been settled by another international governmental organization. These limitations are subject to several exceptions. For example, they do not apply where the procedure pending before the other organization is limited to a general examination of the human rights situation in the state in question and where there has been no decision on the specific facts that are the subject of the petition before the Commission. They do not apply if the procedure before the other organization will not lead to an effec-

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253 Id at para 28.
tive settlement. In addition, these limitations do not apply if the petitioner before the other organization is a third party or a nongovernmental entity that has no mandate from the alleged victim or a family member to act on their behalf.

Fourth, the applicant must have pursued and exhausted all available domestic remedies. The exhaustion requirement is subject to several conditions. It does not apply where the domestic legislation of the affected state does not afford due process to litigants. Similarly, it does not apply if the party alleging a violation has been denied access to domestic remedies or if there has been an unwarranted delay in these proceedings. In addition, the applicant must submit her individual petition within six months of the date on which a final judgment was reached in such domestic proceedings.

Finally, the petition will not be accepted if it is inconsistent with the American Convention. For example, a petition is inadmissible if it does not state facts that tend to establish a violation of the American Convention. Similarly, the petition is inadmissible if it is manifestly groundless or obviously out of order.

Since its creation, the Inter-American Commission’s caseload has steadily increased. In 1997, for example, the Commission received 458 petitions alleging violations of the American Convention or the American Declaration. In 2001, the Commission received 718 petitions. Between 1997 and 2001, the Commission received a total of 3,045 petitions.

B. Relevant Cases of the Inter-American Commission

Some commentators have argued that the provisions of the American Convention clearly contemplate the possibility of class

\[\text{References}\]

256 Id.
257 Id at art 33(2)(b).
258 American Convention, 1144 UNTS 123, at art 46(1)(a) (cited in note 225).
259 Id at art 46(2)(a).
260 Id at art 46(2)(b) and (c).
261 Id at art 46(1)(b). See also Rules of Procedure at art 32(1) (cited in note 240).
262 American Convention, 1144 UNTS 123, at art 47 (cited in note 225).
263 Id at 47(b).
264 Id at 47(c).
265 Consider Total Number of Petitions Received By Year, available online at <http://www.cidh.org/annualrep/2001eng/table.h.htm> (visited Oct 7, 2003).
266 Id.
267 Id.
268 Id.
action or *actio popularis* litigation.\footnote{Consider Melish, *Economic, Social and Cultural Rights* 391 (cited in note 251) ("While class actions are not explicitly provided for in the governing instruments of the inter-American human rights system, there are several provisions that would appear to authorize them."); Davidson, *Inter-American Human Rights* 157 (cited in note 245) ("A further point which should be made about the classes of private persons who have standing to complain to the Commission is that the Convention clearly contemplates the possibility of persons initiating a class action or *actio popularis*."); Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 Am J Intl L 231, 237 (1981) ("That the Inter-American Commission interprets the Convention as permitting an *actio popularis* petition is readily apparent from its rules of procedure.").} Certainly, the Inter-American Commission provides more liberal *locus standi* requirements than either the U.N. Human Rights Committee or the European Court. For example, any person, group of persons, or nongovernmental entity may lodge a petition.\footnote{Id at para 1.} In addition, the applicant need not claim to be the actual victim.\footnote{Id at para 4, 5.} While the Inter-American Commission has not fully embraced the *actio popularis*, its case law appears to recognize several forms of group litigation.

In *Diaz v Colombia*,\footnote{Id at para 43.} two NGOs (REINICIAR and the Comisión Colombiana de Juristas) brought an individual petition against Colombia, alleging several violations of the American Convention.\footnote{Id at para 39 (internal quotations omitted).} The petition charged that Colombia was persecuting members of the Patriotic Union political party through threats, forced disappearances, and summary executions.\footnote{Id at para 43.} Moreover, the petition alleged that the persecution constituted genocide because it sought to eliminate the Patriotic Union as a political force.\footnote{Id at para 43.} In response, the Colombian Government argued that the petition was inadmissible.\footnote{Id at para 7 (cited in note 272).} First, Colombia argued that the case involved "the aggregation of numerous individual communications not necessarily with any connection."\footnote{Report No 5/97, Case 11.227, at 99, available online at <http://www1.umn.edu/humanrts/cases/1996/colombia5-97.htm> (visited Oct 7, 2003).} Second, Colombia asserted that the petition was a generic complaint because it lacked individualized victims and was excessively general.\footnote{Id at para 39 (internal quotations omitted).}

The Inter-American Commission dismissed both admissibility challenges. First, the Commission acknowledged its ability to consider multiple claims in a single petition:
The Commission has processed individual cases dealing with numerous victims who have alleged violations of their human rights occurring at different moments and in different locations so long as all of the victims allege violations arising out of the same treatment.

Indeed, the Commission noted that it has often joined separate petitions into a single case if the petitions share similar characteristics.

Second, the Inter-American Commission considered whether the petition was a generic complaint and, therefore, not sufficiently individualized. The Commission noted that the petitioners presented a list that included the names of each victim and the date and place where they were allegedly injured. Such detail complied with the technical requirements of the Commission’s Regulations. The Commission then reiterated its ability to consider petitions raising numerous individual claims as long as each claim is connected.

The Commission distinguished an earlier case against Colombia, involving similar facts, where it declined to consider numerous individual claims in a single petition and instead chose to issue its findings in a special country report. The Commission acknowledged that the Inter-American system provides various mechanisms for responding to claims of systematic human rights abuses, including the issuance of special country reports or responses to individual petitions. “The Commission makes the decision to employ one or more of these functions or powers in relation to a given situation, always considering the overarching

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279 Id at para 41.

Because the petitioners have set forth facts which tend to demonstrate that the victims in this case suffered violations as a part of an alleged pattern and practice of political persecution against members of the Patriotic Union, there exists the necessary connection between the numerous individuals and facts identified to allow them to be processed together.

281 Id at para 48 (“There exists no provision in the Convention, in the Statute of the Inter-American Commission on Human Rights or in the Regulations of the Commission which limits the number of individual claims or victims which may be considered in this matter.”).
function of the Commission to promote respect for and defense of
human rights." Thus, the Commission has the discretion to de-
cide which mechanism best suits a particular case.

On several occasions, the Inter-American Commission has
recognized group litigation in cases involving the rights of in-
digenous groups. In Case of the Yanomami Indians of Brazil, for example, several petitioners filed an action against Brazil al-
leging violations of the human rights of the Yanomami Indians. The petitioners consisted of individuals who represented several nongovernmental organizations, including the Indian Law Re-
source Center, the American Anthropological Association, the
Anthropology Resource Center, Survival International, and Sur-
vival International, U.S.A. The petition alleged numerous viola-
tions of the American Declaration, including: the right to life, lib-
erty, and personal security; the right to equality before the law; the right to religious freedom and worship; the right to the pres-
servation of health and well-being; the right to education; the right to recognition of juridical personality and civil rights; and the right to property. Specifically, the petitioners alleged that theBrazilian government had failed to protect the interests of the
Yanomami people by permitting the exploitation of the natural
resources of the Amazon and the development of territories occu-
pied by the Yanomami.

The Commission accepted the petition—apparently with no serious challenges to admissibility. After conducting an exten-
sive investigation, including hearings with experts and govern-
ment witnesses, the Commission found that Brazil had violated
the rights of the Yanomami people under the American Declara-
tion. The Commission found violations of the right to life, lib-
erty, and personal security, the right to residence and movement,

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284 Id.
287 Id.
288 Id at para 1.
289 Id at para 3.
290 Yanomami, Case No 7615, at para 3 (cited in note 286).
291 The records of the Inter-American Commission do not reveal any challenges to admissibility.
292 Yanomami, Case No 7615, at section “Resolution” para 1 (cited in note 286).
and the right to the preservation of health and well-being. \textsuperscript{283} It called on Brazil to take measures to protect the Yanomami from infectious disease, to cooperate with the Yanomami in developing educational, medical, and social programs, and to further demarcate the Yanomami territory. \textsuperscript{284}

In Case of the Miskitos of Nicaragua, \textsuperscript{285} the Inter-American Commission again affirmed the collective rights of indigenous peoples. \textsuperscript{286} Several groups, including MISURASATA (an organization representing indigenous peoples), the Indian Law Resource Center, and various leaders of indigenous groups filed a complaint against Nicaragua with the Commission in 1982. \textsuperscript{287} The complaint alleged numerous violations of the American Declaration by Nicaragua in its treatment of the Miskitos, including violations of the right to life, personal security, and property, as well as violations of the rights of indigenous peoples. \textsuperscript{288}

The Commission accepted the petition with no apparent challenges to admissibility. The Commission subsequently held several special sessions and conducted a fact-finding mission to Nicaragua. \textsuperscript{289} In its “Special Report on the Situation of Human Rights of the Miskito Indians of Nicaragua,” the Commission acknowledged that the Miskito Indians could invoke special rights as an ethnic group. \textsuperscript{290} The Inter-American Court of Human Rights has upheld similar group claims in other cases. \textsuperscript{291}

\textsuperscript{283} Id.
\textsuperscript{284} Id at section “Resolution” para 2.
\textsuperscript{286} Id at Section E.
\textsuperscript{287} Id at Section D(1).
\textsuperscript{288} Id at Section D(2).
\textsuperscript{289} Report at Section H (cited in note 295).
\textsuperscript{290} Id at Section J.
IV. CHALLENGES TO CLASS ACTION LITIGATION IN THE INTERNATIONAL ARENA

Class action litigation is not recognized as a procedural mechanism in international law. In general, the individual applicant must be the direct victim of the purported violation. An individual applicant cannot file a complaint on behalf of other victims absent specific authorization from each individual victim. While joinder and third-party intervention are recognized as procedural mechanisms, they do not provide the same advantages as class action litigation.

Of the three institutions described in this Article, the Inter-American Commission appears to be the most receptive to group litigation. This results, in part, from its more liberal locus standi requirements. For example, NGOs can file petitions on behalf of aggrieved individuals. In contrast, the U.N. Human Rights Committee and the European Court of Human Rights make it more difficult to pursue group litigation. Both these institutions have established strict standing requirements to ensure that only individual victims (or their designated representatives) can bring claims.

Cases involving the rights of indigenous groups provide some analogies to group litigation. Both the U.N. Human Rights Committee and the Inter-American Commission have been somewhat receptive to claims brought on behalf of indigenous groups. For example, the Lubicon Lake Band and Yanomami cases provide instances where the rights of indigenous groups were recognized. And yet, these cases also highlight the shortcomings of group litigation as currently practiced in international institutions. Neither case resulted in remuneration to the individual members of the indigenous communities.

Several explanations exist for the absence of class action litigation in international law. First, international law has tradi-

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303 However, some commentators have suggested that the jurisprudence of the Human Rights Committee and the European Court also recognizes the feasibility of group litigation in narrow situations. See Davidson, Inter-American Human Rights 196 (cited in note 245); McGoldrick, Human Rights Committee 172-77 (cited in note 51).
tionally focused on the rights and obligations of states. Indeed, states have long been considered the principal actors in international law. While the state-centric paradigm has undergone significant revisions in recent years, it remains the dominant paradigm. Paradoxically, even human rights institutions mimic the state-centric paradigm. As a result, individuals—and the right to file individual complaints—are often an afterthought in the construction of institutional mechanisms designed to enforce the substantive provisions of international law.

The ICCPR most vividly demonstrates the state-centric paradigm because a state must give its consent under the Optional Protocol before people can file individual communications against that state. Moreover, the decisions of the Human Rights Committee are not binding. These procedural limitations insulate states from individual action.

In contrast, the state-centric paradigm is least evident in the European Convention. States need not give their consent before individuals can file complaints against them in the European Court. Moreover, the decisions of the European Court bind member states, thereby enhancing the power of the Court and its ability to provide redress on behalf of individuals.

Second, the need for class action litigation is minimized in international law because states can bring their own actions to remedy violations of international law. Indeed, a variety of institutions (both domestic and international) hear claims brought by states against other states. On some occasions, states can pur-

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sue claims for violations of interstate obligations. Here, states protect their own rights vis-a-vis other states. On other occasions, states can espouse claims on behalf of their own nationals. While these claims stem from violations of individual rights, the process itself is of a purely interstate nature.

State communications provide one mechanism for states to raise claims of systematic violations of human rights. The ICCPR, the European Convention, and the American Convention allow member states to bring claims against other member states alleging violations of the substantive provisions of the respective treaties. States are not limited to raising claims alleging violations of their own nationals' rights; they can bring claims with respect to any violations of the underlying treaties. In principle, state communications provide a powerful mechanism for addressing systematic violations of human rights. In practice, however, state communications are used infrequently, if at all.

Other international institutions also hear state claims. For example, the International Court of Justice can hear interstate claims alleging violations of international law, including viola-

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309 Consider Dinah Shelton, Remedies in International Human Rights Law (Oxford 1999); Gray, Judicial Remedies (cited in note 22).

310 The law of state responsibility regulates the scope and consequences of state liability. See Shelton, Remedies 93 (cited in note 309).

311 Claims espousal is a well-recognized practice under national and international law, where states seek to redress private injuries through an interstate settlement process. In the Mavrommatis Palestine Concessions Case, the Permanent Court of International Justice elaborated on this inherent feature of claims espousal, albeit through a state-centric lens:

By taking up the case of one of its subjects and resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right—its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.

Mavrommatis Palestine Concessions Case (Greece v UK), 1924 PCIJ, Series A, No 2, at 12. See Panevezys-Saldutiskis Railway Case (Estonia v Lithuania), 1939 PCIJ Series A/B, No 76, at 16.

312 See, for example, Anne Bayefsky, How to Complain, 153 (cited in note 66); Davidson, Inter-American Human Rights 156 (cited in note 245); Schwelb, 2 Israel Yearbook Hum Rts at 51, 53-54 (cited in note 22).

313 ICCPR, 999 UNTS 171, at art 41 (cited in note 40); European Convention, 213 UNTS 222, at art 33 (cited in note 130); American Convention, 1144 UNTS 123, at art 45 (cited in note 225).
tions of treaties and customary international law. Only states may be parties in cases before the Court. However, the Court may consider requests for advisory opinions from certain U.N. organs. Despite such competence, the Court has heard only a handful of cases involving a state's responsibility for systematic human rights violations.

The establishment of international criminal tribunals provides states with another mechanism for responding to systematic human rights violations. For example, the Rome Statute of the International Criminal Court addresses mass atrocities such as war crimes, genocide, and crimes against humanity. The collective nature of the Court's mandate is expressed in the nature of the crimes under its jurisdiction. The Court has jurisdiction to prosecute "the most serious crimes of concern to the international community as a whole." Because these crimes are considered international crimes, they merit an international response.

While the Prosecutor of the International Criminal Court has

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316 Id at art 65.
320 The term hosti humani generis—an enemy of all humanity—has typically been used to characterize perpetrators of international crimes. Because mass atrocities are recognized as international crimes, they deserve international prosecution. As noted by Hannah Arendt:

Nothing is more pernicious to an understanding of these new crimes, or stands more in the way of the emergence of an international penal code that could take care of them, than the common illusion that the crime of murder and the crime of genocide are essentially the same, and that the latter therefore is "no new crime properly speaking." The point of the latter is that an altogether different order is broken and an altogether different community is violated.

independent authority to initiate proceedings, member states (and the U.N. Security Council) also have the right to request an investigation. The Court has the power to order reparations for victims, including restitution, compensation, and rehabilitation. In practice, however, this provision only addresses individual perpetrators found guilty by the Court. It does not establish state responsibility or an obligation on states to provide reparations for victims.

Third, class action litigation in international law may be unnecessary because nonstate actors already have the ability to bring claims for serious violations of international law in a variety of fora. For example, the United Nations allows individuals and NGOs to file petitions alleging human rights violations through several mechanisms. The U.N. Commission on Human Rights provides several avenues for group litigation. The Commission established the Resolution 1503 procedure to consider cases involving a consistent pattern of gross violations of human rights. This confidential procedure allows any person, group of persons, or NGO to submit a communication that alleges “a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.” The Commission also conducts an annual public debate on gross violations of human rights through the Resolution 1235 procedure, which allows NGOs to address violations of human rights by particular countries in a public setting.

Nonstate actors can also bring actions before other international institutions. For example, the International Labor Or...
ganization ("ILO") has a complaint process that allows worker or employer organizations to bring complaints alleging violations of any ILO convention. Pursuant to the ILO Constitution, an industrial association of employers or of workers may file a complaint before the ILO Governing Body alleging that a country "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party." The North American Agreement on Labor Cooperation ("NAALC"), established as a side agreement to the North American Free Trade Agreement ("NAFTA"), provides a similar opportunity for nonstate actors to request an investigation into alleged violations of national labor laws. Under the NAALC, a National Administrative Office accepts and considers public communications on labor law matters arising in the territory of one of the member states. While anyone may submit a public communication, the majority of communications have been submitted by organizations. Other institutions that are open to nonstate actors include the U.S.-Iran Claims Tribunal and the Chapter Eleven provisions of NAFTA.

Finally, class action litigation would face numerous difficulties if implemented in international law. Indeed, these difficulties echo similar problems faced in domestic class action litigation. How would the class be defined? Would individuals be able to opt

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334 For critiques of domestic class action litigation, see Sherman, 52 DePaul L Rev at 409 (cited in note 12); MacKinnon, 6 ILSA J Intl & Comp L at 569 (cited in note 11).
out of such litigation and pursue their own individual claims? How would class representatives be selected? Would class representatives act on behalf of the class or would they pursue more narrow interests? What incentives would guide the settlement process? How would damage awards, if any, be distributed? While these problems exist in domestic class action litigation, they could be exacerbated in international class action litigation. For example, victims of human rights abuses may be far removed from where the international litigation is taking place. Such distance—measured in both territorial and human terms—is particularly challenging in human rights cases, where victims have suffered very personal injuries. "[O]ne claims to represent huge numbers of people with whom one has no contact, speaking for them in public or policy settings, taking positions on issues that deeply and directly affect their lives, on which they have diverse and nuanced opinions." Differences in religion, culture, and nationality may pose insurmountable problems, particularly if such factors contributed to the underlying human rights abuses.

In sum, there are several reasons why class action litigation is not recognized as a procedural mechanism in international law. And yet, one of the most significant explanations—purported difficulty in implementation—is, perhaps, the easiest to address. Through the development of a rigorous set of procedural mechanisms, a class action regime could be developed that is both fair and efficient.

V. ACTIO POPULARIS OR CLASS ACTION?

Critics have long challenged efforts to expand the scope of state liability, whether through an actio popularis or through obligations erga omnes:

The appeal to Latin phrases conceals a lack of thought as to what those phrases actually meant in Roman law and in how they can be applied in the current international order. To ignore the problems of "standing" or to assert that

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356 MacKinnon, 6 ILSA J Intl & Comp L at 573 (cited in note 11).
the rules already evident in international practice and codified in the positive law of the United Nations Charter do not apply in the case of some selected atrocities by some selected villains (but not to others), or that lawyers’ and judges’ views of “law” can overrule the political decisions of the leaders of the various communities that compose the international community today, is much more than can be accepted by anybody truly concerned with peace and justice.\footnote{337}{See Rubin, 35 New Eng L Rev at 280 (cited in note 34).}

Such criticisms may be inapplicable, however, when they seek to challenge the use of class action litigation in international law. Despite the apparent similarities, there are profound differences between an actio popularis and class action litigation (or even other forms of group litigation). These differences are manifest in their competing approaches to locus standi:

Broadly speaking, three alternative approaches may be envisaged. The most restrictive is to accord standing, or locus standi, only where some legal right of the applicant has been infringed by the contested measure. A more liberal approach is to accord standing where, although the applicant cannot point to an infringement of his legal rights, he can show that he has been adversely affected in some other way. The most liberal approach is to allow an actio popularis, or citizen’s action, to be brought on the basis that every citizen has an interest in ensuring that public bodies act within their powers. This approach, it has been observed, is tantamount to the “dissolution of locus standi.”\footnote{338}{Anthony Arnall, Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty, 32 Common Market L Rev 7 (1995). See David Sless, Using International Court of Justice Advisory Opinions to Adjudicate Secessionist Claims, 42 Santa Clara L Rev 357, 373–79 (2002). See generally Noemi Gal-Or, Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines, 21 BC Intl & Comp L Rev 1 (1998); Carol Harlow, Towards a Theory of Access for the European Court of Justice, 12 Yearbook Eur L 213 (1992).}

An actio popularis represents the most attenuated form of group litigation, where the individual applicant seeks relief on behalf of a larger community. In these cases, there is no indication that the applicant is authorized to speak on behalf of this community. Indeed, the applicant may not have even suffered the underlying
injury experienced by the larger community. In such cases, there may be legitimate concerns that the individual applicant may not protect the interests of the larger community. While she has initiated the case, she may be unfamiliar with all the facts of the case and the goals of the victims. In addition, she is not personally affected by the outcome of the case. Accordingly, she may not be motivated to pursue the case vigorously or to its conclusion.

Class action litigation is different. Through the requirements of Rule 23, a class action must share common questions of law or fact among the purported class. Class representatives must have claims or defenses that are typical of the purported class. In addition, class representatives must be able to adequately represent the purported class. The Rule 23 requirements seek to ensure that locus standi—the right (and ability) to protect legal interests—exists in principle and in practice.

Would the Rule 23 requirements alleviate concerns about group litigation in international law? Rule 23 would preclude an actio popularis; yet, it would allow other forms of group litigation to proceed. For example, the commonality requirement would only permit claims that share common questions of law or fact. The typicality requirement would ensure that class representatives have a sufficient interest in the matter and would justify their representation of other victims. Typicality would provide "a safeguard against hypothetical or speculative complaints, since it would allow for careful examination to ensure that the complainants did in fact have a sufficiently close interest in the matter." The adequacy of representation requirement would further enhance these protections by ensuring that the class representatives and their counsel were capable of litigating the case.

A properly constructed class action regime in international law would serve other purposes as well. It could alleviate some of the longstanding criticisms raised against individual complaints, such as concerns about inefficiency and limited success. For example, class action litigation could reduce the caseload of in-
ternational institutions. Currently, individuals seeking justice and some form of redress for their injuries must file individual actions. While joinder allows for certain claims to be brought in a single proceeding, it still requires each victim to file an individual action. This requirement can result in a multitude of individual actions. Class action litigation could reduce such caseloads by bringing multiple victims together in a single proceeding. A clearly defined and rigorous set of procedural guidelines on class action litigation could also promote efficiency in actual proceedings, further reducing delays. For example, special procedures could be established to expedite proceedings. These cases could also be assigned to special panels with expertise in complex litigation.

Class action litigation has other advantages. It may be more effective than individual complaints in highlighting the systematic nature of human rights abuses. "An individual complaint may be anomalous, while a group complaint shows a pattern." Class action lawsuits can be more imposing than individual lawsuits, precisely because they represent the interests of hundreds or even thousands of victims. Thus, states would be less likely to disregard such actions because of their large-scale nature and the attendant publicity that would surround the litigation.

Finally, class action litigation can serve the interests of the individual. Class action litigation could provide relief to individuals who would not otherwise have access to the legal process. It could enable "dispersed and politically unorganized individuals to present their claims as an organization, thereby dispensing with the costs of creating an organization." In some cases, it could facilitate the participation of individuals who could not comply with the stringent procedural and evidentiary requirements of individual litigation. Moreover, class action litigation would offer some anonymity to individuals who might be subject to in-

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346 Helfer and Slaughter, Effective Supranational Adjudication 346–49 (cited in note 97).
timidation or reprisal by the states that are targets of their individual complaints.

CONCLUSION

For decades, class action litigation has been used in the United States to litigate large-scale injuries—from asbestos and Agent Orange exposure to securities fraud and employment discrimination. The legitimacy of class action litigation lies in its purported efficiency in addressing mass torts and other forms of complex litigation.

It is this very logic of efficiency that would serve the interests of individuals, states, and institutions at the international level. Regrettably, there are simply too many victims of torture, summary execution, and genocide in the world today. Their individual claims would swamp the already crowded dockets of international institutions. The majority of these victims likely lack the ability or resources to litigate their own claims. By applying the Rule 23 criteria to group litigation, international institutions can take advantage of the rigors and efficiencies of class action litigation without resorting to the liberal locus standi of an actio popularis.

Of course, any attempt to promote class action litigation in international law must proceed with caution. Collective efforts to promote redress for human rights violations may also raise separate concerns regarding personal autonomy and the rights of individuals. As noted in the domestic context:

Unsought and unwanted representation in a class raises the possibility that some of the intangible and expressive gains from human rights litigation, especially for group-based injuries like rape in genocide, may be undermined. . . . Being forcibly lumped into a group-based class, thereby deprived of direct or actual representation, being represented in name (or no name) only, survivors of group-based atrocities can experience the process as furthering the deprivation of humanity that human rights law promises to restore.

350 Byrnes and Connors, 21 Brook J Intl L at 751 (cited in note 16).
352 MacKinnon, 6 ILSA J Intl & Comp L at 573 (cited in note 11).
Thus, any class action regime should involve a rigorous class certification process, including opt-out provisions. Such mechanisms would ensure that class action litigation in international institutions would not trample on the rights of the very people it seeks to serve and protect.