

TWO BIRDS WITH ONE STONE: HOW THE USE OF THE CLASS ACTION  
DEVICE FOR VICTIM PARTICIPATION IN THE INTERNATIONAL  
CRIMINAL COURT CAN IMPROVE BOTH THE FIGHT AGAINST  
IMPUNITY AND VICTIM PARTICIPATION

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ABSTRACT

*Victim participation in criminal proceedings is generally a rather new phenomenon. The founders of the International Criminal Court (ICC) chose a broad participation scheme that has been praised as an important and effective means of providing victims of gross violations with a voice, and as a mark of progress for international criminal law. However, the current scheme of victim certification complicates the ICC's proceedings and contravenes the interests of victims. This article proposes that the ICC should use the class action device for victim participation. Such a managerial tool would simplify victim certification proceedings and empower victims, thereby hitting two birds with one stone. To set the context for this proposal, this article engages in a comparative and international law analysis of victim participation across national and international jurisdictions. It also asserts that the experience of the U.S. class action litigation with mass human rights atrocities can help guide the ICC in dealing with victim issues, especially as victims at the ICC are likely to exceed the Court's capacity to adequately address their claims.*

INTRODUCTION .....	112
I. VICTIM PARTICIPATION IN THE ICC .....	113
A. The Victim's Role in Criminal Law .....	113
B. The Victim's Role in the ICC .....	117
II. PROBLEMS WITH THE CURRENT PROCEDURE OF VICTIM CERTIFICATION .....	127
A. Obstacles to Achieving Two Central Goals of the ICC .....	127

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112	<i>University of California, Davis</i>	[Vol. 17:1
	B. Chronic Delays .....	128
	C. Exclusion of Most Victims .....	130
	III. USING THE CLASS ACTION DEVICE TO STREAMLINE VICTIM CERTIFICATION .....	134
	A. The Class Action Device and the ICC .....	134
	B. Applying Class Action to Victim Certification.....	135
	C. Adapting Class Action to the ICC.....	140
	IV. THE CLASS ACTION'S BENEFITS TO THE ICC.....	142
	A. The Class Action is Well-Suited for ICC Victims.....	142
	B. The Class Action is Well-Suited to the Institution of the ICC.....	145
	C. The Class Action as a Solution to Current Problems in Victim Certification .....	146
	CONCLUSION.....	149

## INTRODUCTION

Victim participation in criminal proceedings is a rather new phenomenon. The founders of the International Criminal Court (ICC) chose a broad participation scheme that has been praised as an important and effective means of providing victims of gross violations with a voice, as well as a mark of progress for international criminal law. However, as it stands now, the nature of the proceedings is problematic. The current scheme of victim certification – the process by which an alleged victim achieves standing as a victim before the ICC – actually complicates the ICC's proceedings and contravenes the interests of the victims. It creates significant time delays for the Court, while its reach is *de facto* limited to a very small number of existing victims.

This paper argues that applying the class action device<sup>1</sup> in the ICC context would simplify victim certification proceedings and empower victims. Grouping victims' claims together as a class would facilitate victim participation and allow the ICC to better respond to their unique interests. To set the context for this argument, this paper will engage in a comparative and international law analysis of victim participation across national and international jurisdictions, all of which have influenced the procedures currently in use at the ICC.

Part I describes the development and current practice of victim participation at the ICC. Part II details the problems created by the current mechanism of victim certification. Part III introduces the class action device and applies it to the ICC victim certification procedure. Part IV concludes by explaining how the device is particularly apt to solve the problems of victim certification in ICC proceedings.

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<sup>1</sup> A class action is defined by Federal Rule of Civil Procedure 23. *See* FED. R. CIV. P. 23.

## I. VICTIM PARTICIPATION IN THE ICC

This section discusses the mechanism by which the ICC grants the procedural status of a victim. It is divided into two parts. The first part examines the role of the victim in domestic and international criminal law. The second part explains why the present mechanism of victim certification and participation was instituted at the ICC and describes how it currently functions.

### A. *The Victim's Role in Criminal Law*

Understanding why the ICC chose to implement a broad regime of victim participation requires an awareness of how the victim's role in criminal law has evolved over time. Common and civil law have long been divided over the role of victims in the criminal proceedings of their alleged perpetrators.<sup>2</sup> Although victim participation in international criminal law was originally closer to the common law paradigm, it has gradually shifted towards the civil law variant.<sup>3</sup>

In common law jurisdictions, traditionally a victim had no control over the criminal proceedings. Instead, the prosecutor enjoyed wide discretion in bringing a case to court,<sup>4</sup> and the role that would be assigned to the victims. Usually, the victim's role was limited to serving as a witness in the trial and occasionally might take a more central role—yet again as a witness—during the sentencing phase.<sup>5</sup> The rise of the Victims' Rights Movement in the 1960s – which, for the first time, recognized that the victim had a compelling interest in the trial proceedings and that his or her participation at trial ought to be guaranteed – produced significant changes.<sup>6</sup> In the

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<sup>2</sup> See CRAIG M. BRADLEY, *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* xvii, xvii-xxvii (2d ed. 2007) (introducing the division in criminal law between the common and civil law world).

<sup>3</sup> See Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT'L L. 93, 109, 115 (2009) (arguing that the ICC, which is the most recent international criminal law tribunal, has sought a compromise between many aspects of common and civil law systems).

<sup>4</sup> See George P. Fletcher, *The Law of War and Its Pathologies*, 38 COLUM. HUM. RTS. L. REV. 517, 538 (2007) (arguing that prosecutorial discretion is often guided by elements that have no connection to elements of the crime).

<sup>5</sup> RUDOLPH B. SCHLESINGER, UGO MATTEI, TEEMY RUSKOLA & ANTONIO GIDI, *COMPARATIVE LAW*, 858-62 (7th ed. 2009).

<sup>6</sup> For the influence of the victim rights movement, see Executive President's Task Force on Victims of Crime, created by Exec. Order No. 12,360, 47 Fed. Reg. 17975 (Apr. 23, 1982) (establishing President's Task Force On Victims of Crime); PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT (1982), <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcprpt/>, delivering its final report to President Regan in December 1982 with the

United States, for example, the prosecution became more receptive to the needs of the victim.<sup>7</sup> However, the Victims' Rights Movement was not confined to the U.S. Following a trend associated with the civil law in Israel, victim-oriented reforms allowed victims to challenge the prosecutor's decision not to prosecute.<sup>8</sup> Similar reforms have taken place more recently in the UK as well, where an individual can now file a criminal complaint and request the courts to issue an arrest warrant without the involvement of the prosecutor.<sup>9</sup>

By contrast, civil law systems have attributed a significant role to the victims in a criminal case. A victim is allowed to participate as a civil party (which is commonly referred to, even in English, by the French term, *partie civile*) in the trial.<sup>10</sup> Participating in this way ensures that the victim is a full-fledged contributor to the proceedings,<sup>11</sup> on equal footing with both the prosecution and the defense.<sup>12</sup> As a civil party to the action, the victim is endowed with important procedural rights including the right to call witnesses, ask questions, and even to make closing arguments.<sup>13</sup> The victim is also entitled to ask for civil reparations at the close of the criminal

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intention to "address the needs of the millions of Americans and their families who are victimized by crime every year."); Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CAL. L. REV. 1107, 1110-13 (2009), (presenting a brief history of the victim's rights movement in the United States.)

<sup>7</sup> See, e.g., Henning, *supra* note 6, at 1110-13. Victims Impact Statements also play a significant role in common law prosecutions. See, e.g., CRAIG M. BRADLEY, *supra* note 2, at 422 (1999).

<sup>8</sup> See State of Israel Ministry of Public Security, The Israel Police Victims of Crime Services, <http://www.mops.gov.il/BPEng/OnTheAgenda/Victims+of+Crime+Services/Police+VictimsOfCrimeServices.htm> (In 2001, Israel passed the Victims of Crime Act, which regulates the power that victims have in judicial proceedings) (last visited May 15, 2011).

<sup>9</sup> The website of the Home Office lists all rights that a crime victim has in the UK, <http://webarchive.nationalarchives.gov.uk/http://www.homeoffice.gov.uk/crime-victims/victims/Victims-rights/index.html>. Interestingly, the subtitle of this website reads: "We're reforming the justice system so that the needs and rights of victims and witnesses are placed at the heart of what we do."

<sup>10</sup> SCHLESINGER ET AL., *supra* note 5, at 858-62.

<sup>11</sup> MIRIAN DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 200, 212-13 (1986) (explaining the role of victims in civil law criminal trials).

<sup>12</sup> This participation is not free from criticism. See, e.g. Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How do the French do Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 545, 671-72 (1990) (explaining that the participation of the victim compromises the goals of the criminal justice system in to exacting compensation and punishment risk being compromised by the participation of the victim).

<sup>13</sup> See Mirian Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 841 (2007) (describing the power that civil parties have to initiate prosecutions).

proceedings. In such inquisitorial systems, which emphasize the search for the truth, the victim is encouraged to participate so that a court will reach a more accurate judgment.<sup>14</sup> This concept of victim participation is intimately related to the role of the civil law judge who, in contrast to his common law counterpart, is actively involved in uncovering the truth.

In fact, the civil law system traditionally allows victims to challenge a prosecutor's discretion to forgo prosecution. Victims can either launch a prosecution *sua sponte*, as in France,<sup>15</sup> or appeal the prosecutor's decision not to prosecute, as in Germany.<sup>16</sup> Apart from its obvious symbolic message, the ability to launch a criminal trial is a potent tool. If private citizens have been the victims of a crime, they are able to use the machinery of the state to initiate investigations, and at the end of such trials can actually receive monetary damages.<sup>17</sup> As described above, this civil law power has to a certain extent been implemented in common law jurisdictions.

More generally, the rights attributed to victims in the civil and the common law systems reflect the various goals of the criminal process.<sup>18</sup> On one hand, the common law system's concept of the prosecutor as a representative of the people requires the prosecutor to consider the collective benefit of initiating a criminal prosecution. On the other hand, the civil law system's focus on uncovering the truth allows—if not prioritizes—the victim interventions in the individual proceedings. While the juxtaposition is not always absolute, as common law jurisdictions have been gradually moving towards the civil law paradigm, it is clear that victim participation influences and is intimately related to the values of the criminal process.

Since their inception at Nuremberg, international criminal tribunals have sought to adopt procedural elements from both civil and common law systems. With regard to victims, the tribunals began by implementing the

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<sup>14</sup> SCHLESINGER ET AL., *supra* note 5, at 858-62 (explaining the role of the civil party and its roots in the inquisitorial presuppositions of the civil law tradition). In contrast, the common law functions on the basis of an adversarial system, in which the prosecutor and the defense argue their cases.

<sup>15</sup> Frase, *supra* note 12, at 669-70 (clarifying that the “viability of victim-initiated prosecutions . . . may depend heavily upon the active roles of the examining magistrate and presiding trial judge”).

<sup>16</sup> SCHLESINGER ET AL., *supra* note 5, at 858-62.

<sup>17</sup> It is interesting to note that in Spain – a civil law country that provides for active victim participation in criminal proceedings – a group of victims initiated the famous criminal case against former Chilean dictator Augusto Pinochet in 1996. See MARION E. BRIENEN & ERNESTINE H. HOEGEN, VICTIMS OF CRIME IN 22 EUROPEAN CRIMINAL JUSTICE SYSTEMS (2000). It is also interesting to note that the same happened in Chile. See NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005) (mentioning that after the proceedings against Pinochet began in Spain, victims of his dictatorship filed more than sixty complaints against him in Chile).

<sup>18</sup> DAMASKA, *supra* note 11, at 200, 212-14.

model of victim participation used in common law systems. Nevertheless, broad social and attitudinal changes within the international criminal sphere led to a revision of this model in the early 1990s. For the past two decades, the role of the victim has gradually shifted towards the civil law approach.

At the criminal tribunals in Nuremberg, Tokyo, former Yugoslavia, and Rwanda, victims were never part of the criminal process.<sup>19</sup> Instead, victims were only used as witnesses—often greatly augmenting the prosecution's case with their emotional narratives, but without any power themselves to influence the proceedings.<sup>20</sup> Victims, their supporters,<sup>21</sup> and the international legal community criticized the tribunals for leaving various needs of victims (*e.g.*, closure, reparation, avoiding double victimization, etc) off their list of priorities.<sup>22</sup>

Criticism reached a zenith in the 1990s, when many NGOs brought attention to the fact that in some cases ignoring the needs of the victims actually aggravated their trauma.<sup>23</sup> Over the ensuing decade, legal practitioners reacted and espoused a set of principles based on an outline, previously adopted by the United Nations General Assembly in 1985, of the

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<sup>19</sup> The institutional position of these courts explain the lack of victim access to the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), which were supposed to complement national jurisdictions on dealing with victim's issues. See M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUMAN RIGHTS L. REV. 203, 242-43 (2006) ("[T]he structure of the tribunals pre-supposes individual access to national courts on the part of individual victims and leaves the ultimate decision on whether to provide compensation to a victim to national justice systems.").

<sup>20</sup> A very famous case of witness is that of "Witness O," a survivor of the genocide in Srebrenica, Bosnia & Herzegovina. This victim only appeared as a witness in the trial of Radoslav Krstic. For a summary of his account, see *Witness O*, ICTY, <http://www.icty.org/sid/184> (last visited June 1, 2011).

<sup>21</sup> See, *e.g.*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS ("FIDH"), VICTIMS IN THE BALANCE: CHALLENGES AHEAD FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (2002), [hereinafter FIDH REPORT], [http://www.fidh.org/IMG/article\\_PDF/article\\_a1321.pdf](http://www.fidh.org/IMG/article_PDF/article_a1321.pdf) (describing how the ICTR lacked a focus on victims).

<sup>22</sup> See International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), entered into force July 5, 1995, as amended Oct. 1, 2009 [hereinafter ICTR Rules], available at <http://www.unict.org/Portals/0/English/Legal/ROP/100209.pdf> (failing to mention the existence of victims).

<sup>23</sup> See, *e.g.*, FIDH REPORT, *supra* note 21 (arguing that victims were inappropriately excluded from the ICTR); Fiona McKay, Victims Rights Working Grp., Address at the Rome Conference, Redress on Behalf of the Victims Rights Working Group (June 16, 1998), available at <http://www.un.org/icc/speeches/616mck.htm> (describing the impact of victim marginalization by the international criminal tribunals). Interestingly, due to its constant neglect of the victims, victim associations cut off cooperation with the ICTR. See, *e.g.*, Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777, 787 ("[V]ictims' associations . . . became so frustrated with the ICTR that they cut off all cooperation with the tribunal.").

fundamental rights of victims in cases of international criminal violations.<sup>24</sup> This growing recognition of the rights and needs of victims culminated in 1998 with the ratification of the Rome Statute and the creation of the ICC, which deemed victim participation to be a central prerogative.<sup>25</sup> Since 1998, other criminal tribunals established under UN mandates have also bestowed significant rights on victims.<sup>26</sup>

### B. *The Victim's Role in the ICC*

The above history suggests the degree to which victim participation in the ICC is a significant innovation for international criminal law. This section briefly introduces the ICC before explaining how the statute which created the ICC grants procedural status to victims.

After more than fifty years of deliberation,<sup>27</sup> the international community ratified the creation of an international criminal court of prospective jurisdiction.<sup>28</sup> The ICC was established by a group of states

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<sup>24</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, U.N. GAOR, 40th Sess. Supp. No. 43, U.N. Doc. A/RES/40/34, at 214 (Nov. 29, 1985); see Bassiouni, *supra* note 19, at 215-16 (noting the limitation that these principles concerned victims of domestic criminal law).

<sup>25</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15–July 17, 1998, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter *Rome Statute*]. Victim participation is mainly covered under article 68(3):

Where the personal interests of the victims are affected, the court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

<sup>26</sup> See, e.g., Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 1), r. 23 (Feb. 1, 2008), [http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal\\_Rules\\_Revision1\\_01-02-08\\_eng.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/27/Internal_Rules_Revision1_01-02-08_eng.pdf) (providing for participation of victims as civil parties); David Boyle, *The Rights of Victims, Participation, Representation, Protection, Reparation*, 4 J. INT'L CRIM. JUST. 307 (documenting the rights that victims have in the Cambodian Tribunal); see also Special Tribunal for Lebanon, Rules of Evidence and Procedure, r. 86, STL/BD/2009/01/Rev.1, entered into force June 10, 2009, available at <http://www.stl-tsl.org/sid/51>; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (constituting most recent UN Resolution on victim rights).

<sup>27</sup> See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 328 (2003) (explaining all the contours leading to the creation of the ICC).

<sup>28</sup> In this essay, "prospective" means temporal jurisdiction starts from the day of the ICC's ratification, *i.e.*, July 1, 2002.

“mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”<sup>29</sup> Their aim was to end international criminal impunity by supplementing national authorities.<sup>30</sup>

The ICC is composed of five main bodies: the Presidency, which serves as the Court’s administrating body; Judicial Divisions, which include Pre-Trial, Trial, and Appellate Divisions; the Office of the Prosecutor (OTP); the Registry, which includes Outreach, Victims and Witnesses, Protection, Defence, and Detention units; and other offices, such as the Office of the Public Counsel for the Victims, the Office of the Public Counsel for the Defence, and the Trust Fund. Under the Registry’s Victims and Witnesses Unit, the ICC has also created the Victim Participation and Reparation Section (VPRS).

The prosecutorial work, handled by the OTP, is procedurally divided into two phases. First, the prosecutor investigates a situation.<sup>31</sup> In this phase, he assigns a team to examine and report on the general facts of a given area. Second, if the Prosecutor decides that a given situation merits an investment of the Court’s resources, he begins the next phase: prosecution of the case. Cases are always brought against an individual defendant. So far, investigation of a situation has always led to the prosecution of an individual.<sup>32</sup> Victims can participate in either phase.<sup>33</sup>

Victim participation at the ICC is regulated by a procedure outlined in the ICC Rules of Procedure and Evidence, particularly Rules 85-99.<sup>34</sup> The first step is to grant an applicant the status of a “victim.” The route to a victim’s successful participation can be divided into three phases: victim’s certification by the Pre-Trial Chamber (PTC), appointment of legal representation for the victim at the PTC, and participation in the proceedings

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<sup>29</sup> *Rome Statute*, *supra* note 22, Preamble; *see also* George P. Fletcher, Against Universal Jurisdiction, 1 J. INT’L. CRIM. JUST. 580, 580 (2003) (highlighting that ICC’s purpose is to end “impunidad”).

<sup>30</sup> *Rome Statute*, *supra* note 25, at art. 17 (establishing complementarity of the ICC by providing that it will have jurisdiction when states are “unable or unwilling” to exercise jurisdiction on their own).

<sup>31</sup> McGonigle, *supra* note 3, at 115 (explaining that an investigation “into a situation may continue for an unlimited number of years”).

<sup>32</sup> For example, the OTP started investigating into Darfur in 2005 and indicted two individuals in 2007. Sole exception to this statement is the situation of Kenya. However, since it was only opened in 2009, it is too soon to reach definitive conclusions. *See ICC Situations and Cases*, ICC, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited May 15, 2011).

<sup>33</sup> *See* McGonigle, *supra* note 3, at 113 (“[T]he definition of victims applies both before and after the naming of a suspect”).

<sup>34</sup> The text of the Rome Statute does not provide sufficient guidance on victims’ procedural issues.

after the PTC. The following paragraphs describe this procedure in greater detail.

Once the Prosecutor has started investigating a situation, the victim of the underlying acts being investigated can file an application to achieve the official status of a victim in the situation or case.<sup>35</sup> The application can only be filed while the case is before the PTC.<sup>36</sup> At this point, the application consists of a standardized form that has to be submitted to the Registry, specifically to the VPRS.<sup>37</sup> Upon its receipt, the VPRS will forward the application to the appropriate PTC controlling the relevant situation or case.

The PTC is the ICC body that officially grants “victim status” to the applicants,<sup>38</sup> based on a flexible analysis.<sup>39</sup> The general definition of a

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<sup>35</sup> See International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 (2002), *entered into force* Sept. 9, 2002 [hereinafter ICC Rules], *available at* [http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules\\_of\\_procedure\\_and\\_Evidence\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf). Rule 89, “Application for Participation of Victims in the Proceedings” provides:

1. In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements.
2. The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.
3. An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.
4. Where there are a number of applications, the Chamber may consider the applications in such a manner as to ensure the effectiveness of the proceedings and may issue one decision.

<sup>36</sup> Various NGOs that focus on victims have websites that provide an excellent introduction to the topic of victim participation in the ICC. *See, e.g., Participation, VICTIMS’ RIGHTS WORKING GROUP*, <http://www.vrwg.org/smartweb/victims-rights/participation> (last visited May 15, 2011).

<sup>37</sup> See Standard Application Form to Participate in Proceedings Before the International Criminal Court for Individual Victims and Persons Acting on Their Behalf, ICC, [http://www.icc-cpi.int/NR/rdonlyres/5C713EAC-AAE0-46A9-A6F3-CB019284D740/144100/FormParticipation1\\_en1.pdf](http://www.icc-cpi.int/NR/rdonlyres/5C713EAC-AAE0-46A9-A6F3-CB019284D740/144100/FormParticipation1_en1.pdf) (last visited May 15, 2011).

<sup>38</sup> Throughout this paper I use the phrases “grant victim status” and “victim certification”

victim stems from Rule 85 of the ICC, which states: “[v]ictims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”<sup>40</sup> The brevity of this provision has provided little guidance to the Court’s chambers in their decisions on how to apply the rule. The need to square the definition contained in Rule 85, both with practice and with Article 68 of the Rome Statute that establishes victim rights in the ICC,<sup>41</sup> has resulted in a presumption in favor of accepting victim applications as long as they meet the following four basic criteria.

First, the applicant has to be a natural person or an institution.<sup>42</sup> Given that so far only individuals have applied as victims, this preliminary criterion centers on verifying their identity. The Court generally maintains a pragmatic approach towards the identification process. For example, the PTC III, in *Prosecutor v. Jean-Pierre Bemba Gombo*, held that any one of a plethora of documents could constitute sufficient proof of identity, including a card registering the applicant’s profession or membership in a labor union.<sup>43</sup> The PTC I, in *Situation in the DRC*, accepted similarly proof of identity.<sup>44</sup> The PTC II, in the *Bemba* case, even went so far as to request a

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interchangeably. Both refer to the process by which the ICC accepts a victim’s application.

<sup>39</sup> Compare McGonigle, *supra* note 3, at 112-13 (analyzing the broad coverage of the definition of a victim), with International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, r. 2, IT/32/Rev. 44, *adopted on* Feb. 11, 1994; *as amended* Dec. 10, 2009, *available at* <http://www.icty.org/sid/136> (defining victim as “[a] person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.”).

<sup>40</sup> ICC Rules, *supra* note 35, r. 85(a).

<sup>41</sup> See Miriam Cohen, *Victim’s Participation Rights within the International Criminal Court: A Critical Overview*, 37 DENV. J. INT’L L. & POL’Y 351, 366-75 (2009) (detailing ICC jurisprudence attempting to harmonize definition in Rule 85 with Article 68 of the Rome Statute).

<sup>42</sup> ICC Rules, *supra* note 35, r. 85.

<sup>43</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Pre-Trial Chamber III, Fourth Decision on Victim Participation, ¶¶ 36-37, (Dec. 12, 2008) [hereinafter *Gombo*, Fourth Decision], <http://www.icc-cpi.int/iccdocs/doc/doc610092.pdf> (listing various forms of identification as proof of identity and noting that “the Single Judge [can] consider a statement signed by two witnesses attesting to the identity of the victim” but requiring those witnesses prove their own identity using one of the listed methods).

<sup>44</sup> *Situation in the Democratic Republic of Congo*, Situation No. ICC-01/04, Pre-Trial Chamber I, Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06, ¶ 15 (Dec. 24, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc463642.PDFpdf> (listing similar forms of identification

report on the various kinds of documentation available in the locality, in order to determine what forms of identity they could reasonably rely upon.<sup>45</sup> In the *Kony* case, the Court further held that the absence of proper identity documentation was an insufficient reason for dismissing an application.<sup>46</sup> In such instances, the Court believed it was better to defer the victim certification for later consideration.<sup>47</sup>

Second, the Pre-Trial Chamber ascertains whether the facts asserted in the victim application fall within the Court's jurisdiction. The analysis of this requirement proceeds through three distinct steps:

1. the alleged crime must be set out in the Statute of the tribunal (*ratione materiae*);
2. the alleged crime must fall within the limits of temporal jurisdiction set by the tribunal, *i.e.*, post-July 1, 2002 (*ratione temporis*);<sup>48</sup> and
3. the alleged crime must have occurred in the territory of a state party to the Rome Statute (*ratione loci*) or have been committed by a national of a state party to the Rome Statute (*ratione personae*).

Third, the PTC has to determine if the victim suffered harm. Thus far, ICC jurisprudence has interpreted this criterion as applying to any individual who has suffered personal harm of a material, physical, or psychological nature.<sup>49</sup> These three requirements have in practice been analyzed broadly.

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as *Gombo* case).

<sup>45</sup> *Gombo*, Fourth Decision, *supra* note 43, ¶ 34-35 (asking the VPRS to make a catalog of available forms of identity in the Central African Republic).

<sup>46</sup> Prosecutor v. Joseph Kony, Vicent Oti, Okot Odhiambo, Dominic Ongwen, Case No. ICC-02/04, Pre-Trial Chamber II, Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06, at 71 (Mar. 14, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc454972.pdf> (explaining that decision on several applicants was "deferred until the missing documents of each application . . . are submitted").

<sup>47</sup> See, e.g., Prosecutor v. Germain Katanga and Matthew Ngudjolo Chui, Case No. ICC-01/04-01/07, Trial Chamber II, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims ¶ 112 (Sept. procédure (23, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc834746.pdf> [hereinafter *Katanga Victims September 2009*] (deferring forty victims who did not present proper proof of identity).

<sup>48</sup> July 1, 2002 was the day the Rome Statute came into force. Article 126 of the Rome Statute regulated the procedure by which it came into force, *Rome Statute supra* note 25.

<sup>49</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Appeals Chamber, Judgment on the Appeals of The Prosecutor and The Defence Against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, at 4 (July 11, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc529076.pdf> (explaining Rule 85(a) of Rules of Procedure and Evidence and that "[m]aterial, physical, and psychological harm are all forms of harm that fall within the

Fourth, the Court decides if there is a reasonable basis for believing that the harm was caused by the alleged crime as presented by the Prosecutor before the PTC.. As in most causality analyses, this can be very difficult to pinpoint with specificity.<sup>50</sup> Thus, as with the other components of victim applications, the ICC has taken a similarly flexible stance towards proving causality.<sup>51</sup> The Court has held that causality is satisfied if “the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least appear compatible rather than clearly inconsistent.”<sup>52</sup> Additionally, the harm must affect the “personal interests” of the victim.<sup>53</sup> Nevertheless, the Court has interpreted personal interests in a broad manner, leading some to argue that this step has become somewhat superfluous.<sup>54</sup>

The four steps described above are conducted for each individual application.<sup>55</sup> If an application fails to meet any of the four criteria, the PTC will either request additional information or, in rare cases, deny the application.<sup>56</sup> Once additional information is granted, the application will be re-examined. In general, most applicants are granted victim status.<sup>57</sup>

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rule”).

<sup>50</sup> See, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (holding that “reasonably foreseeable” should be the standard for “proximate cause” element of negligence and demonstrating the difficulties of determining causation).

<sup>51</sup> The ICC’s flexible stance was noted by at least one ICC judge. Judge Pikis, in a Separate Opinion concluded that the reference to the term “victim” in articles 43 and 68 gives “the impression that they are not confined to those immediately affected by the pending proceedings.” *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Appeals Chamber, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 Concerning the “Directions and Decision of the Appeals Chamber” of 2 February 2007, Separate Opinion of Judge Georghios M. Pikis, ¶ 13 (June 13, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc286765.pdf>.

<sup>52</sup> *Gombo*, Fourth Decision, *supra* note 43, ¶ 75.

<sup>53</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Appeals Chamber, Decision, in limine, on Victim Participation in the Appeals of the Prosecutor and the Defence Against Trial Chamber I’s Decision Entitled “Decision on Victims’ Participation” ¶ 1-3, (May 16, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc493169.pdf> (recognizing that given the adversarial nature of the proceedings, the personal interest analysis is important).

<sup>54</sup> See *Trumbull*, *supra* note 23, at 798-99 (discussing how the personal interest step has become redundant).

<sup>55</sup> See *Cohen*, *supra* note 41, at 370 (“Once the Court has decided that victims’ personal interests are affected by the proceedings in which they wish to participate, their participation is not automatic. The Court must adjudicate on whether it is appropriate for them to participate at that particular stage of the proceedings.”).

<sup>56</sup> See, e.g., *Katanga Victims* September 2009, *supra* note 47 (deferring forty victims but denying only five).

<sup>57</sup> *Id.* (admitting 287, denying five, and deferring forty victims). In his submissions, even the Prosecutor - who has not been always favorable to victim participation stated that “pour sa part, considere que la majorite des demandeurs remplit les criteres exigés pour se voir

Having bestowed the status of “victim,” the PTC will then determine the appropriate form of legal representation for that particular victim.<sup>58</sup> In some cases, the PTC will allow individual legal representation,<sup>59</sup> in which the victim will be represented by a lawyer of his or her choosing throughout the ICC proceedings.<sup>60</sup>

If the number of the victims is high, individual victim representation must be balanced with “the important practical, financial, infrastructural and logistical constraints faced by the Court.”<sup>61</sup> As a result, in the ICC’s first case, against Thomas Lubanga,<sup>62</sup> the ICC ordered that a common legal representative be established for the victims.<sup>63</sup> Having a common legal representative allows the PTC to group victims together, appointing legal counsel for each group.<sup>64</sup> A common legal representative has support staff both at the ICC’s location in The Hague and on the ground in the relevant locale for the case, talking to and supporting the victims.<sup>65</sup>

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accorded la qualite de victime. *See Id.*, at 11.); Christine H. Chung, *Victims’ Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NW. U. J. INT’L HUM. RTS. 459, 521 (2008) (noting that the test “in practice culls only the procedurally deficient applications”).

<sup>58</sup> This procedure is in some tension with the freedom enshrined within the ICC Rules, *supra* note 35, r. 90(1) (“A victim shall be free to choose a legal representative.”).

<sup>59</sup> The purpose of the individual legal representation is to significantly increase the victim’s participation in the proceedings. *See* McGonigle, *supra* note 3, at 110-11 (explaining that legal representatives’ role is to “advise victims of their rights and represent their interests in the proceedings”).

<sup>60</sup> Trumbull, *supra* note 23, at 792-93 (comparing “vicarious participation” of a victim through a lawyer with “direct participation” of a victim and noting that the former is more common).

<sup>61</sup> Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case. No. ICC-01/04-01/07, Trial Chamber II, Order on the Organisation of Common Legal Representation of Victims, ¶ 11 (July 22, 2009) [hereinafter Katanga Victims July 2009], <http://www.icc-cpi.int/iccdocs/doc/doc715762.pdf>.

<sup>62</sup> The Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06-T-105-ENGETWT22-01-2009-1-63NB T, Trial Chamber orally approved a system for victim representation, which consists of two teams and the OPCV. One member of each team will be present in court each day. *See* Prosecutor v. Thomas Lubanga Dyilo, Case. No. ICC-01/04-01/06, Trial Chamber I, Status Conference Transcript, (January 22, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc622238.pdf>.

<sup>63</sup> *See* Jérôme de Hemptinne, *The Creation of Investigation Chambers at the International Criminal Court: An Option Worth Pursuing?*, 5 J. INT’L CRIM. JUST. 402, 412-13 (2007) (asserting that common legal representation is used to protect the rights of the accused from excessive interference by the victims).

<sup>64</sup> Managerial techniques are not uncommon for a court with such problems. *See generally* Máximo Langer, *The Rise of the Managerial Judge in International Criminal Law*, 53 AM. J. COMP. L. 835 (2005) (arguing that the ICTY judges adopted a managerial approach in regulating their caseload).

<sup>65</sup> There are currently offices of ICC outreach in four countries (Uganda, Central African Republic, Democratic Republic of the Congo, and Chad), which among other tasks, work with

The *Katanga* case illustrates the rationale behind opting for victim groups and common legal representation rather than individual legal representation.<sup>66</sup> In that case, the Trial Chamber (TC) discovered that all the victims, who had already been certified by the PTC and were participating in front of the TC, came from an attack on a single location called Bokoro.. However, the victims included both residents of Bokoro and child soldiers from outside Bokoro. The child soldiers were victims in the sense that they were forced to commit atrocities, but they were also the perpetrators of the atrocities. The child soldiers were different ethnicities from the resident victims. Eventually, the TC decided that the differences between the two groups would likely lead to “conflict[s] of interest,”<sup>67</sup> so resident victims were put in one group and child soldiers were placed in a second group, with separate legal representatives to ensure that each group’s unique interests would be taken into account. When once again confronted with requests for victim certification three months after the creation of these two groups, the PTC upheld the group distinction.<sup>68</sup>

Once victims have been certified by the PTC and received legal counsel, they can participate in the ICC proceedings. The scope of victim participation has historically generated considerable debate among both practitioners and scholars.<sup>69</sup> Because of the lack of clarity in the ICC’s Rules and the strong desire of victims to participate in all stages of the proceedings, the ICC Chambers have allowed a much greater role for the victim than ever before in an international criminal tribunal. This expansive participation occurs despite opposition by the defense,<sup>70</sup> and sometimes even

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victims. For a diagram of the local outreach, see ICC, Outreach Unit Organizational Chart (2009), [http://www.icc-cpi.int/NR/rdonlyres/975E4E5E-4369-4F6D-9BC8726CFD6ED26D/280220/Outreach\\_OrganigramENG1.pdf](http://www.icc-cpi.int/NR/rdonlyres/975E4E5E-4369-4F6D-9BC8726CFD6ED26D/280220/Outreach_OrganigramENG1.pdf).

<sup>66</sup> Katanga Victims July 2009, *supra* note 61.

<sup>67</sup> *Id.* ¶ 6.

<sup>68</sup> See Katanga Victims September 2009, *supra* note 47. The PTC admitted 287 additional victims (to those that had already been accepted). This time all such victims were added to the resident victims group.

<sup>69</sup> See Cohen, *supra* note 41, at 370-73, 375-77 (arguing that victims should not be granted procedural rights at stages when their participation is not appropriate and should be granted limited rights at early stages of the proceedings); McGonigle, *supra* note 3, at 150 (acknowledging that although a “success,” present form of victim participation at the ICC has become a “headache although not a disaster”); cf. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Pre-Trial Chamber I, *Demande de participation à l’audition du témoin Radhika Coomaraswamy*, ¶ 3-5, (Dec. 24, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc799137.pdf> (stating request of legal representatives of victims to participate in various proceedings, including witness examination).

<sup>70</sup> See, e.g., Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Pre-Trial Chamber I, Réponse de la Défense à la « Demande de participation dans la procédure en appel contre la décision du 13 juin 2008 de la Chambre de Première instance I ordonnant la suspension de la procédure » datée du 16 juillet 2008, ¶ 6-11 (July 29, 2008), <http://www.icc->

the prosecution,<sup>71</sup> towards such extensive involvement by victims.

The ICC Rules have held that victims are allowed to make general representations;<sup>72</sup> to take part in reparation claims,<sup>73</sup> claims on jurisdiction,<sup>74</sup> investigations,<sup>75</sup> indictments and their amendments,<sup>76</sup> interim release hearings,<sup>77</sup> confirmation hearings,<sup>78</sup> hearings on admissibility and relevance of evidence,<sup>79</sup> sentencing hearings,<sup>80</sup> and finally to access the record of the case at the Registry.<sup>81</sup> The only limitation is that victims do not have an absolute right to participate; their participation is contingent on a showing of personal interest in the specific proceeding.<sup>82</sup> The latter determination takes place on a case-by-case basis..

Lawyers and the VPRS should routinely speak with victims about the criminal process.<sup>83</sup> Although their effectiveness is questionable because these mandatory communications are carried out through outreach efforts

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[cpi.int/iccdocs/doc/doc537235.pdf](http://www.icc-cpi.int/iccdocs/doc/doc537235.pdf). (demonstrating the defence's negative outlook on victim participation).

<sup>71</sup> See, e.g., Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Pre-Trial Chamber I, Prosecution's Response to Thomas Lubanga Dyilo's "Request for Leave to Appeal the Decision sur les demandes de participation à la procédure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l'affaire Le Procureur v. Thomas Lubanga et de l'enquêteur en République Démocratique du Congo," ¶ 7, 12-15 (Aug. 14, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc192501.pdf> (siding with the Defense and urging the Court to allow the defense's appeal against victim participation).

<sup>72</sup> *Rome Statute*, *supra* note 25, art. 15(3).

<sup>73</sup> *Id.* art. 75(3).

<sup>74</sup> *Id.* art. 19(3).

<sup>75</sup> *Id.* art. 15(3).

<sup>76</sup> ICC Rules, *supra* note 35, r. 93, 128.

<sup>77</sup> *Id.* r. 119(3).

<sup>78</sup> *Id.* r. 121(10).

<sup>79</sup> *Id.* r. 72.

<sup>80</sup> *Id.* r. 143, 145.

<sup>81</sup> See Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ¶ 118 (May 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc486390.pdf>.

<sup>82</sup> See Situation in the Democratic Republic of the Congo, ICC-01/04, Appeals Chamber, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD Against the Decision of the Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor Against the Decision of the Pre-Trial Chamber I of 24 December 2007, ¶ 45 (Dec. 19, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>; see also Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Pre-Trial Chamber I, Décision relative à la demande de participation des victimes a/0001/06 à a/0003/06 à la conférence de mise en état du 5 septembre 2006 [Decision on the Application for Participation of Victims a/0001/06 to a/0003/06 in the Status Conference of 5 September 2006], (Sept. 4, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc192636.pdf> (rejecting victim participation).

<sup>83</sup> See ICC Rules, *supra* note 35, r. 93.

rather than by the lawyers themselves, at least in theory they allow the victims' lawyers to better relay the stories and priorities of their clients to the Trial and Appeals Chambers. For example, some of the most compelling statements on behalf of victims are the ones that convey the "views and concerns" of the victims.<sup>84</sup> Similar stories are also related directly by the victims when they serve as witnesses in the criminal proceedings.

Victims in ICC proceedings, like civil trials, are also allowed to claim monetary reparations.<sup>85</sup> Thus far, all those accused by the ICC have claimed to be indigent, but to circumvent this problem the Rome Statute established a Victims' Fund. The fund is primarily composed of donations from Member States, but if the defendant has any assets, these will be seized and added to the fund.<sup>86</sup> Monetary payments from the fund are supposed to be allocated to "address injuries at a societal level, and thus may benefit victims of perpetrators not convicted by the ICC."<sup>87</sup>

Although the ICC has not yet completed a full trial and some provisions of victim participation may therefore still change, victims are currently supposed to have the following variety of ways in which to interact in the criminal proceedings:

1. Apply for victim status,
2. Share their stories with their lawyers,
3. Receive protection (similar to what witnesses are afforded),
4. Be used as witnesses,
5. Receive regular news from the Court,
6. Receive a judgment informed by their stories,
7. Receive monetary compensation.

Victim certification, the first step, aims at determining whether the applicant could reasonably have been harmed by the accused or—when at the situation phase, and no case has been brought against any individual—whether the applicant was harmed during an event being investigated by the ICC investigation. However, as currently instituted, the victim certification process clashes with two important ICC goals by prolonging impunity and failing to reach all victims. Both of these problems are discussed further below.

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<sup>84</sup> See Chung, *supra* note 57, at 512. The ICC has not yet closed a case but it is expected that the victim participation will continue to play a central role.

<sup>85</sup> See Bassiouni, *supra* note 19, at 224-25 (asserting that the ICC reparations scheme follows a line of similar international treaties, such as the European Convention on the Compensation of Victims of Violent Crimes 1983).

<sup>86</sup> ICC Rules, *supra* note 35, r. 147-48.

<sup>87</sup> Trumbull, *supra* note 23, at 790.

## II. PROBLEMS WITH THE CURRENT PROCEDURE OF VICTIM CERTIFICATION

This section explores the major problems created by the current form of victim certification at the ICC by examining two central goals of the ICC and demonstrating how these goals are actually undermined by the present victim certification scheme.

### A. *Obstacles to Achieving Two Central Goals of the ICC*

One of the primary reasons for the creation of the ICC was to end impunity.<sup>88</sup> In the years following the Cold War, the international community had witnessed a renewal of conflicts and an increase in horrific crimes, and had experienced the limits of the ad hoc tribunals. Thus, the international community decided that the time had come to establish a permanent criminal court with prospective jurisdiction, through the Rome Statute. Proponents argued that the ICC would increase the prosecution of mass crimes and thereby serve as a deterrent to the continuing perpetration of these crimes.<sup>89</sup>

An ancillary, albeit important, goal of the ICC was to empower victims.<sup>90</sup> In contrast to previous criminal tribunals like those for the former Yugoslavia and Rwanda, the Rome Statute explicitly guarantees the rights of victims.<sup>91</sup> There are two clearly laudable goals associated with the concept of victim participation. First, the ICC enhances the quality of information it receives for each case by listening to the victims<sup>92</sup> while simultaneously satisfying the truth-finding goal of criminal trials. Second, the Court also aids the victim in recovering from trauma caused by the alleged crime by allowing victims to share their experiences.<sup>93</sup> Additionally, victim

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<sup>88</sup> See Fletcher, *supra* note 29, at 581-82 (highlighting that ICC's purpose is to end "impunidad").

<sup>89</sup> See J. Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 GEO. J. INT'L L. 363, 369 (2007) (describing the creation of the ICC at the Rome Conference, the stated goal to end impunity, and that "[n]ow, there is hope that law can constrain power").

<sup>90</sup> See *id.* at 369-71 (describing the goal of allowing victim participation); McGonigle, *supra* note 3, at 144-50 (describing victim empowerment as an "ancillary goal" of the ICC and urging the Court to clarify purpose of victim participation).

<sup>91</sup> See Bassiouni, *supra* note 19, at 230 (asserting that with regard to victims, "[t]he Statute's scheme reflects the most advanced position that exists in established international criminal justice").

<sup>92</sup> See McGonigle, *supra* note 3, at 103 ("Autonomous participation in proceedings offers a tangible avenue for expressing emotional suffering and therefore the Court can see the full extent of a victims' harm and not just the harm related to the specific charges against an accused."); Trumbull, *supra* note 23, at 803 (explaining that victims can lead to the truth because they "are likely to have the most information about their own victimization").

<sup>93</sup> See Bassiouni, *supra* note 19, at 231 ("[P]erhaps the most important goals of this

participation provides the possibility for material satisfaction through monetary reparations. Strengthening victims' participation is part of the ICC's mandate,<sup>94</sup> although in practice its reach has been limited to those victims who independently choose to apply to the ICC.

### B. Chronic Delays

Rather than ending international impunity for egregious crimes, as was the ICC's design, the current scheme of victim participation hinders that goal. Current victim certification procedures are so complicated that they delay the trial proceedings, violate the due process rights of the accused, and are detrimental to future victims.

While the drafters of the Rome Statute envisioned a system in which victims would play a central role and thus, to a certain extent, anticipated some time lapses,<sup>95</sup> the delays caused by the current system of victim certification are so significant that they preclude the Court from effectively dealing with other parts of the proceedings.<sup>96</sup> For each victim, certification by the PTC concludes approximately one year after their application is submitted.<sup>97</sup> Additionally, the PTC may issue multiple orders of victim certification for each case.<sup>98</sup> Each order requires the resources not only of the PTC, but also of many other branches of the Court, such as the Registry,

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process are the 're-humanisation' of victims and their restoration as functioning members of society."); Boyle, *supra* note 26, at 313 (discussing victim participation in the Cambodian Extraordinary Chambers' trials and that "[t]heir presence will add a human dimension to the trials that should strengthen their exemplary force, contribute to national reconciliation and enhance the effectiveness of the Cambodian legal system in the future."); Trumbull, *supra* note 23, at 802-03 (explaining that participation is part of the "truth-telling process" which is "therapeutic" for the victims).

<sup>94</sup> Restorative justice cannot take place without the majority of the victims. See Little, *supra* note 89, at 371-80 (describing the goals of victim autonomy, which refers to victims in general, not only those who will or have applied to the ICC); McGonigle, *supra* note 3, at 136 (discussing ICC Rules as permitting "both direct and indirect victims" to participate in ICC proceedings).

<sup>95</sup> See Chung, *supra* note 57, at 507 ("[S]ome of the expenditure and delay associated with providing victims' participation is unavoidable. . .").

<sup>96</sup> See Cohen, *supra* note 41, at 351, 374 (2009) (explaining that participatory rights can threaten the expeditiousness of a trial, especially where there are many victims).

<sup>97</sup> See Chung, *supra* note 57, at 462 ("[T]he true nature of the right being provided to individuals seeking to participate in ICC proceedings is the entitlement to stand in queue, for longer than a year . . .").

<sup>98</sup> See, e.g., Katanga Victims September 2009, *supra* note 47 (certifying numerous victims for participation); Katanga Victims July 2009, *supra* note 61 (same); see also McGonigle, *supra* note 3, at 136 (predicting that these problems will likely become more aggravated with the rise in the number of victim applications).

the VPRS, the OPT, and the Defence.<sup>99</sup> Because the ICC bureaucracy is so preoccupied with victim certification, it is prevented from effectively dealing with many of its other concerns,<sup>100</sup> to the detriment of its overarching goal of bringing perpetrators to justice and ending impunity.<sup>101</sup> The problems stem not only from the difficulty of reviewing a fact-intensive application for victim status but also from the repetitive, and possibly superfluous, procedures that regulate the process (*e.g.*, multiple certifications by the PTC).

Additionally, the increased number of victim applications and delay in processing these applications makes the possibility of a speedy trial unlikely,<sup>102</sup> depriving a defendant of his due process rights as outlined in Article 67 of the Rome Statute.<sup>103</sup> Following Article 14 of the International Covenant on Civil and Political Rights,<sup>104</sup> the Rome Statute provides that the accused shall “be tried without undue delay.”<sup>105</sup> In the *Katanga* trial, PTC I alone has already issued ten decisions on victims’ issues.<sup>106</sup> While it is not easy to precisely calculate the time delay that these decisions cause, their individual length and detail, as well as their collective number allow one to

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<sup>99</sup> See ICC Rules, *supra* note 35, r. 89(1) (“[T]he Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber.”); McGonigle, *supra* note 3, at 136 (“The participation of victims has come at a cost, most notably to the Prosecution, defense and court operations.”); *see also* Chung, *supra* note 57, at 507 (noting that the start date in the *Lubanga* trial was pushed back from March 31, 2008 to June 23, 2008 as proof that “trial-phase work has also been affected by the resource drain”).

<sup>100</sup> See Chung, *supra* note 57, at 461 (“The record of the ICC’s early years demonstrates that thousands of pages and thousands of hours (likely representing a substantial number of euro), have been expended in delivering actual participation in proceedings on behalf of very few victims.”).

<sup>101</sup> See *id.* at 497 (claiming that “[t]he filing of mere hundreds of applications to participate in ICC proceedings has overburdened the participation framework” and has severely impaired the ICC, notably in its “inability . . . to render timely or effective decisions on applications to participate”).

<sup>102</sup> See Hemptinne, *supra* note 63, at 412-13 (arguing that the number of victims and the character of their stories will “infring[e] the rights of the accused”); McGonigle, *supra* note 3, at 140 (asserting that judicial delays exist because “the Chamber must grant or deny victim status on every victim-applicant”).

<sup>103</sup> *Rome Statute*, *supra* note 25, art. 67(1)(c).

<sup>104</sup> International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978) 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also id.* art. 14 (stating that the accused shall be “entitled to trial within a reasonable time”).

<sup>105</sup> *Rome Statute*, *supra* note 25, art. 67(1)(c).

<sup>106</sup> All relevant decisions and the progress of the *Katanga* case can be accessed through the ICC’s Internet database, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/> (follow “Case The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui” hyperlink). The case is currently in the trial phase.

infer that they delay the trial.<sup>107</sup> Such time lapses may be prejudicial to the defendants' rights.<sup>108</sup> If properly objected to, they may lead to acquittal on the basis of technicalities, or, at the very least, to a reduced sentencing.<sup>109</sup> Either result undermines the expressive capacity of the ICC to punish the perpetrators and diminishes the deterrent effects of punishment. Additionally, given that the time-consuming process of victim certification prolongs ongoing cases, the Court's ability to prosecute additional cases is limited. With a smaller number of prosecutions, perpetrators may continue carrying out crimes,<sup>110</sup> creating more future victims<sup>111</sup> and thwarting the goal of ending impunity.<sup>112</sup>

### C. Exclusion of Most Victims

Beyond ending impunity, as originally conceived, a second goal behind victim participation at the ICC is to empower the victims. But the current mechanism of victim certification fails to take into consideration most victims,<sup>113</sup> who for various reasons do not file an application to join the ICC proceedings. As will be discussed more below, this is detrimental to the Court and harms the interests of many victims who do not end up participating.

The ICC investigations and prosecutions are likely to involve thousands of victims, as the Court's subject matter jurisdiction is expressly limited to crimes that are committed on a mass scale.<sup>114</sup> Yet the ICC has limited means

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<sup>107</sup> Cf. Chung, *supra* note 57, at 461-62 (criticizing the length of time spent on victim procedures).

<sup>108</sup> Cf. Trumbull, *supra* note 23, at 823 (explaining that victim participation is generally prejudicial to the accused).

<sup>109</sup> See Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693, 704-05 (2008) (demonstrating how international courts reduce the sentences imposed on defendants when their rights have been violated).

<sup>110</sup> This assumes that perpetrators of mass crimes that fall under the ICC jurisdiction are rationale actors, who could be deterred from acting.

<sup>111</sup> Cf. Trumbull, *supra* note 23, at 812 (demonstrating persuasively that by "allowing legally recognized victims to participate in the proceedings will limit unrecognized victims' access to justice by increasing the cost and length of trials and decreasing the numbers of cases that can be heard before the Court").

<sup>112</sup> Trumbull, *supra* note 23, at 818 (the author also argues that since the international community's interest in deterrence is stronger than the interests of victims, victim participation scheme is overall a negative element of international criminal law).

<sup>113</sup> See Chung, *supra* note 57, at 497 (noting that a limitation of the ICC is "the failure of the court to provide meaningful victims' participation to more victims").

<sup>114</sup> See ICC, Elements of Crimes, ICC-ASP/1/3(part II-B) (Sept. 9, 2002) (limiting the ICC to crimes of genocide, war crimes and crimes against humanity), available at [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf). Cf. ECCC, Press Release, September 16 2010, available at <http://www.eccc>.

at its disposal for prosecuting all of the cases referred to it.<sup>115</sup> These limitations in proportion to the number of victims who fall within the ICC's ambit have in reality led the ICC prosecutor to be selective in investigating and prosecuting only limited number of situations,<sup>116</sup> some of which have been ongoing for a considerable amount of time.<sup>117</sup>

For various reasons, however, many victims of the crimes under ICC jurisdiction do not file victim applications. Some victims do not know about the proceedings.<sup>118</sup> Others do not have the money or the education to file an application.<sup>119</sup> Due to the politicized nature of the crimes under investigation other victims are scared to file a victim's application, fearing reprisals from the accused or the accused's accomplices, who often remain at large<sup>120</sup> and/or beyond the reach of an ICC investigation.

Lack of organization also makes it more difficult to obtain applications from most of the victims. In France during the 1970s Holocaust victims were organized into groups,<sup>121</sup> allowing for their orderly participation, as

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gov.kh/english/news.view.aspx?doc\_id=369 (indicating the large number of victim participation in the ECCC, where the indictment in Case File 002, the Co-Investigating Judges examined 3988 victim applications, of which it admitted 2123 as civil parties.).

<sup>115</sup> A comparison between the ICC and the ICTY is worthwhile: in contrast to the ICC, the ICTY is limited both geographically and temporally. In 2007, the ICTY budget was approximately \$270 million, see Judith A. McMorrow, *Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunals*, 30 B.C. INT'L & COMP. L. REV. 139, 140 (2007). By contrast, in 2009, the ICC budget was limited to \$143 million. Coalition for the International Criminal Court, Budget and Finance Background, <http://www.iccnw.org/?mod=budgetbackground> (last visited May 15, 2011).

<sup>116</sup> After 9 years of operation, the ICC is currently only at the trial phase of its first three cases, against Thomas Lubanga Dyuilo, Germain Katanga and Jean-Pierre Bemba Gombo.

<sup>117</sup> The ongoing situations aptly prove that the OTP focuses on grave and serious allegations of international crimes. So far, they have been limited to Sudan, Central African Republic, Democratic Republic of the Congo, Uganda, Kenya. ICC – Office of the Prosecutor, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/> (last visited May 15, 2011).

<sup>118</sup> Chung, *supra* note 57, at 540 (“[T]hey are not currently receiving adequate information or guidance about the choices available to them.”); Redress, Victims and the ICC: Still Room for Improvement, The Hague, 14-22 November 2008, <http://www.redress.org/downloads/publications/ASP%20Paper%20Draft%20Nov08.pdf> (“Many women, former child soldiers and other vulnerable victims such as the elderly or destitute remain uninformed about the activities of the court.”).

<sup>119</sup> It is interesting to observe that the model application form is available on-line only in English and French. ICC – Forms, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Forms.htm> (last visited May 15, 2011).

<sup>120</sup> Ruth Jamieson & Kieran McEvoy, State Crime by Proxy and Juridical Othering, 45 Brit. J. Criminology 504 (2005) (providing an extensive explanation of how and why victims are via intimidation placed outside the reach of courts).

<sup>121</sup> These groups were created and remain primarily interested in the historic documentation of the Holocaust. For example, in 1979, Serge Karlsfeld created the

civil parties, in the successful trials of former Vichy officials -and Nazi collaborators- Paul Touvier, Maurice Papon and Klaus Barbie.<sup>122</sup> <sup>123</sup> The French victims' coordination and active involvement in all of the Nazi-related cases likely helped maintain the momentum of the investigations, despite the passage of a considerable amount of time.<sup>124</sup> Likewise, in the United States victims of the 9/11 terrorist attacks were successful in gaining some compensation and recognition by mobilizing and organizing themselves.<sup>125</sup> ICC victims, in contrast, have been reached primarily through outreach programs by foreign-based NGOs on an ad hoc basis.<sup>126</sup> These efforts do not effectively reach all victims.

Due to lack of awareness of victim participation in ICC proceedings, victim applications to the ICC are significantly limited.<sup>127</sup> In the cases

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organization, *Fils et Filles de Deportés Juifs de France (FFDJF)*. These groups were created and remain primarily interested in the historic documentation of the Holocaust, which can be seen through their publications, *see, e.g., MAIRIE DE PARIS, LES 11,400 ENFANTS JUIFS DÉPORTÉS DE FRANCE ENTRE JUIN 1944 ET AOÛT 1944* [The 11,400 Jewish Children Deported from France from June 1942 to August 1944] (2007) (Fr.). [http://ffdjf.org/brochure\\_ffdjf\\_paris.pdf](http://ffdjf.org/brochure_ffdjf_paris.pdf) (discussing the 11,400 French Jewish children deported to extermination camps during WWII).

<sup>122</sup> For the involvement of civil parties in these trials, *see e.g.* Nancy Wood, *The Papon Trial in an "Era of Testimony,"* in *THE PAPON AFFAIR: MEMORY AND JUSTICE ON TRIAL* 96, 100-101 (Richard J. Golsan ed., 2000). Adding to the media attention of these trials, a leading lawyer for the civil parties in these trials was Arno Karlsfeld, the well-known and politically active son of Serge and Beate Karlsfeld. The latter couple is also referred to as The Nazi Hunters for their role in uncovering former officials of the Vichy regime.

<sup>123</sup> For the involvement of civil parties in these trials, *see, for example,* Nancy Wood, *The Papon Trial in an "Era of Testimony,"* in *THE PAPON AFFAIR: MEMORY AND JUSTICE ON TRIAL* 96, 100-101 (Richard J. Golsan ed., 2000). Adding to the media attention of these trials, a leading lawyer for the civil parties in these trials was Arno Klarsfeld, the well-known and politically active son of Serge and Beate Klarsfeld. Richard J. Golson, *Introduction: Maurice Papon and Crimes Against Humanity in France, supra*, at 3. The latter couple is also referred to as The Nazi Hunters for their role in uncovering former officials of the Vichy regime. *Id.*

<sup>124</sup> The trial of Klaus Barbie demonstrates this. In 1981, he was extradited from Bolivia after Beate Klarsfeld located him and after—at the persistent requests of the French government—the Bolivian regime stopped shielding him. Alice Y. Kaplan, *Introduction to ALAIN FINKIELKRAUT, REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY*, at ix, xiv (Columbia University Press 1992). For a nuanced discussion of the Klaus Barbie trial, *see ALAIN FINKIELKRAUT, supra*.

<sup>125</sup> *See, e.g.,* September 11th Families' Association, <http://www.911families.org/about%20us.html> (last visited May 15, 2011.). *See* Air Transportation Safety and System Stabilization Act, 49 USC 40 Pub. L. No. 107-42, 115 Stat. 230101 (2001). The act provided for compensation and was passed under the understanding that the victims would not sue for compensation.

<sup>126</sup> *E.g.,* Redress, FIDH, VWRG, Coalition for the ICC, Oxfam.

<sup>127</sup> Chung, *supra* note 57, at 498-99 (estimating that as of May 1, 2008, 509 applications were received by the ICC's Registry). *Cf.* ECCC, Victims Unit: Extraordinary Chambers in

presently before the Court, the number of the victim applications is notably smaller than what is warranted by descriptions of the scale of alleged harms,<sup>128</sup> suggesting that many eligible victims have not filed an application with the Court.<sup>129</sup> The ICC proceedings address only a narrow class of victims—those who have been certified at The Hague. The majority of victims, who never apply for certification, are not taken into consideration. This is detrimental for the goals of the ICC, in which the interests of all victims, especially the unrepresented, were meant to be championed.

Victim participation benefits the Court, which learns the facts of the case primarily through testimonial narratives. Furthermore, victim participation is meant to aid the judges in determining the true events and thereby the guilt or innocence of the defendant.<sup>130</sup> But because victims' narratives derive from a narrow class – only those victims who actually choose to participate – prosecutors can only provide the Court with a stunted version of victims' experiences. Moreover, the participating group of victims is not necessarily representative of all the victims. Instead, the necessary precursor of filing an application form, which presupposes access to the form and ability on the part of the victim-applicant to read and write, makes it even less likely that this minority of victims will adequately reflect the majority.<sup>131</sup>

The current scheme of victim participation is also detrimental to absent victims. Admittedly, faced with limited means, the ICC has a limited array of options with regards to victims who are not participating. But the current system of victim certification bars the ICC from serving non-participating victims in any way. It is impossible to provide such victims with the

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the Courts of Cambodia, <http://www.eccc.gov.kh/english/statistics.aspx> (last visited May 15, 2011) (indicating that 7,195 applications were filed at the Victims Unit of the Extraordinary Chamber in the Courts of Cambodia until December 30, 2009).

<sup>128</sup> See, e.g., Prosecutor of the ICC, Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), *delivered to the UN Security Council* (June 7, 2007), available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Reports+to+the+UNSC/> (stating that mass crimes have allegedly been committed in Darfur and mentioning the existence of refugee camps in Chad).

<sup>129</sup> But see McGonigle, *supra* note 3, at 135 (noting that an increase in the number of victim participation is highly likely).

<sup>130</sup> The value of truth in a criminal proceeding is not limited to a just judgment. For more on the importance of truth in criminal law, see Bassiouni, *supra* note 19, at 276 (“Truth can help provide an historical record, educate people, promote forgiveness and prevent future victimization.”).

<sup>131</sup> The lack of adequate representation can be, to a certain extent, analyzed by the pattern of victim applications. Even though it is hard to tell precisely (notably due to the secrecy surrounding the information on victims' applications), there seems to be a high correlation between the dates of outreach efforts and the filing of victim applications.

cathartic benefits of participation if they are not a part of the proceedings,<sup>132</sup> the viewpoints and the interests of these victims are neither represented nor protected.<sup>133</sup> Their stories are not factored into the indictment against an accused or during the sentencing phase. Furthermore, with monetary claims, none of the money at the disposal of the Victim's Fund can be claimed for the needs of the non-participating victims.<sup>134</sup>

The following section will discuss how using the class action device can solve the above problems that sometimes clash, for instance when problems created by increased victim applications may seem to diminish the necessity of having all victims participate. By more effectively organizing victim claims, the class action device will further the goal of ending impunity and empowering as many victims as possible, while also resolving these conflicting problems.

### III. USING THE CLASS ACTION DEVICE TO STREAMLINE VICTIM CERTIFICATION

This section proposes the use of the class action as a mechanism for victim certification at the ICC. The class action is a tool of civil procedure that allows the grouping of various lawsuits into one major suit.<sup>135</sup> This section briefly introduces and then applies this device to victim participation at the ICC, adapting it to the setting of the ICC.

#### A. *The Class Action Device and the ICC*

The class action device, as described in the U.S. Federal Rules of Civil Procedure (FRCP), can be a potent tool for victim participation at the ICC. For clarity, this paper analyzes only the FRCP's form of the class action device and ignores similar forms of common legal representation found in

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<sup>132</sup> See Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 Mich. L. Rev. 2031, 2102-03 (1998) (noting the psychological benefits of civil suits for the victims).

<sup>133</sup> In briefs filed so far by the Victims' Legal Representatives, the ICC has only been exposed to the views of the certified victims. Unrepresented victims are not mentioned. See, e.g., *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Pre-Trial Chamber I, *Demande de participation a l'audition du temoin Radhika COOMARASWAMY* (Dec. 24, 2009) (failing to mention other victims than the certified ones).

<sup>134</sup> While the Trust Fund is created to provide for all victims, see *ICC Rules*, *supra* note 35, Rule 98, only those victims present in front of the ICC can make demands. It is up to the discretion of the court to take care of other victims. This paper acknowledges both that it is up to the discretion of the court to take care of other victims and that increased victim participation (which it calls for) inevitably creates a need for expanding the Fund's sources.

<sup>135</sup> William J. Aceves, *Action Popularis? The Class Action in International Law*, 2003 U. CHI. LEGAL F. 353, 354 (2003) (mentioning that it is an effective mechanism for pursuing large-scale litigation when individuals are unlikely to litigate individually).

other jurisdictions.

Under Rule 23 of the FRCP, the class action is conducted through a certification process during which the Court considers whether a particular class of plaintiffs or defendants meets the following four requirements:

- 1) The class is so numerous that joinder of all class members is impracticable,
- 2) There are questions of law or fact that are common to each member of the class,
- 3) The claims or defenses of the representative parties are typical of the claims or defenses of all class members, and
- 4) The representative parties are able fairly and adequately to protect the interests of the class.<sup>136</sup>

If these criteria are met, the Court has the power to certify a class by judicial order.<sup>137</sup> A class can be de-certified at any stage in the lawsuit.<sup>138</sup>

After certification, a single plaintiff or a single defendant is understood to represent all of the class members.<sup>139</sup> The Court appoints a class counsel to serve as the legal representative of the class.<sup>140</sup> Further, in some cases the Court may mandate that all of the potential class members receive notice of the litigation.<sup>141</sup> Finally, under the FRCP's class action mechanism, it is also possible to have several subclasses.<sup>142</sup> If a class is separated into subclasses, each subclass will be treated, for all purposes, as a separate class.<sup>143</sup> Such divisions, which are appropriate in situations in which there are diverse interests within a single class, may be created at any point during the proceedings.

#### *B. Applying Class Action to Victim Certification*

Using the class action in the ICC setting would significantly improve the process of victim certification. The class action device has the ability to transform, both substantively and procedurally, the current process of victim participation at all stages in the certification process.

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<sup>136</sup> FED. R. CIV. P. 23.

<sup>137</sup> FED. R. CIV. P. 23(c)(1)(g).

<sup>138</sup> See, e.g., *In re Int'l House of Pancakes Franchise Litig.*, 536 F.2d 261 (8th Cir. 1976).

<sup>139</sup> See, e.g., *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) (describing the class representative as representative of all other members, owing a fiduciary duty to them).

<sup>140</sup> FED. R. CIV. P. 13(g).

<sup>141</sup> FED. R. CIV. P. (c)(2).

<sup>142</sup> See e.g. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000)

<sup>143</sup> See, *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981).

The class action would institute significant changes before victim certification. Currently, prior to certification, the Registry transmits victim applications to the PTC in groups. Such transmissions continue to take place all throughout the Pre-Trial phase. With the class action device, upon receiving the first group of applications from the Registry the PTC would attempt to certify one or more of the alleged victims as representative(s) of the entire class of victims with similar claims.<sup>144</sup> To do so, the PTC would conduct two separate analyses. First, it would have to examine if the specific victim in question meets the four established criteria that are necessary for “victim status.”<sup>145</sup> Second, it would have to examine the four requirements for class action (numerosity, commonality, typicality, adequate representation). A class can only be certified if both of these two tests are met.

As part of the class certification test, the ICC would have to examine the numerosity of the class, i.e. the size and scope of possible groupings of victims. While there are no precise numbers for fulfilling this requirement, U.S. courts have generally established a class if there are, at a minimum, more than forty potential class members.<sup>146</sup> Apart from this basic numerical requirement, other relevant considerations may include calculations in the interest of judicial economy,<sup>147</sup> geographic dispersion of class members,<sup>148</sup> and financial ability of members to file individual victim applications.<sup>149</sup> The numerosity requirement should be easily satisfied at the ICC as the Court investigates abuses “impacting thousands of potential class members.”<sup>150</sup>

Once the numerosity requirement has been fulfilled, the Court would have to determine if all victims have common claims (the commonality

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<sup>144</sup> This procedure would require more close involvement in the case from the ICC, a position which is not without support, *see e.g.* McGonigle, *supra* note 3, at 146 (advocating that the court should adopt a tight control over the proceedings).

<sup>145</sup> *See supra* Part I.B.

<sup>146</sup> *See, e.g.*, Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986) (indicating that, generally, less than twenty-one members means joinder is practical, while more than forty members means joinder is impractical).

<sup>147</sup> *See, e.g.*, In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 290 (2d Cir. 1992) (holding that numerosity was satisfied in part because the class consisting of 850 claimants was geographically dispersed, thereby making individual adjudication of each claim inefficient).

<sup>148</sup> *See, e.g.*, In re Laser Arms Corp. Sec. Litig., 794 F. Supp. 475, 494 (S.D.N.Y. 1989).

<sup>149</sup> *See, e.g.*, Walco Investments, Inc. v. Thenen, 168 FRD 315, 324 (S.D. Fla. 1996) (noting that instead of victim applications, the criterion examined here is the potential to “institute individual lawsuits”).

<sup>150</sup> Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279, 336 (2003).

requirement).<sup>151</sup> In U.S. courts, this requirement is satisfied if all the class members have a single common question of law or fact,<sup>152</sup> the claims do not have to be identical.<sup>153</sup> Further, individual determinations of damages have no bearing on the group's commonality.<sup>154</sup> As such, all victims of armed attacks could fall within one class, regardless of differences in location and time among the various attacks.

In each case, the PTC would also have to consider if the claims put forth by the individual victim were similar to those of the entire class (the typicality rule). This rule ensures that the interests of the class representative are substantially aligned with that of the class.<sup>155</sup> In U.S. jurisprudence, this element is usually satisfied by indicating that the representative's claims arise from the same set of facts and are based on the same legal theories as the claims of the other class members.<sup>156</sup> For example, in the *Marcos* litigation, a prominent class action lawsuit for human rights abuses committed in the Philippines, this analysis was conceptualized as looking to see if "the victim experience[d] pain and suffering from the torture, summary execution, or 'disappearance'..."<sup>157</sup> Similar to the commonality requirement, claims do not need to be identical.<sup>158</sup> In fact, differences as to the degree of injury suffered by various class members are fairly common but rarely result in lack of typicality.<sup>159</sup>

Finally, the PTC would have to consider the suitability of the present victim in order to protect the interests of absent class members (the

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<sup>151</sup> Additionally, under a voluntary class of FED. R. CIV. P. 23(b)(3), the class members must show that the common issues predominate over uncommon issues.

<sup>152</sup> FED. R. CIV. P. 23(a)(2).

<sup>153</sup> See, e.g., *Cohen v. Uniroyal, Inc.*, 77 F.R.D. 685 (E.D. Pa. 1977) ("[T]he commonality requirement has been satisfied plaintiff has shown the existence of a common nucleus of operative fact") (citing *Entin v. Barg*, 60 F.R.D. 108, 113 (E.D. Pa. 1974)).

<sup>154</sup> See, e.g., *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (finding that the individualized circumstances of every child in the custody of the Department of Human Services did not defeat commonality); *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988) (noting that differences in treatment or damages do not defeat commonality).

<sup>155</sup> See, e.g., *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996) (typicality serves to ensure that named representative can serve interests of class members); *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 FRD.R.D. 87, 99 (S.D.N.Y. 1981).

<sup>156</sup> See, e.g., *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996); *In re "Agent Orange" Prod. Litigation*, Liab. Litig. Mdl. No. 382, 818 F.2d 145, 164 (2d Cir. 1987).

<sup>157</sup> *Hilao v. Estate of Marcos*, 103 F.3d 767, 774 (9th Cir. 1996).

<sup>158</sup> See, e.g., *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174-75 (8th Cir. 1983) (noting that differences in mortgage instruments held by class members did not defeat typicality because all members sought the same relief).

<sup>159</sup> See, e.g., *Trautz v. Weisman*, 846 F. Supp. 1160, 1167 (S.D.N.Y. 1994).

requirement of adequacy of representation).<sup>160</sup> In U.S. courts, this is a case-by-case determination, during which the court examines the personal integrity of the representative,<sup>161</sup> any potential conflict of interests between class and representative,<sup>162</sup> and the desire of the class members to litigate. Often, U.S. courts have selected “natural leaders in the impacted community.”<sup>163</sup> To a certain extent, this element also requires that the class representative not be linked to the class attorney in such a way that would preclude the former from supervising the latter.<sup>164</sup>

If a victim has fulfilled all the above criteria, the PTC would appoint him as class representative for all the other victims with similar claims. The other branches of the Court would be notified, and the Registry would place any incoming applications that assert similar claims into that class. The Registry would be responsible for transmitting incoming applications directly to the class counsel. Class counsel would be responsible for, but not limited to, representing these applicants. Furthermore, the PTC, the OTP, and the Defence would no longer be involved.<sup>165</sup> This also happens in civil law trials with *partie civiles*, in which the magistrate and the civil party lawyer are the only two parties relevant to the certification proceedings.

The class action device would drastically alter ICC procedures that take place after victim certification. If the Registry determines that a subsequent applicant asserts a claim which falls outside the existing class(es), it would transmit the application to the PTC and the other relevant ICC departments. The PTC would then review the application. If it agrees with the Registry, it would conduct the victim and class action tests before certifying a new class.

The use of the class action device would not eliminate the need for individual legal representation in some cases. Even though the ICC generally handles situations of mass crimes, there might not be a readily definable class for certification. There also might be victims who do not fall within an existing class and for whom it would make more sense to participate on an individual basis. However, in practice, however, victim

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<sup>160</sup> See, e.g., *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 559 (5th Cir. 1981).

<sup>161</sup> The representative acts as a fiduciary for the entire class. See *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1305 (4th Cir. 1978).

<sup>162</sup> See, e.g., *In re S. Cent. States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 418 (M.D. La. 1980) (requiring “an actual showing of a real probability of potential conflict which goes to subject matter of suit”).

<sup>163</sup> Van Schaack, *supra* note 150, at 345.

<sup>164</sup> See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (holding that the class representative is responsible for paying costs of notice).

<sup>165</sup> Chung, *supra* note 57, at 521 (noting rhetorically, “what is the worth of evaluating hundreds, potentially thousands, of applications to participate for the purpose of granting a theoretical right to participate in court proceedings?”).

applications tend to raise similar claims based on similar facts.<sup>166</sup> It is thus highly likely that a victim from the first set of applications transmitted to the Registry would be certified to represent a significant percentage of the potential victims.

The ICC would also have to take some additional steps to facilitate the victims' participation as a class. The PTC would need to appoint a lawyer to represent the class action.<sup>167</sup> This class counsel would have to adequately represent the interests of the entire class.<sup>168</sup> The ICC could use the experience of domestic jurisdictions for guidance on how to apply the class action device. When determining class counsel in the United States, courts consider a series of factors, including the work the counsel has done in identifying or investigating potential claims in the action, the counsel's experience in handling class actions, and the resources the counsel is willing and able to commit to represent the class.<sup>169</sup> Additionally, the ICC would have to monitor the class to ensure that there were no conflicts of interests. If conflicts were found, the Court would have to decertify the class.<sup>170</sup> Alternatively, the Court could divide a class action lawsuit into more subclasses.<sup>171</sup> The *In re Holocaust Victim Assets Litigation* provides a pertinent example of such subclasses.<sup>172</sup> Hundreds of thousands of Holocaust victims claimed reparations from Swiss banks that had cooperated with the Nazis. However, as the victims included many groups of individuals with diverse claims, the plaintiff's class was further divided into five subclasses on the basis of the claims each victim asserted.

Further, commensurate with the FRCP,<sup>173</sup> the ICC could try to notify

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<sup>166</sup> It is for this reason that in both the *Lubanga* and the *Katanga* case the PTC created groups of common legal representatives.

<sup>167</sup> The class lawyer stems from FED. R. CIV. P. 23(c)(1)(B). It is also found in FED. R. CIV. P. 23(g)(1).

<sup>168</sup> The class counsel has to strike a balance between representing the entire class and providing a meaningful experience to the present victims. For more on the importance of the latter, see Van Schaack, *supra* note 150, at 281 ("[I]t is imperative that class counsel be committed to providing victims with a meaningful experience through litigation and to promoting the principle of human dignity that underlies the human edifice.").

<sup>169</sup> FED. R. CIV. P. 23(g)(1)(A).

<sup>170</sup> FED. R. CIV. P. 23, advisory committee's note (2003; see Amendments). See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) ("[I]t is obvious ... that a class divided between holders of present and future claims ... requires division into homogeneous subclasses under [former] Rule 23(c)(4)(B) [now FED. R. CIV. P. 23(c)(5)], with separate representation to eliminate conflicting interests of counsel.").

<sup>171</sup> FED. R. CIV. P. 23(c)(5).

<sup>172</sup> *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000)

<sup>173</sup> While notice is permissive for the first two types of class action, it is mandatory under the third, see FED. R. CIV. P. 23(c)(2). For the third type of class actions, a major purpose of the requirement to give notice is the power of each individual class member to opt out of the

all potential class members of the ongoing proceedings in order to present them with an opportunity to participate. The notice should include the contact information of the appointed class lawyer.<sup>174</sup> In the United States, the certifying court has discretion in choosing the notification method.<sup>175</sup> The court does not need to ensure that each absent class member received the notice, but only that the notice could have reached every such individual. In practice, U.S. courts have insisted that individual notice be sent to all members whose addresses are known or can be found through “reasonable effort,” which is determined on a case-by-case analysis.<sup>176</sup> Methods of notice have thus far included first-class mail, periodicals, posting notice, radio and television broadcasting, personally contacting as many class members as possible, obtaining and staffing toll-free telephone numbers to provide callers with information about the class action, and giving notice to various state agencies likely to come into contact with the class.

### C. *Adapting Class Action to the ICC*

In adapting the class action device to the ICC setting, it is important to consider the different institutional positions of the device in each setting. While in domestic courts class action is used in civil suits, in the ICC this device would be used in an international criminal trial—a significant departure from its original use. This section focuses on two elements that are central to the use of class action in U.S. courts. Even though both of these elements are ultimately inapplicable in the ICC, they nonetheless inform application of the class action device at the ICC. Notably, this section indicates the reasons for which these two elements of the class action device should not be instituted at the ICC. As such, it aims both to place some limits on the use of the class action device in the ICC and to emphasize that the importation of this device from US civil procedure cannot merely be a copy-paste endeavor.

Similar to human rights class actions in U.S. courts,<sup>177</sup> it would be hard to place victims’ class actions at the ICC exclusively under one of the three

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class action litigated, *cf. Besinga v. United States*, 923 F.2d 133 (9th Cir. 1991) (in which notice of right to opt out was not given).

<sup>174</sup> For a U.S. case on this point, see *Thompson v. Midwest Found. Indep. Physicians Ass’n*, 117 F.R.D. 108, 116, 118 (S.D. Ohio 1987) (directing notice to include names and addresses of class counsel).

<sup>175</sup> FED. R. CIV. P. 23(c)(2)(A); FED. R. CIV. P. 23 advisory committee’s note (2003 Amendments).

<sup>176</sup> FED. R. CIV. P. 23(c)(2)(B).

<sup>177</sup> After the Supreme Court’s ruling in *Ortiz v Fireboard Corp., Fibreboard Corp.*, 527 U.S. 815 (1999), human rights class actions in the U.S. will, in all likelihood, come under FED. R. CIV. P. 23(b)(2) or 23b3(b)(3). Van Schaack, *supra* note 150, at 335 (placing the human rights class actions under 23b2Rule 23(b)(2) or 23b3(b)(3)).

FRCP distinctions of Rule 23(b). In U.S. courts, depending on the claims asserted, the certified class falls within one of three types.<sup>178</sup> The first type is used either when different actions might lead to different obligations for the defendant (e.g. taxpayers challenging appropriation, in which different results may create different obligations for the government) or when adjudication with respect to individual class members would be dispositive of the interests of other members (e.g. when a defendant cannot pay everyone).<sup>179</sup> The second type is used for cases of injunctive relief or declaratory judgment that are applicable to the class as a whole.<sup>180</sup> Lawsuits under this grouping commonly focus on civil rights or First Amendment issues. The third and last type, known as a voluntary class, is used in cases of a predominant question of law or fact common to class members and in which class action is superior to other methods for adjudicating the controversy (e.g. cases of mass liability);<sup>181</sup> this last type is normally used for actions seeking monetary damages.

If the ICC were to adopt the class action device for victim certification, victims would be able to frame their claims so as to fall within any of the above FRCP rule 23(b) classes. Thus, in contrast to U.S. domestic jurisdiction, the possibility to alternate among these options diminishes the rule's importance, as the divisions are not pertinent to the ICC. ICC victims could claim monetary reparations, which would place them under the FRCP 23(b)(3) category; or alternatively fall instead under 23(b)(1) if the victims assert that the amount regulated by the Trust Fund is limited to a small pool of funds. Additionally, if the victims mainly assert that the Court issue a judgment on the present case, which would be analogous to a request for injunctive relief, the lawsuit would be able to fall under 23(b)(2).

The class action provision on opting out is also not pertinent to victim participation in the ICC setting. Unlike the prosecution and defense, victims are not full parties to the ICC proceedings.<sup>182</sup> An alleged victim only has the

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<sup>178</sup> FED. R. CIV. P. 23(b)(1)-(3).

<sup>179</sup> *See, e.g.,* In re Bendectin Prod.s. Liab. Litig., 749 F.2d 300, 305-06 (6th Cir. 1984) (failing to find that a limited fund would affect plaintiff's claim in a products liability action).

<sup>180</sup> *See, e.g.,* Bower v. Bunker Hill Co., 114 F.R.D. 587, 596 (E.D. Wash. 1986) (the plaintiffs were seeking declaratory judgment for medical benefits of their retirement plan); Heastie v. Community Bank, 125 F.R.D. 669, 679-680 (N.D. Ill. 1988) (all class members had signed same contract clause, so the defendant bank was acting on grounds that applied to all class members).

<sup>181</sup> *See, e.g.,* Kurczy v. Eli Lilly & Co., 160 F.R.D. 667, 680 (N.D. Ohio 1995) (denying class certification because the class action was not superior to individual lawsuits, which had already been filed by a majority of individuals); Moskowitz v. Lopp, 128 F.R.D. 624, 636 (E.D. Pa. 1989) (holding that common issues relating to liability were predominant).

<sup>182</sup> In the ICC Statute and Rules of Procedure and Evidence, the Prosecutor and the Defence are designated as "parties," while the victims are named "participants." *See, e.g., ICC Rules, supra* note 35, at subsec. 3; Chung, *supra* note 57, at 465 (arguing that victims are not

right to apply to a proceeding, and his or her application may be denied. If a victim does not participate in a certain set of proceedings in the ICC, by contrast, he is not barred from taking part in the future. Even though a future proceeding on the same crime is unlikely to occur at the ICC level,<sup>183</sup> the potential to participate in the future demonstrates that a victim who fails to receive notification of a criminal prosecution (which will take place regardless of his participation) has not suffered a violation of due process. Consequently, opting out of class representation is irrelevant in the ICC context.

#### IV. THE CLASS ACTION'S BENEFITS TO THE ICC

The present proposal that the ICC adopt a variation of the class action device (as outlined in greater detail in section III.B, *supra*) would drastically change many procedural and substantive steps taken by the ICC. Such a departure is justified, however, as the class action device would improve the process of victim certification at the ICC and solve problems created by the current scheme of victim certification at the ICC, to be discussed more below.

##### A. *The Class Action is Well-Suited for ICC Victims*

The class action device is well-suited to the needs of victims within the institutional capacity of the ICC because, as demonstrated by U.S. civil litigation, the class action works well with victims of mass crimes, its use would not detrimentally alter the interaction between the ICC and the victims, and the ICC is already familiar with many of the steps of the class action analysis.

The suitability of the class action device for the victims of the ICC is suggested by the success that the device has had with victim-initiated civil lawsuits in the U.S.<sup>184</sup> In numerous civil lawsuits victims of human rights atrocities, like those prosecuted under the ICC, have been grouped into class action suits. While most of these lawsuits have been dismissed for various

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*parties civiles* as in some civil law systems).

<sup>183</sup> It would be hard to imagine that the ICC, a court with limited means, could go after many people involved in the same incidents. To the contrary, current practice shows that the ICC Prosecutor selectively prosecutes a limited number of individuals in an effort to spread his attention throughout the world.

<sup>184</sup> Similar mechanisms have been used successfully in the international human rights sphere. *See* Aceves, *supra* note 135, at 358-90 (demonstrating how the class action device has been used by various international human rights institutions as a potent mechanism for victims of human rights abuses; specifically, examining its use in the United Nations Human Rights Committee, the European courts of Human Rights, and the Inter-American Commission on Human Rights).

jurisdictional reasons,<sup>185</sup> three cases provide an important illustration of the potential benefit victims can derive from the use of the class action device. These three examples are not entirely applicable to the ICC settings, as they are civil lawsuits in which the class is the moving party, but they illustrate that victims of human rights violations similar to those covered by the ICC have successfully asserted their interests through the use of the class action device.

A victim-initiated lawsuit targeting the assets of Ferdinand Marcos represented a watershed moment for victims in human rights litigation.<sup>186</sup> The case was a class action suit involving more than ten thousand plaintiffs against a former president of the Philippines who had fled to Hawaii. After the Ninth Circuit reversed the District Court's initial dismissal on the basis of the "act of state" doctrine,<sup>187</sup> various individual cases that had been filed in U.S. courts were consolidated in the District of Hawaii. The class of plaintiffs was composed of "all civilian citizens of the Philippines who, between 1972 and 1986, were tortured, summarily executed or 'disappeared' at the hands of Philippine military or paramilitary groups."<sup>188</sup> The Court divided this large class of plaintiffs into three subclasses: (1) individuals tortured by Marcos' subordinates, (2) heirs of those summarily executed by Marcos' subordinates, and (3) heirs of those who were "disappeared" by Marcos' subordinates.<sup>189</sup> It thus tried to ensure that claimants with significantly divergent interests were not consolidated into the same subclass. Under the Court's discretion, the victims who wanted to participate were required to opt-into the class by completing a claim form.<sup>190</sup> At the end of the trial, the jury awarded the participants in all three classes a total of \$700 million in compensatory damages.<sup>191</sup> This award was eventually reduced and as of now, few victims have received any compensation.<sup>192</sup> Nevertheless, this case has proved highly significant for

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<sup>185</sup> See, e.g., *Aguinda v. Texaco, Inc.*, 945 (2d Cir. 1998); *Doe v. Unocal Corp.*, 67 F. Supp. 625 (S.D. 2d 1140, 1141-42 (C.D. Cal. 1999)); *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D. N.Y. 1996).

<sup>186</sup> *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 771 (9th Cir. 1996).

<sup>187</sup> For more on the "act of state doctrine," see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>188</sup> *Hilao*, 103 F.3d at 774.

<sup>189</sup> *Id.* at 771, 774.

<sup>190</sup> *In re Estate of Marcos Hum. Rts. Litig.*, MDL 840-MLR, Order (D. Haw. May 16, 1991) (issuing and explaining the notice plan).

<sup>191</sup> *Estate of Marcos*, 910 at 1467, 1469.

<sup>192</sup> Van Schaack, *supra* note 150, at 287-89 (providing the history of the lawsuit after the jury award); Seth Mydans, *First Payments are Made to Victims of Marcos Rule*, N.Y. TIMES, Mar. 1, 2011, at A7, available at <http://www.nytimes.com/2011/03/02/world/asia/02-philippines.html> (noting first victims who received reparations from this lawsuit).

victims of human rights atrocities. Not only did the victims obtain a judicial victory against the defendants, but the decision also exemplifies the potential power a class action lawsuit can give to victims of human rights abuses.

Another important class action lawsuit initiated by the victims of a human rights abuse was one against Radovan Karadzic, leader of the Bosnian-Serbs.<sup>193</sup> The U.S. Court of Appeals for the Second Circuit certified the plaintiffs as a limited fund class<sup>194</sup> consisting of “all people who suffered injury as a result of rape, genocide, summary execution, arbitrary detention, disappearance, torture, or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb Forces under the command and control of [Karadzic] between April 1995 and the present.”<sup>195</sup> Following this certification, the *Karadzic* plaintiffs, who had already spent significant amounts of money on a separate lawsuit,<sup>196</sup> tried to opt out of the class. Their motion was denied, as it was considered that any independent lawsuit would “impair the ability of the class members to protect their interests.”<sup>197</sup> Ultimately, the class suit ended in a default judgment in favor of the plaintiffs. Furthermore, the aggregation of victim claims led to increased publicity of the victims’ plight.<sup>198</sup>

A third well-known class action lawsuit alleging human rights violations was filed by victims of the Nazi regime. Many thousands of victims brought the lawsuit against certain Swiss banks for their various roles during the WWII period. In 1997, four different class action lawsuits were consolidated in the Eastern District of New York, in what became the *In re Holocaust Victim Assets Litigation*.<sup>199</sup> Due to the diversity of the participants, the class was divided into five subclasses.<sup>200</sup> Grouping the numerous claims together as one overarching class resulted in an increase of the plaintiffs’ bargaining power. In 1998 the plaintiffs were able to reach a significant monetary settlement with the banks.<sup>201</sup> In approving the

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<sup>193</sup> Doe v. Karadzic, 866 F. Supp. 734, 736 (S.D.N.Y. 1994).

<sup>194</sup> See *supra* Part II (discussing FED. R. CIV. P. Rule 23(b)(1)).

<sup>195</sup> Doe v. Karadzic, 176 F.R.D. 458, 461 (S.D.N.Y. 1997).

<sup>196</sup> See Kadic v. Karadzic, 70 F.3d 232, 236-37 (2d Cir. 1995).

<sup>197</sup> Van Schaack, *supra* note 150, at 290-91 (describing the interaction between the two lawsuits and the court’s decision not to accept an opt-out).

<sup>198</sup> See, e.g., Neil A. Lewis, *Conflict in the Balkans: The Atrocities; U.S. Backs War-Times Lawsuit Against Bosnian Serb Leader*, N.Y. TIMES, Sept. 27, 1995, available at <http://www.nytimes.com/1995/09/27/world/conflict-balkans-atrocities-us-backs-war-crimes-lawsuit-against-bosnian-serb.html?pagewanted=1>.

<sup>199</sup> *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000).

<sup>200</sup> The five subclasses were composed of: a) individuals deprived of their deposited assets by the defendant banks, b) individuals whose assets were looted by the defendants, c) individuals forced to become refugees or not admitted into Switzerland, and d) two classes of victims who had been put into forced labor. *Id.* at 143-44.

<sup>201</sup> For the precise amounts of the settlement, see the official website of the settlement.

settlement, the Court mandated the creation of a notice scheme that would enable victims to opt-out. This scheme, when implemented, was a multilateral plan including “multilingual direct mail, worldwide publication in over five hundred newspapers, public relations efforts, the creation of survivors’ organizations, and internet and community outreach measures.”<sup>202</sup> It is considered to have been the most in-depth effort to notify a class.<sup>203</sup>

If the class action device were adapted to the ICC it would improve victim participation while still preserving important preexisting features.<sup>204</sup> Primarily, the six methods of interaction that the ICC currently uses between victims and the ICC would continue to be upheld, as follows:

1. Victims would still be allowed to apply to the Registry by filling out the victim participation form;<sup>205</sup>
2. Victims would still have the option to have individual legal representation;
3. Victims would still be able to request protection (similar to witness protection);
4. Victims would still be used as witnesses;
5. Victims would still be able to receive regular news, through Court-mandated notice and lawyer contacts;
6. Victims would still receive a judgment informed by their stories; and
7. Victims would remain individually eligible for monetary compensation, which would align to the provisions of the Rome Statute by expanding to include non-present victims.

#### *B. The Class Action is Well-Suited to the Institution of the ICC*

The ICC has the institutional capacity to apply the class action device. At present, the central considerations with class action lawsuits are already

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Swiss Bank Settlement: In re Holocaust Victim Assets Litigation, <http://www.swissbankclaims.com/Chronology.aspx> (last visited May 15, 2011).

<sup>202</sup> Van Schaack, *supra* note 150, at 300.

<sup>203</sup> Henry Weinstein, *Search Opens for Holocaust Claimants*, L.A. TIMES, June 29, 1999, at A3, available at <http://articles.latimes.com/1999/jun/29/news/mn-51182><http://articles.latimes.com/1999/jun/29/news/mn-51182>.

<sup>204</sup> See McGonigle, *supra* note 3, at 147 (arguing that changes of the current victim-court interaction are needed, such as a screening of the victim applications by the Registry).

<sup>205</sup> There are scholars who argue that participation via class action does not reach the same cathartic effect as individual lawsuits. See, e.g., M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INTL. INT’L L. 1069, 1105-06 (1999). But, at the current moment, victims, by being grouped into the scheme of common legal representation, do not receive participatory benefits equivalent to those of an individual lawsuit.

factors in the ICC's scheme for determining common legal representation. Although the ICC uses a different vocabulary, it conducts a similar analysis of commonality and typicality, as is done with class action, when determining the scheme of legal representation. First, the PTC looks at the type of crimes alleged, to ensure that common representation would not hurt individual claims. Then, in order to create groups that would avoid clashes of legal interest, the chamber looks at potential areas of tension amongst the victims. It thus examines the location of events and the victims' gender, ethnicity, and age.<sup>206</sup>

Also analogous to the class action procedure, the ICC has strict requirements for choosing a lawyer to represent the common group. The group lawyer has to be able and willing to represent the victims for the duration of the entire trial and should not have another case pending in front of the ICC. The representative is also required to have a connection with the relevant victims and the particular local situation. Finally, if the grouped victims cannot choose a common lawyer, the PTC will direct the Registry to appoint one.<sup>207</sup> This lawyer has to inform the Court if he believes that something would be good for some of the group but bad for others. The Court, in such instances, would attempt to act impartially. All these requirements and obligations match aforementioned provisions of FRCP 23.

The idea of extending notice to potential victims is also not entirely foreign to the present structure of victim participation in the ICC. In cases of common legal representation, the common lawyer has the responsibility of keeping the victims apprised of the situation.<sup>208</sup> Additionally, in all ICC cases, the outreach effort conducted by the Court (and by NGOs) helps reach the victims of the respective case.

### C. *The Class Action as a Solution to Current Problems in Victim Certification*

The class action device would primarily solve problems created by the ICC's current victim certification mechanism,<sup>209</sup> while also helping to end impunity and take into account all victims of mass atrocities.

Victim certification via the class action mechanism would help reduce impunity because instead of the current burdensome procedure of continuous

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<sup>206</sup> See, e.g., Katanga Victims July 2009, *supra* note 61 (dividing the victims into two groups on the basis of, among other things, their claims, roles in the events, ethnicities, and ages).

<sup>207</sup> Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Pre-Trial Chamber III, Decision on Victim Participation, para. d (Sep. 12, 2008).

<sup>208</sup> See Katanga Victims July 2009, *supra* note 61.

<sup>209</sup> Class representation would also solve many procedural problems that arise post-certification, i.e. at the participation stage.

examinations of incoming victim applications, the class action device would diminish the workload of the different ICC departments.<sup>210</sup> After the PTC has certified a class, the Registry would place all incoming applications with similar claims into their respective class and transfer them to the corresponding class counsel, rather than transmit applications of victims who fall within the certified class(es) to the PTC, the prosecution and the defence. These branches, then, would only receive the applications that assert claims not covered under the certified class(es). A victim and class action analysis would take place for each victim who asserts new claims. All other victims would be represented by the class representative and the class counsel. Victim applications would continue to remain a useful method of communication between victim and counsel.

By ensuring that the Court does not need to conduct individual certification analyses for each victim applicant, PTC proceedings would take significantly less time.<sup>211</sup> As stated above, the PTC I in *Katanga* issued ten orders on victim certification. In the United States, a class certification is conducted through a single motion.<sup>212</sup> Even if more than one class is certified, the ICC would eliminate time spent in the examinations of numerous victim applications. Further, the class action device would be a fixed procedure and not an ad hoc determination. As such, it would facilitate proceedings and increase predictability by enabling the other branches of the Court, i.e. the OTP, the defence and the VPRS, to communicate with the class lawyer from the very beginning of the victims' participation. At present, such communication can only take place at a subsequent time in the proceedings, after multiple victims have filed their applications and the Court has already placed them into a common group. Shorter delays yield more than just bureaucratic benefits; they are crucial in the fight against impunity by enabling the ICC to use its limited resources in other investigations and in helping to guarantee fair trial rights for defendants.<sup>213</sup>

The class action would also empower *all* victims, remedying the problems caused by the current exceptionally low victim application rate. By trusting one victim to represent the claims of all victims, the Court would

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<sup>210</sup> Aceves, *supra* note 135, at 399-400 (asserting that "class action litigation could reduce the caseload of international institutions . . . by bringing multiple victims together in a single proceeding").

<sup>211</sup> Van Schaack, *supra* note 150, at 306-07 (presenting how the massing of claims leads to economies of scale in the proceedings).

<sup>212</sup> These two documents, i.e. the ICC order on common legal representative and the US motion certifying a class, may be inapt for comparison. Nevertheless, both are detailed to allow valid and meaningful juxtapositions.

<sup>213</sup> Trumbull, *supra* note 23, at 803 (asserting that victim participation, by bringing about all the relevant information, is likely to end impunity).

extend recognition to the plight of all current victims without harming the participating ones.<sup>214</sup> While this may appear risky, it takes place, with frequent success, in U.S. federal courts.

For victims interested in achieving catharsis by participating in the Court proceedings, all forms of victim interaction with the Court will continue to exist—the only difference being that instead of the victim’s application being examined by the PTC, the prosecutor and the defence, it will now serve as a form of communication between the victim, the class representative and the class counsel.<sup>215</sup> This will not only ensure a more coherent strategy, but will also serve as a reference point for all victims’ interactions with other branches of the Court.

With regards to non-participating victims, as stated in Part II, the ICC will continue to face some inherent limitations. The class action, however, will still benefit the ICC by allowing it to reach a more balanced judgment, informed by the stories of a greater number of those affected.<sup>216</sup> With a class action, the stories, preferences and requests of the non-participating victims are more easily accommodated.<sup>217</sup> Outreach efforts and NGOs publicize the requests made by large numbers of victims.<sup>218</sup> The class counsel, as a representative of the entire class, would be in a good position to portray a picture that includes stories of the non-participating victims as well.<sup>219</sup> In contrast to a lawyer who depends on victim applications, the class counsel would not be limited to his present clients. Thus, the Court would avoid limiting its reach to the small number of participating victims and thereby be better able to ascertain the truth with regards to the examined

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<sup>214</sup> See Chung, *supra* note 57, at 513 (arguing indirectly for a set procedure for class certification by noting that at the current moment, the limited number of victims who file an application are “in the position of representing thousands or tens of thousands of [victims]... They have not, however, been determined to be representative. They simply are the few who have been fortunate enough to have had their applications considered and ruled upon”).

<sup>215</sup> See Van Schaack, *supra* note 150, at 317-18 (noting—albeit in a different context—that the aggregation of claims becomes “an arrow in the quiver” of the class members).

<sup>216</sup> See War Crimes Research Office, Victim Participation at the Case Stage of Proceedings, 2009 AM. U. WASH. C.L. 49-50 (advocating for also taking into account all the victims).

<sup>217</sup> See Van Schaack, *supra* note 150, at 309-10 (noting that in human rights violations, the claims that arise are similar for many victims and may thereby be “most effectively pled...through collective legal action”).

<sup>218</sup> See, e.g., Redress, Amnesty International, Human Rights Watch, FIDH activities on victims in Darfur. One such NGO’s action is available at <http://www.redress.org/publications/ICCBulletin7-Eng.pdf>.

<sup>219</sup> This becomes particularly important if the paramount role of the victims is to lead towards the discovery of the truth. See Cohen, *supra* note 41, at 373 (“The purpose of the victims’ participation is to shed light on to the suffering and harm that occurred during or as a consequence of the crime being considered and assist in the discovery of the truth.”).

facts.<sup>220</sup>

Apart from helping the Court, the class action could also benefit the victims, both the participating and non-participating. For participating victims, the class action would organize their representation in a single group with many members, allowing more coherence in their litigation tactics and consequently strengthening their position vis-à-vis the ICC's other institutional bodies (e.g. the prosecutor, the defense teams and the judicial chambers). Class certification can further benefit non-participating victims, as the class representative and class counsel have a fiduciary duty to protect the interests of the non-participatory victims.<sup>221</sup> Additionally, through broad notice provisions that extend to all possible class members, the ICC would have an opportunity to spread the information regarding victim participation in a more effective and efficient manner than present outreach efforts.<sup>222</sup> Further, a class action can offer the protection of anonymity to victims who do not participate because of fear of reprisal.<sup>223</sup>

Finally, the class action will also enable the ICC to properly protect the interests of all the victims in cases of monetary reparations.<sup>224</sup> In the U.S., the use of class action litigation in this field is not surprising; in the past, class action lawsuits by victims such as with the *in re* Holocaust Victim Asset Litigation substantively protected significant monetary interests of non-filing victims.

#### CONCLUSION

The class action device has the ability to ameliorate current procedural problems surrounding victim certification at the ICC. It would expedite the current process and allow one lawyer to represent all victims, known and unknown. As such, it has the potential not only to diminish impunity, but also to encompass the needs and desires of unrepresented victims. If undertaken, the introduction of the class action device would be but another

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<sup>220</sup> Interestingly, this increased power may result from the fact that the institutions are less likely to disregard the class representative's demands. See Aceves, *supra* note 135, at 400 (class actions are "more imposing than individual lawsuits").

<sup>221</sup> Van Schaack, *supra* note 150, at 319-20 (acknowledging that "representative justice may provide the only possible justice for victims of a particular policy or individual").

<sup>222</sup> See Aceves, *supra* note 135, at 400 (noting that a class action could "facilitate the participation of individuals who could not comply with the stringent procedural and evidentiary requirements of individual litigation").

<sup>223</sup> *Id.* at 400-01 (claiming that anonymity can significantly benefit a victims' class action lawsuit).

<sup>224</sup> See Van Schaack, *supra* note 150, at 308 (the class action "allows for a more accurate assessment of the systemic harm done to a group and can potentially generate more effective remedies to address class-wide injuries").

step in the ongoing effort to achieve better victim participation at the ICC. Hopefully, such participation will enable the Court to reach its ideal of preventing mass crimes and further victimization.

Finally, the underlying goal of this analysis has been to demonstrate that international criminal law, created at the intersection of the civil and common law systems, can still continue to improve its procedural framework—and hence substantive results—by cross-references. As such, while victim participation is currently largely modeled after characteristics of the civil law system, this essay argues that the common law class action device can make it more effective and meaningful. In such an environment of cross-fertilization, the law can work more effectively towards the goal of a fair and effective trial, as well as the meta-value of greater justice for all.