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Till the Rules of Procedure and Evidence Do Us Part: Should Deceased Persons Be Admitted as Victims before the ICC?

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Abstract

Can convicted persons at the ICC get away with murder? In the context of victim representation for participation and reparations, this has already happened. For many years, ICC case law ruled that victims who died before applying for participation and reparations could not be represented posthumously, rendering deceased persons practically invisible in that dimension of proceedings. However, a minority opinion arguing that the views, concerns, and reparations claims of some deceased victims should be considered is gaining renewed traction. The ICC now stands at a crossroads between two diametrically opposed interpretations. The approach ultimately adopted will affect the accountability of convicted persons, the ICC's role in truth-telling, and its legacy. This article argues that excluding applications on behalf of deceased victims is flawed and advocates abandoning unduly restrictive interpretations in favour of a consistent, victim-centred and human rights–anchored approach.

Keywords

victims – deceased persons – International Criminal Court – posthumous participation – posthumous reparations

1 Introduction

Can convicted persons at the International Criminal Court get away with murder? In the context of admitting victims for the purposes of participation and reparations, this has already occurred. The participation of victims in court proceedings ensures that their voices shape the narrative of a situation or case. They contribute to the discovery of truth and the chronology of events. Upon conviction, victims are entitled reparations where victims are meant to find their suffering recognised and redressed. The convicted person must remain accountable for his crimes and respond, in principle with his patrimony, for the harm caused. To obtain these procedural entitlements, individuals must submit an application to the Courts' Registry to gain the formal status of 'victim'.

The question of whether deceased persons can be admitted as victims – along with those that are alive – is far from incidental to the ordinary operations of the ICC. Many individuals die before justice is served precisely because of the nature of the crimes under its jurisdiction (war crimes, crimes against humanity, genocide and aggression) or the span of time between the commission of crimes and eventual judicial proceedings. The presence or absence of persons who were killed in connection to the crimes under investigation, or who pass away waiting for proceedings, has profound implications for the accountability of convicted persons during reparations, the ICC's capacity of building a historical record, the victims' right to truth-telling, and the eventual impact on other tribunals that are imitating its scheme for victims.

In the first decade of functioning, judges consistently rejected requests for the representation of deceased victims who had passed away before engaging with the Court. However, this position shifted in its second decade, with *some* posthumous representations being permitted. In the absence of definitive regulations or a Chamber's victim manual, the ICC stands at a critical juncture between two mutually exclusive legal interpretations. This article argues that each approach entails, respectively, differing degrees of structural exclusion. It advocates for a revised framework where all posthumous applications are open to being admitted because this would more closely align with the role of victim participation and reparations, and internationally recognised human rights standards.

Prior to the ICC, no international criminal tribunal had paid any special deference or reserved any concrete procedural function to victims.¹ The pro-victim shift of the 1998 Rome Statute was so important that, nowadays, the ‘need to provide justice to victims is commonly cited as one of the most important justifications for international criminal justice.’² The participation of victims is foreseen in article 68(3) and reparations in article 75 of the ICC Statute. The novelty of introducing these two possibilities within an international criminal tribunal at the Rome Conference was such that those articles had to be drafted in ‘skeletal’³ form. Similarly, the connected rules and regulations that make up the Rome legal framework were prepared amidst a scarcity of precedents. As a result, the development of the norms governing victim participation and reparations was meant to happen through the work of judges. Notably, in the realm of reparations, the Court has issued two sets of principles. In 2015, the Appeals Chamber published the *Lubanga* Reparations Principles, which have now been superseded by the *Ntaganda* Reparations Principles, issued by Trial Chamber VI in 2021.⁴

- 1 C. Jorda and J. de Hemptinne, ‘The Status and Role of the Victim’, in A. Cassese, P. Gaeta, and J. RWD Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002), pp. 1387–1420, at p. 1390; F. Mégret, ‘The Rome Conference: Institutional Design and the Constraints of Diplomacy’, in M. de Guzman and V. Oosterveld (eds.), *The Elgar Companion to the International Criminal Court* (Edward Elgar Publishing, Cheltenham, 2020), pp. 20–47, at p. 44.
- 2 N. Hodgson, ‘Victims as Agents of Accountability: Strengthening Victims’ Right to Review at the International Criminal Court’, 34 *Criminal Law Forum* (2023) 273–294, at p. 273.
- 3 L. Walley, ‘The Participation of Victims in the Process of Collective Reparations at the ICC’, in R. Jasini and G. Townsend (eds.), *Advancing the Impact of Victim Participation at the International Criminal Court* (ESCR · Oxford, 2020), pp. 77–93, at p. 78; see also JP. Pérez-León-Acevedo, ‘Assessing Victim Participation during Sentencing at the International Criminal Court’, 17(2) *Journal of International Criminal Justice* (2019) 431–451. See also W.A. Schabas, V. Oosterveld, and M. de Guzman, ‘The Dynamics of the Rome Conference’, in M. de Guzman and V. Oosterveld (eds.), *The Elgar Companion to the International Criminal Court* (Edward Elgar, Cheltenham, 2020), pp. 3–19, at pp. 17–18, explaining that, to salvage the approval of the Rome Statute, a package deal was presented to the delegations, full of compromises and bottom lines.
- 4 ICC – Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, ‘Annex A to Judgment on the Appeals against the ‘Decision Establishing the Principles and Procedures to be Applied to Reparations’ of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2’, 3 March 2015, ICC-01/04-01/06-3129-AnxA (‘Lubanga Reparations Principles’). The relevant paragraphs containing the reparations principles (paras. 28–103) were undisturbed by the appeal against the order. ICC – Trial Chamber VI, *Prosecutor v. Ntaganda*, ‘Reparations Order’, 8 March 2021, ICC-01/04-02/06-2659, paras. 28–103 (hereinafter *Ntaganda Reparations Principles*).

However, the assessment after almost 30 years of the ICC, is that its Chambers have produced a volume of precedent where many victim aspects are uncharted, under-theorized or outright inconsistent.⁵ This did not escape the Independent Expert Panel that audited the Court in 2020, which referred to ‘inconsistencies in procedure adopted by different Chambers creating confusion and uncertainty’⁶ in the legal representation of victims, an ‘overly complex, bureaucratic, inconsistent’⁷ processes for participation, and ‘inconsistency and unpredictability to the reparations process.’⁸

Critiques to what the ICC does or fails to do for victims abound in scholarship. At the meta-level, some have taken issue with the ICC’s narrow scope of victim representation, especially in light of the massive scale of victimization in the Court’s cases.⁹ Terms like ‘juridification of victims’¹⁰ were coined to describe how only a small, selected group is allowed to participate in proceedings. Others have characterised the ICC’s victim engagement system as one that ‘transforms victims into productive and reproductive capitalist subjects.’¹¹ Other strand of criticism focuses on whether the ICC victim scheme is actually delivering. For example, some question the authenticity of representation when the Court engages with hundreds or thousands of victims, but only a small number, the ‘statistical victim’ are formally acknowledged.¹² In addition, there seem to be ‘potential for groups of victims

5 See e.g., L. Moffett, ‘Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague’, 13(2) *Journal of International Criminal Justice* (2015) 281–311, at pp. 291–292; M. Cohen, *Realizing Reparative Justice for International Crimes* (Cambridge University Press, Cambridge, 2020), pp. 102–111.

6 Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report (30 September 2020), International Criminal Court – Assembly of States Parties, ICC-ASP/19/16, para. 865.

7 *Ibid.*, para. 858.

8 *Ibid.*, para. 894.

9 See e.g., K. McEvoy and K. McConnachie, ‘Victims and Transitional Justice: Voice, Agency and Blame’, 22(4) *Social & Legal Studies* (2013) 489–513; C. Schwöbel-Patel, ‘The ‘Ideal’ Victim of International Criminal Law’, 29(3) *European Journal of International Law* (2018) 703–724; L. Moffett, *Justice for Victims Before the International Criminal Court* (Routledge, Oxon, 2014), pp. 21–24.

10 S. Kendall and S. Nouwen, ‘Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood’, 76(3/4) *Law and Contemporary Problems* (2013) 248–250.

11 L. Ullrich, *Victims and the Labour of Justice at the International Criminal Court: The Blame Cascade*, Clarendon Studies in Criminology (Oxford University Press, 2024), p. 8.

12 See e.g. E. Haslam and R. Edmunds, ‘Whose Number is it Anyway? Common Legal Representation, Consultations and the ‘Statistical Victim’’, 15(5) *Journal of International Criminal Justice* (2017) 931–952; C. Garbett, ‘From Passive Objects to Active Agents: A

to be under-represented¹³ due to, for example, age or gender. Others are disenchanted with how reparations are working in practice.¹⁴

This article intervenes in this latter body of literature by delving into a largely overlooked but practically significant issue: whether posthumous victim representation should be permitted within the ICC framework. While existing scholarship has extensively critiqued the legitimacy, representativeness, and practical efficacy of victim participation and reparations, it has paid relatively little attention to how the Court should treat victims who have died before or during proceedings.¹⁵ By bringing posthumous representation and reparations into focus, this article advances a novel critique of the ICC's current structure. It proposes a more normatively coherent framework for victim legal schemes that is aligned with the purposes of victim representation, and the human rights standards that need to inform the Rome Statute's interpretation.

Section 2 explains how individuals can obtain victim status before the ICC and under what circumstances such requests may be submitted by a third party. Section 3 critically examines the Court's case law, identifying a sharp distinction between the resumption of applications on behalf of deceased persons and new applications submitted only after the individual's passing. It analyses the reasons why the latter have been rejected and argues that this approach is untenable. Section 4 advances four novel normative reasons substantiating the argument that the ICC should consider applications submitted on behalf of deceased persons.

Comparative Study of Conceptions of Victim Identities at the ICTY and ICC', 15(1)*Journal of Human Rights* (2015) 40–59, at p. 49.

- 13 A. Jones, 'The demographics of victim participation at the International Criminal Court', *Leiden Journal of International Law* (2025) 1–28, p. 28.
- 14 C. Ferstman, 'Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness', in C. Ferstman and M. Goetze (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill | Nijhoff, Leiden, 2020), pp. 446–478, at p. 446; L. Moffett and C. Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court', 34(3) *Leiden Journal of International Law* (2021) 749–769, at p. 751.
- 15 Except for T. Bacharova, *The Standing of Victims in the Procedural Design of the International Criminal Court* (Brill Nijhoff, Leiden, 2017), pp. 23–38, analysing the pros and cons of the divergent lines of case-law at the Court; K. Sharma, 'Representatives of Absent Victims or Indirect Victims? An Analysis of Intergenerational Victimhood at the International Criminal Court', in H. Ruiz Fabri, V. Rosoux and A. Donati (eds.), *Representing the Absent* (Nomos, Baden-Baden, 2023), pp. 39–68, at pp. 46–47 and 66–68, noting the divided approach of the Court. On the broader idea of afterlives of international criminal justice and their aesthetic function, see M.A. Drumbl and C. Fournet, 'Introduction', in M.A. Drumbl and C. Fournet (eds), *Sights, Sounds, and Sensibilities of Atrocity Prosecutions* (Brill, Leiden, 2024) 1–26.

2 Becoming a Victim Before the ICC

The notion of ‘victim’ is defined in the Rules of Procedure and Evidence (RPE), a subordinate instrument adopted by the Assembly of States Parties to facilitate the Statute’s application. According to the RPE, both natural persons (rule 85(a)) and legal entities (rule 85(b))¹⁶ can be victims of crimes within the jurisdiction of the ICC.

Rule 85(a) RPE says that victims mean ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court’. The ICC case-law sustains that natural persons encompass both direct and indirect victims so long as they have endured ‘personal, but not necessarily direct, harm’.¹⁷ Direct victims ‘are those whose harm is the result of the commission of a crime for which the defendant was convicted’¹⁸ and for which a causal link must exist. Indirect victims ‘are those who suffer harm as a result of the harm suffered by the direct victim’¹⁹ because of their bond.²⁰ For example, in the war crime of using, conscripting or enlisting children,²¹ a child soldier would be the direct victim and his mother would qualify as an indirect one due to the suffering caused by the loss of her child.

Direct and indirect victims have the same entitlements to participate and receive reparations. There is not, so to speak, a victim hierarchy. The main practical difference between direct and indirect victims would normally lie in the modality of reparations they would receive. For instance, a permanently wounded child soldier may need prosthetics and physical rehabilitation, whereas the reparations for his mother would assume other forms. In practice, many individuals qualify as both direct and indirect victims simultaneously.

Individuals willing to gain victim status before the International Criminal Court must submit an application to the Court’s Registry.²² The form²³ asks details such as their identity, an account of the events, and the

¹⁶ Rule 85(b) RPE and *Ntaganda Reparations Principles*, para. 32.

¹⁷ *Ntaganda Reparations Principles*, para. 33.

¹⁸ *Ibid.*, para. 34. For participation, instead of a crime for which the defendant has been convicted, it would read for which a defendant has been accused.

¹⁹ *Ibid.*, para. 35.

²⁰ *Ibid.*, para. 36.

²¹ Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.

²² Rule 89 RPE and regulation 86 of the Regulations of the Court. For reparations, see rule 94 RPE.

²³ A standard application form can be found in <https://www.icc-cpi.int/about/victims/victim-application-forms> and <https://www.icc-cpi.int/sites/default/files/2025-03/2019-JointApplication-Form-Individuals-PDF-ENG.pdf>.

harm suffered. The Registry submits its assessment to the competent Chamber, which then takes a final decision on the admissibility of the victim to the stage of proceedings in place.²⁴ There is no appeal against these decisions, but also no barrier for the interested person to re-apply.²⁵

A victim may become interested and apply at any point to the Court while the proceedings have not concluded. That a victim has chosen not to participate in trial proceedings is not an impediment for them to claim reparations after there is a conviction. This is underpinned by the ICC principles of equality and procedural fairness in reparations, according to which '[a]ll victims are to be treated fairly and equally during the reparations process, irrespective of whether they participated in the trial proceedings.'²⁶

2.1 *Third-Party Application*

The Rules of Procedure and Evidence presume that a person would normally apply by themselves – with perhaps assistance from a lawyer or other trained intermediary – but as the *author* of the document itself. Only rule 89(3) RPE stipulates submission by a third-party:

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.

Able adults can therefore delegate this to a third person when there is mediating consent. Outside of that scenario, a third party can take over the representation of a potential victim so long as he is a child or disabled. The RPE does not specify the type of disability that one must have, but presumably, this rule refers to psychological disabilities that have a bearing on the victim's mental faculties.

²⁴ For participation, see regulation 86 RoC; for reparations, regulations 62–65 of the TFV Regulations, in conjunction with the established case-law according to which the final approval of victims as beneficiaries of individual reparations lies with the competent Chamber. See, e.g., ICC – Appeals Chamber, *Prosecutor v. Al Mahdi*, 'Judgment on the Appeal of the Victims against the 'Reparations Order'', 8 March 2018, ICC-01/12-01/15-259-Red2, paras. 69–72; ICC – Appeals Chamber, *Prosecutor v. Ntaganda*, 'Judgment on the Appeals against the Decision of Trial Chamber VI of 8 March 2021 Entitled 'Reparations Order'', 12 September 2022, ICC-01/04-02/06-2782, paras. 7–16.

²⁵ Rule 89(2) RPE.

²⁶ *Ntaganda Reparations Principles*, para. 41; and *Lubanga Reparations Principles*, para. 12.

This rule envisages that the application may be made 'by a person', without restricting this possibility to 'natural' ones only. Therefore, there is nothing in rule 89(3) RPE that would prevent legal entities (such as NGOs and the like) to intervene on behalf of this type of victims.²⁷

3 ICC Case-Law on Deceased Victims

Rule 89(3) RPE makes no mention of the dead. It rather operates in a binomial reality in which either the victim is alive and well to consent intervention on their behalf, or they are lacking capacity by reason of being a child or disabled. This gap was soon put to the test as, naturally, the ICC eventually had to deal with victims who had passed away, sometimes even as a result of the crime at stake. From that moment, the Court's case-law has made a sharp distinction between incidents that involve merely *resuming* victim engagement with the Court after someone's passing, and applying to the Court for the first time on behalf of a dead person.

3.1 *Resumption of Applications*

When the victim has died after having submitted an application to participate and/or receive reparations, judges have consistently permitted the continuation of action by the victim's heirs or other appointed third parties. According to this established line of jurisprudence, a person can resume an application on behalf of a deceased victim if he or she can provide evidence of (i) the victim's death; (ii) the relationship to the victim; and (iii) where the applicant cannot easily be presumed to be entitled to continue the action or represent the family,²⁸ he or she must demonstrate having been appointment

²⁷ This is in line with the forms that the Court's Registry made available in proceedings connected to the Prosecutor's Request for Authorisation of an Investigation in the *Myanmar/Bangladesh* situation. These could 'be used by victims or persons/organizations representing victims who have been allegedly forcibly displaced from Myanmar.' Section 5 of the form said 'If you are a person/organization representing victim(s) briefly describe your relationship to the victim(s)' and one of the options read 'NGO/Civil Society representative'. The form may be accessed at https://www.coalitionfortheicc.org/sites/default/files/cicc_documents/vprs-form-eng.pdf.

²⁸ ICC – Trial Chamber VI, *Prosecutor v. Ntaganda*, 'Fourth Decision on Victims' Participation in Trial Proceedings', 1 September 2015, ICC-01/04-02/06-805, fn. 10; ICC – Trial Chamber IX, *Prosecutor v. Ongwen*, 'Decision on LRV Request Concerning the Deaths of Participating Victims', 30 August 2017, ICC-02/04-01/15-962, paras. 3–4.

by the family members of the victim in question.²⁹ The modality of third-party intervention will vary depending on whether the process is at trial or reparations stage. For trial participation, the resumption of such an application comes with the limitation that no new views and concerns can be lodged on behalf of the deceased victim.³⁰ Moreover, if a victim dies after having been admitted to proceedings, the legal representative of victims has a due diligence obligation to contact their surviving relatives 'regarding the continuation of the action, and to inform the Chamber accordingly as soon as possible.'³¹

In reparations, awards can accrue to the benefit of the heir.³² With the exception of monetary compensation, many reparations modalities are

29 ICC – Trial Chamber I, *Prosecutor v. Gbagbo and Blé Goudé*, 'Decision on the Resumption of Action Applications', 11 October 2017, ICC-02/11-01/15-1052, paras. 12–17;

ICC – Trial Chamber III, *Prosecutor v. Bemba*, 'Decision on 'Requête relative à la reprise des actions introduites devant la Cour par des victimes décédées'', 24 March 2016, ICC-01/05-01/08-3346, paras. 28–31; ICC – Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo Chui*, 'Decision on the Applications to Resume Action Submitted by the Family Members of Deceased Victims a/0025/08, a/0051/08, a/0197/08 and a/0311/09', 14 June 2011, ICC-01/04-01/07-3018-tENG, paras. 23, 25, 27, 29; ICC – Trial Chamber VI, *Prosecutor v. Ntaganda*, 'Fourth Decision on Victims' Participation in Trial Proceedings', 1 September 2015, ICC-01/04-02/06-805, para. 8; ICC – Trial Chamber VIII, *Prosecutor v. Al Mahdi*, 'Decision on LRV Request for Resumption of Action for Deceased Victim a/35084/16', 2 June 2017, ICC-01/12-01/15-223, paras. 2–4; ICC – Trial Chamber II, *Prosecutor v. Katanga*, 'Décision relative à la demande de reprise d'instance introduite par un proche de la victime décédée a/0265/09 et de désignation d'un nouveau mandataire pour représenter la victime a/0071/08', 12 December 2016, ICC-01/04-01/07-3721.

In the context of reparations, see e.g.: ICC – Trial Chamber VIII, *Prosecutor v. Al Mahdi*, 'Decision on the Request of the Legal Representative of Victims for Resumption of Action for Deceased Victims a/10283/21 and a/10293/21', 7 July 2021, ICC-01/12-01/15-393; ICC – Trial Chamber II, *Prosecutor v. Ntaganda*, 'Addendum to the Reparations Order of 8 March 2021', 14 July 2023, ICC-01/04-02/06-2858-Red, para. 137.

30 See e.g., ICC – Trial Chamber VI, *Prosecutor v. Ntaganda*, 'Fourth Decision on Victims' Participation in Trial Proceedings', 1 September 2015, ICC-01/04-02/06-805, paras. 7–8.

31 ICC – Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo Chui*, 'Decision on the Disclosure of the Identity of Victims to the Parties and Order to the Prosecutor and the Defence to Submit Additional Observations in Respect of Certain Deceased Victims', 11 April 2011, ICC-01/04-01/07-2827-tENG, para. 12.

32 *Ntaganda Reparations Principles*, paras. 41 and 44. See also, ICC – Trial Chamber II, *Prosecutor v. Katanga*, 'Decision on the Application for Resumption of Action Brought by Family Members of Deceased Victim a/0195/08', 9 November 2021, ICC-01/04-01/07-3891, paras. 8–10; ICC – Trial Chamber VIII, *Prosecutor v. Al Mahdi*, 'Decision on the Request of the Legal Representative of Victims for Resumption of Action for Deceased Victims a/11180/21 and a/11182/21', 21 December 2021, ICC-01/12-01/15-437, paras. 5–9; ICC – Trial Chamber II, *Prosecutor v. Ntaganda*, 'Addendum to the Reparations Order of 8 March 2021', 14 July 2023, ICC-01/04-02/06-2858-Red, para. 137.

intransmissible, such as physical and psychological rehabilitation. In these circumstances, it would be for the Trial Chamber in question to decide on a case-by-case basis whether to transmute the value of those reparations into cash, or limit itself to symbolically pronounce the reparation award in favour of the victim without triggering its implementation.

The line of jurisprudence on resumption of applications is crucial to appreciate that the ICC does not have any principled opposition to entertain actions on behalf of deceased victims. It buttresses the stance that, at the ICC, death does not signify an abrupt end to their claims. These rights to participate and receive reparations can outlive the victim.

3.2 *De Novo Applications*

The ICC's case law is divided on *silent* deceased victims – those who died without engaging the Court. Can someone apply on behalf of a deceased child soldier or a parent who died waiting for proceedings? Can an NGO apply for victims who then passed away due to Ebola or Covid-19? The answer varies depending on the Chamber.

3.2.1 The Restrictive Approach: De Novo Applications Are Not Permitted

This subsection recounts the rationale behind the ICC restrictive approach (not allowing posthumous applications) and critically discusses the flaws behind the Court's reasoning in defending this position.

The Court first addressed posthumous applications in the Darfur (Sudan) situation, where massive killings had been a common denominator. The only person to have stood trial and be convicted in this situation, Abd-Al-Rahman (aka 'Ali Kushayb'), leader of the Janjaweed forces, 'encouraged and gave instructions that resulted in the killings, the rapes and destruction committed by the Janjaweed [...] mainly by the exhortations which accompanied his orders to 'wipe out and sweep away' [...] and the words 'don't leave anyone 'behind and bring no one alive'.³³ In addition to those who died in this unspeakable manner, others may have perished for other causes since the investigation began, including recently because systematic killings have again resumed.³⁴ Can these fatal victims count on their own right for participation

33 International Criminal Court, *Transcript of The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman*, page 26, available at icc-cpi.int/sites/default/files/Transcripts/0902ebd180cb9b08.pdf (accessed on 30 November 2025), p. 26.

34 Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights Situation in Sudan, 1 January to 30 June 2025*, (<https://www.ohchr.org/sites/default/>

and reparations? In 2007, Pre-Trial Chamber I had to grapple with the applications of on behalf of two late individuals (i.e. the applicants), who were seeking victim status:

At the outset, the Single Judge notes that Applicants a/0025/07 and a/0027/07 are deceased. The Single Judge points out that rule 89(3) of the Rules limits the submission of applications on behalf of others to applications made on behalf of children under the age of 18 and disabled persons. There is however no provision that permits applications to be made on behalf of deceased persons. Furthermore, rule 89(3) of the Rules allows the submission of an application on behalf of a person, provided that the person has given his or her consent. The Single Judge notes that such consent is impossible in the case of deceased persons. *It is therefore the Single Judge's view that deceased persons do not fall within the meaning of 'natural persons' under rule 85(a) of the Rules.*³⁵

There are three reasons why this passage is flawed. First, it wrongly equates the ability to give consent with someone's status as a 'natural person'. These two parameters are fundamentally distinct concepts. If this equivalence between the ability to give consent and natural personhood held true, then children and disabled individuals would not qualify as natural persons either. Second, the judge based her decision on a hermetic reading of rule 89(3) RPE, without considering the broader normative framework of the Rome Statute to which the RPE are subordinate, especially human rights (art. 21(3) of the Rome Statute). Section 4.4 below examines human rights standards in connection to dead persons and *locus standi*.

Third, the Rome Statute 'advances the general stance that death is not a fact which necessarily precludes all rights or legal interests accorded to the individual.'³⁶ This is true also for convicted persons. The Statute casts its personal jurisdiction over 'natural persons'³⁷ and, normally, criminal jurisdiction

files/documents/countries/sudan/ohchr-report-human-rights-situation-in-sudan-1-january-30-juin-2025.pdf (last accessed on 30 November)).

35 ICC – Pre-Trial Chamber I, *Situation in Darfur*, 'Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07', 6 December 2007, ICC-02/05-11, para. 36 (emphasis added).

36 Bacharova, *supra* note 15, p. 30.

37 Article 25(1) Rome Statute.

‘cannot be exercised over a deceased person.’³⁸ However, in cases new evidence appears or a judge has acted in a way that has led to their removal, article 84 foresees the revision of the conviction or sentence of the convicted person, even after his death. When those grounds are met, those qualified to apply are:

[t]he convicted person or, *after death*, spouses, children, parents or one person alive at the time of the accused’s death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person’s behalf.

This means that, even for convicted individuals, death does not automatically negate the status of natural persons.³⁹ Moreover, individuals who had a close personal connection – spouses, children, parents – and the Prosecutor, do not need the consent of the deceased person to bring a revision action, while only third parties outside this list do. By contrast, the 2007 *Darfur* victim decision, in insisting on the existence of prior consent, subjected victims to more stringent requirements for having their claims represented than those imposed on convicted persons.

This Darfur 2007 reasoning was endorsed by other Chambers in several situations and constituted the ICC dominant approach for several years.⁴⁰ In

38 ICC – Pre-Trial Chamber I, *Prosecutor v. Al-Werfalli*, ‘Decision Terminating Proceedings against Mr Mahmoud Mustafa Busayf Al-Werfalli’, 15 June 2022, ICC-01/11-01/17-24, para. 4.

39 Cf. In *Delic*, the ICTY had to decide whether to continue appeal criminal proceedings against a defendant who had suffered an atemporal death. The ICTY Appeals Chamber ruled that ‘the personal jurisdiction of the Tribunal is limited to ‘natural persons’, which, read in the context and in light of the [ICTY] Statute’s object and purpose, should be understood in its ordinary meaning, *i.e.*, the living.’ ICTY – Appeals Chamber, *Prosecutor v. Delic*, ‘Decision on the Outcome of Proceedings’, 29 June 2010, IT-04-83-A, para. 6.

40 ICC – Pre-Trial Chamber I, *Situation in the Democratic Republic of Congo*, ‘Corrigendum to the ‘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’’, 31 January 2008, ICC-01/04-423-Corr-tENG, paras. 23–25;

ICC – Pre-Trial Chamber I, *Prosecutor v. Katanga and Ngudjolo Chui*, ‘Public Redacted Version of the ‘Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case’’, 10 June 2008, ICC-01/04-01/07-579, paras. 60–63; ICC – Pre-Trial Chamber I, *Situation in the Democratic Republic of Congo*, ‘Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of

what follows, I scrutinise those decisions that offered additional arguments to deny posthumous applications.

In 2009, Trial Chamber II rejected applications made on behalf of victims who died after the Bogoro attack (DRC) during proceedings against Mr. Katanga, even though this attack represented the crux of the case. Noting that rule 89(3) RPE was silent on the matter, the Chamber argued it was unclear what the drafters of the Rome Statute intended regarding deceased victims.⁴¹

This reasoning overlooks that the numerous gaps in the ICC's victim legal scheme are not accidental. The lack of explicit guidance should instead trigger judges' gap filling function, which would have required analysing this issue beyond rule 89(3) RPE.

Then, Trial Chamber II continued by problematizing the existence and content of a deceased person's consent because:

[s]uch consent, unless the deceased thought to give express consent while still alive, will in most cases prove to be impossible to establish. In any event, said consent will be impossible to prove when the person died during an attack, as will often be the case.⁴²

Using the death of a person who has been killed during an attack as an impediment to be represented as a victim adds a degree of institutional

Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, 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', 3 July 2008, ICC-01/04-505, paras. 22–23; ICC – Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo Chui*, 'Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, with Confidential ex parte Annex Only Available to the Registry and to the Legal Representatives of the Victims', 23 September 2009, ICC-01/04-01/07-1491-Red-tENG, paras. 49–56; ICC – Pre-Trial Chamber II, *Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, 'Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, with Confidential Annex', 26 August 2011, ICC-01/09-02/11-267, paras. 45–57.

- 41 ICC – Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo Chui*, 'Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, with Confidential ex parte Annex Only Available to the Registry and to the Legal Representatives of the Victims', 23 September 2009, ICC-01/04-01/07-1491-Red-tENG, para. 54: '[i]t is therefore impossible to draw any conclusion as to what exactly the States Parties had in mind regarding the issue of deceased victims.'
- 42 ICC – Trial Chamber II, *Prosecutor v. Katanga and Ngudjolo Chui*, 'Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, with Confidential ex parte Annex Only Available to the Registry and to the Legal Representatives of the Victims', 23 September 2009, ICC-01/04-01/07-1491-Red-tENG, para. 56 (footnotes omitted).

gagging to the act of unlawful killing. The Trial Chamber also questioned the reliability of the content of such consent saying that ‘a person acting on behalf of a deceased person cannot be in a position to convey the views and concerns of the deceased accurately, in the sense of article 68(3) of the Statute.’⁴³ This line of reasoning appears under-theorised. The judges failed to explain why surrogate expression of views is considered acceptable when made on behalf of children or incapacitated persons, yet deemed inherently unreliable in the case of deceased victims. Rather than confronting this inconsistency, the Chamber adopted an absolutist position, preferring the complete exclusion of deceased victims’ representation over any form of approximate representation. Yet, approximation is a structural feature of victim participation before the ICC, even in relation to living, competent adults, particularly given the scale of victim groups. In practice, not every victim’s views and concerns are individually or perfectly conveyed. To refuse any representational status to deceased victims on the basis that accuracy cannot be guaranteed, reflects an unrealistic standard that privileges formal purity over meaningful inclusion.

Mr. Germain Katanga was eventually convicted as an accessory for, *inter alia*, murder as both a war crime and a crime against humanity.⁴⁴ However, the direct victims of these crimes were not accorded a distinct space in the *Katanga* Reparations Order. Their unique and irreparable harm was not recognised in its own right, effectively allowing the convicted to escape accountability for murder within the reparations process. Instead, the deaths of these victims were treated merely as evidentiary support for the claims of indirect victims seeking reparations for psychological harm.⁴⁵

Precisely in *Katanga*, the late Judge Hans-Peter Kaul appended a partly dissenting opinion expressing the view that successors ‘should have the right to represent the interests of the deceased person as well as their own’⁴⁶ in both the participation and reparations phase. This judge spearheaded the, at first, minority approach of permitting *de novo* applications on behalf of dead victims, which will be discussed in the section immediately after this one.

43 *Ibid*, para. 56 (footnotes omitted).

44 ICC – Trial Chamber II, *Prosecutor v. Katanga*, ‘Judgment Pursuant to Article 74 of the Statute’, 7 March 2014, ICC-01/04-01/07-3436-tENG, p. 658.

45 ICC – Trial Chamber II, *Prosecutor v. Katanga*, ‘Order for Reparations pursuant to Article 75 of the Statute’, 24 March 2017, ICC-01/04-01/07-3728-tENG, paras. 76–139.

46 ICC – Trial Chamber II, *Prosecutor v. Katanga*, ‘Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims – Partly Dissenting Opinion of Judge Hans-Peter Kaul’, 23 September 2009, ICC-01/04-01/07-1491-Red-tENG, para. 5.

In 2011, Pre-Trial Chamber II dealt with the deceased victim issue in a case within the situation in Kenya, which involved murder as a crime against humanity.⁴⁷ After noting ‘that different Chambers of this Court [had] advanced conflicting interpretations on whether an application for participation in the proceedings could be submitted on behalf of a deceased person,’⁴⁸ the Single Judge denied the possibility of such applications because:

Only in the two cases provided for *expressis verbis* in the said provision [rule 89(3) RPE] it is possible that an application for participation be submitted by someone on behalf of the victim without the requirement of the victim’s explicit consent. The Single Judge takes the view that such exceptions are grounded on the fact that a child – as well as in some instances people with serious disabilities – cannot give a legally valid consent. Accordingly, the Single Judge is of the view that the *ratio* behind the participation on behalf of a victim who is a child or a disabled cannot be applied in case of an application on behalf of a deceased person due to the essential difference between the two scenarios. In the instances referred to in rule 89(3) of the Rules an application is submitted on behalf of a victim – who is a natural person – either with the explicit consent of the victim or in the hypotheses in which no valid consent can be given either because the victim is a child or is disabled. Conversely, in the scenario sub judice a deceased individual cannot give consent for the submission of an application on his or her behalf.⁴⁹

47 The case against Mr. Francis Kirimi Muthaura, Mr. Uhuru Muigai Kenyatta, and Mr. Mohammed Hussein Ali was ultimately abandoned after charges were not confirmed or were withdrawn. See, ICC – Trial Chamber II, *Prosecutor v. Muthaura, Kenyatta and Ali*, ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, 23 January 2012, ICC-01/09-02/11-382-Red; ICC – Office of the Prosecutor, *Prosecutor v. Muthaura and Kenyatta*, ‘Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura’, 11 March 2013, ICC-01/09-02/11-687; ICC – Trial Chamber V(B), *Prosecutor v. Kenyatta*, ‘Decision on the Withdrawal of Charges against Mr Kenyatta’, 13 March 2015, ICC-01/09-02/11-1005.

48 ICC – Pre-Trial Chamber II, *Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, ‘Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, with Confidential Annex’, 26 August 2011, ICC-01/09-02/11-267, para. 46.

49 ICC – Pre-Trial Chamber II, *Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, ‘Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings, with Confidential Annex’, 26 August 2011, ICC-01/09-02/11-267, para. 49.

This passage is deeply tautological. It falls short of explaining why the two groups – children / disabled individuals and deceased persons – are fundamentally different in this respect. It does not justify that the *ratio* (i.e. inability to give consent) does not apply to deceased persons exactly for the same reason it applies to children and the disabled. In fact, the opposite argument could be made that such *ratio* could be extended to dead victims because, like children and disabled individuals, they are unable to give consent.

In 2013, the Pre-Trial Chamber of *Gbagbo*, while trying to circumvent the question, ended up adding an extra reason to reject post-mortem applications. The decision related to 12 applicants intending to participate on behalf of their deceased relatives. The Single Judge did ‘not consider it necessary to entertain a discussion on whether or not the possibility to apply for participation on behalf of deceased victims is foreseen by the legal framework of the Court’⁵⁰ because the living applicants qualified as indirect victims. In other words, in the opinion of this Chamber, the suffering of a relative acted as a form of substitute for that of the deceased.

3.2.2 The Open Approach: Case-Law Allowing Applications on Behalf of the Deceased

At the other end of the spectrum, there are decisions that admit applications *de novo* made on behalf of deceased victim. The earliest example is from 2008 when the late Judge Hans-Peter Kaul, acting for Pre-Trial III in the *Bemba* case, said:

The Single Judge is aware that rule 89(3) of the Rules establishes that a person may act ‘with the consent of the victim’ or ‘on behalf of a victim, in the case of a victim who is a child or (...) a disabled person’. However, the Single Judge holds that the question whether a deceased person may be recognized as a victim of the case must be decided in conformity with internationally recognized human rights and related jurisprudence pursuant to article 21(3) of the Statute. The Single Judge finds it self-evident that a victim does not cease to be a victim because of his or her death.⁵¹

⁵⁰ ICC – Pre-Trial Chamber I, *Prosecutor v. Gbagbo*, ‘Corrigendum to the Second Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings’, 6 February 2013, ICC-02/11-01/11-384-Corr, para. 40. See also: ICC – Pre-Trial Chamber I, *Prosecutor v. Blé Goudé*, ‘Second Decision on Victims’ Participation in the Pre-Trial Proceedings and Related Issues’, 1 August 2014, ICC-02/11-02/11-111, para. 9.

⁵¹ ICC – Pre-Trial Chamber III, *Prosecutor v. Bemba*, ‘Fourth Decision on Victims’ Participation’, 12 December 2008, ICC-01/05-01/08-320, para. 40.

This ruling highlights that the question of posthumous applications should not be answered by the RPE alone, but in consideration of the broader legal context of the ICC, especially human rights. After resorting to examples from the Inter-American Court of Human Rights,⁵² Judge Kaul's decision allowed applications made on behalf of deceased individuals. However, he also introduced three qualifying criteria for these applications to be admitted:

- (1) the deceased was a natural person,
- (2) the death of the person appears to have been caused by a crime within the jurisdiction of the Court and
- (3) a written application on behalf of the deceased person has been submitted by his or her successor.⁵³

A year later, in 2009, Trial Chamber I acting in the case against *Lubanga*, admitted the application made by an adult on behalf of his deceased nephew; a child soldier who was killed shortly after being conscripted.⁵⁴ The judges in *Lubanga* noted that the 'person acting on behalf of a victim does not have to be a relative or a legal guardian because, within the Rules, the expression 'person acting' is undefined and unrestricted.'⁵⁵ As such, Trial Chamber I adopted a more liberal approach by removing the last eligibility criterion introduced by Judge Hans-Peter Kaul, and potentially allowing any other natural or legal person to represent a late victim.

In 2010, Trial Chamber III in *Bemba* endorsed this view. It asserted that the death of victim does not extinguish his relevance before the Court, that this kind of participation was also relevant for the Court to understand the relevant events, and that this intervention was not exclusive to relatives of the deceased individual, as follows:

The death of a victim should not extinguish the opportunity for the Chamber to consider his or her views and concerns, in that it would be markedly unjust if an alleged perpetrator in these circumstances prevented the ICC from receiving relevant representations from the person fatally affected. Participation by victims is not a one-sided exercise: although it is specifically intended to benefit those whose

⁵² ICC – Pre-Trial Chamber III, *Prosecutor v. Bemba*, 'Fourth Decision on Victims' Participation', 12 December 2008, ICC-01/05-01/08-320, paras. 44–45.

⁵³ *Ibid.*, para. 39.

⁵⁴ ICC – Trial Chamber I, *Prosecutor v. Lubanga*, 'Annex 2: Order Issuing Confidential and Public Redacted Versions of Annex A to the 'Decision on the Applications by 7 Victims to Participate in the Proceedings' of 10 July 2009 (ICC-01/04-01/06-2035)', 10 July 2009, ICC-01/04-01/06-2065-Anx2-RSC, p. 15.

⁵⁵ *Ibid.*

personal interests are engaged, it also enhances the Court's understanding of the relevant events [...] The most fundamental restriction is that this participation should not be prejudicial to or inconsistent with the rights of the accused, and a fair and impartial trial.⁵⁶

Despite these decisions, the Court's dominant approach for several years was that of denying the possibility of submitting applications on behalf of deceased victims. In recent years, there has been a turn towards enabling such applications. In 2018, Pre-Trial Chamber I in the *Al Hassan* case allowed concerns of deceased persons to be brought to the attention of the Court.⁵⁷ In 2019, Pre-Trial Chamber II followed suit in *Yekatom* and *Ngaïssona*.⁵⁸ However, both the *Al Hassan* and *Yekatom* and *Ngaïssona* Pre-Trial Chambers also adhered to the additional requirements laid down by Judge Hans-Peter Kaul according to which the rights of the deceased victim have to be 'exercised by their successors during the proceedings, if these successors are victims recognized as participants in the proceedings.'⁵⁹

Overall, the starkly divergent decisions reached on the same issue – along with frequent shifts in reasoning and eligibility criteria – highlight the inconsistencies and gaps in the Court's evolving legal framework on victims. These are not merely technical flaws; they contribute to significant legal uncertainty and the impact of such decisions is far from marginal. This is particularly true in proceedings like *Yekatom* and *Ngaïssona* where the causation of death is a definitional factor of the case.⁶⁰

⁵⁶ ICC – Trial Chamber III, *Prosecutor v. Bemba*, 'Corrigendum to Decision on the Participation of Victims in the Trial and on 86 Applications by Victims to Participate in the Proceedings', 12 July 2010, ICC-01/05-01/08-807-Corr 1, para. 83.

⁵⁷ ICC – Pre-Trial Chamber I, *Prosecutor v. Al Hassan*, 'Decision Establishing the Principles Applicable to Victims' Applications for Participation', 24 May 2018, ICC-01/12-01/18-37-tENG, para. 52.

⁵⁸ ICC – Pre-Trial Chamber II, *Prosecutor v. Yekatom and Ngaïssona*, 'Decision Establishing the Principles Applicable to Victims' Applications for Participation', 5 March 2019, ICC-01/14-01/18-141, para. 36.

⁵⁹ ICC – Pre-Trial Chamber I, *Prosecutor v. Al Hassan*, 'Decision Establishing the Principles Applicable to Victims' Applications for Participation', 24 May 2018, ICC-01/12-01/18-37-tENG, para. 52, citing ICC – Pre-Trial Chamber III, *Prosecutor v. Bemba*, 'Fourth Decision on Victims' Participation', ICC-01/05-01/08-320, paras. 47–51.

⁶⁰ ICC – Pre-Trial Chamber II, *Prosecutor v. Yekatom and Ngaïssona*, 'Corrected Version of 'Decision on the Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaïssona'', 14 May 2020, ICC-01/14-01/18-403-Red-Corr, paras. 97, 110, 123, 138.

4 Affording Eligibility to Deceased Victims' Applications: Four Pillar Arguments

The remainder of this article advances four lines of argument to support the view that *de novo* applications on behalf of deceased persons should be permitted, without being restricted by the eligibility criteria proposed by Judge Hans-Peter Kaul (i.e. specifically, that the victim must have died as a result of the crime and that the applicant must be a successor). These arguments are grounded in theoretical reflection, practical considerations, and international human rights law. First, from a theoretical perspective, although capturing the views and concerns of someone who can no longer express them involves an exercise in approximation, some degree of representation is preferable to none at all. Not doing so may contravene several reparations principles. Second, from a practical standpoint, some chambers have relied on the indirect representation of family members as a sort of fall-back. However, relatives of deceased victims may also be deceased, unwilling, or unable to apply, making this an unreliable fallback. Third, the memories and perspectives of deceased victims are unlikely to be adequately represented during the Prosecutor's case, whose mandate differs fundamentally from that of the LRVs. Fourth, international human rights standards affirm that victims' interests continue to merit recognition and protection even after death.

4.1 *Imperfect Representation is Better than No-Representation*

The Rome Statute defines the purpose of victim participation as the expression of victims' 'views and concerns' (art. 68(3)) and qualifies that such representation must be 'substantive and effective' (*Ntaganda* reparations principles, para. 46). Yet, in practice, the ICC already applies this standard flexibly. The Court routinely allows a small number of legal representatives to speak on behalf of thousands of victims, many of whom never communicate directly with counsel. Their 'views and concerns' are therefore constructed through inference and generalization, rather than through individual expression.

Within this framework, the collective or 'statistical' representation of living victims is admittedly an imperfect outcome, an abstraction that inevitably flattens individual voices. This imperfection allows nonetheless some degree of recognition and participation within the limits of large-scale proceedings. By contrast, the systematic exclusion of deceased victims on the grounds that we cannot personally and accurately know their views and concerns transforms imperfection into erasure. If approximate representation of the living is tolerated as sufficiently substantive and effective, then refusing even that

degree of approximation to the dead creates an unjustifiable inconsistency in the Court's own logic of representation.

While it is true that the dead cannot articulate their 'views and concerns,' law routinely represents those who cannot speak for themselves, such as minors, the disappeared, or future generations. In each case, representation proceeds through reasonable inference about shared human concerns such as dignity, remembrance, and justice. Extending this principle to the deceased is not a distortion of participation's purpose, but a way of ensuring that justice accounts for the full scope of loss.

Thinking within the context of the Rome legal framework, the restrictive jurisprudential line also runs counter to several core reparations principles. Under the principle of accessibility, '[d]irect and indirect victims should be able to participate throughout the reparations process and receive adequate support to make their participation substantive and effective.'⁶¹ Yet the decisions allowing only the applications of surviving relatives expose a fundamental paradox: they acknowledge the existence of indirect victims while disregarding the individual whose direct suffering is the very basis of that status.

Moreover, denying a person's claim solely because they are deceased unfairly restricts their access to participation and to reparations. The Court has already made clear that death does not extinguish a victim's entitlement to these rights, as the acceptance of applications submitted on behalf of deceased victims is uncontroversial. The resulting distinction between deceased persons who are recognised as case victims and those who are not is thus one of form rather than substance. This inconsistency further undermines the principle of equality, which requires that '[a]ll victims are to be treated fairly and equally during the reparations process, irrespective of whether they participated in the trial proceedings.'⁶²

A deeper justification for inclusion lies in understanding participation not merely as procedural expression but as an act of moral recognition and a tool for narrative building. Victim participation acknowledges that harm occurred and that the person harmed retains juridical and moral significance. Death does not extinguish this subjecthood. Deceased victims remain part of the collective experience of atrocity, and excluding them reinforces their erasure, the very silence that international criminal justice seeks to resist.

Representation of deceased victims will inevitably lack the precision attainable in smaller cases, but its inclusion still makes participation more

⁶¹ *Ntaganda Reparations Principles*, para. 46; *Lubanga Reparations Principles*, para. 29.

⁶² *Ntaganda Reparations Principles*, para. 41.

substantive and effective than total exclusion. Representation is not an exact science; it exists on a spectrum of approximation. Even when abstract or symbolic, it affirms existence and harm. Silence, by contrast, forecloses recognition altogether. Substantive representation thus resides not in perfect accuracy but in the principled effort to ensure that the dead remain present within the narrative of justice.

4.2 *The Role of Relatives as Indirect Victims*

Some decisions that preclude applications on behalf of deceased persons suggest that their claims can effectively be ‘redeemed’ through the applications of surviving relatives as indirect victims. At first glance, this approach is discomfiting because it treats the harm suffered by the direct victim and the harm experienced by their relatives as interchangeable. In addition, there are also two practical reasons why this supposed fall-back solution is untenable. First, it assumes that the deceased has a surviving family. Second, it takes for granted that such surviving family is able and willing to apply to the Court.

4.2.1 The Deceased Victim May not Have Surviving Relatives

The crimes that the ICC deals with do not happen in isolation and must bear certain gravity.⁶³ To be sure, the Rome Statute clarifies that the Court has jurisdiction over war crimes ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’.⁶⁴ Crimes against humanity must involve ‘the multiple commission of [prohibited] acts [...] pursuant to or in furtherance of a State or organizational policy to commit such attack’.⁶⁵ For the ICC, genocidal acts intending to destroy a group as a whole or in part must have taken place in a context ‘of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.’⁶⁶ It is far from hypothetical that entire families and generations are obliterated in the course of these crimes.

For example, the conviction against the cousins Milan and Sredoje Lukic at the ICTY included the murder of 59 persons who were burned alive in the Pionirska incident in the Bosnian town of Višegrad in 1992. The victims were

63 Article 17(1)(d) RS. Gravity requires considering whether the crimes in question have, among others certain degree of impact and large scale. For a commentary on gravity, see M. Longobardo, ‘Factors Relevant for the Assessment of Sufficient Gravity in the ICC: Proceedings and the Elements of International Crimes’, *Questions of International Law (QIL) Zoom-in*, 33 (2016), 21–41.

64 Article 8(1), Rome Statute.

65 Article 7(2)(a), Rome Statute.

66 ICC Elements of crimes, article 6, last element.

Muslim children, women and elderly men who often were from the same families.⁶⁷ Sometimes, deceased victims may be orphaned children with no relatives to veil for his interests, like the children of Izieu. These were 44 Jewish children who had lost their parents during WWII and found shelter in an orphanage in the French town of Izieu. The infamous Klaus Barbie, aka the 'Butcher of Lyon', arranged for the Gestapo to raid the orphanage and, shortly before the war ended, all of them but one (a non-Jew), were deported and killed.⁶⁸ In the more recent Israel-Hamas war, Amnesty International has documented attacks that 'in some cases [have] wiped out entire families'⁶⁹ that should be investigated as war crimes.

Therefore, relying on the existence of surviving relatives to shed light on the story and suffering of those who have already passed away entails a serious risk. It may lead to disregard the plight of victims who are completely forsaken, with no one close to them to advocate on their behalf. It condemns all such direct victims to be forgotten in the realm of participation and reparations, erasing their suffering from public memory and institutional concern.

4.2.2 The Surviving Family May Not be Able or Willing to Engage with the Court

Even if the family is alive, the uncertainty of the benefits of engaging with the Court, the personal preference of staying away from one's own traumatic memories, or the volatile security situation in the areas that have been ridden with mass atrocities, are all factors that may discourage victims from approaching the ICC.

At the ICC there is a stark contrast between, on the one hand, the highly individualized process that victims need to go through to be admitted as participants in proceedings and, on the other, the massification of their concerns through a common legal representative.⁷⁰ A standard application form would capture highly individualized information about the victim's identity, harm suffered, supporting documentation, and verified witness

67 ICTY – Trial Chamber II, *Prosecutor v. Lukic and Lukic*, 'Judgement', 20 July 2009, IT-98-32/1-T, paras. 567, 934, 947.

68 See e.g., M. Ribou, 'The Children of Izieu', *New York Times*, 2 August 1987, section IV, p. 26, col. 1; J. Dawsey, 'Targeting the Most Vulnerable: Klaus Barbie and the Izieu Children's Home', *The National WWII Museum New Orleans*, 19 May 2019.

69 Amnesty International, *Damning Evidence of War Crimes as Israeli Attacks Wipe Out Entire Families in Gaza*, available at [amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza/](https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza/) (accessed 26 April 2025).

70 Rule 90(2) RPE; and regulations 79 RoC.

accounts.⁷¹ In addition, ‘applicants on average wait in excess of a year for a determination on their ‘status as a victim’.⁷² Markus Funk chides with the data required in these forms saying that ‘[n]othing in these materials, however, gives applicants an honest sense of how exceedingly unlikely it is that [...] the Chamber will accord the victim an opportunity to substantively participate in the proceedings.’⁷³ In the *Ongwen* case alone, there were more than 4,000 participating victims which were represented by just two teams of lawyers.⁷⁴ As a result, it is virtually impossible that victims’ lawyers convey the views and concerns of each victim, but rather generally rely on grand narratives that, at times, are illustrated by reference to concrete experiences. This is connected to the phenomenon that Emily Haslam and Rod Edmunds have labelled ‘the statistical victim’.⁷⁵ The immense contrast between the degree of personal involvement required and the collective treatment received may dissuade potential applicants from making the effort, perhaps even more so if they are indirect victims.

In addition, some cultures – or merely people’s personal preferences – may be more inclined to deal with suffering through an intended forgetfulness ‘wilful amnesia’.⁷⁶ For example, in the *Katanga* case, victims rejected the idea of commemorative events and monuments arguing that they could be useless, counterproductive or fuel social tensions.⁷⁷ In short, this line of reasoning that defers and relies on the willingness of surviving relatives to come forward underestimates that some people may use their free will to not engage with the Court.

Lastly, the ICC often operates in situations where there may still be an active armed conflict or ongoing campaigns of violence. This effectively means that the oppressors and perpetrators can still exert fear and control over the population. Even when they do not, the close memory of such

71 See regulation 86(2) RoC. For reparations see, similarly, rule 94 RPE requiring, *inter alia*, the identity and address of the claimant, a description of the harm, the location and date where the events allegedly happened, supporting documentation etc.

72 T.M. Funk, *Victims’ Rights and Advocacy at the International Criminal Court*, 2nd edn (Oxford University Press, Oxford, 2015), p. 122.

73 *Ibid*, p. 123.

74 ICC – Pre-Trial Chamber II, *Prosecutor v. Ongwen*, ‘Decision on Contested Victims’ Applications for Participation, Legal Representation of Victims and Their Procedural Rights’, 27 November 2015, ICC-02/04-01/15-350, para. 17.

75 Haslam and Edmunds, *supra* note 12.

76 I have explored this in relation to memorialization measures in M. Lostal, ‘Implementing Reparations in the *Al Mahdi* Case: A Story of Monumental Challenges in Timbuktu’, 19(4) *Journal of International Criminal Justice* (2021) 831–853, at p. 851.

77 *Katanga Reparations Order*, para. 301.

occurrences may play a chilling effect on the community.⁷⁸ This may act as a deterrent for victims if engagement with the Court, or the perception of collaboration with it, could trigger a threat to their physical, psychological or material well-being.⁷⁹ In sum, even if there is a surviving family, there is no guarantee that they would want to come forward.

4.3 *The OTP Will not Make all Their Memories Bear*

One might argue that the fate of deceased victims can still be reflected in the proceedings through the work of the Office of the Prosecutor (OTP), particularly when their experiences are used as evidence to support the Prosecution's case. However, this reasoning would wrongly assume that the roles of the OTP and victim representatives fully coincide in function and scope.

The role of the OTP fits into the zero-sum dimension of criminal proceedings that traditionally focus on establishing either the guilt or innocence of the accused. It exists in a bifurcated adversarial logic 'designed to culminate in a confrontational showdown between the prosecution and the accused.'⁸⁰ As Adrian M. Plevin puts it a 'trial's focus on criminal culpability does not necessarily cater for accurate accounts of history since the structure, rules, and procedure are directed at the determination of guilt beyond all reasonable doubt'.⁸¹

By contrast, the participation of victims, where allowed,⁸² pursues 'victim-orientated justice'.⁸³ This entails that their experiences are not reduced to evidentiary tools, but instead form part of a larger mosaic that brings to light the deeper context of the criminal conduct, and the basis for reparative measures. Their participation contributes to the building of a broader

78 Common Legal Representative of Victims (CLRV), *Prosecutor v. Ongwen*, Closing Brief, ICC-02/04-01/15-1720-Red, para. 51.

79 Funk, *supra* note 72, pp. 125–126.

80 J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation', 32(2) *Journal of Law and Society* (2005) 394–316, at p. 297.

81 A. M. Plevin, 'Beyond a 'Victims' Right': Truth-Finding Power and Procedure and the ICC', 25 *Criminal Law Forum* (2014) 441–464, at p. 450.

82 For a critical view on the extent to which victims are engaged in international criminal processes, see L. Zegveld, 'Victims as a Third Party: Empowerment of Victims?', in S. Weill, K. T. Seelinger and K. Bree Carlson (eds) *The President on Trial: Prosecuting Hissène Habré* (Oxford University Press, Oxford, 2020) 309–322.

83 Moffett, *supra* note 9, p. 58; see also M. Peña and G. Carayon, 'Is the ICC Making the Most of Victim Participation?', 7 *The International Journal of Transitional Justice* (2013) 518–535, at p. 523 defining victim-oriented justice as one where 'the victim goes from the position of 'object' to that of 'subject'.

historical record, is connected to their right to truth,⁸⁴ and their entitlement to reparations.⁸⁵ They can ‘close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth’⁸⁶ and ‘bring a unique perspective on the issues being litigated that is different from those of the prosecution and the defence.’⁸⁷

One of the key areas in which LRVs provide a unique contribution – beyond the scope of the Office of the Prosecutor – is in the broader range of victims they can represent. This distinction arises from the OTP’s primary mandate: to establish the elements of a crime. However, at the ICC, there is a crucial distinction between being the *target* of a crime and being a *victim*. The Court has adopted a definition of victimhood that breaks the equivalence between being the object of a criminal act and being its victim. Instead, the concept of victimhood centers on the experience of *harm* resulting from the commission of a crime. As defined under Rule 85(a) of the Rules of Procedure and Evidence: ‘“Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.’ This means that the group of victims represented by LRVs only partially overlaps with those addressed by the OTP.

For instance, to establish the war crime of rape, the OTP will rely on the victim testimony or other evidence to demonstrate the use of force or coercion, and the required sexual invasion.⁸⁸ However, the OTP needs not delve into the life experience of the victim beyond this act, which can include the loss of self-esteem, sense of humiliation, ostracization from her community, an unwanted pregnancy, the contraction of HIV etc. In other words, the OTP

84 *Ntaganda Reparations Principles*, para. 45. See also ICC, Pre-Trial Chamber I, *Situation in Myanmar*, Request under Regulation 46(3) of the Regulations of the Court, Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute’, ICC-RoC46(3)-01/18-37, 6 September 2018, para. 88; ICC, Pre-Trial Chamber I, *Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the ‘Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute’, ICC-01/11-01/11-662, 5 April 2019, para. 77; ICC, Office of Public Counsel for Victims, *Prosecutor v. Ongwen*, Public Redacted Version of Common Legal Representative of Victims’ Closing Brief, ICC-02/04-01/15-1720-Red, 28 February 2020, para. 2 (footnotes omitted).

85 Regulation 56 of the Regulations of the Court [RoC].

86 ICC, Pre-Trial Chamber I, *Prosecutor v. Katanga and Ngudjolo Chui*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, para. 34(ii).

87 Peña and Carayon, *supra* note 83, p. 525.

88 Aside from the other elements, such as the awareness of the perpetrator that there was an armed conflict in which the conduct took place, see ICC Elements of Crimes, Article 8 (2) (b) (xxii)-1 and Article 8 (2) (e) (vi)-1.

would focus on this individual's account as a victim *of* rape, but would not explore the compounded effects of this crime and how she then became a victim *because of* such rape. The latter dimension would only be captured by the LRV through notion of 'harm' of rule 85(a) RPE. Similarly, the child product of the unwanted pregnancy would be immaterial to prove the crime of rape, but would nevertheless constitute a victim under rule 85(a) RPE.⁸⁹

Another example that illustrates how the LRV can capture a much broader group of victims and set of experiences is the crime against the environment. The war crime against the environment consists in

Intentionally launching an attack in the knowledge that such attack will cause [...] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁹⁰

The constitutive elements do not include the need to affect human beings,⁹¹ although they may be used as aggravating factors. As such, the OTP would not need to focus on human harm to establish this crime, since the primary object of the act is the environment itself. In contrast, the LRV's central role would be to explore the short- and long-term effects caused by environmental destruction, such as death, forced displacement, loss of livelihood, health issues, birth defects, psychological trauma, and more. In sum, the use of victims by the OTP varies greatly in scope and function compared to those who fall under the purview of victims' lawyers.

4.4 *Human Rights Standards*

The ICC Rules of Procedure and Evidence do not forbid applications on behalf of deceased victims. They just do not regulate the matter. The RPE are subordinate to the Rome Statute and exist for the purpose of enabling its correct application. A judicial decision that, when needed, fails to explore the normative context in which the RPE are situated risks misapplying the Rome legal framework.⁹²

⁸⁹ ICC, Appeals Chamber, *Prosecutor v. Ntaganda*, Judgment on the Appeals against the Decision of Trial Chamber VI of 8 March 2021 entitled 'Reparations Order', ICC-01/04-02/06-2782, 12 September 2022, para. 661.

⁹⁰ Article 8(2)(b)(iv), Rome Statute.

⁹¹ For a comprehensive treatment of this crime, see M. Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (Cambridge University Press, Cambridge, 2022).

⁹² Article 21(3), Rome Statute.

4.4.1 Human Rights Jurisprudence

The work of human rights committees and regional tribunals is essential for understanding the application of human rights law. As Volker Nerlich has noted, while mentions to the Human Rights Committee are sparse, 'far more references are made to the jurisprudence of *regional* human rights bodies, notably that of the European Court of Human Rights'.⁹³ In fact, Judge Hans Peter-Kaul resorted to the work of the Inter-American Court of Human Rights to support his then minority position that deceased victims should be admitted to proceedings. The rulings of the IACtHR clarified that successors are entitled to the compensation for damages endured by victims prior to their death.⁹⁴

The key question that remains to be explored is whether the human rights bodies allow claims brought forward on behalf of victims who are deceased or otherwise unable to give consent because they are, for example, disappeared. While the answer appears to be unequivocally in the positive, a caveat must be taken into account. The existence of human rights cases hinge on the existence of victims, as they pit the individual(s) whose human rights are at risk against the State. By contrast, the existence of cases at the ICC are led by the Prosecutor while victims are only participants. With that vital difference in mind, the guidance of human rights institutions continues to provide a valid yardstick to interpret and apply the sources of law at the ICC. This is, first, because Article 21(3) of the Rome Statute mandates that the interpretation and application of the law be consistent with recognised human rights, notably the principle of equality. Second, while victims are only participants in the criminal phase, they become fully fledged parties during the reparations proceedings following conviction, with a status closer to that accorded to victims in human rights cases.

Communications to the Human Rights Committee are generally submitted on behalf of one or more individuals, with their consent, 'unless the author(s) [of the complaint] can justify acting on their behalf without such consent'.⁹⁵ This has included communications brought on behalf of deceased persons.⁹⁶

93 V. Nerlich, 'Article 21(3) of the ICC Statute: Identifying and Applying 'Internationally Recognized Human Rights'', in P. Lobba and T. Marinello (eds.), *Judicial Dialogue on Human Rights* (Brill | Nijhoff, Leiden, 2017), pp. 73–89, p. 82 (emphasis in the original).

94 He made reference to the case of *Aloeboetoe et al. v. Suriname*; *Garrido and Baigorria v. Argentina*. See ICC, Pre-Trial Chamber III, *Prosecutor v. Bemba*, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 12 December 2008, paras. 44–45.

95 Rule 91, Rules of Procedure of the Human Rights Committee.

96 E.g. *Bazarov and Bazarov v. Uzbekistan*, Comm. 959/2000, U.N. Doc. A/61/40, Vol. II, p. 43 (HRC 2006); *Yuliya Vasilyevna Telitsina v. Russian Federation*, Communication No. 888/1999, U.N. Doc. CCPR/C/80/D/888/1999 (2004).

On its side, the European Convention of Human Rights foresees that the European Court of Human Rights ‘may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim’.⁹⁷ Typically, the direct involvement of the victim or, at least, her consent, is expected.⁹⁸ The rule is that ‘[a]pplications can be brought only by living persons or on their behalf; a deceased person cannot lodge an application’.⁹⁹ The general approach to representation by the deceased’s next of kin has been restrictive when ‘the alleged violation of the Convention was not closely linked to the death or disappearance of the direct victim’.¹⁰⁰ This tends to happen in cases involving issues of dignity, privacy or family life.¹⁰¹

However, the European Court has made several exceptions and extended standing to family members who filed complaints about violations that were not directly connected to the death or disappearance of the primary victim.¹⁰² For example, *Editions Plon v. France* was a case pursued by the widow and children of late President Mitterrand that involved civil liability for revealing his medical information while he was alive. The ECtHR held that ‘the national courts’ assessment that these ‘rights of others’ [i.e. protecting one’s own reputation and privacy] were passed on to his family on his death does not appear in any way unreasonable or arbitrary’.¹⁰³ The criteria to allow extending *locus standi* to family members may include the existence of ‘a certain moral interest in lodging the [...] application’,¹⁰⁴ a general interest concerning the overall interest in respecting human rights,¹⁰⁵ or a

97 Article 34, European Convention of Human Rights.

98 Rule 47(1)(c) Rules of the European Court of Human Rights.

99 European Court of Human Rights – Registry, *Practical Guide on Admissibility Criteria* (31 August 2024), para. 16.

100 European Court of Human Rights, Registry – Key Theme, *Article 34/35: The Locus Standi of Relatives (Indirect Victims) to Bring a Case to the Court when the Direct Victim Has Died* (31 August 2023), p. 1.

101 See e.g. European Court of Human Rights, *Sanles Sanles v. Spain*, Decision on Application No. 48335/99, 26 October 2000, pp. 7–8; European Court of Human Rights, *Dzhugashvili v. Russia*, Decision on Application No. 41123/10, 9 December 2014, paras. 24–25.

102 European Court of Human Rights, *supra* note 100, p. 1.

103 European Court of Human Rights, *Éditions Plon v. France* (Application No. 58148/00), Judgment, 18 May 2004, para. 34.

104 European Court of Human Rights – Fifth Section, *Akbay and Others v. Germany*, Judgment (Merits and Just Satisfaction), Applications Nos. 40495/15, 37273/15 and 40913/15, 15 October 2020, para. 89.

105 E.g., European Court of Human Rights – Second Section, *Marie-Louise Løyen and Others v. France*, Judgment (Merits and Just Satisfaction), Application No. 55929/00, 5 July 2005, para. 29.

‘demonstrated a material interest in the outcome of the case’ such as inheriting ‘any pecuniary award that may have resulted from the domestic proceedings’.¹⁰⁶

Moreover, the European Court of Human Rights has also granted standing to representatives not related to the deceased victim. The leading case on this matter is *Valentin Câmpeanu v. Romania*,¹⁰⁷ which involved a young orphan with intellectual disabilities and HIV who died in deplorable conditions in a State institution. The case, which highlighted serious human rights violations by the State of Romania, was brought before the European Court of Human Rights by an NGO, the Centre for Legal Resources. The Centre for Legal Resources argued it had standing because, in extreme cases like Mr. Câmpeanu’s – where the victim was a disabled orphan with no family – NGOs would often be the only ones able to defend human rights. Denying their standing, the NGO said, would let the Government exploit his tragic situation to avoid scrutiny, effectively denying the most vulnerable access to justice.¹⁰⁸ In light of the exceptional circumstances surrounding Valentin Câmpeanu’s case and the severity of the allegations, the European Court permitted the Centre for Legal Resources to represent him, despite the absence of formal authorization and the fact that he had already passed away when the application was submitted. The European Court emphasized that allowing the State to avoid accountability under such conditions would run counter to the European Convention’s core purpose.¹⁰⁹ Some parallel can be drawn to the reparations scheme of the ICC. If applications on behalf of deceased victims were precluded, it would allow the convicted person to avoid accountability. This would defeat the two main purposes of reparations: ‘[1] oblig[ing] those responsible for serious crimes to repair the harm they caused to the victims

¹⁰⁶ European Court of Human Rights – Fifth Section, *Stoimenovikj and Miloshevikj v. North Macedonia*, Application No. 59842/14, 25 March 2021, para. 25.

¹⁰⁷ European Court of Human Rights – Grand Chamber, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Judgment, Application No. 47848/08, 17 July 2014.

¹⁰⁸ *Ibid.*, para. 91.

¹⁰⁹ *Ibid.*, para. 112. See relying on the Câmpeanu precedent, European Court of Human Rights – Third Section, *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania*, Judgment (Merits and Just Satisfaction), 24 March 2015, paras. 34–46; European Court of Human Rights – Third Section, *Kondrulin v. Russia*, Judgment (Merits and Just Satisfaction), Application No. 12987/15, 20 September 2016, paras. 28–34; European Court of Human Rights – Fifth Section, *Association Innocence en Danger and Association Enfance et Partage v. France*, Judgment (Merits and Just Satisfaction), Applications Nos. 15343/15 and 16806/15, 4 June 2020, paras. 119–132; see *contra* European Court of Human Rights – Fifth Section, *Bulgarian Helsinki Committee v. Bulgaria*, Decision, Applications Nos. 35653/12 and 66172/12, 28 June 2016.

and ... [2] enabl[ing] the Court to ensure that offenders account for their acts.¹¹⁰ If the individuals harmed by the convicted person cannot be represented in the reparations process solely due to their death, the perpetrator is hardly being meaningfully compelled to repair the harm inflicted. For instance, his financial liability will not reflect the reparations that should have been awarded to them for whatever harm they would have endured while alive.

In sum, while the European general rule is that applications must be submitted or authorized by the living victim, the possibility that next-of-kin and even associations to represent the deceased is also clearly recognised.

The Inter-American system of human rights makes a distinction between being a victim and a petitioner. Petitions can be submitted by '[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization.'¹¹¹ There does not need be any connection between the petitioner and the victim, and the latter's consent is not required.¹¹² As such, the fact that associations can lodge claims on behalf of disappeared or deceased victims is undisputed.¹¹³

Lastly, the African human rights system likewise distinguishes between being a 'complainant' and a 'victim'. The African Commission provides broad access to its complaint procedure, allowing 'any natural or legal person' to submit a communication.¹¹⁴ The competence *ratione personae* is open to a wide range of people, not just the victims themselves, but also groups, NGOs, and others, even if they are not citizens or registered in the country of the Respondent State.¹¹⁵ The African Commission has labelled this as an *action popularis* approach and has further acknowledged that the

¹¹⁰ *Katanga Reparations Order*, ICC-01/04-01/07-3728, para. 15.

¹¹¹ Article 44, American Convention of Human Rights, and rule 23 of the Rules of Procedure of the Inter-American Commission of Human Rights.

¹¹² Inter-American Commission of Human Rights, *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.91 Doc. 7, p. 157 (1996); see also Inter-American Commission of Human Rights, *Digest of the IACHR on its Admissibility and Competence Criteria*, OEA/Ser.L/V/II.175, 4 March 2020, p. 15.

¹¹³ See e.g. Inter-American Commission of Human Rights, *Admissibility Report 33/01, Case 11.552, Araguaia Guerrilla Movement Julia Gomes Lund et al. v. Brazil*, 6 March 2001, para. 40. The competence of the association to lodge the complaint was not even disputed by the respondent State.

¹¹⁴ Articles 55 and 56 of the African Charter and rule 115(1) and 115(2)(e) of the Rules of Procedure of the African Commission.

¹¹⁵ See e.g., African Commission on Human and Peoples' Rights, Communication 277/2003, *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana* (2013) ACHPR, paras. 73–81; African Commission on Human and Peoples' Rights, *Fadhl Al*

author of a communication need not know or have any relationship with the victim. This is to enable poor victims of human rights violations on the continent to receive assistance from NGOs and individuals far removed from their locality. All the author needs to do is to comply with the requirements of Article 56 [of the African Charter]. The African Commission has thus allowed many communications from authors acting on behalf of victims of human rights violations.¹¹⁶

This paints a picture of a shared principle across all regional human rights systems: each allows third parties, including NGOs, to submit applications on behalf of deceased or otherwise unavailable victims. The distinction between the European, Inter-American, and African systems is one of degree, but not of kind. The European Court of Human Rights allows such submissions as a matter of exception, whereas the Inter-American and African systems treat them as routine practice. Their positive stance towards the *locus standi* on behalf of deceased persons is also in line with the recent finding of the Special Rapporteur on extrajudicial, summary or arbitrary executions. He has recently published a thematic report on the 'Protection of the Dead', where he found that there is abundant support of the fact that 'the respect and protection owed to every individual with regard to their life and inherent dignity'¹¹⁷ do not cease after death.

4.4.2 The Human Rights of Equality and Non-discrimination

Equality and non-discrimination represent a fundamental principle that 'gives concrete expression to the basic idea on which the whole international human rights system is founded: that all human beings, regardless of their status or membership of a particular group, are entitled to the same set of rights.'¹¹⁸ It constitutes the premise of the Universal Declaration of Human Rights, permeates all existing human rights treaties, and is also present in the *Theo van Boven / Bassiouni* principles concerning on the right to a remedy and

Mawla Husni Ahmed Ismail and 19 Ors (represented by Freedom and Justice Party of Egypt) v. Arab Republic of Egypt (10 November 2019), para. 65.

¹¹⁶ African Commission on Human and Peoples' Rights, *Article 19 v. State of Eritrea* (Communication 275 of 2003) [2007] ACHPR 79, 30 May 2007, para. 65.

¹¹⁷ United Nations General Assembly, *Protection of the Dead: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Morris Tidball-Binz* (25 April 2024) A/HRC/56/56, para. 59.

¹¹⁸ D. Moeckli, 'Equality and Non-Discrimination', in D. Moeckli, S. Shah, S. Sivakumaran and D. Harris (eds.), *International Human Rights Law* (Oxford University Press, Oxford, 2017, 3rd edn.), pp. 148–164, p. 151.

reparation.¹¹⁹ The *Ntaganda* Reparations Principles expressly endorse that '[r]eparations shall be granted to victims without adverse distinction on the grounds of sex, gender identity, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth, marital, or other status.'¹²⁰

However, the ICC's jurisprudence that rejects *de novo* applications on behalf of deceased persons effectively results in discrimination on three potential grounds: having suffered a lethal crime, age, and health. This discriminatory impact stems from the fact that the Court recognises the right of deceased victims to representation and reparations *only* if they initiated the application while alive. In doing so, the ICC implicitly accepts that a victim's death does not, in itself, preclude consideration of their interests. Yet, by drawing an arbitrary line at whether a form was signed and submitted prior to death, the Court penalizes those who, due to the circumstances of their death or condition, were unable to do so, performing a form of structural exclusion.

The first discriminatory ground is self-evident: victims who die instantly as a result of a core international crime are inherently deprived of the opportunity to consent to or even contemplate future judicial representation. In a paradoxical twist, the Court denies them recognition as victims precisely *because* of the incident that turned them into victims.

The second and third grounds relate to individuals who, although not fatally harmed by the crime itself, pass away due to other causes – such as age or illness – before they submit their applications. Their exclusion effectively disadvantages elderly or ill individuals whose deaths, although temporally disconnected from the act of victimization, nonetheless occur before procedural deadlines. As a result, their harms go unacknowledged, not for lack of merit, but due to the mere timing of their deaths.

Moreover, the line of jurisprudence championed by Judge Hans-Peter Kaul which only admits applications on behalf of deceased victims when their death is directly linked to the crime and the application is submitted by a successor, further entrenches discrimination against victims of non-lethal crimes and those without surviving family members. It creates a hierarchy among victims according to which those whose harm has resulted in death

¹¹⁹ United Nations, *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*, General Assembly Resolution 60/147, 16 December 2005, para. 25.

¹²⁰ *Ntaganda Reparations Principles*, para. 42.

have more opportunities for representation and reparations than those who have suffered non-lethal harm.

Additionally, the stipulation that applications must be lodged by successors discriminates against individuals who are entirely abandoned, orphaned, or whose relatives are unable or unwilling to advocate on their behalf. Such cases are more likely in regions facing acute insecurity, where family members may be understandably reluctant to engage with international judicial mechanisms. This, in effect, constitutes a form of geographical or locality-based discrimination.

In light of this, a more equitable and context-sensitive approach would be to follow the example of the Inter-American and African human rights systems explained above, which routinely allow third parties—including NGOs and associations—to represent victims' interests. These frameworks recognize that third-party representation is not only pragmatic but essential in contexts where victims are isolated or their communities are too vulnerable to engage directly with legal processes.

5 Conclusion

The case-law excluding deceased victims from participation and reparations is fundamentally flawed. It renders their suffering invisible or subordinate to that of surviving relatives, diminishes the accountability of the convicted, and narrows the scope of truth to which victims are entitled. Posthumous victim applications should be considered regardless of the circumstances of death or the presence of next of kin.

Current exclusions stem from a narrow reading of the ICC Rules, but this approach ignores the Court's normative framework. Victim participation and reparations are intended to provide a space for victims' voices, enhance the Court's understanding of events, affirm the right to truth, and ensure that the convicted respond to the full extent of harm caused. The ICC's structural realities (handling crimes of extraordinary gravity that often result in death, and proceedings that span years or decades) further underscore the inadequacy of denying participation to victims who die before proceedings conclude.

Denying *de novo* applications also conflicts with the principle that Chambers 'shall take into account the needs of *all* victims',¹²¹ and the obligation to interpret ICC law in line with international human rights.

¹²¹ Rule 86 RPE, emphasis added.

A principled shift is required: harm does not vanish with death. Participation and reparations must reflect the totality of suffering, not only that of survivors. Victims should be eligible for posthumous representation regardless of cause of death or family presence. As seen in regional human rights practice, third parties should be allowed to submit applications to ensure that no victim is silenced. LRVs, already mandated to represent groups of victims, could include deceased victims while still requiring evidence of harm and causality, ensuring the process is guided by dignity, equality, and victim-centered justice rather than procedural formality.

Failing to adopt a consistent approach risks undermining legal certainty, procedural coherence, and undermines the Court's ability to deliver justice for victims. Excluding deceased victims effectively silences experiences central to understanding the full scope of harm and allows perpetrators to evade accountability. In the realm of victim representation and liability for reparations, this would be, quite literally, letting convicted persons get away with murder.