2. Representatives of Absent Victims or Indirect Victims? An Analysis of Intergenerational Victimhood at the International Criminal Court (ICC)

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Abstract: *Given the undeniable lasting impact that international crime can and does effectuate, affecting generations who witness and experience its effects, this chapter focuses on intergenerational victimhood, in the context of International Criminal Court (ICC) proceedings. Based on an analysis which explores whether family members of victims, (including deceased victims), can participate and seek reparation, this chapter provides three key findings. First, that family members of victims can participate and seek reparations in two capacities: as victims themselves or as successors of deceased victims. Second, that this position remains unchanged irrespective of the category of victims as victims of a situation or victims of crimes. Third, that this remains further unaffected by the four categories of crimes that the victim has been subjected to. However, the chapter argues, that the underlying crimes may have an impact on the exact form of participation or reparation sought, particularly with respect to sexual and gender-based crimes, in the case of children born out of rape.*

1. Recognition of Victimhood Through the Generations by the International Criminal Court (ICC): Introduction

The lasting impact of unimpeded and rampant international crime has seldom been disputed.[1] Any analysis of the modalities that allow victims, access to the International Criminal Court (ICC), would be incomplete if it overlooked this intergenerational or transgenerational[2] dimension to international crime and the harm that ensues as a result. This chapter aims at focusing on this intergenerational or transgenerational aspect of the victims' regime at the ICC in particular. To do this, this chapter involves an analysis of the possibility of family members of victims participating in court proceedings and seeking reparations either as victims themselves or as successors of deceased victims. As part of this analysis, this chapter

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1 See: Regina E Rauxloh, 'Good Intentions and Bad Consequences: The General Assistance Mandate of the Trust Fund for Victims of the ICC' (2021) 34(1) Leiden Journal of International Law 203, 203–204.

2 The terms intergenerational and transgenerational have been used synonymously throughout this chapter.

asks and attempts to answer three questions in particular. First, whether family members of victims can participate in proceedings before the Court under any circumstance, whether as victims themselves or successors of victims, and seek reparations. Second, whether the answer would remain unchanged irrespective of whether the victims are victims of a situation or victims of crimes. Third, whether in the case of victims of crimes, the applicable position both for participation and reparation remains unchanged irrespective of the crime in question. For this last part of the analysis, other than the four categories of international crime under Article 5 of the Rome Statute, this hapter also studies the impact of the different underlying acts, relying on the example of sexual and gender-based crimes in particular. This is with a view to determining whether the rights of family members to participate and seek reparation, if any, remain unaffected by the specific crimes and underlying acts that the (deceased) victims were subjected to.

For the purpose of this chapter, the 'absent' signifies deceased victims as well as the children of victims, who may either have had no agency at the time the crimes were committed or were born as a result of these crimes or after. Thus, the chapter refers to the present generation as victims of the crime, and those present at the time of the commission of these crimes. Future generations refer to the children, grandchildren, and great grandchildren of these victims. For this chapter, there is no limitation in the number of generations that qualify as future generations, other than those applicable *vis-à-vis* the jurisdictional limits of the ICC. This aspect is discussed in detail later in the chapter. Past generations refer to deceased victims, irrespective of whether or not their death was a result of the crimes perpetrated. This includes both sets of deceased victims, those who died after initiating proceedings before the Court and those who died prior thereto.

2. 'Victims' before the International Criminal Court: Eligibility Criteria and Relevant Factors (or Pre-requisites)

In the two decades since its establishment, the ICC has developed a multifarious regime governing the status and rights of victims before the Court. This refers to both, victims of situations before the Court as well as victims of specific cases pursued by the Office of the Prosecutor (OTP), also referred to as 'victims of crimes'. This regime, developed through the Court's albeit fragmented jurisprudence, adds colour to Articles 68 and 75

of the Rome Statute, which cater for victim participation and reparation respectively. *Vis-à-vis* the former, Article 68(3) states that:

> [w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.[3]

Article 68(3) thus acts as the sole legal provision under the Statute on victim participation while Article 75 acts as its equivalent *vis-à-vis* reparation. Article 75(1) states that:

> [t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.[4]

Instead of 'principles relating to or in respect of victims', the French text of Article 75 specifically mentions *'principes applicables aux formes de réparation… à accorder aux victimes ou à leurs ayants droit'*. Irrespective of this, while the French text appears clearer in this regard, both versions arguably cater for an action on behalf of a victim.

While on participation, Article 68 talks of personal interests of victims and on reparation, Article 75 envisages reparations to victims and the determination of the 'scope and extent of any damage, loss and injury' to victims, both provisions lack a definition of 'victims'. The Rules of Procedure and Evidence of the ICC assist with this, albeit slightly. Rule 85 defines the term 'victims' for the purpose of both the Statute and the Rules themselves. This definition is twofold. According to this, natural persons qualify as victims if they 'have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.[5] This places the Court in a position

3 Art 68(3), Rome Statute of the International Criminal Court.
4 Art 75(1), Rome Statute of the International Criminal Court.
5 Rule 85(a), Rules of Procedure and Evidence of the International Criminal Court.

to determine the scope of 'harm' suffered by each of these individuals and whether it is linked to the crimes within the Court's jurisdiction, ie a causal nexus. *Prima facie,* harm does not appear to have been limited here to direct harm.

According to Rule 85, organisations can equally be categorised as victims if they 'have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.[6] Thus, read together, the immediate variance between the provisions for the qualification of individuals as victims and that of organisations, is that the harm sustained by the latter is clearly limited to direct harm. Further yet, the direct harm that organisations suffer as a result of crimes within the Court's jurisdiction must be specifically sustained by property that is dedicated to a specific purpose listed under Rule 85 which appears to effectively exclude organizations dedicated to purely economic purposes, or economic organizations. The application forms for participation as victims usually differ for individuals and organisations.

2.1. Recognition as a Victim and the Resultant Consequences

While the sheer scale and nature of international crime often, if not always, results in mass victimization, official recognition as a victim before the ICC is much narrower in scope.[7] As mentioned earlier, recognition as a victim is limited to the situations and cases being investigated and prosecuted at the Court. Further, such recognition is limited by its objectives. These are to allow victims a voice through participation in the proceedings before the Court and to seek reparation for the harm they suffered. While victims can both participate generally in proceedings and seek reparations, the application process for the two stages is separate irrespective of any overlap in eligibility criteria. The rights that ensue from official recognition as a victim thus vary, based on whether this recognition pertains to participation or reparation. Maintaining the distinction between these two stages, the Court has stated on occasion that, 'victim participation at the ICC does not *per se* involve a request for reparations, but rather only the possibility for victims

6 Rule 85(b), Rules of Procedure and Evidence of the International Criminal Court.
7 See for eg *vis-à-vis* the 'reparation gap', Rauxloh (n 1) 204.

to have their views and concerns heard on matters affecting their *personal* interests.'[8]

While the Statute and the Rules are not particularly verbose on who qualifies as a victim other than the definition that Rule 85 has to offer, the Court has dealt with this on several occasions. The definition and role of victims *vis-à-vis* participation was dealt with by the Trial Chamber in the Court's first case, *The Prosecutor v Lubanga*. This however was not the first decision of the Court concerning the participation of victims. The first decision was instead that of the Pre-Trial Chamber in *The Situation of the Democratic Republic of Congo*, where amongst other issues the Court discussed and distinguished the concepts of victims of the situation and victims of a case.[9] The key question that the Pre-Trial Chamber dealt with in that decision was whether victims could participate in proceedings at the investigation stage.[10]

In 2006, in the case of *The Prosecutor v Lubanga*, the Pre-Trial Chamber determined that individuals could qualify as victims if they fulfilled the four criteria listed under Rule 85.[11] As per the Pre-Trial Chamber's interpretation, these four criteria required that 'the victim must be a natural person; that he/she has suffered harm; that the crime from which the harm resulted must fall within the jurisdiction of the Court and that there must be a causal link between the crime and harm'.[12] In this decision the Pre-Trial Chamber reinforced its previous view that in order to qualify as victims, individuals had to demonstrate a *sufficient* causal link between the harm they suffered and the crimes that 'there are reasonable grounds to believe' that the accused 'bears criminal responsibility and for which the Chamber

8 Megan Hirst, 'Termination of Victim Participation' in Kinga Tibori-Szabó and Megan Hirst (eds), *Victim Participation in International Criminal Justice: Practitioners' Guide* (Springer 2017) 422.

9 *The Situation in the Democratic Republic of the Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6,* Pre-Trial Chamber I, 17 January 2006, ICC-01/04–101-tEN-Corr, 17.

10 ibid., 7.

11 *The Prosecutor v Thomas Lubanga Dyilo, Decision on the Applications for the Participation in the Proceedings of a/0001/06, a/0002/06 in the case of the Prosecutor v Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo,* Pre-Trial Chamber I, 28 July 2006, ICC-01/04–01/06–228-tEN, 7.

12 ibid.

has issued an arrest warrant'.[13] In the view of the Pre-Trial Chamber, a causal link as per Rule 85

> at the case stage, is substantiated when the victim, and where applicable, close family or dependents, provides sufficient evidence to allow it to be established that the victim has suffered harm directly linked to the crimes contained in the arrest warrant or that the victim has suffered harm whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of these crimes.[14]

Essentially, in its decision the Pre-Trial Chamber foresaw two possibilities. First that the applicant demonstrated evidence to establish they suffered harm as a *direct* result or 'directly linked' to the crimes listed under the arrest warrant against the accused.[15] Second and alternatively, that the harm was a result of an intervention to help 'direct victims' of the crimes.[16] Thus, while not in so many words, the Court appears to acknowledge two categories of victims, direct and indirect. The Court relies on both, the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', as well as the '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'.[17] This concept of dividing victims into direct and indirect victims was later developed more explicitly through the Court's jurisprudence as discussed under the section on 'direct versus indirect victims below'.

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13 *The Prosecutor v Thomas Lubanga Dyilo, Decision on the Applications for the Participation in the Proceedings of a/0001/06, a/0002/06 in the case of the Prosecutor v Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo,* Pre-Trial Chamber I, 28 July 2006, ICC-01/04–01/06–228-tEN, p.9; relying on its decision in, *The Prosecutor v Thomas Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v Thomas Lubanga Dyilo,* Pre-Trial Chamber I, 29 June 2006, ICC-01/04–01/06–172-tEN, 6.

14 ibid., 7–8.

15 ibid.

16 ibid.

17 ibid., citing, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', United Nations General Assembly, 29 November 1985, UN Doc No A/RES/40/34; 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', Human Rights Commission, 19 April 2005, Resolution 2005/35.

In the situation of Uganda, Pre-Trial Chamber II determined the criteria for participation of victims slightly differently. The Pre-Trial Chamber stated that an assessment was to be undertaken 'by analysing (i) whether the identity of the applicant as a natural person appears duly established; (ii) whether the events described by each applicant constitute a crime within the jurisdiction of the Court; (iii) whether the applicant claims to have suffered harm; and (iv) most crucially, whether such harm appears to have arisen "as a result" of the event constituting a crime within the jurisdiction of the Court'.[18] This approach appears to have been applied so far by the Court, in its subjective analysis of 'victimhood' for the purpose of court proceedings. Similarly, *in The Prosecutor v Ntaganda*, the Court reiterated these criteria with the slight difference of requiring that there be a 'direct causal nexus between the crime and the harm', and that this be a crime for which the defendant was convicted.[19]

2.2. Family Members as Successors of Deceased Victims

Over the years, the Court has received applications for both participation and reparation by family members of victims.[20] These applications have been in different capacities, either as successors of deceased victims, or as victims themselves. This section engages with the former while the latter position is discussed under the section on 'family members of victims as victims themselves'. In order to address the position of family members as successors of deceased victims and the ensuing rights of this status, this section starts with an analysis of the legal standing of deceased persons as

18 *Situation in Uganda, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06,* Pre-Trial Chamber II, 10 August 2007, ICC-02/04–101, 10.

19 *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02/06–2659, 15. In response to the appeal filed against this decision, the Appeals Chamber in its decision reiterated its stance in *The Prosecutor v Lubanga,* on the issue of causation and stated that, '[t]he standard of causation is a "but/for" relationship between the crime and the harm and, moreover, it is required that the crimes for which Mr Lubanga was convicted were the "proximate cause" of the harm for which reparations are sought.' See *The Prosecutor v Bosco* 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, para 650.

20 See for example, Héctor Olásolo and Alejandro Kiss, 'The Role of Victims in Criminal Proceedings before the International Criminal Court' (2010) 81(1–2) Revue internationale de droit pénal 125, 128.

victims before the Court and then deals with two situations where these persons can be represented by successors. First, in situations where the primary victim dies after initiating the original action; and second, where the primary victim is deceased prior to the commencement of the original proceedings.

2.2.1. Legal Standing of Deceased Persons as 'Victims'

Since the Rules of Procedure and Evidence stipulate that natural persons can qualify as victims before the Court, whether or not deceased persons can be categorised as victims has largely been dependent on the Court's interpretation of the term 'natural persons'. The Court has thus far not been uniform in its treatment of this question.[21] However gradually, its jurisprudence on the matter highlights patterns in the Court's treatment of the issue. At the Pre-Trial stage itself the Court has had varied approaches to this question. One approach has been to reject applications on behalf of deceased persons, in light of the fact that they are not 'natural persons' in the view of the Court.[22] Another, has been to consider such applications where the applicants themselves allege harm as a result of the death of a relative. This is analysed in greater detail under the section on family members as victims themselves.

A different Pre-Trial Chamber took a third approach whereby it decided that a victim who died as a result of a crime within the jurisdiction of the Court could be granted the status of a victim if an application to this effect was filed by the deceased victims' successor. In *The Prosecutor v Jean-Pierre Bemba Gombo*, the Pre-Trial Chamber, decided that it was possible for deceased persons to be represented as victims if the following three criteria were fulfilled: 'that (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

21 ibid., 128–129.

22 *The Situation in Darfur, Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/001/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a 0035/07 to a/0038/07,* Pre-Trial Chamber I, 14 December 2007, ICC-02/05–111-Corr, p.18; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case,* Pre-Trial Chamber I, 10 June 2008, ICC-01/04–01/07–579, 25.

deceased person has been submitted by his or her successor'.[23] Thus, basing itself on an interpretation which in the view of the Pre-Trial Chamber was 'in conformity with internationally recognized human rights and related jurisprudence', the Chamber found it 'self-evident that a victim does not cease to be a victim because of his or her death'.[24] The Chamber appeared to rely on the jurisprudence of the Inter-American Court of Human Rights and European Court of Human Rights for this.[25] However, perhaps it ought to be noted here that, the application that the Chamber dealt with appeared to have been made both on behalf of the applicant having sustained harm as a result of the death of her father as well as the harm her deceased father had sustained.[26] It seems unclear if the Chamber's decision would have been the same had the applicant not had the status of a victim herself.

Trial Chambers appear to have been similarly divided on the issue and have taken different approaches in this regard. For example, one approach has been to allow deceased victims to be represented in proceedings if they died after submitting their application to be treated as a victim in the proceedings.[27] Most of the Trial Chambers' engagement with this issue has in fact been whilst disposing requests for resumption of action on behalf of deceased victims.

2.2.2. Resumption of Action on Behalf of a Deceased Victim

As mentioned above, a significant portion of the applications submitted to the Court on behalf of deceased victims has been for the resumption of action initiated prior to the death of these victims. Thus, the objective of these applications is to not allow proceedings to abate on the death of the victims who initiated it. Arguably, this has been in line with the Statute's objective to ensure that proceedings remain informed by the views of the victims, and that the views of eligible victims are not silenced in cases where the victims have since died. Such applications do not constitute new

23 *The Prosecutor v Jean-Pierre Bemba Gombo, Fourth Decision on Victims' Participation,* Pre-Trial Chamber III, 12 December 2008, ICC-01/05–01/08–320, 15.

24 ibid.

25 ibid., 16, citing IACtHR, *Case of Aloeboetoe et al v Suriname,* Judgment of 10 September 1993, para 54; and IACtHR, *Case of Garrido and Baigorria v Argentina,* Judgment of 27 August 1998, para 50; and *Keenan v The United Kingdom,* Judgment of 3 April 2001, Application no 27229/95, paras 135 et seq.

26 ibid., 15–17.

27 This appears to be based on the Court's interpretation of Rule 89(3). See Olásolo and Kiss (n 20) 130.

applications as victims or amount to initiation of new proceedings before the Court.

The Court has dealt with this issue on several occasions. While the Court now has a relatively consistent approach towards such matters, this was definitely not the case initially, since the Court's earlier jurisprudence on the matter was quite fragmented. Starting with the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui,* in which the Trial Chamber allowed a 'close relative' to resume participation on behalf of the deceased victim who had previously been participating in the course of proceedings.[28] However, in this case the Chamber clarified that the successor's participation would be limited to being 'on behalf of the deceased victim and within the limits of the views and concerns expressed by the victim in his or her initial application'.[29] For such resumed participation, the Trial Chamber asked that applicants furnish proof: '(i) of the death of the participating victim (usually by death certificate), (ii) of the family relationship between the deceased and the person wishing to resume the participation, and (iii) that the deceased victim's family have specifically mandated the person to continue the deceased victim's participation before the ICC'.[30] However, this was the subject of an appeal and the Appeals Chamber disagreed with the approach of the Trial Chamber. In the appeal, the Appeals Chamber dealt with the issue of whether deceased victims ought to be removed from the list of participating victims, as well as that of resumption of participation on behalf of deceased victims.[31] The Appeals Chamber noted that while the defence did not '*per se* object to the resumption of participation of deceased victims', the defence did nonetheless, 'object to the "excessive" delay in resuming participation on behalf of certain victims who have long since died'.[32] While the defence in this instance requested that a 'time bar' be placed on applications for the resumption of participation, the Appeals Chamber instead did not deem the 'resumption of a deceased victim's participation by an heir/successor' appropriate.[33]

28 Hirst (n 8) 420–421.
29 ibid., 421.
30 ibid.
31 *The Prosecutor v Mathieu Ngudjolo Chui, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims,* Appeals Chamber, 23 September 2013, ICC-01/04–02/12–140, 10–13.
32 ibid., 12.
33 ibid., 12–13.

The Chamber based its view on the understanding that '[v]ictims who are deceased can no longer be said to be participating' and that as far as their views and/or concerns that had been expressed by them prior to their death were concerned, these would not be disregarded by the Court. Thus, the Chamber appeared steadfast that, while the views of victims as expressed by them during the proceedings prior to their death would continue to be a part of the court record, allowing successors to resume participating on their behalf was not appropriate. Accordingly, the Appeals Chamber asked the Registrar to remove deceased victims and any representatives thereof from the list of participating victims in this case.[34] However, whilst stating that the Chamber found the resumption of participation on behalf of a deceased victim inappropriate, the Chamber nonetheless cautioned that '[t]his is without prejudice to any determination on the resumption of participation on behalf of deceased victims in relation to reparation proceedings.'[35] Thus, clearly the Court did not seem intent on limiting the right of succession to claims for reparation *per se*.

This question was revisited in the case of *The Prosecutor v Germain Katanga* where family members of deceased victims requested that they succeed these victims and 'continue the action initiated by those victims'.[36] The defence did not oppose the application in question in this instance, as noted by the Trial Chamber[37], which acknowledged that, 'the close relatives of a victim authorised to participate in the proceedings and who is now deceased may decide to continue the action initiated by the victim before the Court, but that they may do so only on behalf of the deceased victim and within the limits of the views and concerns expressed by the victim in his or her initial application'.[38] In addition to the limitation that this caveat places on the resumption of action by successors of deceased victims, the Chamber also required that such persons acting on behalf of a deceased

34 ibid., 13.

35 ibid.

36 *Le procurer c Germain Katanga, Demande de reprise des actions introduites par les victimes a/0170/08 et a/0294/09,* La chambre de première instance II, 13 janvier 2015, ICC-01/04–01/07–3515-Red; *The Prosecutor v Germain Katanga, Decision on the applications for resumption of action submitted by the family members of deceased victims a/0170/08 and a/0294/09,* Trial Chamber II, 11 May 2015, ICC-01/04–01/07–3547-tENG.

37 *The Prosecutor v Germain Katanga, Decision on the applications for resumption of action submitted by the family members of deceased victims a/0170/08 and a/0294/09,* Trial Chamber II, 11 May 2015, ICC-01/04–01/07–3547-tENG, 4.

38 ibid.

victim furnish evidence as to the death of the deceased victim, their relationship to the deceased victim and authorisation or 'appointment by' the deceased victim's family. These three conditions are identical to the Court's previous rulings on the matter as discussed above. Whilst seemingly at odds with the Appeals Chamber's approach in *The Prosecutor v Mathieu Ngudjolo Chui*, the Trial Chamber granted these individuals permission to resume action on behalf of the deceased victims, and also specified that its decision was 'without prejudice to the Chamber's order pursuant to article 75 of the Statute, which will decide as to the award of reparations'.[39]

Then, in 2015, the Trial Chamber in *The Prosecutor v Bosco Ntaganda* dealt with a request by the spouse of a deceased victim who asked the Court for permission 'to resume the action initiated before the Court by her deceased husband'.[40] The defence objected to this application, arguing that the evidence furnished by the applicant fell short of the requirements set out previously by the Court for the resumption of action on behalf of deceased victims. The Chamber granted this request. In granting the request to resume action on behalf of the deceased victim, the Chamber relied on the earlier three requirements specified in *The Prosecutor v Katanga*. In this case in particular, while the applicant furnished proof with respect to the first two criteria, *vis-à-vis* the third, ie appointment by the victim's family, the Court specified that this was 'where the applicant cannot easily be presumed to be entitled to continue the action or represent the family'.[41] The Court unambiguously clarified that 'such a presumption can, for example, be drawn where the applicant is: the spouse of a deceased victim; an only surviving child of a deceased victim, where the child has reached the age of eighteen and the deceased victim was either unmarried or the victim's spouse is already deceased; or the parents of an unmarried deceased victim who either has no children or whose children are below the age of eighteen'.[42] Further, in this case the Trial Chamber attempted at further simplifying and standardising the process for resumption of action by family members on behalf of deceased victims through the use of standardised forms and templates.[43] The Trial Chamber appears to have

39 ibid., 6.
40 *The Prosecutor v Bosco Ntaganda, Fourth decision on victims' participation in trial proceedings,* Trial Chamber VI, 1 September 2015, ICC-01/04–02/06–805, 3.
41 ibid., 5.
42 ibid.
43 ibid., 6–7.

made no reference to the Appeals Chamber's decision in *The Prosecutor v Mathieu Ngudjolo Chui*.

The Court dealt with this issue again in 2016 in *The Prosecutor v Jean-Pierre Bemba Gombo*, where a request was made for the resumption of action by the successors of several deceased victims.[44] The defence requested that the applicants be asked to provide further information *viz* 'the requirements for the participation by family members of deceased victims'.[45] After such further submissions were filed by the legal representative for the victims, the defence then asked the Chamber to reject the request for resumption on the basis that the supporting documents fell short of the requirements for 'continued representation'.[46] The defence cited the Appeals Chamber's decision in *The Prosecutor v Mathieu Ngudjolo Chui* wherein 'the resumption of a deceased victim's action by a successor was not deemed appropriate'.[47] In addition, the defence stated that, in light of the jurisprudence of the Court, applications on behalf of a victim can only be introduced in cases where the victim has consented to this or in a situation where such application is 'on behalf of a child or a disabled person'.[48] Further, the defence argued that any applications made on behalf of deceased ought to be rejected if the applicant did not allege any moral harm that resulted from the death of the deceased person, and that any relatives of deceased persons could only participate if they demonstrated personal harm suffered 'as a result of an incident falling within the parameters of the confirmed charges'.[49] However, it was argued by the legal representative for the victims that the defence argument fused together two distinct procedures; application for resumption of actions by a successor versus that of an application as a new victim.[50] In light of this not being a new application for victim participation, the Chamber did not find the defence's argument of

44 *The Prosecutor v Jean-Pierre Bemba Gombo, Decision on 'Requête relative à la reprise des actions introduites devant la Cour par des victimes décédées',* Trial Chamber III, 24 March 2016, ICC-01/05–01/08–3346, 3.
45 ibid., 3–4.
46 ibid., 5.
47 ibid., 8.
48 ibid.
49 ibid.
50 ibid., 9–10.

relevance.[51] The Trial Chamber in this case, thus followed the jurisprudence of Trial Chambers II and VI in this regard.[52]

Further, and specifically in relation to the defence's reliance on the Appeals Chamber's decision in *The Prosecutor v Mathieu Ngudjolo Chui,* the Trial Chamber stated that that decision pertained to appellate proceedings and was specifically 'without prejudice to any determination on behalf of deceased victims in relation to reparation proceedings'.[53] Thus, the Chamber found that since the present instance involved the 'sentencing and reparations stage', its decision to allow resumption of action applications was not contrary to the Appeals Chamber's decision.[54] Dissimilar to the approach of Trial Chamber VI in *the Prosecutor v Ntaganda* however, the Trial Chamber in this case stated that all three conditions including the third, which involved a mandate by the family of the deceased victim, were necessary to grant a request for a resumption of action.[55] However, the Chamber appeared to be of the view that the assessment of this criterion, of a specific mandate, had to be case based. In this instance, the Chamber found that, contrary to the arguments of the defence, 'the family link or other close connection between the Successor and the Deceased Victim is confirmed by the *jugement d'homologation*' and that '[i]ndeed the *jugement d'homologation* validates the decision of the *Conseil de famille*, composed of family members, nominating a person among its members to act as successor.'[56] This is in conformity with the Court's contextual approach towards the concept of family members.[57]

Notwithstanding its decision in this case, the Chamber asked that future applications for resumption of action include the 'specific family relationship or other close connection between the Successor and the deceased

51 ibid., 13.
52 ibid., 14.
53 ibid., 14–15.
54 ibid.
55 ibid., 15.
56 *The Prosecutor v Jean-Pierre Bemba Gombo, Decision on 'Requête relative à la reprise des actions introduites devant la Cour par des victimes décédées',* Trial Chamber III, 24 March 2016, ICC-01/05–01/08–3346, 19–20.
57 See for example, Luke Moffett and Clara Sandoval, 'Tilting at Windmills: Reparations and the International Criminal Court' (2021) 34(3) Leiden Journal of International Law 749, 755.

person' directly in each of the applications.[58] In this case, the Trial Chamber considered this issue, of resumption of action, in an instance where the deceased person had previously been admitted as a victim in the proceedings. Nevertheless, the Court's analysis does not exclude the possibility of family members acting on behalf of a deceased victim in the absence of such pre-existing participation by the deceased person prior to their death. Lastly, in its decision, the Trial Chamber also clarified that a declaration made prior to their death, 'that they were only seeking reparations for themselves', did not preclude the resumption of such actions by their successors.[59] The Chamber also specified a simplified procedure for future resumption of action requests similar to that recommended by Trial Chamber VI in *The Prosecutor v Bosco Ntaganda*. In connection to this procedure for future requests, the Chamber also made reference to a template for a 'resumption of action' application form which was annexed to the Chamber's decision.[60]

Subsequent to this decision, Trial Chamber II dealt with a similar request in *The Prosecutor v Germain Katanga* in December 2016.[61] In this instance, the legal representative of the victims requested that a successor of a deceased victim be allowed to resume action on behalf of the deceased victim.[62] In its response to the legal representative of victims' filing, the defence did not object to the resumption of action request.[63] The Trial Chamber reinforced its previous decision and recalled 'that close relatives of a victim who was authorised to participate in trial proceedings but who has died in the course of the trial may continue the action which the latter initiated before the Court'.[64] In allowing this request, the Chamber

58 *The Prosecutor v Jean-Pierre Bemba Gombo, Decision on 'Requête relative à la reprise des actions introduites devant la Cour par des victimes décédées',* Trial Chamber III, 24 March 2016, ICC-01/05–01/08–3346, 20.

59 ibid.

60 *The Prosecutor v Jean-Pierre Bemba Gombo, Decision on 'Requête relative à la reprise des actions introduites devant la Cour par des victimes décédées',* Trial Chamber III, 24 March 2016, ICC-01/05–01/08–3346, 28; Annex B, *Template for "Resumption of Action Form" to be prepared by the Registry,* 24 March 2016, ICC-01/05–01/08–3346-AnxB.

61 *The Prosecutor v Germain Katanga, Decision on the Application for Resumption of Action Submitted by a Relative of Deceased Victim a/0265/09 and the Appointment of a New Representative for Victim A/0071/08*, 12 December 2016, ICC-01/04–01/07–3721-tENG.

62 ibid., 3.

63 ibid., 4.

64 ibid.

reinforced its previously established principles for the resumption of action, including that such action be limited to the same confines as the deceased victim's application and that the application had to establish that they fulfilled the three pre-requisites for such applications.[65]

Despite the disjointed nature of the Court's early jurisprudence on the matter, this right of resumption of action appears to have been consistently upheld by various Trial Chambers of the Court ever since, irrespective of the Appeals Chamber's decision in 2013. Objections to such action on behalf of the defence for instance have related predominantly to the time taken for such proceedings. As discussed above, on at least one occasion the defence asked that a time limit be imposed for such action.[66] In *The Prosecutor v Al Mahdi,* The Trial Chamber's reparations order was partly amended by the Appeals Chamber on 8 March 2018.[67] While the issue of deceased victims does not appear to have been addressed through the reparations order and the amended order in this case, it did arise after these decisions. This was in the form of a request by a family member of an applicant for reparations who was then deceased, to be able to 'succeed the victim for purposes of the reparations award'.[68] In this instance it had been argued that the victim's individual request for reparation had already been granted by the Trust Fund for Victims and that accordingly it was requested 'that the designated successor can benefit from the reparations

65 *The Prosecutor v Germain Katanga, Decision on the Application for Resumption of Action Submitted by a Relative of Deceased Victim a/0265/09 and the Appointment of a New Representative for Victim A/0071/08*, 12 December 2016, ICC-01/04–01/07–3721-tENG, 4–5.

66 *The Prosecutor v Mathieu Ngudjolo Chui, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims,* Appeals Chamber, 23 September 2013, ICC-01/04–02/12–140, 12.

67 *The Prosecutor v Ahmad Al Faqi Al Mahdi, Reparations Order,* Trial Chamber VIII, 17 August 2017, ICC-01/12–01/15–236; *The Prosecutor v Ahmad Al Faqi Al Mahdi, Judgment on the appeal of the victims against the "Reparations Order",* Appeals Chamber, 8 March 2018, ICC-01/12–01/15–259-Red2.

68 *The Prosecutor v Ahmad Al Faqi Al Mahdi, Decision on the LRV Request for Resumption of Action for Deceased Victim a/20519/19,* Trial Chamber VIII, 21 April 2020, ICC-01/12–01/15–357, p.3 citing *le procurer c Ahmad Al Faqi Al Mahdi, demande de reprise d'action introduite par la victim a/20519/19,* Chambre de première instance VIII, 3 avril 2020, ICC-01/12–01/15–355.

award accorded to the victim'.[69] Accordingly, in support of the request the representative of victims submitted evidence to establish that the victim in question was deceased; that the proposed successor was a 'family relation' to the deceased victim; and that the family of the deceased victim had 'designated the person to resume the action initiated by [the deceased victim]'.[70] Seeing that these conditions appear to have been met, and in light of the fact that the Chamber had granted a similar request in 2017[71] when these three conditions had been met, the Chamber granted the request.[72] In the particular circumstances of this case, the Chamber was of the view that 'the entitlement to the reparations award granted to the victim is not terminated by the victim's death' and that '[t]herefore, if the conditions mentioned above are met, a designated family member is eligible to become beneficiary of the reparations award'.[73]

In its Reparations Order in *The Prosecutor v Bosco Ntaganda,* the Trial Chamber stated unambiguously that, '[i]n the event that a victim who was found eligible for reparations dies before receiving them, the victim's descendants or successors shall be equally entitled to them.'[74] In doing this, the Chamber relied on the Court's previous jurisprudence on the matter. Specifically, the Chamber relied on the decisions of Pre-Trial Chamber III in *The Prosecutor v Jean-Pierre Bemba Gombo* and of Trial Chamber II in *The Prosecutor v Germain Katanga*, as well as the jurisprudence of other courts that these Trial Chambers cited in their decisions. Therefore, the position of the Court thus far with the exception of a few decisions which the Court appears to have consistently deviated from since, appears to be to allow the resumption of action by successors of deceased victims. While this *per se* shows that the Court has appeared willing to allow requests for resumption in all stages of the proceedings whether with a view to

69 *The Prosecutor v Ahmad Al Faqi Al Mahdi, Decision on the LRV Request for Resumption of Action for Deceased Victim a/20519/19,* Trial Chamber VIII, 21 April 2020, ICC-01/12–01/15–357, 3.

70 ibid.

71 *The Prosecutor v Ahmad Al Faqi Al Mahdi, Decision on LRV Request for Resumption of Action for Deceased Victim a/35084/16,* Trial Chamber VIII, 2 June 2017, ICC-01/12–01/15–223, 3–4.

72 *The Prosecutor v Ahmad Al Faqi Al Mahdi, Decision on the LRV Request for Resumption of Action for Deceased Victim a/20519/19,* Trial Chamber VIII, 21 April 2020, ICC-01/12–01/15–357, 3–4.

73 ibid.

74 *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02/06–2659, 18.

simply participate or seek reparation, the rights ensuing from the grant of such requests are not unfettered. Any participation or action pursuant to resumption requests are confined by the original contours of participation or action granted to the deceased victim. Further, requests for resumption are subject to the three general criteria discussed above. While the Court plays a role in granting such requests, based on the jurisprudence and practice of the Court thus far, such requests would essentially now be dealt with by the Registry similar to other applications, with the Court playing an affirmational role in the grant of these requests.

2.3. Family Members of Victims as Victims Themselves

While resumption of action requests represent a significant portion of the Court's interaction with the requests by family members to participate in proceedings and seek reparations, such requests on behalf of deceased victims are not the only means through which such individuals can participate in court proceedings and seek reparations. The Court's jurisprudence on the subject also caters for family members of victims including family members of deceased victims to participate and seek reparation before the Court as victims themselves. The evolution of this recognition is intertwined with the Court's interpretation of the concept of victimhood. A key aspect of this, is the Court's acknowledgment of the possibility of both direct and indirect victims. In turn, this understanding is based on its acknowledgment that harm suffered by victims can be either direct or indirect as discussed in the following section.

2.3.1. Direct Versus Indirect Victims

Whether an individual qualifies as a direct victim appears to hinge on the harm they suffered and whether it was direct or indirect.[75] The question appeared to have arisen in *The Prosecutor v Thomas Lubanga Dyilo*, where

75 This harm whether direct or indirect must be personal to the victim and can be 'material, physical and psychological'. See *The Prosecutor v Thomas Lubanga Dyilo, 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), Annex A, Order for Reparations (amended),* Appeals Chamber, 3 March 2015, ICC-01/04–01/06–3129-AnxA, 3.

the Registry asked the Chamber for advice on around 200 applications submitted by individuals claiming to have suffered harm as a result of the crimes committed by the child soldiers who themselves were direct victims in this case.[76] On this matter, the Appeals Chamber held that what was a pre-requisite was that the alleged harm had to be *personal* to the victim.[77]

The definition of victims unambiguously limits the kind of harm sustained by organisations to direct harm. The absence of a similar limitation indicates the deliberate inclusion of both direct and indirect harm sustained by natural persons. Nonetheless, the Court has, on occasion required the causal link between the harm suffered and crimes committed to be direct, at least in part, with the exception of situations where persons suffer harm whilst assisting 'direct victims'. In *The Prosecutor v Thomas Lubanga Dyilo*, as stated above, Pre-Trial Chamber I required, that to establish that the causal link stipulated under Rule 85, an individual had to 'provide sufficient evidence to establish that that person has suffered harm directly linked to the crimes set out in the arrest warrant' unless such person 'suffered harm by intervening to assist the direct victims in the case'.[78] The person would have to similarly provide sufficient evidence for the latter. Thus, while it has been argued that through this, the Court on occasion overlooked this distinction and limited the scope of 'victimhood' for natural persons, the inclusion of harm suffered whilst intervening to assist direct victims appears to maintain this wider scope. Nonetheless, it comes with the effect of dividing these victims into direct and indirect victims. However, the ambit of indirect victims has since been interpreted in a broader manner, so as to include family members of victims of crimes where such individuals suffer personal harm as a result of their relationship to direct victims of crimes.

The two categories of direct and indirect victims are also referred to at the reparation stage of the proceedings. In *The Prosecutor v Bosco Ntaganda*, the Trial Chamber clearly distinguished successors of deceased victims who died before receiving reparations and 'indirect victims who suffered personal harm'. The latter according to the Trial chamber, were 'entitled to

76 Olásolo and Kiss (n 20) 135, fn 32.

77 ibid., H136.

78 *The Prosecutor v Thomas Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo,* Pre-Trial Chamber I, 28 July 2006, ICC-01/04–01/06–228-tEN, 8–9.

reparations on their own right, regardless of whether they are the rightful successors of the deceased victim'.[79] In this case, the Trial Chamber maintained the distinction between direct and indirect victims.[80] The Court defined direct victims as 'those whose harm is the result of the commission of a crime for which the defendant was convicted'.[81] On the other hand, the Court defined indirect victims as 'those who suffer harm as a result of the harm suffered by the direct victims'.[82] While deliberating whether the Trial Chamber in this decision, erred in what the defence alleged amounted to 'the creation of a new category of indirect victims including persons who did not have a close personal relationship with the victim, who was nevertheless of significant importance in the lives', the Appeals Chamber upheld this distinction of direct and indirect victims.[83] The Appeals Chamber did not find an error on the part of the Trial Chamber in this regard and dismissed this ground of the defence's appeal.[84]

The Court's decision in *Ntaganda* thus, stated unambiguously that, natural persons could be either direct or indirect victims, 'provided they suffered a personal but not necessarily direct harm'.[85] This approach thus falls in line with the steadily growing jurisprudence of the Court that emphasises on the 'personal' nature of harm. In order to qualify for either, as a direct or an indirect victim, the individual thus has to demonstrate a causal nexus between the personal harm suffered, whether direct or indirect.[86] Previously, whilst hearing an appeal against a decision concerning participation, the Appeals Chamber agreed with the Trial Chamber's interpretation that there could be direct as well as indirect victims *viz* the context of Court proceedings. The Appeals Chamber further elaborated its understanding

79 *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02–2659, 18 citing as an example, Inter-American Court of Human Rights, *Case of Juan Humberto Sánchez v Honduras,* Series C No 102, para 66.

80 ibid., 54.

81 ibid., 16.

82 ibid.

83 *The Prosecutor v Bosco* 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 18, 591. In para 18 of this decision, the Appeals Chamber acknowledges that 'the criteria for classification as a direct or indirect victim are indeed legal criteria that have been determined by the Trial Chamber and in this judgment […]'.

84 ibid., para 640.

85 ibid.

86 ibid.

of this statement. According to the Appeals Chamber, '[h]arm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims', and that '[t]his is evident for instance, when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child'.[87] Thus, in the view of the Appeals Chamber, '[t]he recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child.'[88] The Appeals Chamber stated clearly that it was not therefore necessary for the harm suffered to be direct harm, however, what remained essential was that the harm be personal to the victim.[89]

In doing this, the Chamber relies on the principles set out for this by the Appeals Chamber thus including within the ambit of indirect victims each of the four subcategories recognised in that decision.[90] Therefore, accordingly the Trial Chamber recognised four categories of indirect victims: 'i. the family members of direct victims, ii. anyone who attempted to prevent the commission of one or more of the crimes under consideration, iii. individuals who suffered harm when helping or intervening on behalf of direct victims, and iv. other persons who suffered personal harm as a result of these offences'.[91]

Perhaps, crucial in appreciating the impact of the Court's decision to acknowledge the category of indirect victims, is the fact that both direct and indirect victims are entitled to receive reparations. Thus, by adopting

87 *The Prosecutor v Thomas Lubanga Dyilo, Judgement on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008,* Appeals Chamber, 11 July 2008, ICC-01/04–01/06–1432, 13–14. In *The Prosecutor v Ntaganda,* the Appeals Chamber clarified that the Court in its jurisprudence 'has referred to the demonstration of a close personal relationship as being *one* way of proving harm', and that therefore 'it has not expressly closed the door to other ways in which this can be done'. See *The Prosecutor v Bosco* 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, para 622.

88 *The Prosecutor v Thomas Lubanga Dyilo*, ibid., 14.

89 ibid., 15.

90 *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02–2659, 46.

91 ibid., 17; *The Prosecutor v Thomas Lubanga Dyilo, 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), Annex A, Order for Reparations (amended),* Appeals Chamber, 3 March 2015, ICC-01/04–01/06–3129-AnxA, 2.

this twofold interpretation of victimhood, the Court arguably caters for intergenerational access to reparations for international crime. This is particularly the case in *The Prosecutor v Bosco Ntaganda,* where the Court, as discussed below, recognises 'transgenerational harm' as a specific category of harm. The Trial Chamber in *Ntaganda*, also stated that it was possible for a person to 'qualify simultaneously as a direct and as an indirect victim, on the basis of different crimes for which the defendant was convicted, and therefore may seek reparations for the different harms suffered'.[92] An example of this based on the observations of the Trial Chamber, is children born out of rape. The Chamber stated that 'although children born out of rape are considered direct victims, they may have also suffered transgenerational harm as indirect victims.'[93] The status of children born out of rape and their claim to reparation is specifically dealt with below. However, this decision by the Trial Chamber was appealed by the defence and one group of victims. The Appeals Chamber upheld the Trial Chamber's finding *viz* children born out of rape,[94] while *vis-à-vis* the concept of transgenerational harm, the Appeals Chamber found that the Trial Chamber had erred and remanded the issue back to the Trial Chamber to 'assess and properly reason the matter […].'[95]

2.3.2. Types of Harm

Whilst establishing its principles on reparations, the Court has defined 'harm' as denoting 'hurt, injury and damage', stating that it need not be 'direct, but it must have been personal to the victim'.[96] According to the Court, such harm might be 'material, physical and psychological'.[97] The Court's decision to acknowledge specifically the multiplicity of harm and the various forms of its manifestation can reasonably be interpreted as

92 *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02–2659, 17.

93 ibid., 66.

94 *The Prosecutor v Bosco* 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, para 642.

95 ibid., para 493.

96 *The Prosecutor v Thomas Lubanga Dyilo, 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), Annex A, Order for Reparations (amended),* Appeals Chamber, 3 March 2015, ICC-01/04–01/06–3129-AnxA, 3.

97 ibid.

having led it to recognise the different categories of victims mentioned above.

Although the decision is the subject of an appeal, and the matter is to be decided by the Trial Chamber, particularly in view of 'the issue of scientific certainty as to the concept' and 'whether it is appropriate to award reparations at the ICC as well as any applicable evidentiary requirements for this', the Court's jurisprudence now makes an express reference to 'transgenerational harm'. Relying on the Trial Chamber's Decision in *The Prosecutor v Germain Katanga*, the Trial Chamber in *The Prosecutor v Ntaganda* defined transgenerational harm as 'a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter'.[98] The Court went on further to state that:

> [i]t is characterised by the existence of an intergenerational cycle of dysfunction that traumatised parents set in motion, handing-down trauma by acting as violent and neglectful caretakers deforming the psyche and impacting the next generation. Traumatised parents, who live in constant and unresolved fear, unconsciously adopt a frightening behaviour. This affects their children's emotional behaviour, attachment, and well-being, increasing the risk that they will suffer post-traumatic stress disorders, mood disorders, and anxiety issues. It is argued that the noxious effects of trauma may be transmitted from one generation to the next, with a potential impact on the structure and mental health of families across generations.[99]

The Trial Chamber in *Ntaganda* also speaks of 'mass victimisation, affecting victims as members of families and entire communities'.[100] Consistent with previous jurisprudence, the Trial Chamber clarified that, such harm, as well as transgenerational harm 'shall be personally suffered by the victim'.[101] The Chamber also stated that children of direct victims might have suffered transgenerational harm, irrespective of the date on which they were born, provided they establish that they suffered such a harm as a result of the crimes that the accused was convicted of.[102] The actual qualification

98 *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02–2659, 30.
99 ibid.
100 *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02–2659, 30–31.
101 ibid., 31.
102 ibid., 66.

of individuals as victims of transgenerational harm or other indirect harm remains contingent on a subjective analysis of the personal harm that they have suffered. Moreover, in light of the Appeals Chamber's decision, the Trial Chamber will now have to reassess this category of harm and the standards applicable to the concept. Notwithstanding this, the principles set out by the Court, and its reference to these distinct categories of harm, present an opportunity to broaden access to the Court for such victims of crimes. Further, arguably, such recognition could also have symbolic value. Irrespective of that, practical advantages of this approach would definitely require the consistent application of these principles on a case-to-case basis in combination with coordinated approaches to logistical challenges that might arise. Given the multiple organs that are involved, particularly in the reparation process at the ICC, such coordinated approaches would be crucial for any successful implementation of reparation orders.

3. Differentiated Claims on the Basis of Different Categories of Victims and Different Categories of Crimes?

The previous sections of this Chapter reveal the different avenues for the representation of deceased victims in court proceedings and the rights of family members as successors and victims themselves. Based on this analysis, it is possible for family members to represent deceased victims through resumption of action requests in situations where the victim initiated proceedings prior to their death. However, it is also possible for family members to both, participate in proceedings and seek reparations as victims themselves. In most instances, this is as indirect victims. While initially disjointed, the Court's jurisprudence has now established two distinct sets of criteria for applications by family members for these two avenues. While the analysis based on these two criteria remains subjective, it offers insight as to the broad principles applied to these categories and recognition of victimhood before the Court. This section instead analyses the second question underlying this Chapter, of whether this position remains unaffected irrespective of (i) whether such victims are victims of situations or victims of a crime; and (ii) the category of crimes and underlying acts that the victims were subject to.

3.1. Victims of a Situation Versus Victims of a Crime

Other than the distinction between direct and indirect victims, which, as discussed above do not restrict access to the Court to the latter, the Court also categorises victims into victims of the situation and victims of crimes. This distinction originated whilst the Court considered whether, or not, it was possible for victims to participate in proceedings at the investigation stage.[103] Seeing this as possible and taking into consideration that the law applicable to the Court distinguishes cases and situations from a procedural perspective, the Court chose to maintain this distinction in its recognition of victims. Accordingly, the Court specified '[i]n light of this distinction, the chamber considers that, during the stage of investigation of a situation, the status of victim will be accorded to applicants who seem to meet the definition of victims set out in rule 85 of the Rules of Procedure and Evidence in relation to the situation in question. At the case stage, the status of victim will be accorded only to applicants who seem to meet the definition of victims set out in rule 85 in relation to the relevant case.'[104] Thus, essentially this division represents the procedural division at the Court between a situation and a specific case.

Prima facie this distinction does not appear to give rise to differentiated claims by family members whether as successors or victims themselves. Arguably, this distinction of victims of the situation and victims of crimes is less relevant *vis-à-vis* the issue of continued participation on behalf of deceased victims within proceedings, since in such cases it is the status of the deceased victim, and their original action, which will be continued through resumption proceedings. Similarly, in cases where family members of victims apply as victims themselves, their status as victims of a situation or of a crime will depend on the stage of the proceedings. Their particular status, as a family member of a victim ought not to alter the procedure for their recognition as victims.

103 *Situation in the Democratic Republic of the Congo, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6,* Pre-Trial Chamber I, 17 January 2006, ICC-01/04–101-tEN-Corr.

104 ibid., 17.

3.2. Difference in Legal Status Based on the Category of Crime and Underlying Acts

This section considers the third question that this Chapter set out to address – whether the different categories of crimes and underlying acts victims have been subject to, alter the status of family members as successors of deceased victims or victims themselves. Irrespective of whether family members apply for recognition as successors of deceased victims or as victims themselves, their eligibility as outlined in the sections above, remains unchanged by the category of crime that the individual was a victim of. Thus, the four categories of crimes, genocide, crimes against humanity, war crimes and aggression, do not directly affect the position of family members either as victims or as successors of deceased victims before the Court. The resumption of action applications that the Court has dealt with thus far, have dealt with such requests without allotting any weight or distinct treatment to the particular category of crime. Again, with the caveat that in resumption of action proceedings, any continued proceedings must be limited by the confines of the original action.

Specifically in the context of resumption proceedings, there is nothing in the jurisprudence of the Court to indicate its inclination to treat such requests differently based on specific categories of crimes. Nor is there any evidence to indicate that the Court is inclined to allot such differentiated treatment to requests by family members of victims as victims themselves, on the basis of the four categories of crimes within the Court's jurisdiction. Irrespective of this indifference to the categories of crimes, the same cannot be said for the effect of *underlying acts* to such crimes. First it is important to clarify that similar to the analysis above, a study of the impact of the different categories of underlying acts listed under the Statute on resumption of action requests, reveals that the Court does not treat these requests any differently on this basis. Thus, it is crucial to recognize that these different categories of underlying acts warrant differentiated treatment only in instances where the Court determines the status of family members of victims *as victims themselves*. This is particularly because of the Court's treatment of harm as a result of certain crimes, particularly in the context of sexual and gender-based crimes. This is specifically in view of the Court's categorisation of children born out of rape and sexual slavery as direct victims. This is discussed in further detail in the section below.

3.3. Children Born out of Rape and Sexual Slavery as Victims at the ICC

In its reparations order in *The Prosecutor v Ntaganda,* the Court noted the distinction between direct and indirect victims and deliberately held that children born out of rape and sexual slavery were direct victims of the crime.[105] This was upheld by the Appeals Chamber.[106] Prior to its decision in *Ntaganda,* children born out of rape, as children of direct victims of the crime, would have been eligible to participate in court proceedings and seek reparations as indirect victims. Thus, their position would have been similar to children of victims of other underlying acts such as torture, murder or deportation. However, in light of this decision, should it be followed subsequently, the Court could be required to recognize at least three generations of victims of certain sexual and gender-based crimes, in view of the Court's recognition of children born out of rape as direct victims. This is since pursuant to this decision, family members of children born out of rape *could* qualify as indirect victims.[107] Arguably, in situations where it was urged that grandparents of children born out of rape were primary carers for such children, in light of the jurisprudence of the Court, should these individuals demonstrate the requisite evidence pertaining to harm and its causal nexus to the crimes charged, in theory they could also qualify as victims. The Court clarified however, that children of victims of rape and other sexual and gender-based crimes, other than children born out of rape could still be eligible as indirect victims of the crime, similar to children of victims of other crimes.

It should be noted that both expert reports in *Ntaganda* recommended the inclusion of children born out of rape as victims. In fact, in *Ntaganda*, *vis-à-vis* transgenerational harm and harm suffered by children born out of rape, the Chamber appears to have adopted a stronger approach than the one recommended by the Expert Report on reparations. According to this report, transgenerational harm, which ought to be considered in this case, would include 'physical and psychological harm suffered by children of former child soldiers and physical, psychological and material harm

105 *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02/06–2659, 46.

106 *The Prosecutor v Bosco* 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, para 642.

107 ibid., para 660.

suffered by children born out of rape'.[108] This approach recommended by the experts would have resulted in children born out of rape being eligible as indirect victims. However, contrary to this, the Trial Chamber was firm in stating that 'in light of the circumstances of the case, children born out of rape and sexual slavery may qualify as direct victims, as the harm they suffered is a direct result of the commission of the crimes of rape and sexual slavery'.[109] The manner in which the Court framed this, highlights that irrespective of the principle that Court emphasised, this assessment remains subjective.

Prior to the Court's decision in *The Prosecutor v Ntaganda,* in *The Prosecutor v Jean-Pierre Bemba Gombo*, where the Court handed out its first conviction for sexual violence and gender-based crimes, later overturned by the Appeals Chamber, an expert report made several recommendations to the Court *vis-à-vis* reparations in the case. In their report, the experts specifically mentioned the different types of harm that children born out of rape suffer. Other than stating that '[f]amily members of eligible victims of rape and murder are also eligible for reparations', the experts specifically stated that, '[t]he Court may consider opening a new filing period for surviving victims of rape and children born of rape'.[110]

4. Recognising the Past and the Future – Recognition of 'Intergenerational Victimhood': Conclusion

While the initial jurisprudence of the ICC on the question of whether or not deceased persons could be victims before the Court appeared divided,[111] a substantial volume of litigation on the subject ever since, has allowed greater clarity on the matter. As discussed in this Chapter, the jurisprudence of the Court caters for deceased victims to be represented in Court by their successors in situations where such victims had initiated proceedings

108 *The Prosecutor v Bosco Ntaganda, Experts Report on Reparation, Presented to Trial Chamber VI, International Criminal Court,* 29 October 2020, ICC-01/04–02/06–2623-Anx1-Red2, 49.

109 *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02/06–2659, 46.

110 *The Prosecutor v Jean-Pierre Bemba Gombo, Expert Report on Reparation, Presented to Trial Chamber III, International Criminal Court,* 20 November 2017, ICC-01/05–01/08–3575-Anx-Corr2-Red, 91.

111 See for example, William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016) 1063.

before the Court prior to their death. For this, successors are required to demonstrate proof of death of the deceased victim, proof of familial relationship and in most cases a mandate by the deceased victim's family to act on the deceased victim's behalf. Irrespective of this, any action in this capacity represents a continuation of proceedings and does not amount to the recognition of a new victim within the proceedings. However, the Court has at least on one occasion, hinted at the possibility of new applications being filed on behalf of deceased victims.

While not *on behalf* of deceased victims, children of deceased victims and other family members[112] of deceased victims are entitled to both participate in proceedings and seek reparations at the ICC. According to the Court, they can do this by qualifying as 'indirect victims'. As highlighted through decisions by the Court in the past, the difference between the two categories of victims, direct and indirect, is that while both categories suffer harm, the harm that indirect victims suffer is usually as a result of their relationship to direct victims.[113] This excludes children born out of rape or other sexual and gender-based crimes such as sexual slavery, where the defendant has been convicted of these crimes. Such children qualify as direct victims, which automatically entitles their children the *possibility* of qualifying as indirect victims themselves.

The case of *The Prosecutor v Dominic Ongwen* particularly highlights the issue of claims for victim participation and reparation by or on behalf of children. While the case has not reached the stage of reparations, the crimes that the defendant has been convicted of in this case, including both crimes

112 The Court's approach towards the concept of family and family has been informed by contextual interpretations, see for example the Court's decision in *The Prosecutor v Bosco Ntaganda*, where the Court held that 'due regard ought to be given to the applicable social and familial structures in the affected communities'. See *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02/06–2659, 46.

113 In the appeal against the reparations order in *The Prosecutor v Germain Katanga*, the Appeals Chamber stated that '[o]ne way in which an indirect victim may satisfy these requirements is by demonstrating a 'close personal relationship' with the direct victim, supported by evidence and established on a balance of probabilities. Establishing a close relationship may prove both the harm and that the harm resulted from the crimes committed.' See *The Prosecutor v Germain Katanga, Judgment on the appeals against the order of Trial Chamber II of 24 March 2017 entitled "Order for Reparations pursuant to Article 75 of the Statute",* Appeals Chamber, 8 March 2018, ICC-01/04–01/07–3778-Red, p.51; cited in *The Prosecutor v Bosco Ntaganda, Reparations Order,* Trial Chamber VI, 8 March 2021, ICC-01/04–02/06–2659, 47.

against humanity and war crimes of forced pregnancy,[114] highlight issues pertaining to the status of children as victims before the Court. In this case, the Prosecutor has referred to 'children born in captivity' as a distinct category of victims whilst referring to those born as a result of 'forced marriages'.[115] In light of this, the Court's impending decision on reparations could further develop and clarify the status of children as victims and intergenerational victimhood more generally.

The Court has in its past jurisprudence explicitly recognised the intergenerational aspects of harm. This might explain its analogous acceptance of several generations of victims of international crime. In view of the crimes that the Court was established to prosecute, and those currently being prosecuted, the Court's reference to transgenerational and multifaceted forms of harm represents a welcome, if not warranted, development in its jurisprudence. However, given that the decision concerning the concept of 'transgenerational harm' now rests with the Trial Chamber, the subsisting uncertainty on the matter might thus benefit from further clarification.

However, a clear factor for what remains a subjective analysis of victimhood, is that the harm suffered whether transgenerational or direct, must be 'personal'. The significance of the Court's insistence on *personal* harm being suffered by the victims, together with its conscious decision to include children born out of rape as direct victims should perhaps be viewed as steps in the same direction. It demonstrates a cognisant move by the Court towards recognising such individuals as direct victims and the emphasis that the harm suffered by victims is personal. While the decision to limit the kinds of harm suffered whether direct or indirect to personal harm could have been motivated by a strict or narrow interpretation of the Statute, as a consequence it has, in the least, the symbolic effect of acknowledging that each of these admitted victims have suffered harm personally and that they are not designated victims purely by surviving victims, who have since died (or as the successors of deceased victims).

114 *The Prosecutor v Dominic Ongwen, Trial Judgment,* Trial Chamber IX, 4 February 2021, ICC-02/04–01/15–1762-Red, 1052–1053.

115 *The Prosecutor v Dominic Ongwen, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen,* 6 December 2016 <https://perma.cc/Q3NG-P3SS>.