



Fostering Victims' Rights in the Proposed Crimes Against Humanity Convention

Comments to the International Law Commission

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Acknowledgements

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I. INTRODUCTION

1. **REDRESS** is an international human rights organization with a mandate to support victims of torture and related crimes under international law in their search for justice and other forms of reparation. It has a recognised expertise in the international norms and procedures pertaining to victims' rights and regularly provides advice to courts and tribunals about their procedures to engage with victims, represents victims in legal proceedings and intervenes before national, regional and international courts in those areas.
2. These comments have been prepared for the International Law Commission (ILC) as part of its ongoing consideration of the topic "Crimes against humanity". They focus in particular on the victims' rights provisions contained in the third report of the Special Rapporteur, Mr Sean Murphy, which was considered at the ILC's 69th session in May 2017 (Third Report), and text of the draft articles adopted by the ILC on first reading in June and July 2017 (Draft Articles) and the commentaries to the Draft Article adopted by the ILC in July 2017 (Commentaries). These comments are issued in response to the invitation to Governments, international organizations and others for comments and observations on the draft preamble, 15 draft articles and a draft annex, together with commentaries thereto.
3. In writing these comments, we seek to engage ILC Members in a dialogue on relevant developments in the area of victims' rights as they pertain to crimes under international law, so that these may be taken into account in the ongoing drafting process. It is envisioned that the ILC's text once finalised, will form the basis for a new Crimes Against Humanity Convention. It is therefore important that the ILC's final text reflects, and is consistent with, standards that already apply to victims of crimes under international law, including victims of crimes against humanity, and do not compromise existing rights and protections.
4. These comments are not intended to be exhaustive; instead, we highlight those issues which we believe would benefit from additional consideration by the ILC. We would welcome the opportunity to further engage with the Special Rapporteur and other interested parties on these comments, and any related matters.

II. BACKGROUND

5. Numerous normative standards on victims' rights have been clarified or agreed in recent decades.¹ These focus on an array of issues, including the obligation of States to carry out an effective investigation, ensure victims' dignity and privacy, protect victims from reprisals, keep victims informed about the progress of proceedings and allow for their views to be considered as appropriate at different

¹ See, e.g., 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, UNGA Res 60/147 (16 December 2005); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985); Updated Set of principles for the protection and promotion of human rights through action to combat impunity (8 February 2005) UN Doc E/CN.4/2005/102/Add.1; COE, Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure (28 June 1985); COE, Recommendation No. R (87) 21 on Assistance to Victims and the Prevention of Victimisation (17 September 1987); Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (International Meeting on Women's and Girls' Right to a Remedy and Reparation, Nairobi, 19-21 March 2007) <https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf >

stages of proceedings. They also address the right to reparation, not only reaffirming the right to claim reparations but the standards applicable to reparations awards and the need for awards to be enforceable, requiring facilities for the location, tracing and freezing of assets for the benefit of reparations and the establishment of funds and programmes to deliver reparations, especially when there are large numbers of victims. This growing corpus of standards has been incorporated progressively into treaties² and the findings of interpretive bodies,³ and also feature in domestic and international jurisprudence.⁴

6. The statutes and regulations of international criminal courts and tribunals have incorporated progressively an array of measures to positively engage victims in the criminal justice process, to facilitate direct participation and to deliver reparations. In particular, the International Criminal Court, Special Tribunal for Lebanon, Extraordinary Chambers in the Courts of Cambodia, Extraordinary African Chambers and Kosovo Specialist Chambers include a variety of victims' rights provisions. While these courts and tribunals operate on a *sui generis* basis, their practice is relevant, nevertheless, to identify common patterns and approaches, and indeed the statutes of such bodies (particularly the Rome

² Council of Europe, European Convention on the Compensation of Victims of Violent Crimes, ETS No. 116 (adopted 24 November 1983, entered into force 1 February 1988); EU; Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA); International Convention for the Protection of All Persons from Enforced Disappearances, (adopted 20 December 2006, entered into force 23 December 2010) Arts 18, 20(2), 24(4); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) Art 14(1); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) Art 8; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) Art 16(9)

³ UN Human Rights Committee, 'General Comment 31' Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13; Committee Against Torture, 'General comment 3', Implementation of article 14 by States parties (13 December 2012) UN Doc CAT/C/GC/3; CEDAW Committee, 'General Recommendation 28' (16 December 2010) UN Doc CEDAW/C/GC/28, para 32; CESCR, 'General Comment 3' (14 December 1990) UN Doc E/C.12/1991/23; CESCR 'General Comment 9' (3 December 1998) UN Doc E/C.12/1998/24, paras 2, 3, 8, 9; African Commission on Human and Peoples' Rights, 'General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)' (23 February to 4 March 2017). See also, comments and statements by Special Rapporteurs: UN Human Rights Council, 'Report of the Special Rapporteur on violence against women (Reparations for women subjected to violence)' (23 April 2010) UN Doc A/HRC/14/22; UNGA, 'Report of the Special Rapporteur on trafficking in persons, (The right to an effective remedy for trafficked persons)' (9 August 2011) UN Doc A/66/283; UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (4 June 2012) UN Doc A/HRC/20/14, paras. 49-62; UN Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (9 August 2012) UN Doc A/HRC/21/46; UNGA, 'Interim report of the Special Rapporteur on torture' (11 August 2000) UN Doc A/55/290, paras 24-30; UNGA, 'Report of the Special Rapporteur on torture' (3 July 2003) UN Doc A/58/120, paras 29-35; UNGA, 'Report of the Special Rapporteur on torture' (15 January 2007) UN Doc A/HRC/4/33, paras 61-68; UN Commission on Human Rights, 'Report submitted by the Special Rapporteur on toxic waste' (19 January 2001) UN Doc E/CN.4/2001/55, paras 74- 83; CESCR, 'General Comment 14' The right to the highest attainable standard of health (11 August 2000) UN Doc E/C.12/2000/4, para 59

⁴ Referenced throughout this comment

Statute) have been used by some States to frame victims' procedures for domestic international crimes prosecutions.⁵

7. In his first report, the Special Rapporteur underscores that '[a] convention on crimes against humanity should build upon the text and techniques of relevant existing treaty regimes, but should also avoid any conflicts with those regimes';⁶ 'rather than conflict with other treaty regimes, a well-designed convention on crimes against humanity could help fill a gap in existing treaty regimes and, in doing so, simultaneously reinforce those regimes.'⁷ The Special Rapporteur takes this approach with respect to the definition of crimes (consistency with the Rome Statute).
8. The Special Rapporteur does not limit the approach of 'avoiding conflicts' and 'filling gaps' to specific aspects of the Convention. We would submit that **this general approach should be understood as applicable to all aspects of the Draft Articles, including the consideration of victims' rights**. Thus, the draft Convention should reflect the Rome Statute and other applicable treaties, as well as relevant jurisprudence, academic writings and expressions by States on victims' rights.

III. VICTIMS' RIGHTS IN THE ILC TEXT – A HOLISTIC APPROACH

9. The current text collates all provisions relating specifically to victims in Draft Article 12. We would submit however, that **the Draft Articles as a whole, should reflect applicable standards and best practice concerning victims' rights**.
10. The 'overall objective' of the Draft Articles is to form the content of 'a convention on the prevention and punishment of crimes against humanity', on the basis that (as framed by the Special Rapporteur) 'prevention, punishment and inter-State cooperation' regarding crimes against humanity 'appears to be a key missing piece in the current framework of international law, and in particular, international humanitarian law, international criminal law, and international human rights law'.⁸ The focus on prevention and punishment is reflected in Draft Articles 1 and 2.
11. **Missing from the list of objectives in Draft Article 1, and the actions that States agree to undertake in Article 2 is the notion of 'repair', or 'ensuring victims obtain reparations'**.
12. As the ILC has confirmed, international law considers the responsibility to make reparation is inherent in the concept and reality of an internationally wrongful act. The oft-cited *dicta* from the *Chorzow Factory* state:

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form...

⁵ For instance, the Ugandan International Crimes Division of the High Court has incorporated victim participation into its special international crimes procedures, even though these do not feature in its criminal procedure for ordinary crimes.

⁶ ILC, First report on crimes against humanity By Sean D. Murphy, Special Rapporteur, A/CN.4/680 (17 February 2015) para 20. See also Commentaries, paragraph 4.

⁷ Ibid, para 26

⁸ First Report, paras. 10 *et seq.* Commentaries, paras. 2-3. The Commentaries note that a Convention may form an "important additional piece in the current framework of international law".

[...]

The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁹

13. Article 31(1) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts notes that:

The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

14. Victims of gross violations of human rights law and serious violations of international humanitarian law are entitled to reparation whoever the perpetrator.¹⁰ As a result of States' due diligence obligations under human rights treaties, even where a non-State actor is the perpetrator of violations, States have an obligation to investigate, prosecute, punish *and repair*. Thus while the responsibility to make reparation does not need to be an express objective or obligation in the Draft Articles in order for it to arise, its inherent nature does mean that it *should be* (and, as discussed below, *is*) a key focus of the international community, and therefore should be reflected as such in Draft Articles 1 and 2.

15. "Repair" is not only inherent in an unlawful act (and certainly an act such as a crime against humanity), but the international community has expressed its conviction that directly considering the rights of victims – particularly as manifested through participation and reparation – has a role to play in affording justice for international crimes and negating impunity (as the preamble to the Draft Articles emphasises they are a manifestation of a determination to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes").¹¹

16. This approach is evidenced in the statements by the principals of the ICC. In 2016, the President, Judge Silvia Fernández de Gurmendi noted:

⁹ *Factory at Chorzow (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), 29 and 47.

¹⁰ 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.

¹¹ Principle 1 of the Impunity Principles states:

Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

The interpretation and application of the legal framework of the ICC has not been easy in the initial years of the Court. This system is a unique “hybrid” that combines elements of different legal systems and traditions and includes elements of restorative justice through a system of victims’ participations and reparations.¹²

17. On the tenth anniversary of the ICC, the then President of the Court, Judge Sang-Hyun Song, said:

As you can see, the ICC is about much more than just punishing the perpetrators. The Rome Statute and the ICC bring retributive and restorative justice together with the prevention of future crimes.¹³

18. Judge Eboe-Osuji noted in a dissenting opinion in *Kenyatta*:

...it is to be considered that in recognising the right to reparation for victims of atrocities, the States Parties were ensuring that the Rome Statute in its principles is in step with developments in the relevant spheres of international law that now lay a great store in ensuring that restorative justice (to the victims) is given just as much scope as punitive justice (is given against accused convicts).¹⁴ (Emphasis added.)

19. *Elements* of restorative justice, and particularly considering the role and agency of victims and reparations as a direct way of considering victims’ rights, were reflected in the negotiation of the Rome Statute. “Reparations were not anymore seen by some state representatives as a mere by-product of the criminal trial, but instead were elevated to one of the purposes of international criminal justice”.¹⁵

20. In 1999, Elisabeth Guigou, France’s Minister of Justice said:

Victims are and must remain at the heart of our concerns. The recognition of their rights and the reparation of the harm they have suffered are both the origin and the purpose of international criminal law [...] This ambition must translate into our will to depart from the traditional models of international criminal justice and modify the idea itself that we have of the victim. We must cease, once and for all, to consider that victims are mere witnesses.¹⁶ (Emphasis added.)

21. Such statements show the importance attached to respecting the rights of victims and affording reparation in combatting international crimes *at all levels and in all contexts*. As is evident in these statements, to delineate too finely between the three concepts belies the fact that each element is intrinsic to the other – for example, reparation and punishment play a role in prevention, punishment may contribute to reparation, and reparation to punishment. Any convention on crimes against humanity will be concerned with combatting impunity from all angles, and thus adopting a holistic approach.

¹² Keynote, Helsinki, Finland, 9 June 2016.

¹³ Judge Sang-Hyun Song, President of the International Criminal Court, 7th Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law & World Parliamentary Conference of Human Rights, International Human Rights Day 2012, Remarks at the opening session, p. 3.

¹⁴ Dissenting Opinion, 11.

¹⁵ C Sperfeldt, “Rome’s Legacy: Negotiating the Reparations Mandate of the International Criminal Court”, *International Criminal Law Review* 17 (2017) 351-377, 366.

¹⁶ Speech of the Garde des Sceaux, Elisabeth Guigou, at the international symposium, ‘Acces des victimes a la Cour penale internationale’, Paris, 27 April 1999. Cited from Pascal Chifflet, ‘The Role and Status of the Victim’, in Gideon Boas and William Schabas (eds.), *Developments in the Case Law of the icty* (Martinus Nijhoff, Leiden, 2003), p. 105. See *ibid*.

22. The Third Report notes that “issues relating to victims, witnesses and other affected persons invariably arise” “in the aftermath of the commission of a crime”.¹⁷ This temporal divide is reflected in the text of the Draft Articles. However, in light of the considerations set out above, we would suggest this is too narrow, and that **“issues relating to victims” do not just occur after a crime has been committed.** Preventing, punishing or repairing crimes cannot be isolated from the “pre-crime” universe.
23. This approach is also supported by States: for example, in 2016, Mr. Mitzal, on behalf of Poland, re-emphasised the stance taken by his government in 2015, that:
- the draft articles would benefit from the introduction of a victim-oriented approach, with particular attention to the most vulnerable category of victims, namely children. **It should thus be stipulated in draft articles 1 and 2 that the draft articles also applied to “a remedy and reparation for victims”.** (Emphasis added.)¹⁸
24. We recommend the same approach.

IV. ARTICLE 12 – ASPECTS NOT COVERED BY THE DRAFT TEXT

Including a definition of ‘victim’

25. The **draft text contains no definition of victim.** We would encourage the ILC to consider including a definition of victims, given the consolidating standards in this regard.

Article 1, 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

"Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

Article 8, 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation:

For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Rule 85, ICC Rules of Procedure and Evidence:

For the purposes of the Statute and the Rules of Procedure and Evidence: (a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that 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.

26. A clear definition of victim may avoid the situation of States Parties to an eventual convention unduly restricting the scope of persons who may participate in criminal proceedings or be eligible beneficiaries

¹⁷ Third Report, pg. 75.

¹⁸ A/C.6/71/Sr.26, para. 54.

of reparation programmes. It may also reduce the likelihood of having contradictory standards which may prove confusing, particularly for transnational proceedings involving multiple States. The definition of 'victim' should be construed widely to include, not only individuals, but the wider community that may suffer as a result of crimes against humanity.

An individual's status as a victim is not contingent on the apprehension of a perpetrator

27. As the African Commission's Committee for the Prevention of Torture recently articulated in its General Comment on Torture Victims' Right to Redress, 'An individual is a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim.'¹⁹ This language is taken directly from Section V, Paragraph 9 of the UN *Basic Principles and Guidelines*, as well as Paragraph 2 of the 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.
28. This principle is important in that it recognises that the term 'victim' and the rights flowing from it are not contingent on the variables of a legal process over which the victim has little control. Whether an individual will be investigated and found guilty of a crime will depend on factors such as the existence of sufficient proof that he or she committed the act and had the requisite intent. There may be doubt as to whether one or several persons is culpable for a particular act (which may result in an acquittal), or a known perpetrator may have died or be incapable of prosecution for reasons such as mental incapacity. None of these factors are relevant to the status of a person as a 'victim', which depends on whether they suffered harm as a result of a crime (regardless as to whether the crime is prosecuted or not, or there is a conviction as a result of any prosecution).
29. This distinction is recognised in the successive principles and declaratory instruments referred to earlier, as well as in the European Union Victims' Directive, which requires states to provide support to victims, regardless of whether they play a role in the proceedings, whether proceedings ever take place or even whether the perpetrator is identified.²⁰ This notion that the status of a person as a 'victim' is not contingent on the recognition of a particular individual as culpable for the crime, has also been incorporated at the national level into criminal injury compensation schemes which afford victims access to support and assistance, as well as certain lump sum payments, regardless of whether a perpetrator is known, fully investigated or prosecuted. Similar approaches have been taken by truth commissions and administrative claims processes, and by victim trust funds such as the assistance mandate of the one in operation at the International Criminal Court.

¹⁹ African Commission, 'General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)', Adopted at the 21st Extra-Ordinary Session of the African

Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia, para 17

²⁰ Directive 2012/29/EU, Directive of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the

rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 [EU Victims' Directive], Art.

8(5) and Recitals 19 and 40.

Including a clear prohibition of discrimination

30. The draft text contains no overarching definition or clear prohibition of discrimination with respect to the procedural or substantive aspects of reparation. Article 21(3) of the ICC Statute specifies that ‘The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.’ The ICC Trial Chamber, in its decision on the implementation of reparations, has held specifically that Article 21(3) shall apply to the implementation of reparations.²¹ Thus, we would recommend that the ILC’s draft text contain an explicit reference to the principle of non-discrimination.

V. ARTICLE 12 – SPECIFIC COMMENTS ON THE DRAFT TEXT

Draft Article 12(1)(a) – The right to complain

31. **Draft Article 12(1)(a)** provides that States will take the necessary measures to ensure that “any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities”.
32. While the Draft Articles necessarily operate at a level of generality, language could be inserted to ensure that States operationalise the right to complain and remove all practical and procedural barriers which may impede victims from filing complaints. Such language could, for example, note that, in addition to “taking necessary measures to ensure” a “right to complain”, States will “take necessary measures” on a non-discriminatory basis, to ensure “access to the mechanisms of justice” or to “implement or operationalize that right”. States should be obligated to keep victims informed of the progress of complaints and to carry out investigations which are timely, adequate and effective. Furthermore, victims should be entitled to challenge a decision of the competent body not to proceed with an investigation or prosecution.
33. Furthermore, the right of victims to information should be incorporated. Access to information including how to make a complaint, how to obtain protection and support as well as the circumstances in which they may be eligible for compensation, have all been incorporated into Article 4 of the EU Victims’ Directive,²² and must be applied – proactively and ex officio – in all cases even without the request of the victim. Similar rights of access to information have been incorporated into national legislation in countries in Asia, Latin America and Europe.²³

²¹ ICC, Prosecutor v Lubanga, ‘Decision establishing the principles and procedures to be applied to reparations’, ICC-01/04-01/06-2904 7 August 2012, para 184

²² EU Victims’ Directive, Article 4(1), Recital 22; Victim Support Europe (2013), Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe (‘VSE Handbook for Implementation’), p. 9.

²³ These are discussed in REDRESS and ISS, ‘Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions’, September 2015, p. 79

34. Equally, the right to information about the progress of criminal complaints - understood as vital in and of itself but also as a precondition for victims to be in a position to exercise active participation rights – is reflected in the EU Victims’ Directive, as well as in human rights jurisprudence. Victims have the right to receive information about their rights and the progress of cases that concern them, such as the progress and disposition of their specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case.²⁴
35. Information should be communicated in a manner in which it can best be understood by victims.²⁵ The European Court of Human Rights has regularly found violations of the European Convention when States have failed to keep victims informed about the progress of criminal investigations.²⁶ Similar rulings have been made by the Inter-American Court of Human Rights²⁷ and the UN Committee Against Torture.²⁸
36. The right to information is particularly important in that it may bear strongly upon the ability of victims to exercise rights to participate; courts have also found that the right to information is closely tied to the right to an effective remedy.²⁹ In the case of gross violations of international human rights law, this is recognised to require a judicial remedy,³⁰ though administrative mechanisms are often the most realistic way to deliver prompt, adequate and effective reparation to victims in cases of large scale violations and/or where other barriers prevent the majority of victims from effective access to court.³¹

Draft Article 12(1)(b) - Protection from intimidation

37. Draft Article 12(1)(b) makes clear that complainants, witnesses, relatives, representatives and other participants shall be protected against ill-treatment and intimidation as a consequence of making a complaint, giving testimony, providing information or other evidence. The right to protection has been recognised by numerous courts and treaty body mechanisms,³² and has been incorporated into a

²⁴ UN Basic Principles and Guidelines, para 12(a).

²⁵ EU Victims’ Directive, paras 21-33

²⁶ ECtHR, *Zontul v Greece* (2012), App. No. 12294/07, 17 January 2012, para. 71; *Ognyanova and Choban v Bulgaria* (2006), App. No. 46317/99, 23 February 2006, paras. 43, 136-137.

²⁷ Caracazo Case, Judgment of August 29, 2002, Inter-Am Ct. H.R., (Ser. C) No. 95 (2002)

²⁸ See, *Dimitrijevic v Serbia and Montenegro*, Comm. No. 207/2002, CAT, A/60/44, 24 November 2004, para. 5.4; *Hajrizi Dzemajl et al. v Serbia and Montenegro*, Comm. No. 161/2000, CAT, A/58/44, 21 November 2002, 85 CAT/C/29/D/161/2000, para. 9.5 -9.6.

²⁹ See e.g., *Zontul v Greece*, ECtHR, App. No. 12294/07, 17 January 2012, in which it was held that by ignoring Zontul’s request for information on the progress of his case, the Greek authorities had deprived him of his right to seek compensation and to participate in proceedings following his complaint regarding torture at the hands of state actors while in immigration detention. See also *Ognyanova and Choban v Bulgaria*, ECtHR, App. No. 46317/99, 23 February 2006.

³⁰ UN Basic Principles and Guidelines, para 12

³¹ UN, ‘Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Rashida Manjoo’, UN Doc A/HRC/14/22, 23 April 2010, p 35ff

³² See for example, *Rajapakse v. Sri Lanka*, UN Doc. CCPR/C/87/D/1250/2004, 5 Sept. 2006; *Delgado Paez v. Colombia*, UN Doc.

number of treaties³³ as well as national legislation in many countries around the world.³⁴ Adequate protection can prove particularly important in regards to a victim's decision to ultimately report a crime and to cooperate with police investigations and trials.

38. While this protection is framed in laudably broad terms, there are a few omissions that may limit the effectiveness of the protection. As there is no justification for anyone being subjected to ill-treatment or intimidation as a result of justice for crimes against humanity, the scope of the protection could be broadened to encompass "associated persons". Communities that are not relatives, representatives, or participants are often targeted for the actions of community members. Following the words "evidence given", the ILC could consider adding a catch all – "or other forms of cooperation".

39. Draft Article 12(1)(b) qualifies the obligation to take measures to ensure protections against ill-treatment and intimidation by the phrase "[t]hese measures shall be without prejudice to the rights of the alleged offender referred to in draft Article 11". While there is no doubt that the rights of the accused must be respected, the duty of the State to protect is also not subjugated – the State must choose appropriate measures that protect both sets of rights. As the Commentary to Article 12 notes at paragraph 10:

Subparagraph (b) does not provide a list of protective measures to be taking by States, as the measures will inevitably vary according to the circumstances at issue, the capabilities of the relevant State and the preferences of the person concerned.

40. In light of the duties of the State to protect the rights of the accused, victims, and associated persons, "these measures shall not compromise the rights of the accused" or equivalent language such as "are

CCPR/C/39/D/195/1985 (23 Aug. 1990); *Kiliç v. Turkey* (App. No. 22492/93), ECtHR 128 (2000); *Kurt v. Turkey* (Application No.

15/1997/799/1002), 25 May 1998; *Case of the Rochela Massacre v. Colombia* (Merits, Reparations, and Costs), Inter-Am. Ct. H.R. (ser. C) No. 163,

11 May 2007, paras. 155, 171.

³³ See e.g., Art. 13 of the UN Convention Against Torture; Art. 14(1) of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 24 of the Convention against Transnational Organized Crime; Arts. 2(b), 6, 9(b) and 10(2) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol); Art. 16 of the Protocol against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol). The need to protect victims and witnesses is a well-established feature of international criminal law. See in this respect, Rules 17, 19, 74(5), 76, 87 and 88 of the Rules of Procedure and Evidence of the ICC and Arts.

54(3)(f), 57(3)(c), 64(2) and (6), 68 and 93(1)(j) of the ICC Statute; Rules 69, 75 and 81(B) of the Rules of Procedure and Evidence of the ICTY;

Rules 34, 65(C), 69, 75, 77 of the Rules of Procedure and Evidence of the ICTR.

³⁴ See, REDRESS and ISS, 'Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes

Prosecutions', September 2015, pp. 87 – 90. See also, REDRESS, 'Ending Threats and Reprisals Against Victims of Torture and Related

International Crimes: A Call to Action' December 2009; UNODC, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, Feb. 2008.

not inconsistent with” or “in a manner not prejudicial to” might be a more appropriate formulation than “without prejudice to”. The suggested language mirrors the wording in the Rome Statute and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, as noted in the Third Report. Draft Article 12(2) adopts a similar approach.

41. In addition, Draft Article 12(1)(b) does not currently address victims’ wider protection needs. International standards recognise that victims are entitled to be treated with compassion and respect for their dignity, taking into account individual victims’ personal situations and immediate and special needs, age and gender. There is a positive obligation to ensure that interactions with victims are carried out in a safe environment; every care should be taken to avoid re-victimisation and re-traumatisation, to ensure privacy is respected and to minimise inconvenience.³⁵ It is recognised that particularly vulnerable individuals such as child victims must have access to procedures and forms of support that have been adapted specifically to their needs.³⁶
42. Furthermore, victims should also be provided access to relevant assistance and support services,³⁷ including health, psychological, protection, social and other relevant services and the means of accessing such services,³⁸ as well as legal or other advice or representation and emergency financial support, where relevant or appropriate. Support should be available from the moment the competent authorities become aware of the victim, and from the earliest possible moment after the commission of a crime, irrespective of whether it has been reported formally.³⁹
43. Victim support has become a standard feature of many domestic legal systems.⁴⁰ Section 11(1) of the Kenyan Victim Protection Act provides that any person dealing with a victim shall ensure that the victim is *immediately* secured from further harm before any other action is taken in relation to the victim. These shall include placing the victim in a place of safety, in case of a vulnerable victim; securing food and shelter until the safety of the victim is guaranteed; securing urgent medical treatment for the victim; immediate psychosocial support for victim and police protection for the victim where appropriate.⁴¹ The Vienna Declaration on Crime and Justice committed Member States ‘to introduce, where appropriate, national, regional and international action plans in support of victims of crime, such

³⁵ UN Basic Principles and Guidelines, para 12(b); CEDAW, ‘General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations’, UN Doc CEDAW/C/GC/30, 18 October 2013 para 81(h); (k). See also, the Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1 of 8 Feb. 2005. Principle 32 and the EU Victims’ Directive, Art. 21 and Recital 54.

³⁶ See, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC Res’n 2005/20.

³⁷ UN Basic Principles and Guidelines, para 12(c)

³⁸ CEDAW, ‘General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations’, UN Doc CEDAW/C/GC/30, 18 October 2013, para 38 (e) and (f)

³⁹ See, EU Victims’ Directive, para 37

⁴⁰ See, e.g., European Union Agency for Fundamental Human Rights, ‘Victims of crime in the EU: the extent and nature of support for victims’ (2014) http://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en_0.pdf

⁴¹ Section 11 of the Kenyan Victim Protection Act, Act no. 17 of 2014

as mechanisms for mediation and restorative justice, and we establish 2002 as a target date for States to review their relevant practices, to develop further victim support services and awareness campaigns on the rights of victims and to consider the establishment of funds for victims, in addition to developing and implementing witness protection policies.⁴² Also, it has been recognised that '[w]omen victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence.'⁴³

Draft Article 12(2) – Victim participation

44. Draft Article 12(2) draws from Article 68(3) of the ICC Statute, which provides:

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

45. However, Draft Article 12(2) includes a caveat that is not relevant in the context of the Rome Statute that the right to participate be “in accordance with [a State’s] national law”. While, as noted in paragraph 13 of the Commentary to Draft Article 12, this provides flexibility and allows States to implement this provision in a way that aligns with their legal systems, it also allows States to compromise the intended effect of this provision altogether. If the Draft Articles wish to adopt the paradigm encapsulated in the Rome Statute, they may consider making the obligation mandatory, but qualifying the manner of participation as “in a manner” or “by means” “compatible with its national laws”.

46. Article 10 of the EU Victims Directive codifies a right to be heard. Article 10(1) states:

Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child’s age and maturity.

Member States are also required to enable participation through, for example, providing information and ensuring that victims do not incur any expense as a result of their participation.⁴⁴

47. The preamble notes:

When providing information, sufficient detail should be given to ensure that victims are treated in a respectful manner and to enable them to make informed decisions about their participation in proceedings. In this respect, information allowing the victim to know about the current status of any proceedings is particularly important. This is equally relevant for information to enable a victim to decide whether to request a review of a decision not to prosecute⁴⁵

48. Though Draft Article 12(2) addresses the right to be heard, it does not contain any qualification for the victim’s consent. A State shall “enable views and concerns”; but without qualification that this is “subject to the victims’ wishes” (on the presumption that the victim has been informed of the

⁴² *Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21st Century*, (A/CONF.187/4).

⁴³ EU Victims’ Directive, para 17

⁴⁴ Paras. 26 and 47.

⁴⁵ Para. 26.

procedure, risks, etc.), “subject to a victim’s free, prior and informed consent” and/or “in accordance with a victim’s rights” (the latter would incorporate the right to privacy; prior informed consent, etc.)

49. Additionally, Draft Article 12(2) should address victims’ legal representation, which is required if victims are to be able to participate effectively.

Draft Article 12(3) – Right to obtain reparation

50. Draft Article 12(3) does not protect victims’ procedural rights to access judicial (or even non-judicial) remedies for crimes against humanity. The “right to obtain” does not guarantee access to a state judicial mechanism. Coupled with the absence of a standard of reparation, it would be possible for a State to fulfil its obligations under Draft Article 12(3), and Draft Article 12 as a whole, by providing victims with token reparation outside of Court (which reparation could be collective, symbolic, or another form of reparation that does not speak to the victims’ loss and not tailored to the needs of the victims), without any access to any form of judicial or non-judicial mechanism. This would compromise a victims’ human rights and negate a State’s obligations encapsulated in the 2005 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 to inter alia provide “equal and effective access to justice” and “mak[e] available adequate, effective, prompt and appropriate remedies, including reparation”.⁴⁶

51. The Commentaries emphasise key points that could be compromised by the current formulation of Draft Article 12(3). These include the Comment of the Committee against Torture that:

The obligations of States parties to provide redress under Article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.⁴⁷

52. The Commentaries note “the movement towards a more comprehensive concept of reparation” (paragraph 17) and the Third Report notes, at footnote 300, the recommendation of the Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence that a “broad array of coherently organized measures” be adopted for victims of massive violations. However, adopting an array of measures does not undermine the obligation that, collectively, those measures should respond to the harm. Rather, to the contrary, the ability to use a mix of measures should ensure responsiveness to different aspects of the harm suffered. Typically a variety of forms will be necessary to repair adequately the breach, including compensation and measures of acknowledgment and non-recurrence. However, these different forms should be applied as a whole and without tokenism; the goal is to devise reparations to best approximate and respond to the variety of harms suffered. Furthermore, the victims’ position – such as a context of poverty, discrimination or marginalisation,

⁴⁶ Principles 3(c) and 2(c).

⁴⁷ See Committee Against Torture, general comment No. 3 on the implementation of article 14 (CAT/C/GC/3), paras. 2 and 3.

which may have contributed to the violation, should be taken into account in determining appropriate forms of reparation. Reparation should not be discriminatory.

53. A standard is necessary to ensure that the measures adopted are compliant with a State's international law obligations. There is an obligation to afford **adequate, effective and prompt reparation which should be proportional to the gravity of the violations and the harm suffered.**
54. Draft Article 12(3) provides for victims' rights to obtain reparation "for material and moral damages, on an individual or collective basis...". However, the Commentaries (paragraph 20 to Draft Article 12) and the Third Report note that "individual and collective reparations may be appropriate". Usually, in large-scale cases, victims will have suffered both individually and collectively, and these two separate facets of victimisation should be reflected in awards and awarded cumulatively. However, the current wording of the text suggests that they are in the alternative. Article 97 of the ICC Rules of Procedure and Evidence allows for reparation to be awarded "on an individualized basis or, where [the Court] deems it appropriate, on a collective basis or both". [emphasis added]
55. It is important for the ILC text to take account that the obligation to afford reparations is one borne principally by the State, and not to be borne exclusively by a convicted perpetrator. The Basic Principles and Guidelines also stress States' positive obligation to ensure that reparation awards are enforceable.

15. [...] In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

VI. RECOMMENDATIONS

56. In sum, to address the potential gaps in Draft Article 12, we would recommend *inter alia* the following amendments:
- Provide for access to redress for victims, including that mechanisms be "effective and accessible".
 - Require that remedies (procedural and substantive) are available on a non-discriminatory basis.
 - Provide for a "right to reparation", rather than a "right to obtain reparation".
 - Provide for a standard of reparation, such that reparation must be, at a minimum, "prompt, full, adequate and effective" in line with the Basic Principles and Guidelines. The reparation must address the harm suffered.

- Ensure that reparation may be awarded on an “individual or collective basis or both” wording adopted in the ICC Rules.
- Make clear that States are obligated to take all possible steps to ensure that reparations awards are enforced. This should include tracing and freezing and seizing assets for the purposes of reparations and developing accessible procedures so that victims can exercise fully their rights.