

Participation, Reparation and Redress: Draft Article 12 of the ILC's Draft Articles on Crimes Against Humanity at the Intersection of International Criminal Law and Human Rights Law

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Abstract

This article considers primarily draft Article 12 of the ILC's Draft Articles on Crimes Against Humanity, which address questions of victim participation and reparation, as well as the right to complain and the protection of complainants, witnesses, victims and others. In analysing the different aspects of draft Article 12, the authors outline ways in which its provisions could be strengthened. The authors note that, in several respects, draft Article 12 does not go far enough in articulating victims' rights and leaves too much to be determined by States' domestic law. In so doing, the text risks undermining certain rights recognized and protected under international law and may impede realization of some of the central objectives of the draft Articles (and thus the convention of which the draft Articles are intended to form the basis), including affording justice and eradicating impunity for crimes against humanity, harmonization of relevant laws and facilitating mutual cooperation. The authors also argue that the draft Articles as a whole would benefit from a more holistic vision of victims' rights. The formulation of the draft Articles should reflect that past, current and future potential victims underlie the rationale for a convention on crimes against humanity. The authors hope that their reflections will prove useful to States and other actors, as they submit comments on the draft Articles prior to their finalization by the ILC in 2019.

1. Introduction

In 2013, the International Law Commission (*ILC*) included the topic of crimes against humanity in its long-term programme of work.¹ In the same year, the General Assembly “t[ook] note” of the ILC's decision.² The overall objective of the draft Articles is to form the content of ‘a

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¹ *First report on crimes against humanity* by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/680, 17 February 2015, para. 1.

² General Assembly Resolution 68/112, para. 8 (18 December 2013).

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’.³ The ILC’s Draft Articles on Crimes Against Humanity expressly address questions of victim participation and reparation, as well as the right to complain and the protection of complainants, witnesses, victims and others. These rights, and corresponding obligations, are primarily contained in draft Article 12, which is examined in this article. However, as we argue below, the text would benefit from a more holistic vision of victims’ rights. Victims’ rights, and the role of victims, cannot and should not be restricted to a single article; rather, these issues should be embedded throughout. As suggested by the first line of the Preamble: ‘*Mindful* that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity...’, it is past victims and potential future victims that motivate and compel the need for a convention. We also argue that the draft Articles do not go far enough in articulating victims’ rights and leave too much to be determined by States’ domestic law. In so doing, the text may risk undermining certain rights recognized and protected under international law and may impede realization of some of the central objectives of a convention, including affording justice and eradicating impunity for crimes against humanity, harmonisation of relevant laws and facilitating mutual cooperation.

In preparing this article, we have drawn on a paper we authored for the non-governmental organisation REDRESS, which was submitted to the Special Rapporteur, Mr. Sean D. Murphy in March 2018.⁴ We begin by identifying a number of cross-cutting issues that affect the realisation of victims’ rights in the draft Convention. We then proceed to analyse each of the sub-paragraphs of draft Article 12 and thereafter also identify options for and concerns arising from areas not currently covered by the text.

³ *First report on crimes against humanity*, *supra* note 1, paras 10 *et seq.* Commentaries, paras 2-3.

⁴ C. Ferstman and M. Lawry-White, *Fostering Victims’ Rights in the Proposed Crimes Against Humanity Convention: Comments to the International Law Commission*, REDRESS, March 2018. <https://redress.org/wp-content/uploads/2018/04/CAH-Convention-and-Victims-Rights.pdf> (accessed May 2018).

2. The Evolution of Draft Article 12

Draft Article 12 reads:

Article 12

Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:
 - (a) 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; and
 - (b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.
2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.
3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Paragraph 2 of the Commentaries to draft Article 12 reflects upon the practice underlying inclusion of draft Article 12:

Many treaties addressing crimes under national law prior to the 1980s did not contain provisions with respect to victims or witnesses and, even after the 1980s, most global treaties concerned with terrorism did not address the rights of victims and witnesses. Since the 1980s, however, many treaties concerning crimes have included provisions similar to those appearing in draft article 12, including treaties addressing acts that may constitute crimes against humanity in certain circumstances, such as torture and enforced disappearance. Some of the statutes of international courts and tribunals that have jurisdiction over crimes against humanity, notably the 1998 Rome Statute of the International Criminal Court, have addressed the rights of victims and witnesses, and the General Assembly of the United Nations has provided guidance for States with respect to the rights of victims of crimes, including victims of crimes against humanity. (Internal citations omitted).

Throughout the Commentaries, the different elements of draft Article 12 are discussed by reference to this practice, as it has evolved over time. While the right to an ‘effective remedy’ has been included in human rights treaties since the Universal Declaration of Human Rights, the practice of States, human rights bodies and other relevant actors has interpreted and evolved the content of that right. The role of victims and their rights is given greater prominence in international criminal law, [and greater specificity and rigour in human rights law]. The draft Articles, and draft Article 12 in particular, reflect this trend. But, in certain key respects, do not do so fully.

The first draft of draft Article 12 was presented in the Special Rapporteur’s third report to the ILC (*Third Report*) and addressed the questions of complaints, protection and victims’ rights. The drafting committee subsequently considered draft Article 12 at the ILC’s sixty-ninth session. Certain victims’ rights had been tangentially touched upon in the Special Rapporteur’s second report, particularly in the context of the need for ‘prompt’ investigations.⁵ At the second session (at which the second report was submitted), the ILC Secretariat also submitted a memorandum on treaty monitoring mechanisms. This is discussed in more detail in the final section. As is customary, States commented on the draft Articles throughout the process, including during the General Assembly Sixth Committee sessions. Certain States, like Poland, advocated a more “victim-centred” approach from 2015 onwards.⁶ The position and concerns of various States are referenced, as relevant, throughout this article.

3. General Approach to the Drafting of the Convention and the Impact for Victims’ Rights

⁵ The Drafting Committee amended the wording of draft Article 12(1)(a) to “better align with the investigation” under draft Article 8. *Report of the Drafting Committee, Sixty-ninth session*, 1 June 2017, 5.

⁶ *Report of the International Law Commission on the work of its sixty-eighth session*, UN Doc. A/C.6/71/Sr.26, 5 December 2016, § 54. See also, *Report of the International Law Commission on the work of its sixty-seventh session*, UN Doc. A/C.6/70/SR.21, 25 November 2015, § 68 and *Report of the International Law Commission on the work of its sixty-ninth session*, UN Doc. A/C.6/72/SR.19, 20 November 2017, § 93.

In his three reports to the International Law Commission and related writings and statements, the Special Rapporteur has outlined his general approach to the drafting of the Articles, which includes the following elements:

A. A Recognition of the Multiple Bases and Purposes of the Convention under International Law

First, the text encompasses criminal law aspects in recognition that a crime against humanity constitutes a crime under international law giving rise to individual criminal responsibility. Second, it engages state responsibility in recognition that a crime against humanity attributable to a State constitutes an internationally wrongful act giving rise to a State's secondary obligation to afford reparations. Furthermore, it engages States' conventional and customary international law obligations to prevent, prohibit, punish and repair human rights violations, which form the underlying bases for the widespread or systematic crimes captured by the draft Articles. If States have particular responsibilities to prevent, prohibit, punish and repair singular acts of torture, extrajudicial executions, disappearances or rape, those responsibilities persist when those same acts are committed in a widespread or systematic matter against a civilian population.

These multiple purposes are inherently linked as should be the approaches taken to achieving them; States' obligations are not only engaged in a secondary sense when they commit an internationally wrongful act, their procedural obligations are engaged at a much earlier stage to give effect to the substantive obligation to prevent crimes against humanity and to ensure the proper application of individual criminal responsibility. Also, a State's obligation to afford reparations is not extinguished when an individual is determined to be criminally responsible for crimes against humanity. Depending on the circumstances, a State may be jointly or severally liable for reparations together with the individual perpetrator(s) and thereby subject to damages

above and beyond the harm caused by its own unlawful conduct,⁷ or at least, adjudged to be liable in proportion to its specific responsibility for the unlawful conduct.⁸ In either scenario its responsibility to repair would be engaged. Even in those circumstances where the impugned acts or omissions cannot be attributed to the State (in whole or in part), international standards encourage States to ‘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.’⁹

Certain States have expressed concern about the ‘burden’ that States may bear in respect of reparations.¹⁰ Some of these concerns arise from a lack of clarity – a question we address further below. Others arise from the practical difficulties to put in place reparations schemes for mass crimes, such as the high financial costs associated with compensating large numbers of

⁷ See for instance, Democratic Republic of the Congo, Military Garrison Court of Ituri, *Bongi Massaba case*, Judgment, 24 March 2006, in which the Court ordered Mr Blaise Bongi Massaba jointly with the Democratic Republic of the Congo to pay the stipulated amount of damages to the victims, cited in ICRC, IHL Database, Customary IHL, Practice Relating to Rule 150. Reparation, Section B. Compensation, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule150_sectionb (accessed May 2018).

⁸ This was the approach taken by a Chadian court which had ruled on the crimes allegedly committed by 22 former members of the security services. It determined that the Chadian Government was responsible to pay one half of the sum of reparations awarded in the case. [*Ministère public et Ismael Hachim et autres contre Saleh Younous Ali, Warou Fadoul Ali et Autres*, Decision of 25 March 2015, cited in Reed Brody, ‘Victims bring a Dictator to Justice The Case of Hissène Habré’, *Brot für die Welt*, 2nd updated edition, June 2017, 15, https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis70-The_Habre_Case.pdf (accessed May 2018)]

⁹ *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*, GA Res. 60/147, 16 December 2005, § 16. See also, § 15.

¹⁰ See, e.g., *Summary Record of the 26th Meeting*, UNGA 6th Committee, 72nd Session, UN Doc. A/C.6/72/SR.26, 23 – 27, 31 October and 1, 10 November 2017, § 135: ‘The issue that merits further consideration under this draft article 12 is the extent to which States will bear the burden of reparations, regard being had to the difficulties that may be associated with the discharge of that burden’; *Summary Record of the 21st Meeting*, UNGA 6th Committee, 72nd Session, UN Doc. A/C.6/72/SR.21, 23 – 27, 31 October and 1, 10 November 2017, § 16: ‘Paragraph 3 of [draft Art. 12] was unclear as to what the State’s duty to provide reparation and other remedies for victims entailed’.

individuals and the competing budgetary priorities of the State, as well as the inherent complexity of claims programmes involving large numbers of victims. However, there is a logic to States addressing reparations, even where their international responsibility is not engaged. This is because in addition to engaging States' due diligence obligations, many of the objectives of reparation fall naturally within a State's scope of concern. These encompass recognition, rebuilding dignity, re-affirming the rights of victims as citizens, as well as acknowledging the importance of the norms that have been breached, as part of a wider commitment to fostering the rule of law. The crimes reflected in the draft Convention could result in victims of both State and non-State actors. To distinguish between them on this basis would undermine many of the objectives just laid out, as well as what States and the international community are trying to achieve with a draft Convention and the fight against impunity more generally.

B. Consistency with States' Existing International Obligations including those Accepted by States Parties to the International Criminal Court

The Special Rapporteur has underscored that the text should align with States' pre-existing international obligations. In his first report, he indicates 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,'¹¹ and makes specific reference to the Genocide Convention, the Torture Convention and the Rome Statute. The principle of coherence should apply not only to conventions but also to customary international law, particularly in respect to the legal frameworks applicable to offences which form the underlying bases for crimes against humanity (e.g., torture, enforced disappearances, sexual violence).

In the area of victims' rights, the text of draft Article 12 does not align with international standards, including the standards articulated in the UN 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 (*Basic Principles and*

¹¹ *First report on crimes against humanity by Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/680, 17 February 2015, § 20.

Guidelines),¹² which ‘do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms’,¹³ as well as the ILC’s past work on reparations, including the Articles on the Responsibility of States.¹⁴ This is despite the Commentaries explicit reference to the General Assembly’s ‘guidance for States with respect to the rights of victims of crimes, including victims of crimes against humanity’, including the Basic Principles and Guidelines.¹⁵ At the same time, there is a need to take into account and reflect those aspects of the draft Articles that are specific to it. The draft Articles articulate States’ obligations vis-à-vis crimes against humanity proceedings that occur largely at domestic or transnational levels. This introduces fundamental differences conceptually and practically from a statute which sets out the procedures of an international court; also the inclusion of state responsibility necessitates a more robust approach to reparations than the Rome Statute, which focuses exclusively on individual criminal responsibility.

C. Focusing on a Text that is ‘Adoptable’

There is debate about how ‘progressive’ and detailed a draft convention should aspire to be; ‘too progressive a proposal might not attract many ratifications while too conservative a proposal might miss an opportunity to protect the humanitarian goals the convention hoped to promote.’¹⁶

¹² *Basic Principles and Guidelines*, *supra* note 9.

¹³ *ibid*, preamble. See also, Th. Van Boven, ‘Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines’ in C. Ferstman, M. Goetz and A. Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (The Hague: Martinus Nijhoff, 2009) 19 – 40, at 19, 26.

¹⁴ *Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its 53rd session*, UN Doc. A/CN.4/SER.A/2001/Add.1, 23 April-1 June and 2 July-10 August 2001 [ARS].

¹⁵ *Report of the International Law Commission on the work of its sixty-ninth session*, UN Doc. A/C.6/72/SR.19, 20 November 2017, § 93 and fn. 452.

¹⁶ L.N. Sadat and D.J. Pivnichny, ‘Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity’, Report of a Meeting of Experts at Villa Moynier, Geneva, Switzerland, Crimes Against Humanity Initiative, Washington University in St. Louis, School of Law, para. 72.

The Special Rapporteur appears in many respects to have taken a cautious approach; controversies have tended to have been resolved by either omitting them from the text or affording States great latitude to implement provisions in accordance with their domestic law without – we argue – adequate or sufficiently clear baselines for State compliance. The latter approach is particularly evident in respect of victim participation and reparations, even though these aspects have been recognized as crucial conditions precedent for the realization of the rights to truth and to justice,¹⁷ and should have the same strength of obligation as the classic retributive aspects of the draft Articles. The integrality of these and other victims’ rights to a draft convention is all the more important in a text which focuses primarily on national level proceedings. Unlike the debates that plague the ICC and some other international criminal tribunals, the proceedings contemplated by the draft Articles are not *sui generis* proceedings where the issue is whether these rights are best served by an international or domestic court; the draft Articles are designed to address States’ obligations at the domestic level.

While it is important to develop a text that States feel able to sign on to and ratify, a draft convention should contribute to the overall clarity of the law concerning crimes against humanity and should not inadvertently lower or weaken pre-existing law. The draft Convention must also be sufficiently robust and precise in order to be effective. The overall goal of the text should be to develop a workable framework to clarify obligations and aid States to deal practically with all facets of those obligations without exception. The potential for effective cooperation is also premised on sufficient cross-border consistency.

4. Victims’ Rights in the Draft Convention - the Need for a Holistic Approach

As noted above, the basis for a draft convention is to address a lacuna in the international and transnational criminal law framework, as the ‘prevention, punishment and inter-State cooperation’ regarding crimes against humanity ‘appear[] to be a key missing piece in the current

¹⁷ See, e.g., Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-474), Pre-Trial Chamber I, 13 May 2008, §§ 32 – 39; Directions on Unrepresented Civil Parties’ Rights to Address the Pre-Trial Chamber in Person, *Ieng Sary* (Case 002), Pre-Trial Chamber, 29 August 2008, § 5.

framework of international law, and in particular, international humanitarian law, international criminal law, and international human rights law'.¹⁸ The focus on prevention and punishment is reflected in draft Articles 1 and 2.

Combatting impunity also requires fulfilling the right to redress and a remedy (*ubi jus, ibi remedium* - where there is a right there is a remedy). The ILC Articles on State Responsibility codify the principle that an obligation to make reparation is inherent in an internationally wrongful act.¹⁹ This *dictum* from *Chorzow Factory*,²⁰ subsequently incorporated into the reasoning of the ICJ and many other international tribunals, underlies the increasing emphasis of the international community that considering the rights of victims has a role to play in affording justice for international crimes and negating impunity. Reparations do more than address victims' needs: 'they avoid a climate of impunity and preserve principles of legality'.²¹ They also provide some measure of recognition on the part of society of victims' suffering. Addressing an illegal act thus requires more than punishment in the traditional sense of prosecution and conviction. Further, to delineate too finely between prevention, punishment and reparation 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. A convention on Crimes Against Humanity will be concerned with combatting impunity from all angles, and thus adopting a holistic approach.

That impunity may be multi-faceted is reflected in the ever-growing body of international standards that codify victims' rights, including the first of the Impunity Principles:

Impunity is a failure of States to meet their obligations to investigate violations, take appropriate measures in respect of the perpetrators, particularly in the area of justice, to ensure that they are prosecuted, tried and duly punished, to provide the victims with

¹⁸ *First report on crimes against humanity*, *supra* note 1, paras 10 *et seq.* Commentaries, paras 2-3.

¹⁹ ARS, *supra* note 14, Art. 31.

²⁰ *Factory at Chorzow (Germany v. Poland)*, 1928 PCIJ Series A, No. 17., at 29, 47.

²¹ D. Shelton, 'The right to reparations for acts of torture: what right, what remedies?', 17(2) *Journal on Rehabilitation of Torture Victims and Prevention of Torture* (2007) 96, at 97.

effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.²²

This approach is evidenced in the statements of States in the negotiation of the Rome Statute, as well as in subsequent statements of ICC principals and judges.²³ 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.²⁴ (Emphasis added.)

The Council of Europe recommended a 'holistic approach' be adopted when addressing draft Article 12.²⁵ It referenced in this respect, the revised Guidelines on the protection of victims of terrorist acts,²⁶ noting *inter alia* the importance of involving victims of terrorism in the fight against terrorism, implementing a general legal framework to assist victims and providing assistance to victims in legal proceedings. Several States recommended expanding the scope of the draft Articles. In 2017, Belarus stated: 'Draft article 1 (Scope) should include a reference to

²² *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, UN Doc. E/CN.4/Sub.2/1997/20, Annex II, 26 June 1997, § 20(1).

²³ See e.g., former President Judge Fernández de Gurmendi, Keynote speech 'International Criminal Court Today: Challenges and Opportunities', Helsinki, Finland, 9 June 2016; former President Judge Sang-Hyun Song, Opening remarks at the 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, at 3 [both available at www.icc-cpi.int (visited 1 April 2018)].

²⁴ Speech of the *Garde des sceaux*, Elisabeth Guigou, at the international symposium, '*Accès des victimes à la Cour pénale internationale*', Paris, 27 April 1999, cited in P. Chifflet, 'The Role and Status of the Victim', in G. Boas and W. Schabas (eds), *Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff, 2003), at 105.

²⁵ M. Requena, Head of the Public International Law and Treaty Office Division of the Council of Europe, Statement to the 72nd Session of the Sixth Committee of the General Assembly, Report of the International Law Commission on the work of its 69th Session, 23-27 October 2017.

²⁶ *Revised Guidelines of the Committee of Ministers on the protection of victims of terrorist acts*, CM(2017)44-final, 19 May 2017.

protection of victims, which would complement the focus on prevention and prosecution in the draft articles’,²⁷ and Poland reiterated over multiple years its stance that: ‘the draft articles would benefit from the introduction of a victim-oriented approach... It should thus be stipulated in draft articles 1 and 2 that the draft articles also applied to “a remedy and reparation for victims”’.²⁸ This approach would align more closely with international law’s conception of victims’ rights, as well as furthering the draft Articles’ overall objectives.

5. Article 12 – ‘Victims, Witnesses and Others’

The phrase ‘victims, witnesses and others’ first appears in the Special Rapporteur’s third report, under the slightly differently worded heading ‘victims, witnesses and other affected persons.’²⁹ In that report, the Special Rapporteur notes that ‘victims, witnesses and others may wish to come forward with information pertaining to the commission of a crime, which may be of assistance in preventing further crimes, apprehending alleged offenders and prosecuting or extraditing those offenders.’³⁰ While none of these terms are defined within the text, ‘others’ is explained in the commentary to relate to complainants – natural or legal persons who lodge complaints with the authorities, and as a consequence, are entitled to certain protections, without prejudice to the rights of the accused.³¹ In the ILC’s Report of its sixty-ninth session, it is clarified further that ‘The term “any person” includes but is not limited to a victim or witness of a crime against humanity, and may include legal persons such as religious bodies or non-governmental organizations.’³²

²⁷ *Summary Record of the 26th Meeting*, UNGA 6th Committee, 72nd Session, UN Doc. A/C.6/72/SR.26, 23 – 27, 31 October and 1, 10 November 2017, § 54.

²⁸ *Report of the International Law Commission on the work of its sixty-eighth session*, UN Doc. A/C.6/71/Sr.26, 5 December 2016, § 54. See also, *Report of the International Law Commission on the work of its sixty-seventh session*, UN Doc. A/C.6/70/SR.21, 25 November 2015, § 68 and *Report of the International Law Commission on the work of its sixty-ninth session*, UN Doc. A/C.6/72/SR.19, 20 November 2017, § 93.

²⁹ *Third report on crimes against humanity by Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/704, 23 January 2017, Ch IV. The heading is changed to ‘Victims, Witnesses and Others’ in *Report of the International Law Commission, Sixty-ninth session*, UN Doc. A/72/10, 1 May - 2 June and 3 July - 4 August 2017, Ch. IV.

³⁰ *Third report on crimes against humanity, Ibid.*, § 160.

³¹ *Ibid.*, §§ 160, 180.

³² *Report of the International Law Commission, Sixty-ninth session*, UN Doc. A/72/10, 1 May - 2 June and 3 July - 4 August 2017, Commentary to draft Art. 12, para. 6.

The recognition that anyone can make a complaint is important; there may be many reasons why a direct victim may not wish to file a complaint – the victim may be afraid of repercussions, he or she may be traumatized or in flight. Similarly, it should be possible (and indeed encouraged) for public officials to inform the competent authorities when they see other officials or non-State actors planning or partaking in crimes against humanity.

Only draft Article 12(1) deals with ‘others’; the remainder of Article 12 focuses particularly on victims.

A. Draft Article 12(1)(a) – The Right to Complain

Draft Article 12(1)(a) should be read in conjunction with a State’s obligation to investigate set out under draft Article 8.³³ This is to be understood as an obligation that exists independent of the lodging of a formal complaint.³⁴ The Commentary to draft Article 8 could be usefully expanded to capture the principle of effectiveness. The UN Human Rights Committee has affirmed, ‘the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.’³⁵ The Grand Chamber of the European Court of Human Rights has recognized that allegations concerning serious violations of human

³³ Draft Article 8 reads: “Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction”.

³⁴ This is consistent with the approach taken by the Special Rapporteur: ‘Indeed, since it is likely that the more systematic the practice of torture is in a given country, the fewer the number of official torture complaints that will be made, a violation of article 12 of the 1984 Convention against Torture is possible even if the State has received no such complaints. The Committee against Torture has indicated that State authorities must “proceed automatically” to an investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, with “no special importance being attached to the grounds for the suspicion”.’ See *Ibid.*, Commentary to draft Art. 8, para. 2. The African Commission on Human and Peoples’ Rights has found similarly: ‘whenever there is a crime that can be investigated and prosecuted by the State on its own initiative, the State has the obligation to move the criminal process forward to its ultimate conclusion.’ [*Article 19 v. Eritrea*, Communication 275/03, 30 May 2007, para. 72].

³⁵ *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 March 2004.

rights should lead to investigations which are ‘capable of leading to the identification and punishment of those responsible’ otherwise ‘it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity’.³⁶ Particularly relevant for crimes against humanity, ‘certain lines of inquiry, which fail to analyze the systematic patterns surrounding a specific type of violations of human rights, can render the investigations ineffective.’³⁷

Draft Article 12(1)(a) is a separate obligation to enable complaints to be made to the competent authorities. Complaints processes must be accessible to all and capable of being exercised in practise, and ‘should be appropriately adapted so as to take account of the special vulnerability of certain categories of persons, including in particular children.’³⁸ Information should be communicated in a manner in which it can best be understood.³⁹

While the draft Articles necessarily operate at a level of generality, it would be important for them and the Commentaries to contain language to require States to operationalize the right to complain and remove barriers to filing complaints. For instance, complaints processes should be non-discriminatory. There should be no fee and no time-limit to filing complaints concerning crimes against humanity. Officials should accept complaints regardless of whether they are submitted orally or in writing and irrespective of whether they are accompanied by supplementary evidence. The complaints process must be safe and secure, and cater to victims’ needs for privacy and dignity.

The draft Articles should also incorporate specifically the right to access information, which is a condition precedent to an effective complaints process and integral to operationalising access to

³⁶ *El-Masri v. The former Yugoslav Republic of Macedonia* (Grand Chamber), Appl. No. 39630/09, 13 December 2012, para. 182.

³⁷ *Case of the Rochela Massacre v. Colombia* (Merits, Reparations and Costs), Series C No. 163, 11 May 2007, paras 156, 158 and 164.

³⁸ *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 15(1).

³⁹ *Directive 2012/29/EU 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*, [EU Victims’ Directive], paras 21-33.

justice.⁴⁰ Access to information, including how to make a complaint, how to obtain protection and support as well as the circumstances in which victims may be eligible for compensation, have all been incorporated into Article 4 of the EU Victims' Directive,⁴¹ and under the Directive 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 worldwide.⁴² 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.⁴³ Similar findings have been made by the Inter-American Court of Human Rights⁴⁴ and the UN Committee Against Torture.⁴⁵

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

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 recognized by numerous courts and treaty bodies,⁴⁶ and has been

⁴⁰ See e.g., *Zontul v. Greece*, Appl. 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. See also *Ognyanova and Choban v. Bulgaria*, Appl. No. 46317/99, 23 February 2006.

⁴¹ EU Victims' Directive, *supra* note 39, Art. 4(1), Recital 22.

⁴² 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, at 79.

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

⁴⁴ *Case of the Caracazo v. Venezuela* (Reparations and Costs), Series C No. 95, 29 August 2002.

⁴⁵ See, *Dimitrijevic v. Serbia and Montenegro*, UN Doc. CAT/C/33/D/207/2002, 24 November 2004, para. 5.4; *Hajrizi Dzemail et al. v. Yugoslavia*, UN Doc. CAT/C/29/D/161/2000, 2 December 2002, paras 9.5 - 9.6.

⁴⁶ See e.g., *Rajapakse v. Sri Lanka*, UN Doc. CCPR/C/87/D/1250/2004, 5 September 2006; *Delgado Paez v. Colombia*, UN Doc. CCPR/C/39/D/195/1985, 23 August 1990; *Kurt v. Turkey*, Appl. No. 15/1997/799/1002, 25 May 1998; *Case of the Rochela Massacre v. Colombia* (Merits, Reparations, and Costs), Series C No. 163, 11 May 2007, paras. 155, 171.

incorporated into a number of treaties⁴⁷ as well as national legislation in many countries around the world.⁴⁸ Adequate protection can prove particularly important in regards to a person's decision to report a crime and to cooperate with investigations and trials.

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, the scope of the protection could be broadened to encompass 'associated persons'. Community members that are not relatives, representatives, or participants are often targeted or suffer for the actions of others within their communities. Following the words 'evidence given', the ILC could consider adding a catch all – 'or other forms of cooperation'. In addition, the use of the language 'as a consequence of' does not take account of the situation in which individuals or groups are intimidated in order to prevent them from engaging with the justice system in the first place. More neutral language such as 'in respect of' may capture such situations, as would de-linking draft Article 12(1)(b) from 12(1)(a).

The obligation to protect is qualified by the phrase '[t]hese measures shall be without prejudice to the rights of the alleged offender referred to in draft Article 11'. The rights of the accused must, of course, be respected, but the duty of the State to protect is just as prevalent – it is not subjugated. As the Commentary to draft Article 12 notes at paragraph 10:

⁴⁷ See e.g., Art. 13 UN Convention Against Torture; Art. 14(1) International Convention for the Protection of All Persons from Enforced Disappearance; Art. 24 Convention against Transnational Organized Crime; Arts 2(b), 6, 9(b) and 10(2) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Art. 16 Protocol against the Smuggling of Migrants by Land, Sea and Air. Victim and witness protection is a well-established feature of international criminal law. See, Rules 17, 19, 74(5), 76, 87 and 88 ICC RPE and Arts. 54(3)(f), 57(3)(c), 64(2) and (6), 68 and 93(1)(j) ICCSt.; Rules 69, 75 and 81(B) ICTY RPE; Rules 34, 65(C), 69, 75, 77 ICTR RPE.

⁴⁸ See, REDRESS and ISS, *Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions*, September 2015, at 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*, February 2008.

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.

In light of the duties of the State to protect the rights of the accused, victims, and associated persons, and the flexibility it is afforded in doing so, language such as ‘are not inconsistent with’ or ‘in a manner not prejudicial to’ the rights of the accused 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.

In addition, draft Article 12(1)(b) does not address victims’ wider protection needs. The Commentaries note that ‘the term “ill-treatment” relates not just to the person’s physical well-being, but also includes the person’s “psychological well-being, dignity or privacy”’.⁴⁹ This phrase was included in the Commentaries on the recommendation of the drafting committee and is drawn from Article 68(1) of the Rome Statute.⁵⁰ However, the measures proposed as examples in the Commentaries show that the focus is on protection from the actions of others as a result of making the complaint (in camera proceedings, relocation of witnesses, etc.). We would argue that protection needs go much further than this. International standards recognize 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-victimization and re-traumatization, to ensure privacy is respected and to minimize inconvenience.⁵¹

⁴⁹ *Report of the International Law Commission, Sixty-ninth session*, UN Doc. A/72/10, 1 May - 2 June and 3 July - 4 August 2017, at 95, para. 9.

⁵⁰ *Report of the Drafting Committee, Sixty-ninth session*, 1 June 2017, 5.

⁵¹ *Basic Principles and Guidelines*, *supra* note 9, para. 12(b); *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc. CEDAW/C/GC/30, 18 October 2013, paras 81(h); (k). See also, *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, 8 February 2005, principle 32 and the EU Victims’ Directive, *supra* note 39, Art. 21 and Recital 54.

Certain victims, for example, children, and specific groups of women and men (depending on the individual, community, the context and the violation suffered) will require particular protective measures. It has been recognized 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 victimization, of intimidation and of retaliation connected with such violence.'⁵² Stigmatization, for example, may be a deterrent in victims coming forward to complain or participate in proceedings or reparation programmes. For victims that still choose to do so, the consequences – if appropriate protective measures are not in place – may endure for years, if not lifetimes.

It is recognized 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.⁵³ Part of fulfilling these needs is to ensure that victims are provided access to relevant assistance and support services,⁵⁴ including health, psychological, protection, social and other relevant services and the means of accessing such services,⁵⁵ 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's identity, and from the earliest possible moment after the commission of a crime, irrespective of whether it has been reported formally.⁵⁶ Article 68(1) Rome Statute does list factors that should be taken into account in determining protective measures that include age, gender, health, and the nature of the crimes, with particular reference to victims of sexual and gender based violence and children. The ILC chose not to mirror these considerations in the Commentaries. We would argue that they have a place in the text of the Draft Articles themselves – in line with the approach of the Rome Statute.

⁵² EU Victims' Directive, *supra* note 39, para. 17.

⁵³ *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, UN Doc. E/CN.15/2005/L.2/Rev.1, 25 May 2005.

⁵⁴ *Basic Principles and Guidelines*, *supra* note 9, para. 12(c).

⁵⁵ *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc. CEDAW/C/GC/30, 18 October 2013, paras 38 (e) and (f).

⁵⁶ EU Victims' Directive, *supra* note 39, para. 37.

C. Draft Article 12(2) – Victim Participation

Participation in proceedings is one manifestation of a victim's right to be heard, as encapsulated, for example, in Article 10 of the EU Victims' Directive: 'Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence...'.⁵⁷ It is also reflected in many human rights treaties, as applicable to judicial proceedings (including criminal proceedings). Article 12(2) of the Convention on the Rights of the Child, for example, provides that 'the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'.

Draft Article 12(2) draws from the wording of Article 68(3) of the Rome Statute. However, it includes a caveat 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 objective of this provision altogether. If the ILC wishes to adopt the paradigm encapsulated in the Rome Statute, it might consider making the obligation mandatory, retaining flexibility to take into account to different legal systems, but (similar to the language of draft Article 11(3)), subject to the proviso that the manner of participation must enable full effect to be given to the purpose for which the rights accorded under draft Article 12(2) are intended.

Though draft Article 12(2) addresses the right to be heard, it does not contain any qualification for the victim's informed consent or privacy, nor does it refer to States' obligations to facilitate victim participation, particularly for vulnerable and marginalised groups, who would invariably require specific support and protection in order to participate. In addition, in order to give effect to victims' right to participate, States should remove barriers to participation, such as ensuring that victims do not incur any expense as a result of their participation, and facilitating victims' legal representation. These aspects could usefully be elaborated upon in the Commentaries.

⁵⁷ *Ibid.*

D. Draft Article 12(3) – Right to Obtain Reparation

Crimes against humanity are inherently detrimental to victims' dignity, agency and place in society.⁵⁸ Each victim will suffer the effects of the violation in their own way. Reparation is therefore not charity, development or simply 'the right thing to do'. It is the natural consequence of the violation of rights and a crucial component of the conception of rights themselves.

The Commentaries emphasize that States' obligation to afford reparation have procedural and substantive elements.⁵⁹ However, draft Article 12(3) does not protect victims' procedural rights to access judicial (or even non-judicial) remedies. The 'right to obtain' does not guarantee access to a State mechanism. It is incongruent with States' pre-existing obligations under human rights treaties - whereby a victim of a single act of torture or enforced disappearance has a right to 'seek' reparations before a Court or other appropriate mechanism – to suggest that victims of such crimes when perpetrated in a widespread or systematic manner have no such right. The *Basic Principles and Guidelines* specify that the obligation to respect, ensure respect for and implement human rights and international humanitarian law includes, *inter alia*, the duty to: 'provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, ... and provide effective remedies to victims, including reparation.'⁶⁰ Effective remedies include prompt reparations. The draft Articles and Commentaries omit any specification of this characteristic. The *Basic Principles and Guidelines* underscore States' obligations to afford reparations that are 'adequate, effective and prompt'.⁶¹

⁵⁸ P. de Greiff, 'Justice and Reparations', in P. de Greiff (ed.) *The Handbook of Reparations* (Oxford: OUP, 2006), at 460.

⁵⁹ *General Comment No. 3 on the implementation of article 14*, UN Doc. CAT/C/GC/3, 13 December 2012, paras 2, 3.

⁶⁰ *Basic Principles and Guidelines*, *supra* note 9, para. 3. Note however, that the victim's right to claim (as opposed to receive) reparations for international humanitarian law violations occurring in an international armed conflict is contested [discussed in C. Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford: OUP, 2017), at 74-83]. Furthermore, a victim's ability to claim reparations for a violation which took place outside a court's territorial jurisdiction may be hampered by immunities.

⁶¹ *Basic Principles and Guidelines*, *supra* note 9, para. 11(b).

Draft Article 12(3) also fails to include a standard against which reparation is to be determined, even though there is some consistency under international law as to what is required. The ILC's Articles on the Responsibility of States, drawing on *Chorzow Factory*, has describes the standard for reparation as 'full' reparation, to wipe out all the consequences of the illegal act and re-establish the *status quo ante*.⁶² Human rights treaties use descriptors such as fair, adequate, appropriate, proportionate to the harm, and equitable, which, while not lesser standards, 'help to clarify what is required, particularly when re-establishing the *status quo ante* is impossible and it is impractical to quantify the harm precisely.'⁶³

In contrast, these Commentaries simply note 'the movement towards a more comprehensive concept of reparation'.⁶⁴ This is a reference to forms of reparation: typically a variety of forms of reparation will be necessary to adequately repair the breach. However, different forms of reparation – taken as a whole – should not amount to tokenism; the goal is to devise reparations to best approximate and respond to the variety of harms suffered.

Including a standard is necessary to ensure that the measures adopted are compliant with a State's international law obligations. Achieving the standard will be facilitated by the flexibility inherent in the *indicative* list of reparative forms, as well as the term 'as appropriate', set out in draft Article 12(3). The ILC drafting committee, which added the words 'as appropriate', noted in this conjunction that 'the capacity of a responsible State to provide full compensation to all victims may be limited, especially in circumstances where a State is struggling to rebuild itself in the aftermath of a crisis'.⁶⁵ However, while recognising that every scenario is different, that is not an argument to compromise the standard required by international law; but, rather, a reason to reemphasise it.

⁶² ARS, *supra* note 14, Arts 30, 31, 34.

⁶³ C. Ferstman, *International Organizations and the Fight for Accountability*, *supra* note 60, at 87. 'Turning back the clock' on the harm suffered as a result of human rights and international criminal law violations will often be impossible from a victim-perspective. See, e.g., M. Lawry-White, 'The Reparative Effect of Truth Seeking in Transitional Justice', ICLQ 64:1.

⁶⁴ Para. 17 (draft Art. 12).

⁶⁵ *Report of the Drafting Committee, Sixty-ninth session*, 1 June 2017, 5-6.

Draft Article 12(3) suggests that individual or collective reparation is in the alternative. However, the Commentaries⁶⁶ note that ‘individual *and* collective reparations may be appropriate’. Victims of a crime that is ‘widespread or systematic’ will usually have suffered both individually and collectively, and these two separate facets of victimization should be reflected in awards and awarded cumulatively. The ability to ensure a comprehensive reparations award relies upon the flexibility to consider various measures that may be material, symbolic, individual or collective. Rule 97 ICC RPE 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].

In sum, 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) by providing victims with token reparation without any access to judicial oversight. This would compromise a victim's human rights and negate a State’s obligations encapsulated in the Basic Principles and Guidelines to *inter alia* provide ‘equal and effective access to justice’ and ‘mak[e] available adequate, effective, prompt and appropriate remedies, including reparation’.⁶⁷ It would also create inconsistencies between different ILC texts, and – for the reasons explained earlier – compromise the draft Articles’ objectives.

6. Aspects Not Covered in the Draft Text

A. No Definition of ‘Victim’

The draft Articles do not contain a definition of ‘victim’ of crimes against humanity.

The drafting committee considered including a definition in the text, but preferred to leave the determination to national legal systems and to provide guidance on definitions in the Commentaries.⁶⁸ The Commentaries point out that there are many international conventions

⁶⁶ Para. 20 (draft Art. 12).

⁶⁷ *Basic Principles and Guidelines*, *supra* note 9, paras. 3(c), 2(c).

⁶⁸ *Report of the Drafting Committee, Sixty-ninth session*, 1 June 2017, 5-6.

addressing international crimes, transnational crimes and human rights that refer to victims but do not define the term.

However, the strategy of ambiguity carries certain risks. The draft Articles are designed to facilitate harmonisation. ‘Victims’ may form or comprise a basis for jurisdiction, the instigators of or providers of the evidential basis for prosecutions, participants in proceedings, recipients of protection and reparation. These roles are at the core of the processes set out in the draft Articles. The draft Articles envisage the potential for multi-jurisdictional efforts. Ambiguity may create confusion, as well as unequal treatment of victims across borders. The potential for effective inter-State dispute settlement or a delocalized monitoring mechanism is also dependent upon consistency cross-jurisdiction.

By examining the definitions contained within certain key instruments, we can see the variables that may affect who or what qualifies as a victim, including the scope of harm, proximity to the harm, the manner in which harm was experienced or inflicted, whether relatives or dependents are included and/or others involved in trying to prevent or mitigate the harm, whether non-natural persons may be victims.

The scope of harm provided in draft Article 12(3) – ‘material or moral’ – provides some guidance as to who might qualify as a victim, but other key factors, such as the proximity of the harm, are left to discretion. The ambiguity in the text itself could add to the confusion as part of an interpretative exercise. Draft Article 12(1)(b), for example, may cause confusion as to the limits of the definition: ‘complainants, victims, witnesses, and their relatives and representatives’, i.e., the relatives and representatives of victims cannot qualify as victims themselves. Yet, in respect of certain violations – such as disappearances – it is clear that relatives of those who have been ‘disappeared’ are victims. The lack of clarity has been identified as a point of improvement by *inter alia* Algeria, Poland, and Estonia – the latter stating: ‘[t]o ensure that victims' rights are fully recognized and ultimately realized, we consider

it, however, important to include a definition for the term victim, as it may appear to be a gap for determining exactly which persons qualify as “victims of a crime against humanity”.⁶⁹

Would the definition be construed to include non-natural persons, as in the Rome Statute? Would it be construed broadly? The specialist Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation notes that ‘to accurately reflect and incorporate the perspectives of victims and their advocates, the notion of “victim” must be broadly defined’ ‘within the context of women’s and girls’ experiences and their right to reparation’.⁷⁰

A person’s status as a victim is irrespective ‘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’.⁷¹ This principle is important in that it recognizes that the term ‘victim’ and the rights flowing from it are not contingent on the variables of a criminal proceeding. Whether an individual will be investigated and found guilty of a crime will depend on factors such as prosecutorial resources, the existence of sufficient proof that he or she committed the act and had the requisite intent. None of these factors are relevant to the status of a person as a ‘victim’, which depends on whether the person 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). This principle is recognized in the EU 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.⁷² The principle has also been incorporated at the national level into criminal injury compensation schemes that afford victims access to support and assistance, as well as certain small payments, regardless of whether a perpetrator is known, fully investigated or prosecuted.

⁶⁹ Estonia, UN Doc. A/C.6/72/SR.20, para. 71; Algeria, UN Doc. A/C.6/72/SR.21, para. 16; Poland, UN Doc. A/C.6/72/SR.19, para. 92. Sweden (Nordic countries), UN Doc. A/C.6/72/SR.18 para. 57 endorsed draft Art. 12, ‘...although it did not contain a definition of victim of such crimes’.

⁷⁰ Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation, adopted at the International Meeting on Women’s and Girls’ Right to a Remedy and Reparation, 19 - 21 March 2007.

⁷¹ *Basic Principles and Guidelines*, *supra* note 9, para. 5.

⁷² EU Victims’ Directive, *supra* note 39, Art. 8(5) and Recitals 19 and 40.

Similar approaches have been taken by truth commissions and administrative claims processes, and by victim trust funds.

B. No Prohibition on Discrimination

The most vulnerable or marginalized groups in society are often targeted specifically in the commission of crimes, yet excluded from or disadvantaged in reparations processes.

Non-discrimination in the recognition and realization of rights is a fundamental tenet of human rights law reflected in the preambles and provisions of many human rights treaties. Victims should be heard and their harm responded to in a way that respects their equal dignity and right to redress and reparation. The draft Articles, on the other hand, contain no prohibition on discrimination in the realisation of victims' rights: this risks undermining their effectiveness.

The Commentaries could also draw States' attention to the need to take active measures to ensure the participation and representation of groups that are often marginalized. Ensuring meaningful participation of different victims and victims groups from the outset of the reparations process facilitates the integration of different experiences and perspectives. Decisions on and the delivery of reparations should similarly not reinforce pre-existing patterns of discrimination, but rather strive to transform them.⁷³

Depending on the legal system, reparations for crimes against humanity may be instituted by a court at the conclusion of a criminal prosecution for said crimes or following a civil claim for damages brought by victims. Equally, reparations may arise as part of a transitional justice process or in furtherance to governmental policy. Regardless of the origins, the principle of non-discrimination should apply so as to ensure that particularly marginalized or other vulnerable victims groups who may not have engaged with a court process, or whose experiences were not captured by a narrow court process, are not disadvantaged in consequence during reparations proceedings.

⁷³ Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation, *supra* note 70, para. 3.

For the same reasons, reparations for crimes against humanity should not be made conditional on a prior criminal conviction. There may be many reasons why a criminal proceeding ends in an acquittal or is not pursued to its conclusion (such as the death of the accused or procedural irregularities in the investigation), or why a civil claim against a non-State actor is dismissed. While this will invariably impact on a respondent's personal liability to afford reparations, it does not impact on the wider responsibilities of the State to afford or facilitate the affording of reparations for crimes against humanity.

Fundamental to achieving the draft Articles' objectives is that measures taken to fulfill obligations do not entrench discriminatory structures that facilitated the commission of violations in the first place.

C. Absence of a Monitoring and/or Complaints Mechanism

At the request of the ILC, the ILC Secretariat produced a memorandum providing information on existing treaty-based monitoring mechanisms which might be of relevance to future work on the draft Articles.⁷⁴ This was followed by the consideration by the Special Rapporteur of monitoring mechanisms and dispute settlement in his third report.⁷⁵ Mechanisms and related procedures put in place for other treaties have ranged in scope, function, access and enforceability; though not all have been equally effective in helping ensure that States parties fulfil their commitments under the convention. The Special Rapporteur has proposed a single draft Article on inter-State disputes,⁷⁶ and has left open the possibility that States Parties to an eventual crimes against humanity convention may in future select 'one or more mechanisms to supplement existing mechanisms, but that selection would turn less on legal considerations and more on policy factors and the availability of resources.'⁷⁷

⁷⁴ *Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission, Memorandum by the Secretariat*, UN Doc. A/CN.4/698, 18 March 2016.

⁷⁵ *Third report on crimes against humanity by Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/704, 23 January 2017, Ch. VII.

⁷⁶ *Ibid.*, para. 263.

⁷⁷ *Ibid.*, para. 262.

While recognizing the limitations of many monitoring mechanisms, the approach taken by the Special Rapporteur is unfortunate, given that, in practice, inter-State disputes tend only to be invoked in respect of alleged international crimes when they align with the invoking State's national interests. The efficacy of the draft Convention would be enhanced by specifying the creation of a monitoring mechanism that allows for individuals (and groups of individuals or communities, if the latter is included in the definition of victim) to submit complaints directly, rather than relying on States to submit such complaints on their behalf. States and victims (by definition) have different priorities, and there is no guarantee that a State will take up the case of victims should another State fail to comply with its obligations.

7. Conclusions

The approval of an ILC mandate to develop draft Articles on crimes against humanity, with a view to developing a draft Convention should be applauded. As should the thorough work of the Special Rapporteur in developing the draft Articles. We are convinced that, once adopted, a convention will play a crucial role in clarifying States' obligations to prevent, prosecute and afford reparations for crimes against humanity. In so doing, it will contribute to specific and general deterrence, the restoration of victims' sense of dignity and engagement in their communities and the fostering of peace and mutual respect. A convention is also crucial for its potential to improve cooperation between States in the fight against crimes against humanity.

As States and others submit written comments to the ILC (throughout December 2018), and the text finalised in 2019, we hope our reflections will be useful. We have identified a number of areas for improvement, many of which draw upon core tenets of international criminal law and human rights law and should be of central concern to States as they consider the international and national rule of law following the commission of crimes against humanity. Fundamentally, the imperative of tackling crimes against humanity lies in the "millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity". And it is the consciousness of these "millions" that should be principal in any transnational convention.