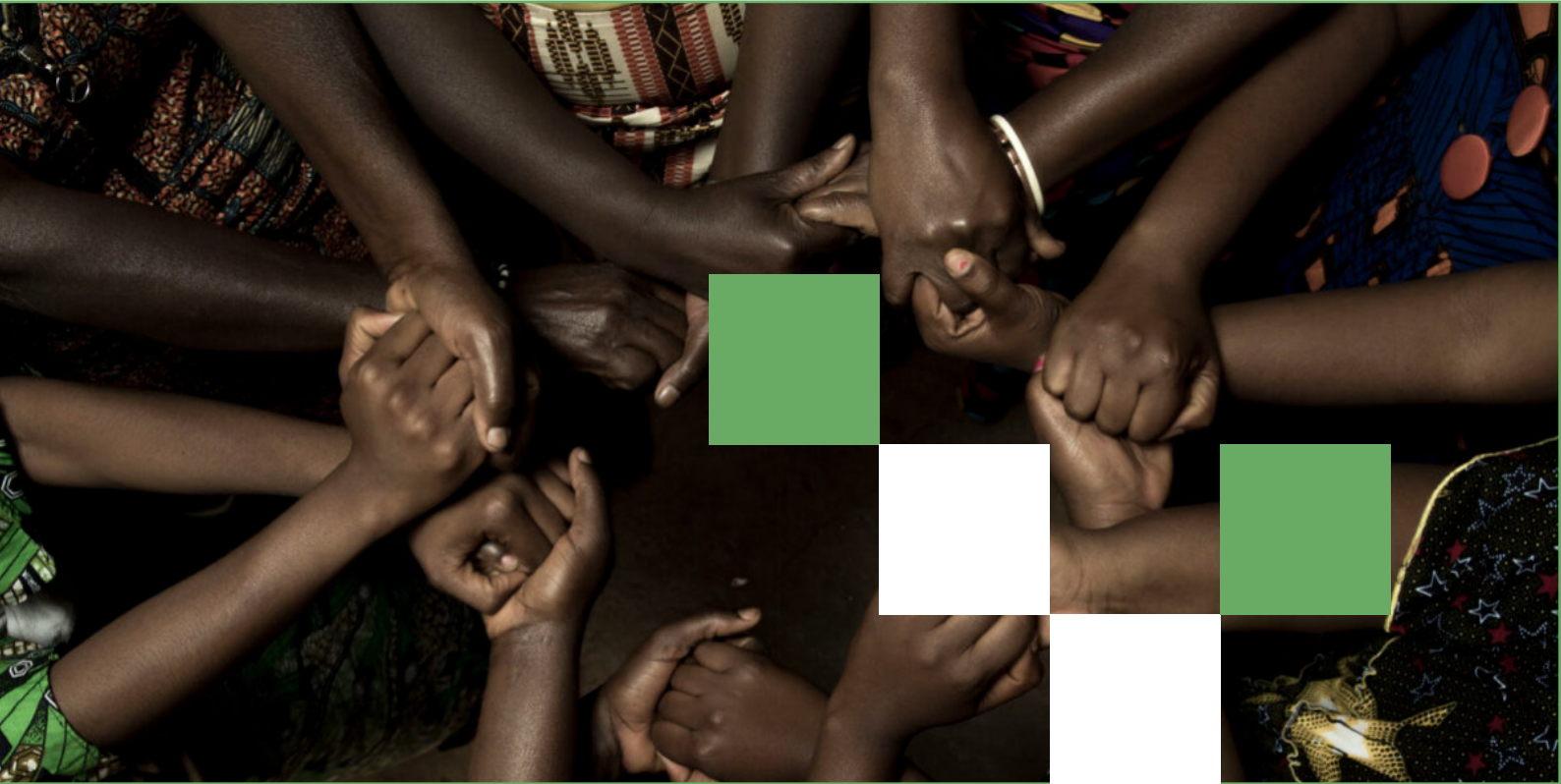


VICTIMS' AND SURVIVORS' RIGHTS IN A CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY

Policy Submission: Recommendations to States

March 2024



FOREWORD

The International Law Commission (ILC) commenced its work on draft articles on the prevention and punishment of crimes against humanity (Draft Articles) in 2014, with the goal of creating the basis for a Convention on crimes against humanity (CAH Convention). The ILC's work culminated in 2019 with the existing Draft Articles for the convention, and the Draft Articles with commentaries. In its 21st session in 2019, the ILC recommended the Draft Articles to the General Assembly of the United Nations (UNGA) with a view to develop a CAH Convention on the basis of the Draft Articles, by the UNGA or a conference of plenipotentiaries.¹ Debates held with states before the Sixth Committee of the UNGA in October 2023, and submissions subsequently issued by states in December 2023 have shown wide support for a CAH Convention.² This Policy Submission (Submission) provides our recommendations to states on strengthening victims' rights in a prospective CAH Convention.

We support the efforts of the ILC and Sixth Committee of the UNGA to establish legal principles for a Convention to prevent crimes against humanity, protect people from such crimes, prosecute and punish perpetrators, and provide reparation to victims and survivors. A prospective CAH Convention would fill an existing gap in international treaty law. Existing treaties on states' due diligence obligations only cover genocide, war crimes, torture, and enforced disappearance. Other treaties which cover crimes against humanity and other core international crimes, set obligations for judicial cooperation among states in the fight against those core international crimes, and created the international criminal court with jurisdiction over such crimes. In other words, no international treaty currently sets states' full due diligence obligations in relation to crimes against humanity. A future CAH Convention will crystallise existing norms of customary international law and *jus cogens* (peremptory norms of international law). It is crucial that this tool adopts a progressive approach to the rights of victims and survivors, and reflects the most advanced standards regarding their rights.

This submission was prepared by REDRESS, the International Federation for Human Rights (FIDH), the Global Survivors Fund (GSF) and TRIAL International. It was researched and drafted by Julie Bardèche, Senior Legal Advisor at REDRESS and Élise Flecher, Programme Officer at FIDH, and reviewed by the REDRESS, FIDH, TRIAL International and GSF teams. This submission also draws extensively from the Policy Submission on Enhancing Victims' Rights in Mutual Legal Assistance Frameworks, prepared in May 2020 by Dr Sarah Finnin.³ It also draws from REDRESS' 2018 comments to the ILC.⁴

1 UNGA, *Report of the International Law Commission*, 74th Session, Supplement No. 10, UN Doc A/74/10, para. 42.

2 See: UNGA, Sixth Committee, *Briefing on the recommendation adopted by the ILC on the occasion of the adoption of the draft articles on the prevention and punishment of crimes against humanity*, UN Doc A/C.6/77/INF/4, 19 April 2023; see also: Priya Pillai, "Draft Convention on Crimes Against Humanity: A Window of Opportunity", *Opinio Juris*, 22 November 2022.

3 FIDH, ECCHR, REDRESS, *Enhancing Victims' Rights in Mutual Legal Assistance Frameworks: Recommendations for the Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity and War Crimes*, 1 June 2020 (**hereinafter**: Policy Brief on MLA).

4 REDRESS, *Fostering Victims' Rights in the Proposed Crimes Against Humanity Convention*, March 2018 (**hereinafter**: REDRESS Brief).

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I. Role and importance of a Crimes Against Humanity Convention

Crimes against humanity are being committed across continents, with or without links to armed conflicts, and have severe impacts on civilian populations. Crimes against humanity are typically defined as acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁵ Such acts include among others murder, imprisonment, enslavement, torture, deportation, rape, sexual slavery and other forms of sexual violence, persecution, apartheid, and enforced disappearance. A prospective CAH Convention would crystallise states' obligations to prevent, investigate, prosecute, punish and provide reparation to victims and survivors for the crimes, and to cooperate to fulfil such obligations, as they currently exist in customary international law, and some of which have attained the status of peremptory norms of international law.

International treaties exist in relation to the prohibition of other core international crimes including genocide, war crimes, torture, and enforced disappearance.⁶ A prospective CAH Convention would fill an existing gap in treaty law in relation to crimes against humanity.

Other frameworks exist to respond to crimes against humanity. The Rome Statute on the International Criminal Court (ICC) established the ICC's jurisdiction over crimes against humanity, for the purpose of individual criminal accountability. The Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes (Ljubljana-The Hague Convention), signed by 34 states⁷ so far this year, and which is due to enter into force, facilitates state cooperation over crimes against humanity and other core international crimes. Despite some overlaps, these treaties have different scopes and do not crystallise the entire set of state obligations relating to crimes against humanity. The Rome Statute is a tool to prosecute perpetrators where the ICC has jurisdiction, and promote the criminalisation of crimes against humanity in States Parties' domestic legislation; the Ljubljana-The Hague Convention is aimed at enhancing cooperation once crimes have been committed and judicial proceedings are triggered as a response. Further, many states have not ratified either the Rome Statute or the Ljubljana-The Hague Convention. These treaties are mutually reinforcing and a CAH Convention is needed to complement and further strengthen the existing system aimed at preventing and responding to the most serious crimes under international law.

A prospective CAH Convention shall set obligations for states to: (1) prevent crimes against humanity, by transposing and criminalising them, as well as relevant modes of liability, in domestic law, and taking other legislative and practical measures required; (2) investigate such crimes as they occur, prosecute and punish perpetrators, including through the application of the principle of universal jurisdiction; and (3) provide reparation to victims and survivors.

The prospective CAH Convention should also ideally reflect jurisprudential and other evolutions of the notions and standards pertaining to crimes against humanity. For instance, the Draft Articles recognise the status of jus cogens of the prohibition of crimes against humanity in the preamble; they depart from the Rome Statute by not defining the notion of 'gender' to allow for the continuation of its evolution; they recognise states' obligation to

5 Draft Article 2; Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes, Article 5(2) (**hereinafter**: Ljubljana-The Hague Convention); Rome Statute of the International Criminal Court, Article 7 (**hereinafter**: Rome Statute).

6 Convention on the Prevention and Punishment of the Crime of Genocide; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; Geneva Convention relative to the Protection of Civilian Persons in Time of War; Convention for the Protection of Cultural Property in the Event of Armed Conflict; Additional Protocols to these Conventions; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**hereinafter**: UNCAT); International Convention for the Protection of All Persons from Enforced Disappearance (**hereinafter**: ICPPED).

7 Republic of Slovenia, "The Ljubljana-The Hague Convention is signed in The Hague after a decade of efforts", 14 February 2024.

prosecute or extradite perpetrators, and establish extra-territorial – including universal – jurisdiction over such crimes. We welcome these provisions. Departing from the Draft Articles, however, states should ensure that a prospective CAH Convention reflects recognised standards of international law and does not regress or revert progress made. Among others, desired provisions include:⁸ a definition of enforced disappearance in line with the International Convention for the Protection of All persons from Enforced Disappearance,⁹ and stronger provisions on the prohibition of amnesties and similar measures of impunity. This Submission primarily focuses on the rights of victims and survivors and key related issues in a prospective CAH Convention, and offers recommendations to strengthen the Draft Articles.

II. A Crimes Against Humanity Convention must affirm and promote existing victims' and survivors' rights

States' obligation to recognise the rights of victims and survivors of crimes under international law is enshrined in a range of international instruments.¹⁰ Those rights include, for example:

- the right to complain to competent authorities;¹¹
- the right to receive information;¹²
- the right to participation;¹³
- the right to be heard;¹⁴
- the right to access support services;¹⁵
- the right to protection;¹⁶
- the right to truth;¹⁷ and
- the right to reparation.¹⁸

These rights are guaranteed to all victims and survivors of crimes under international law. Victim status is to be

8 See Amnesty International, *General Recommendations to States for a Convention on Prevention and Punishment of Crimes Against Humanity*, 2023.

9 ICPPED, Article 2.

10 See e.g. OHCHR, *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*, UN General Assembly Res 60/147, UN Doc A/RES/60/147 (16 December 2005) (**hereinafter**: Basic Principles and Guidelines). As stated in the Preamble, the Basic Principles and Guidelines “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.”

11 Compare e.g. ICPPED, Article 12; UNCAT, Article 13. See also: 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 (**hereinafter**: EU Victims' Directive), Article 5; Ljubljana-The Hague Convention, Article 12.

12 Compare e.g. ICPPED, Article 24(2); OPCRCSC, Article 8(1)(b); PPSPT, Article 6(2)(a). See also EU Victims' Directive, Articles 4 and 6.

13 Compare e.g. ICPPED, Article 24(2); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (**hereinafter**: OPCRCSC), Article 8(1)(c); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (**hereinafter**: PPSPT), Article 6(2)(b); Rome Statute, Article 68. See also EU Victims' Directive, Article 10.

14 Compare e.g. PPSPT, Article 6(2)(b); OPCRCSC, Article 8(1)(c). See also: EU Victims' Directive, Article 1; Ljubljana-The Hague Convention, Article 83(2).

15 Compare e.g. OPCRCSC, Article 8(1)(d); PPSPT, Article 6(3); ICPPED, Article 15; UNCAT, Article 14. See also EU Victims' Directive, Articles 8 and 9; Ljubljana-The Hague Convention, Article 82.

16 Compare e.g. UNCAT, Article 13; ICPPED, Article 12; PPSPT, Article 6(1) and (5); OPCRCSC, Article 8(1)(f). See also: Council of the European Union, *Guidelines on EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – 2019 Revision of the Guidelines* (**hereinafter**: EU Torture Guidelines), p. 29; EU Victims' Directive, Articles 18-24; Ljubljana-The Hague Convention, Article 82.

17 See among others: Human rights Committee, *Lyashkevich v. Belarus*, Communication No 887/1999, Views adopted on 3 April 2003, A/58/40, vol. II, annex V, appendix P, para. 9.2; Inter-American Commission on Human Rights, *Case of Ignacio Ellacuría et al.*, 22 December 1999, Report No. 136/99, para. 221; see also: ICPPED, Preamble and Article 24.

18 Compare e.g. ICPPED, Article 24(4)-(5); PPSPT, Article 6(6); OPCRCSC, Article 9; UNCAT, Article 14; Ljubljana-The Hague Convention, Article 83.

determined by the harm a person has suffered;¹⁹ it must not be made dependent on the victim or survivor making a formal complaint, a perpetrator being identified, arrested or convicted,²⁰ nor should it be affected by other limitations on access to justice.

- **Recognising the pivotal and specific role of victims and survivors in investigations and prosecutions of crimes against humanity**

In the context of crimes against humanity, victims' and survivors' rights have been affirmed and recognised by the Rome Statute, the Statutes of hybrid criminal courts and tribunals, and international jurisprudence.²¹ They have also been recognised by the Ljubljana-The Hague Convention, at Articles 81 to 83.

Many victims and survivors of crimes under international law typically reside outside the state conducting an investigation or prosecution. This raises many challenges: these victims and survivors are often severely traumatised and have limited access to support or rehabilitation, and often live in ongoing conflict or insecurity. This leaves them in need of special protection against intimidation, retaliation and repeat or secondary victimisation. This is compounded by other factors: *“the sheer number of victims potentially implicated in such proceedings; language issues; cultural differences; lack of infrastructure; and insufficient expertise or resources to dedicate to victim engagement.”*²² Despite these limitations, victims and survivors are often the *“cornerstone of viable investigations or prosecutions”* of crimes under international law, including crimes against humanity.²³ They act as complainants and witnesses in investigations, and criminal cases would often not be led without their courage, efforts and contributions.²⁴ For these reasons, a prospective CAH Convention should acknowledge the pivotal role of victims and survivors and recognise them as a separate category of individuals with distinct rights than those of other actors.²⁵ It should also enhance the level of protection granted to them, and enunciate their rights and corresponding state obligations in detail.

- **Adopting an inclusive and wide definition of ‘victim’**

The Draft Articles do not contain a definition of the term ‘victim’. This approach leaves the interpretation of this notion at the discretion of states. Defining ‘victims’ in broad terms, reflecting their status in international law, would enable to set criteria for states to identify the beneficiaries of relevant rights, and to ensure that no victim or survivor is left out, leaving no room for discrimination. The ICC’s Rules of Procedure and Evidence contain a definition of the term ‘victim’,²⁶ as does the Ljubljana-The Hague Convention,²⁷ which reproduces the ICC definition.

19 Compare e.g. ICC Rules of Procedure and Evidence, Rule 85; Basic Principles and Guidelines, Article 8; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN General Assembly Res 40/34, UN Doc A/RES/40/34 (29 November 1985), Articles 1-3. See also EU Victims’ Directive, Article 2(1)(a).

20 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 Treatment or Punishment (Article 5)*, 2017, para. 17; Basic Principles and Guidelines, Article 9. See also REDRESS Brief, paras 27 and following.

21 ICC Rome Statute; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea; Internal Rules of the Extraordinary Chambers in the Courts of Cambodia; Statute of the Extraordinary African Chambers. For jurisprudence see references below under each section, and in REDRESS Brief.

22 Policy Brief on MLA, p. 9.

23 Policy Brief on MLA, p. 10.

24 *Ibid.*

25 This is supported by [Australia](#) and [Portugal](#). On the crucial role played by victims and survivors, see also the submission of the [United Kingdom](#).

26 ICC Rules of Procedure and Evidence, Rule 85: *“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.”*

27 Ljubljana-The Hague Convention, Article 81(1): *“Without prejudice to broader definitions under domestic law and for the purposes of this Part of the Convention: a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime to which this Convention applies; b) “Victims” may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art, science or charitable purposes, or to their historic monuments, hospitals and other places and objects for humanitarian purposes.”*

A prospective CAH Convention should include a definition of ‘victims’ that includes not only persons who suffered harm directly or indirectly as a result of a violation, but also others who may have been harmed while intervening to assist them, prevent a violation, or may have been otherwise impacted.²⁸ International courts have recognised that crimes against humanity could affect entire communities, persons belonging to the same group as the direct victims, and have recognised the transgenerational dimensions of harm, giving the notion of victim a very wide meaning.²⁹ This should ideally be reflected in a prospective CAH Convention.³⁰

We recommend that states include a wide and open-ended definition of the term ‘victim’ in a prospective CAH Convention, aligned with international standards, and provisions guaranteeing the rights to complain, to receive information, to participate, to receive protection, to be heard, to truth, and to reparation. Recognising the crucial role played by victims and survivors and promoting their rights in a prospective CAH Convention will enhance its function as a tool against impunity for crimes against humanity and for victims and survivors. At minimum, it is crucial that a prospective CAH Convention does not curtail victims’ and survivors’ rights recognised in existing conventions and jurisprudence.

RIGHTS TO INFORMATION AND (MEANINGFUL) PARTICIPATION

Draft Article 12 provides as follows:

“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; [...]

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.”

Victims’ and survivors’ rights to participation³¹ and information³² are well-established under international law. The right to information is a prerequisite to victims’ and survivors’ participation. We commend the ILC for including victims’ right to participation in Draft Article 12(2) which guarantees the rights of victims and survivors to have their “*views and concerns [...] presented and considered*” in criminal proceedings. We recommend that states do not limit the right to participation in criminal proceedings, but also enable them to participate in administrative, civil, and other proceedings relating to crimes against humanity. We also recommend that states include victims’ and survivors’ right to information about their rights, the circumstances of crimes against humanity, and any on-going proceedings, whether criminal or other, in a prospective CAH Convention. Meaningful victims’ and survivors’ participation and agency directly hinge on their access to information.

Victims’ and survivors’ participation often forms the foundation of viable and successful investigation and prosecution of international crimes, including crimes against humanity, before international and domestic courts.³³ The ICC has recognised that: “[f]or the Court to be able to properly fulfil its mandate, it is imperative that its role

28 Committee Against Torture, *General Comment 3*, para. 3; see also: ICL, *Draft Articles on Prevention and Punishment of Crimes Against Humanity, With Commentaries*, 2019 (hereinafter: Commented Draft Articles), Article 12 commentary, para. 4, p. 103; see also: Basic Principles and Guidelines, Article 8.

29 ICC, Trial Chamber IX, *Reparations Order*, 28 February 2024, ICC-02/04-01/15 (Ongwen), paras. 206-207 (on transgenerational harm), 407 (on harm done to communities).

30 The following states have expressed support for the inclusion of a definition of the notion of ‘victim’: [Argentina](#), [Australia](#), [Brazil](#), [Colombia](#), and [Liechtenstein](#).

31 ICPPED, Article 24(2); OPCRCSC, Article 8(1)(c); PPSPT, Article 6(2)(b); Rome Statute, Article 68. See also EU Victims’ Directive, Article 10.

32 ICPPED, Article 18; OPCRCSC, Article 8(1)(b); PPSPT, Article 6(2)(a). See also EU Victims’ Directive, Articles 4 and 6.p. 14.

33 FIDH, ECCHR, REDRESS, *Breaking Down Barriers: Access to Justice in Europe for Victims of International Crimes*, September 2020 (**hereinafter**: *Breaking Down Barriers*), p. 14; FIDH, *Whose Court is it? Judicial handbook on victims’ rights at the International Criminal Court*, April 2021, Introduction, pp. 11-14.

and activities are properly understood and accessible, particularly to the victims of situations and cases before the Court”.³⁴ Victims and survivors provide invaluable knowledge on the context, the violations and crimes, as well as their scale. Without their contributions, many cases could not have reached the trial stage. Facilitating victims’ and survivors’ participation in criminal, reparation or other proceedings that may impact their lives and livelihood, is also a form of reparation for them. Their meaningful participation at every stage of the justice process is an essential element for effective and transformative reparations, as highlighted by victims themselves in the Kinshasa Declaration.³⁵

Gambia Case in Germany:³⁶

In November 2023, in the first trial held on the basis of universal jurisdiction for crimes committed in The Gambia during former President Jammeh’s regime, the joint plaintiffs and their lawyers were present at trial and enjoyed the same procedural rights as the prosecution and defence. This included questioning witnesses and experts, filing and reacting to procedural motions, and requesting evidence to be introduced at trial. They also gave closing statements.

Ensuring victims’ and survivors’ meaningful and effective participation entails guaranteeing that they receive and access information about their rights and ongoing investigations and proceedings, whether criminal, civil, administrative, or other. For victims and survivors to be able to participate in proceedings, they must be aware of the process presented to them in a language they understand, and clear and accessible systems must be in place. Child victims must also be able to participate in proceedings in a manner that safeguards their interests.

Syrian Regime-related Trial in the Netherlands:³⁷

In November 2023, a Dutch court considered charges against a Syrian man accused of crimes against humanity and war crimes, in the first Syrian regime-related trial in the Netherlands. In January 2024, Mustafa A. was convicted of war crimes and crimes against humanity for complicity in torture, inhumane treatment and illegal arrest and for membership of a criminal organisation.

For the first time in Europe, the trial presented the unique feature of simultaneous in-court interpretation from Arabic to Dutch and vice-versa to those attending the trial, as well as live broadcasting, following a request by two civil society organisations that were civil parties in the case. Victims were able to follow and understand the proceedings, including through the media that were also able to report on the trial.

Other states, such as Switzerland and Germany,³⁸ have also taken measures to facilitate victims’ and survivors’ participation in legal proceedings. At the international level, the ICC has developed a comprehensive approach to outreach and public information, recognising these as essential for the Court’s legitimacy and the effectiveness of its mandate.³⁹ The ICC’s outreach programmes aim to ensure that affected communities understand the Court’s role, proceedings, and decisions. The Court also provides information on victims’ and survivors’ rights and how they can participate in proceedings and seek reparation.

34 ICC, PTC III, Palestine, Decision on Information and Outreach, 2018, ICC-01/18-2.

35 Kinshasa Declaration On the Rights to Reparation and Co-creation of Survivors and Victims of Conflict-Related Sexual and Gender-Based Violence, Articles 6 and 12.

36 TRIAL International, *Questions and Answers on First German Trial for Serious Crimes Committed in The Gambia*, 29 November 2023.

37 Just Security, ‘Syrian Regime Crimes on Trial in The Netherlands’, 22 November 2023; Justice Info, ‘Syrian trials translated into Arabic: The Netherlands’ conclusive test’, 13 February 2024.

38 ECCHR, *Torture in Syria on trial in Koblenz: A Documentation of the Al-Khatib proceedings*, 2022; Justice Info, ‘Syrian trials translated into Arabic: The Netherlands’ conclusive test’, 13 February 2024; FIDH, ‘Q&A: Justice for enforced disappearances in Belarus: Former member of President Lukashenka’s elite hit squad brought before a Swiss Court’, 30 August 2023.

39 ICC Registry, “Integrated Strategy for External Relations, Public Information and Outreach”.

Recommendations

In a prospective CAH Convention, states should:

- explicitly recognise the rights of victims, survivors, and their families to receive and access information regarding the violations, the proceedings and their rights; and
- broaden the scope of the victims' and survivors' right to participation beyond criminal proceedings; namely to administrative, civil, and other proceedings.

RIGHT TO PROTECTION

Draft Article 12(1)(b) provides as follows:

“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.”

Draft Article 12(1)(b) protects complainants, victims, witnesses, their relatives and representatives, and other persons participating in proceedings against ill-treatment and intimidation as a consequence of making a complaint or providing information, testimony or other evidence.

While we commend the ILC for including this provision in the Draft Articles, we recommend that, in a prospective CAH Convention, states expand this article to include individuals who might be at risk as a result of proceedings, even if they do not necessarily have a formal role in such proceedings. The right to protection against all forms of ill-treatment and retaliation against victims and witnesses participating in investigations or criminal proceedings is well established under international law.⁴⁰

Ensuring the protection of victims, survivors, and witnesses is critical to enable their participation in proceedings. Engaging in criminal proceedings exposes victims, survivors, their families and communities, and those who support them, to reprisals and insecurity. As such, they require special protection against intimidation, retaliation and repeat or secondary victimisation.⁴¹ Improper protection can lead to cases collapsing in the absence of the participation of victims, survivors, and witnesses.

In a prospective CAH Convention, states should expand Draft Article 12(1)(b) to ensure adequate protection to all individuals whose safety or well-being might be jeopardised by an investigation, prosecution, extradition or other proceedings within the scope of the treaty. This includes victims and survivors (regardless of whether they choose to participate in proceedings), witnesses, their families, members of their communities, human rights defenders, investigators, lawyers, health care professionals, monitoring bodies and any other individual or institution assisting victims in accessing justice and redress.

⁴⁰ UNCAT, Article 13; ICPPED, Articles 12(1) and 18(2); PPSPT, Article 6(1) and (5); OPCRCSC, Article 8(1)(f); Rome Statute, Article 68; Statute of the International Criminal Tribunal for the former Yugoslavia, Article 22; Statute of the International Criminal Tribunal for Rwanda, Article 21; United Nations Convention against Corruption, Articles 32 and 33; United Nations Convention against Transnational Organized Crime, Article 25. See also EU Torture Guidelines, p. 29; EU Victims' Directive, Articles 18-24; Ljubljana-The Hague Convention, Article 82.

⁴¹ Policy Brief on MLA, p. 13.

A prospective CAH Convention should recognise states' positive obligation to ensure that interactions with victims and survivors take place in a safe environment, to take active steps to avoid re-victimisation and re-traumatisation, and to ensure the respect of their privacy. The ILC clarified in its commentaries to the Draft Articles that "[t]he 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".⁴² For the sake of clarity, it is advisable that states expressly include all these aspects in the text of a prospective CAH Convention.

We recommend using the same language as provided in Article 82 of the Ljubljana-The Hague Convention for a provision on protection. It also draws from the wording used in the Rome Statute,⁴³ and aligns with international standards on the rights of victims of serious violations of international law.⁴⁴ This would also ensure unity and consistency across international instruments.⁴⁵

Ensuring a broad provision regarding protection in a prospective CAH Convention would expand the means available to states. For example, it could provide national authorities with a legal basis they can invoke to justify allocating resources (whether human, financial or otherwise) to provide protection, which, in turn, could result in the availability of stronger evidence. This would contribute to strengthening the fight against impunity for some of the most serious crimes under international law.

Recommendations

In a prospective CAH Convention, states should:

- expand effective protection to all individuals whose safety or well-being might be jeopardised by investigations or any proceedings concerning crimes against humanity, even if they do not have a formal role in such proceedings; and
- explicitly include protection against secondary victimisation and the establishment by states of measures aiming to make this right effective.

RIGHT TO TRUTH

The Draft Articles do not provide for victims' and survivors' right to truth. While the ILC stated in its commentary that the wording of Draft Article 12 should not be read as excluding this right,⁴⁶ in a prospective CAH Convention, states should explicitly recognise victims' and survivors' right to truth. This right naturally derives from the right of victims and survivors to an effective remedy and to information (see above) and has been widely recognised by regional courts and other human rights bodies.⁴⁷

Recommendation

In a prospective CAH Convention, states should recognise victims' and survivors' right to truth.

⁴² Commented Draft Articles, Article 12 commentary, para. 11, p. 105-106.

⁴³ Rome Statute, Article 68.

⁴⁴ Basic Principles and Guidelines, Article 10.

⁴⁵ This is supported, among others, by the United Kingdom in their https://www.un.org/en/ga/sixth/78/cah/uk_e.pdf December 2023 comments and observations on the Draft Articles. https://www.un.org/en/ga/sixth/78/cah/uk_e.pdf

⁴⁶ Commented Draft Articles, Article 12 commentary, para. 24, p. 109.

⁴⁷ See among others: Human rights Committee, *Lyashkevich v. Belarus*, Communication No 887/1999, Views adopted on 3 April 2003, A/58/40, vol. II, annex V, appendix P, para. 9.2; Inter-American Commission on Human Rights, *Case of Ignacio Ellacuría et al.*, 22 December 1999, Report No. 136/99, para. 221; see also: ICPPED, Preamble and Article 24. The inclusion of the right to truth in the CAH Convention is supported by the states of Argentina and Liechtenstein.

RIGHT TO REPARATION

Draft Article 12(3) provides as follows:

“Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity, committed through acts attributable to the State under international law or committed in any territory under its jurisdiction, 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.”

Adopting a comprehensive reparation concept

Victims and survivors of crimes against humanity face significant obstacles in obtaining reparation for the harm that they have suffered. This is especially notorious in cases where prosecutions take place in a third state exercising extra-territorial jurisdiction, where victims and survivors may be excluded from accessing reparation through proceedings or reparation funds in that state.⁴⁸ Even where states enable victims and survivors to obtain compensation orders against authors of crimes, such perpetrators rarely have sufficient assets to provide compensation.⁴⁹

Draft Article 12 currently recognises the *“comprehensive reparation concept”*, by listing six open-ended forms of reparation (restitution, compensation, satisfaction, rehabilitation, cessation, and guarantees of non-repetition). The wording *“as appropriate”* provides leeway for states to adapt reparation measures to the situation of the victims and survivors and to its domestic legal system. We commend the broad approach to the concept of reparation, which reflects existing standards.⁵⁰

The right of victims and survivors of international human rights and humanitarian law violations, including crimes against humanity, to an effective remedy and reparation is well-established in international law and jurisprudence.⁵¹ While the concept of ‘remedy’ refers to the legal processes that can provide for the establishment of the truth, justice and reparation, the term ‘reparation’ refers to substantive measures designed and implemented to repair the harm done as a result of a human rights, or humanitarian law violations, including crimes against humanity.⁵²

Under international law, a state must provide reparation when a violation is attributable to it. This is for instance the case when violations are committed by representatives, officials or agents of that state, or by private actors acting on behalf of the state, with the acquiescence or tolerance of the state, of exercising state-like functions. This is also the case when a state fails to prevent, protect victims and survivors, and/or respond appropriately to the violation, including through conducting a prompt, effective, independent, impartial, thorough and gender-sensitive investigation.⁵³

Further, states exercising their jurisdiction over a crime under international law, should provide effective remedies to ensure that victims and survivors can access reparation.⁵⁴ Concretely, this means that states should create the

48 Policy Brief on MLA, p. 12.

49 *Ibid*; see also: Breaking Down Barriers.

50 See among others: Basic Principles and Guidelines, Articles 18 and following.

51 Universal Declaration of Human Rights, Article 8; International Covenant on Civil and Political Rights, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; ICPPED, Article 24; UNCAT, Article 14; Convention (IV) respecting the Laws and Customs of War on Land, Article 3; International Committee of the Red Cross Customary International Humanitarian Law Rules, Rule 150; Rome Statute, Article 75; Ljubljana-The Hague Convention, Article 83; see also: Basic Principles and Guidelines.

52 REDRESS, *Practice Note on Reparation for Torture Survivors*, March 2024 (hereinafter REDRESS Practice Note), p. 6.

53 *Ibid*, p. 8; International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Chapter 5: State Responsibility, p. 66.

54 *Ibid*; Ljubljana-The Hague Convention, Article 83.

framework and mechanisms necessary to enable victims and survivors to seek and obtain reparation, through judicial, administrative or other procedures.⁵⁵

Recommendations 1

In a prospective CAH Convention, states should:

- recognise a broad right to reparation for victims and survivors, including the ‘comprehensive reparation concept’; and
- not limit reparation to harm linked to acts attributable to the state or committed on its territory.

Draft Article 12 currently provides that reparation be provided to victims and survivors for “*material and moral damages*”. This wording is limiting and fails to recognise all the types of harm that victims and survivors may suffer in the context of crimes against humanity. The Basic Principles and Guidelines recognise that harm can include “*physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights*”, among others.⁵⁶ ICC jurisprudence has recognised that harm can be material, physical or psychological, and that emotional or economic loss can also fall within the definition of harm.⁵⁷

The Al Mahdi Case:⁵⁸

On 17 August 2017, the ICC’s Trial Chamber VIII issued a Reparations Order in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, in which it held Al Mahdi liable in damages for individual and collective reparations for the community of Timbuktu, for attacks against religious and historic buildings in that city.

The Chamber underscored the importance of cultural heritage and stated that, “[b]ecause of their purpose and symbolism, most cultural property and cultural heritage are unique and of sentimental value. As a result, they are not fungible or readily replaceable. The destruction of international cultural heritage thus ‘carries a message of terror and helplessness; it destroys part of humanity’s shared memory and collective consciousness; and it renders humanity unable to transmit its values and knowledge to future generations.’”⁵⁹

The Chamber ordered reparations for three types of harm: material damage to the historic and religious buildings attacked, consequential economic loss, and moral harm.

Recommendations 2

In a prospective CAH Convention, states should:

- recognise all forms of harm that can arise as a result of crimes against humanity, and
- keep any list open-ended so as to avoid limiting the notion of harm.

55 REDRESS Practice Note, p. 8; see also: Breaking Down Barriers, pp. 126 and following; see also: Article 83 of the Ljubljana-The Hague Convention, which recognises victims’ right to reparation: when “[t]he crime has been committed in any territory under the jurisdiction of that State Party; or [when t]hat State Party is exercising its jurisdiction over the crime.”

56 Basic Principles and Guidelines, Article 8; note that the Ljubljana-The Hague Convention does not list types of harm in order to avoid unduly limiting the notion and providing states with leeway in recognising forms of harm not envisaged by the drafters of the Convention: Ljubljana-The Hague Convention, Article 81. See also: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, Article 1.

57 ICC, Appeals Chamber, *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008*, 11 July 2008, ICC-01/04-01/06-1432 (Lubanga), para. 32; PTC1, *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, 17 January 2006, ICC-01/04-101 (DRC), para. 116.

58 ICC, Trial Chamber VIII, *Reparations Order*, 17 August 2017, ICC-01/12-01/15 (Al Mahdi).

59 *Ibid.* para. 22.

Draft Article 12 provides that reparation can be provided on an “*individual or collective basis*”. We recommend that states keep this wording in a prospective CAH Convention. The Basic Principles and Guidelines also recognise individual and collective victims.⁶⁰

The Ongwen Case.⁶¹

On 28 February 2024, the ICC’s Trial Chamber IX issued a Reparations Order in the Case of the Prosecutor v. Dominic Ongwen in relation to crimes against humanity committed in Northern Uganda, including murder, sexual violence, enslavement, torture, destruction of cultural property among others.

The Chamber ordered both individual symbolic monetary awards, and collective measures of rehabilitation, as well as symbolic collective measures of satisfaction (apologies ceremonies, memorial prayers, cleansing ceremonies etc), for the victims of the case.

Recommendations 3

In a prospective CAH Convention, states should:

- keep both individual and collective reparation; and
- not unduly restrict them to either category, as a combination of both individual and collective measures is generally necessary to provide adequate reparation to victims and survivors.

No statutes of limitations for reparation proceedings

Draft Article 6(6) provides for states’ obligation to take measures so that their domestic statutes of limitations do not apply to crimes against humanity. This principle is in line with recognised international standards,⁶² but a prospective CAH Convention should provide for a self-executing norm not requiring state action to ensure statutes of limitations do not apply to crimes against humanity.⁶³ The Draft Articles fall short of proscribing statutes of limitations in the context of reparation proceedings, when these are detached from criminal proceedings (civil, administrative or other proceedings). The Draft Articles adopt a conservative approach and the ILC commentary only suggests that “[m]easures to preclude any statute of limitations on civil claims should be considered in appropriate circumstances.”⁶⁴

A prospective CAH Convention should prohibit statutes of limitations in the context of reparation proceedings linked with crimes against humanity.⁶⁵ Where they exist, statutes of limitation present a barrier for survivors and victims to realise their right to reparation, and often leads to re-traumatisation.

60 Basic Principles and Guidelines, Article 8; see also: Ljubljana-The Hague Convention, Article 83(1): this article removed the distinction to enable states to recognise both collective and individual reparation in their domestic systems.

61 CC, Trial Chamber IX, *Reparations Order*, 28 February 2024, ICC-02/04-01/15 (Ongwen).

62 TRIAL International, *Towards a Convention on the Prevention and Punishment of Crimes against Humanity: Recommendations to States*, March 2024, p. 3 (hereinafter: TRIAL Briefing).

63 *Ibid*, pp. 3-4.

64 Commented Draft Articles, Article 12 commentary, para. 22, p. 108.

65 See also TRIAL Briefing, pp. 4-6.

Bosnia and Herzegovina civil claims:⁶⁶

In Bosnia and Herzegovina, victims who have sought to obtain reparation through civil proceedings, but were (wrongly) rejected based on expired statutes of limitations had to pay not only for their own fees but also for those incurred by the alleged perpetrators. Many ended up in debt, or bankrupt, and were severely re-traumatised. The Constitutional Court of Bosnia and Herzegovina upheld statutes of limitations for war time compensation claims in 2013, perpetuating this issue in the country.

In 2019, the Committee Against Torture (CAT) ruled in *A v. Bosnia and Herzegovina* that statutes of limitations should not apply to reparations proceedings in cases of torture. The CAT held that this derived from victims' right to an effective remedy, which imposes an obligation on States to "*enact legislation and establish complaints mechanisms and ensure that such mechanisms and bodies are effective and accessible to all victims*"; and from the "*continuous nature of the effects of torture*."

The Basic Principles and Guidelines⁶⁷ and the Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Impunity Principles)⁶⁸ affirm that prescriptions do not apply to reparation claims.

Recommendations

In a prospective CAH Convention, states should:

- ensure that statutes of limitations do not apply to crimes against humanity; and
- explicitly establish that statutes of limitations do not apply to civil, administrative, or any other proceedings in which victims of crimes against humanity seek reparation.

Mutual legal assistance for the purpose of asset recovery and reparation

Draft Article 14(2) contains provisions on mutual legal assistance in the investigation and prosecution of crimes against humanity. Specifically, it provides for assistance for the purpose of "*identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes*". In its commentary, the ICL indicated that "*other purposes*" could include restitution of property to a victim.⁶⁹

⁶⁶ GSF, Trial International, Vive Žene, *Bosnia and Herzegovina Study on Opportunities for Reparations for Survivors of Conflict-related Sexual Violence, We raise our voices*, March 2022, pp. 60-62; see also: Committee Against Torture, *A v. Bosnia and Herzegovina, Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 854/2017, 11 September 2019*, UN Doc CAT/C/67/D/854/2017, para. 7.5.

⁶⁷ Basic Principles and Guidelines: Article 6: "*Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law. 7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.*"

⁶⁸ Commission on Human Rights, *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 23: "*[p]rescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are by their nature imprescriptible. When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.*"

⁶⁹ Commented Draft Articles, Article 14 commentary, para. 14, p. 126.

Making the right to reparation effective is central to victims' and survivors' rights. Reparation orders are often not implemented, because of a lack of political will by states, the indigence of perpetrators, and a lack of funding sources for broader reparation measures. Enabling states to activate mutual legal assistance for the purpose of enforcing reparation orders or identifying perpetrators' assets would help overcome many barriers that victims and survivors currently face. This approach would also ensure coherence with the provisions of the recently adopted the Ljubljana-The Hague Convention.⁷⁰

The Hissène Habré case:⁷¹

In July 2017, the Extraordinary African Chambers (EAC), a hybrid court embedded in the Senegalese judicial system, issued a judgement on the Prosecutor v. Habré case, in relation to international crimes, including crimes against humanity, committed in Chad in the 1980s. The EAC ordered compensation – and other reparation – for over 7,000 victims. It also ordered that the African Union establish a Trust Fund to disburse the reparation award, including by seeking to recover the assets of Hissène Habré. To this day, the Trust Fund has not been fully established and the victims have not received compensation.⁷²

This is in part due to a lack of political will, and to the absence of transnational pathways to recover Habré's assets for the purpose of reparation. Matters are now further complicated by the death of Hissène Habré as this renders prospects of recovering his assets dimmer.

A prospective CAH Convention should contain broader language on mutual legal assistance, to make victims' and survivors' rights to reparation effective. The freezing of assets should not be solely envisaged for the purpose of restitution of property. Restitution is difficult to obtain in practice, and happens only in a very limited number of cases. States should thus envisage including mutual legal assistance for the liquidation of assets of a convicted perpetrator for the purpose of financing other types of reparation measures for victims and survivors.⁷³

Restitution or compensation are often not possible in the context of crimes against humanity. The value of compensation would often not be tied with proceeds of crimes, a concept often absent from cases of crimes against humanity. For instance, torture often yields no material proceeds, nor do sexual violence, enforced disappearance or murder. In this context it is crucial to recognise that any assets of a perpetrator may be identified, traced, frozen or seized, confiscated and then liquidated for the purpose of financing any type of reparation, in a non-limitative way, and that mutual legal assistance should be made possible for this purpose.⁷⁴

Recommendation

In a prospective CAH Convention, states should provide for explicit language on judicial cooperation and mutual legal assistance to identify, trace, freeze, seize, confiscate, and liquidate any assets of perpetrators for the purpose of providing reparation to victims and survivors.

70 Ljubljana-The Hague Convention, Articles 45, 46, and 47 on asset recovery, reinforced by Article 83 on victims' rights.

71 See among others: REDRESS, ATPDH, GSF, *Breaking the Silence: Chad Study on Reparations for Survivors of Conflict-Related Sexual Violence*, April 2023, pp. 46 and following.

72 Note recent development: ICJ, "Chad: Hissène Habré's victims receive \$16.5 million", 5 March 2024.

73 See a minima language included in the Ljubljana-The Hague Convention at Article 45(1): "the proceeds of crime or [equivalent], or other property for the purposes of providing reparations to victims in accordance with article 83, paragraph 3, situated in its territory".

74 See for full reflections on the Ljubljana-The Hague Convention: Leanna Bunnard and Danaé van der Straten Ponthoz, "Paving the Way for Asset Recovery and Reparations", in *Opinio Juris*, 2 August 2023; see also: Julie Bardèche, "A Giant with Feet of Clay? Victims' Right to Reparation in the MLA Convention", in *Opinio Juris*, 1 August 2023.

