

Draft Crimes Against Humanity Convention Must Center Victims and Survivors

Submitted by:

Amnesty International
Center for Human Rights Advocacy
Dr. Denis Mukwege Foundation
Free Yezidi Foundation
Global Justice Center
Global Survivors Fund
Grace Agenda
Grace Acan, women's Advocacy Network and a member of SEMA,
Uganda
International Center for Transitional Justice
REDRESS
Survivor Speak Out Network at Freedom from Torture
Women's League of Burma
Women's Peace Network

Overview: States should adopt a survivor-centric approach to the Draft Crimes Against Humanity Convention

States must take a survivor-centric approach throughout when considering the Draft Articles on the Prevention and Punishment of Crimes Against Humanity (the “Draft Crimes Against Humanity Convention”).¹ This is an essential approach in relation to all victims and survivors of crimes against humanity,² particularly those who may face ongoing marginalization or risks, such as survivors of sexual violence and other gendered harms.³

A survivor-centric approach recognizes that victims and survivors of crimes against humanity will have suffered immense harm and trauma. It aims to put the rights and agency of each victim and survivor at the forefront of all actions and ensures that they are treated with dignity and respect and supported to make informed decisions with regards to accessing protection, support, justice, and remedy based on their own needs and priorities. Such an approach also requires states to keep at the forefront of their minds how the text of the treaty will *actually affect* victims and survivors, including consideration of how victims and survivors will be able to meaningfully and effectively access their rights through the treaty’s provisions and the institutions implementing them. It emphasizes that seeking justice is a right, not just a privilege, for victims and survivors.

A survivor-centric approach thus requires states to ensure that victims’ and survivors’ rights are robustly protected and set out throughout the Draft Crimes Against Humanity Convention. International criminal law and international human rights law provide that victims and survivors have rights to: (i) effective protection; (ii) effective support; (iii) notice of their rights; (iv) timely notice of developments during proceedings, including those related to justice and remedy; (v) participate in criminal and other relevant legal proceedings; (vi) have legal representation during criminal and other relevant legal proceedings; (vii) obtain full and effective reparation; and (viii) have reparation awards enforced.

Such an approach also requires that states ensure that all provisions related to protection, assistance, remedy, and reparations for victims and survivors respect and strengthen their autonomy and are

¹ The International Law Commission’s 2019 Draft articles on the Prevention and Punishment of Crimes Against Humanity are draft articles that remain subject to state consideration and negotiation before forming the potential basis of a new international treaty on crimes against humanity. For the purposes of this brief, we refer to the “Draft Crimes Against Humanity Convention” in reference to the fact that the ILC’s draft articles could form the basis of a future convention on crimes against humanity.

² The term “victim” is customarily used to describe people whose human rights have been violated. For example, it is the term adopted in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Rome Statute of the International Criminal Court, Protocols Additional I and II to the Geneva Conventions, and the recently adopted Mutual Legal Assistance Convention (see below). The term also recognizes that, unfortunately, not all who are subject to crimes against humanity survive. However, the term “survivor” better reflects the strength, agency and resilience of many people who have experienced crimes against humanity and is often the preferred term for survivors of gender-based violence and gender justice activists. We thus use both in this brief, as does, for example, 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 in its preamble. While the terminology used in this brief is related to the rights, procedural and substantive, that an affected person has, it should be without prejudice to how any individual person identifies, and is not meant to overrule a person’s own experience of how they identify.

³ 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 highlights the importance of a “victim-oriented perspective” while UN SC resolution 2467 recognizes “the need for a survivor-centred approach in preventing and responding to sexual violence in conflict and post-conflict situations”.

provided irrespective of survivors' ability or willingness to cooperate in legal proceedings against the alleged perpetrator.⁴

In line with the human rights law principle that requires all people to be involved in decision-making that affects them,⁵ a survivor-centric approach also requires states to meaningfully engage victims and survivors in treaty development, adoption, implementation and monitoring processes, participating in decisions that impact them, and ensuring that victims' and survivors' voices are adequately represented in the final provisions of the treaty. States must understand victims and survivors' priorities at each stage of the process. For example, in other forums, victims and survivors have identified justice and accountability as a key priority, including by strengthening the ability of international and domestic justice systems to deliver justice for gender-based crimes.

As victims and survivors are not a homogeneous group, when taking a survivor-centric approach, states must give particular consideration to ensuring the substantive equality of victims and survivors who are subjected to marginalization and discrimination, including intersectional discrimination.⁶

This brief first sets out the importance and potential avenues of state action to ensure robust, meaningful, and effective participation of victims and survivors in discussions and decision-making in relation to the Draft Crimes Against Humanity Convention (Section I). It then highlights specific ways in which the provisions of the Draft Crimes Against Humanity Convention should be strengthened to reflect international human rights law and standards in line with a survivor-centric approach, namely by: adopting a broad and unambiguous definition of 'victim' in the treaty that ensures all individuals harmed by crimes against humanity are included (Section II); and expanding the treaty's reparations provisions (in present Draft Article 12(3)) to ensure all relevant victims and survivors have access to prompt, full, and effective reparations (Section III). It concludes with a non-exhaustive list of additional examples for consideration that states should include in discussions on the recognition and rights of victims and survivors (Section IV).

I. Ensure effective victim and survivor participation in treaty-making, adoption, implementation, and monitoring

a. Issue

Adopting a survivor-centric approach requires that victims and survivors are able to meaningfully and effectively participate in, and are empowered to take a leadership role in, discussions and decision-making around the development of the treaty, particularly in relation to aspects that affect them. It also requires ensuring that victims' and survivors' views are adequately represented in the final provisions of the treaty. Victims and survivors should also be able to effectively and meaningfully

⁴ See e.g. CEDAW, GR 35, article 31b, UN CRPD preamble and article 3.

⁵ Basic Principles of Justice for Victims of Crime and Abuse of Power, para 6 (c). Human Rights Committee, General Comment 25. See also: June 2018, OHCHR, Guidelines on the effective implementation on the right to participate in public affairs, at: <https://www.ohchr.org/en/documents/tools-and-resources/guidelines-effective-implementation-right-participate-public-affairs>

⁶ E.g. CEDAW GR 28, CEDAW GR 35, CRPD article 6.

participate through all stages of treaty-making, as well as in the adoption, implementation, and monitoring of the Draft Crimes Against Humanity Convention.

b. Argument

In particular, victims' and survivors' leadership and participation should take place at the national level, to reflect the views or concerns of relevant stakeholders in their national positions. States should also discuss with victims and survivors if and how they wish to continue to participate in decision-making around the Draft Crimes Against Humanity Convention if it is enacted, including in terms of adoption, implementation, and monitoring of the Draft Crimes Against Humanity Convention at the national level. At the international level, states should ensure that victims' and survivors' views are meaningfully considered throughout the preparatory and formal negotiation stages, and that survivors and victims are considered integral stakeholders — and ultimate beneficiaries of any future convention — in the treaty-making process.

In this regard, victims and survivors must be actively supported in their participation, through adequate funding, technical and legal assistance, outreach, and public information activities, as well as through measures that allow for safe engagement, and which mitigate the risk of re-traumatization as much as possible. At an early consultation phase, it is crucial for victims and survivors to be informed about the Draft Crimes Against Humanity Convention and the possibility of stakeholders participating and having their voices heard, especially as there can be an awareness gap in victims' and survivors' understanding of international crimes and related processes. This will require ensuring stakeholders are able to understand the provisions of the Draft Crimes Against Humanity Convention and, most importantly, how they will be impacted by these provisions. No states or other stakeholders should exclude, hinder, or harass victims and survivors or their representatives from participating or expressing their views on the present process in national or international forums.

States and all stakeholders will need to very thoroughly consider the modalities of participation of victims and survivors to ensure that participation is fully inclusive, non-discriminatory, genuine, effective, and meaningful. Sustained efforts should also be made to enable representation of diverse victim and survivor groups, including groups facing discrimination and intersectional discrimination, and survivors of violations which may be stigmatized. This may require a needs assessment or mapping of victim and survivor groups who would wish to participate in the process. While the meaningful participation of potentially very large and geographically wide groups of victims and survivors could present challenges, these could be mitigated. For example, states could consider the modalities of individual and/or collective participation and may consider whether consensually designated persons or organizations could act as representatives of victims and survivors. Other possible modalities could

provide for victims and survivors to participate alongside community-based organizations or civil society activists they already know and trust.

c. Recommendations

To ensure that victims and survivors are meaningfully engaged in decision-making around the treaty, states should:

- Facilitate victims and survivors to take a leadership role in all stages of development, adoption, implementation, and monitoring of the treaty, particularly in aspects that affect them, and especially at the national level;
- Consult broadly with victims and survivors on their priorities and how they wish to be engaged in treaty-making, adoption, and implementation processes;
- Provide victims and survivors with adequate funding, technical and legal assistance, and outreach and public information activities, in a manner that ensures safe engagement; and
- Ensure that diverse victim and survivor groups are engaged, which may require states to map victim and survivor groups who would wish to participate.

II. The Draft Crimes Against Humanity Convention should include a broad and unambiguous definition of ‘victim’

a. Issue

The Draft Crimes Against Humanity Convention could further strengthen the rights of victims enumerated in the draft. In this regard, it is particularly concerning that the Draft Crimes Against Humanity Convention does not currently define the term ‘victim,’ thereby in effect leaving it up to individual state parties to define who would qualify as such. This is a problem, as flawed national efforts to address crimes against humanity have excluded many victims for lack of an inclusive definition. In many cases, national authorities and mechanisms give preference to members of dominant or powerful groups, directly discriminate against certain communities, or ignore the needs of marginalized victims. Giving states unfettered latitude in determining exactly which persons qualify as ‘victims’ of a crime against humanity for the purposes of the Convention could be used to justify future injustices and potentially reinforce the exclusion of already marginalized people and groups.

The rights of victims are primarily addressed in present Draft Article 12, which is therefore the main focus of the following section. However, rights of victims and survivors could also be recognized and strengthened in other parts of the Draft Crimes Against Humanity Convention (see Section IV below).

b. Argument

We recommend that the Draft Crimes Against Humanity Convention be revised to specifically include a clear and unambiguous definition of the term ‘victim,’ and this revision to be based on consultation with victims and survivors.

To be in line with international standards, the definition must, at a minimum, be sufficiently broad to encompass all persons who suffer harm from acts that constitute crimes against humanity. States must

ensure that no undue restrictions are placed on the individual who may be able to participate in criminal proceedings or be eligible for reparation programs.⁷

The Draft Articles could adopt as a basis the definition of ‘victim’ from Rule 85 of the Rules of Procedure and Evidence of the International Criminal Court (ICC), which defines victims as “*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;*” and further clarifies that “[*v*]ictims 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.”⁸ Notably, this definition is also included almost verbatim in the Mutual Legal Assistance Convention adopted in May 2023, but there in the form of primary treaty law.⁹

This definition appropriately links ‘victims,’ and the consequent rights that accrue to them, to the *harm* suffered, rather than requiring that a ‘victim’ be a person against whom a crime was directly committed. A similar definition of ‘victim’, defining victim by the harm suffered, is also included in the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)¹⁰ and the Convention on Cluster Munitions.¹¹ Indeed, the use of the ‘harm link’ to define

⁷ “Fostering Victims’ Rights in the Proposed Crimes Against Humanity Convention”, Redress, available at: <https://redress.org/wp-content/uploads/2018/04/CAH-Convention-and-Victims-Rights.pdf> (Mar. 2018)

⁸ Rules of Procedure and Evidence of the International Criminal Court, Rule 85.

⁹ 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 81 (May 2023) available at: <https://www.gov.si/assets/ministrstva/MZEZ/projekti/MLA-pobuda/The-Ljubljana-The-Hague-MLA-Convention-English-v5.pdf>; see especially Article 81(1)(a): “*Victims’ means natural persons who have suffered harm as a result of the commission of any crime to which this Convention applies*” (emphasis added).

¹⁰ Convention for the Protection of All Persons from Enforced Disappearance, 2716 U.N.T.S. 3 (Dec. 2010), Article 24(1) defines victims as “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.” It is generally accepted that victims of enforced disappearance also include people connected to the person who was forcibly disappeared, such as family members.

¹¹ Convention on Cluster Munitions, 2688 U.N.T.S. 39 (May 2008) Article 2(1) defines ‘Cluster munition victims’ as “all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities.”

victims is well-recognized in international law,¹² as also noted by the International Law Commission (ILC) in its commentary accompanying the Draft Crimes Against Humanity Convention.¹³

In addition, over the last three decades, numerous treaties, their monitoring bodies, court decisions, and other international standards have also consistently stated the following about victims:¹⁴

- Victims are persons who have suffered harm through acts or omissions that constitute violations of the applicable treaty or relevant body of law;
- Victims also include the immediate family or dependent of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization;
- Victims can suffer individual and/or collective harm;
- Harm includes: physical, mental or moral injury, emotional suffering, economic or other material loss, or substantial impairment of their fundamental rights; and
- A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted, and regardless of the familial relationship between the perpetrator and the victim.

Adopting an explicit and comprehensive definition will prevent ambiguity, give guidance to states when implementing the convention, and avoid confusion in cases of transnational proceedings involving different states with their own individual and possibly conflicting definitions of the term ‘victim.’ In its current form, the lack of clarity on the definition of ‘victim’ in the Draft Crimes Against Humanity Convention could hinder victims’ access to justice and entitlements pursuant to the convention at the national and transnational level and risks making participating in judicial processes a potentially traumatizing and harmful experience for victims and survivors — for example, if victims and survivors had to enter into lengthy legal processes to prove their entitlement to the guarantees provided in the treaty.

Above all, linking the definition of ‘victim’ to the harm suffered would ensure the inclusion of all persons who might indirectly suffer harm from crimes against humanity, including, for example,

¹² Rules of Procedure and Evidence of the International Criminal Court, Rule 85; 2006 International Convention for the Protection of All Persons from Enforced Disappearance, Article 24(1); The Convention on Cluster Munition, Article 2(1); Committee on Torture in its General Comment No. 3 on the implementation on Article 14 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States; guidance on the use of the term ‘victim’ by the African Commission on Human and Peoples’ Rights in its General Comment No. 4; 1950 Convention for the Protection of Human Rights and Fundamental Freedoms. See also *Vallianatos and Others v. Greece*, Application Nos. 29381/09 and 32684/09, Judgment of 7 November 2013, Grand Chamber, European Court of Human Rights, ECHR 2013 (extracts), para. 47; *Çakici v. Turkey*, Application No. 23657/94, Judgment of 8 July 1999, Grand Chamber, European Court of Human Rights, ECHR 1999-IV, para. 98; *Elberte v. Latvia*, Application No. 61243/08, Judgment of 13 January 2015, Fourth Section, European Court of Human Rights, ECHR 2015, para. 137; *Street Children (Villagrán-Morales et al.) v. Guatemala*, Judgment of 19 November 1999 (Merits), Inter-American Court of Human Rights, Series C, No. 63, paras. 174–177 and 238; *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000 (Merits), Inter-American Court of Human Rights, Series C, No. 70, paras. 159–166; and *Yakeye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005 (Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 125, para. 176; African Commission on Human and Peoples’ Rights, general comment No. 4 (2017) on the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (art. 5), para. 16.

¹³ Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, 2019, p. 103-104.

¹⁴ As noted by the ILC in its commentary on the Draft Crimes Against Humanity Convention, while other international instruments do not explicitly include a definition for ‘victim,’ practice guidance notes associated with those instruments essentially establish a definition of ‘victim’.

children born out of sexual violence. This would also appropriately reflect the understanding that such crimes do not just impact individuals but may also affect their families and the wider community.

c. Recommendations

States should amend present Draft Article 12 to include a definition of ‘victim’ based on consultations with a broad range of victims and survivors, and in line with international standards, including to ensure that the definition is sufficiently broad to encompass all persons who suffer harm from acts that constitute crimes against humanity. At a minimum, the Draft Crimes Against Humanity Convention should follow the approach in the Mutual Legal Assistance Convention and include an explicit definition of victims in the treaty text, such as Rule 85 of the ICC Rules of Procedure.

III. Reparations provisions should be expanded

a. Issue

Strengthening and broadening the existing reparations language in the Draft Crimes Against Humanity Convention presents another opportunity to incorporate a survivor-centric approach.

Reparations are currently addressed in Article 12(3) of the Draft Crimes Against Humanity Convention, which provides:

“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.”

b. Argument

The existing language should be clarified to ensure that it is not only victims and survivors of crimes against humanity who pursue legal proceedings in courts who have the right to obtain reparations. While states should provide a right to a judicial remedy to victims and survivors of crimes against humanity, reparations should also be accessible to those who do not wish to pursue such legal proceedings. While some victims and survivors are able and very much willing to engage in criminal or other judicial legal proceedings, others cannot or do not want to engage in legal proceedings, or do not see it as a priority. For example, in relation to victims and survivors of conflict-related sexual violence, the Global Survivors Fund has noted that “[l]egal proceedings are complex and costly... take years to complete,” and participation in these proceedings is “difficult” for survivors of sexual and gender-based violence (SGBV).¹⁵ Unlike judicial proceedings, administrative proceedings can implement “lower standards of evidence” and “simpler processes” that create easier access to

¹⁵ UNGA Preliminary Findings of the Global Reparations Study, Executive Summary, p. 11, available at https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2021/09/report/global-reparations-study-executive-summary-report-of-preliminary-findings/20210927GSFReport_UNGA_Preliminary_Findings.pdf. The study also notes that “court orders [for reparations] following conviction tend only to relate to an infinitely small proportion of survivors, are limited in value, and are very rarely enforced.” *Id.* at 10.

reparations for victims and survivors of SGBV.¹⁶ This is thus an essential element of a survivor-centric approach, required to ensure the agency and autonomy of victims and survivors who may or may not wish to engage in legal proceedings.¹⁷

To do this, states should include language in present Draft Article 12(3) requiring states to establish reparation programs that complement reparations from participation in criminal proceedings.¹⁸ Additional mechanisms, such as civil, administrative, or disciplinary proceedings and programs of various types, are encouraged in international standards, including Principle 32 of the Updated Set of Principles for the protection and promotion of human rights through action to combat impunity.¹⁹ Likewise, as set out in Principle 32, “[v]ictims and other sectors of civil society should play a meaningful role in the design and implementation of such programmes,” and “concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes.”²⁰ The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has likewise called for states to “implement administrative reparations schemes without prejudice to the rights of victims/survivors to seek judicial remedies.”²¹ In doing so, the CEDAW Committee has moreover set out that “priority should be given to the agency, wishes, decisions, safety, dignity and integrity of victims/survivors.”²²

Second, it is important that victims and survivors of crimes against humanity have access to reparations that are “prompt, full and effective.”²³ This is particularly important as in many contexts, victims and survivors of crimes under international law complain that reparation measures provided have been ineffective in addressing the harm they have suffered. Other treaties and international standards further clarify the extent of states’ obligations to provide reparation. In particular, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (UN Basic Principles) emphasize that victims have a right to “adequate, effective and prompt reparation” and “full and effective reparation.”²⁴ The Convention on Enforced Disappearance provides that victims “have the right to reparation and prompt, fair and adequate compensation.”²⁵ The Convention against Torture also provides for the “enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”²⁶ Article 12(3) of the Draft Convention should as far as possible clarify the extent of states parties’ obligations.

The Global Survivors Fund has also noted how SGBV leaves survivors with “significant physical and psychological injuries that require immediate medical and mental health care,” and often negatively

¹⁶ UNGA Preliminary Findings of the Global Reparations Study, Executive Summary, p. 7.

¹⁷ CEDAW, GR 35, article 31b.

¹⁸ See General Recommendations to States for a Convention on Prevention and Punishment of Crimes Against Humanity, Amnesty International, IOR 40/6497/2023, March 2023 at 20.

¹⁹ E/CN.4/2005/102/Add.1, 8 February 2005.

²⁰ E/CN.4/2005/102/Add.1, 8 February 2005

²¹ CEDAW GR 35, article 33b.

²² CEDAW GR 35, article 33b. E/CN.4/2005/102/Add.1, 8 February 2005.

²³ See General Recommendations to States for a Convention on Prevention and Punishment of Crimes Against Humanity, Amnesty International, IOR 40/6497/2023, March 2023 at 19.

²⁴ Principles 11(b), 15, 18.

²⁵ ICPPED, article 24(4).

²⁶ CAT, article 14(1).

impacts their livelihoods, relationships and family ties, and cultural status.²⁷ Accordingly, SGBV survivors require holistic care that addresses all of the impacts they face from these crimes, as per each individual’s needs.²⁸ Reparations that are not full or effective will weaken the power of the reparations, and reparations that are not prompt will cause victims and survivors unnecessary suffering. Moreover, it becomes more complex and costly to repair harms that have gone untreated for lengthy periods of time. Prompt, full, and effective access to reparations would help mitigate the damages caused by SGBV and allow victims and survivors to begin the healing process as quickly as possible.

Where the crime against humanity relates to underlying discrimination, such as in relation to gender-based violence crimes or other gendered harms, states should ensure a range of measures aimed at ensuring non-repetition, including legal, social, and economic reforms that help to address the underlying discrimination and inequality that caused or significantly contributed to the violation, taking into account individual, institutional, and structural aspects.²⁹

Finally, the use in Draft Article 12(3) of the wording “reparation for material and moral damages” may be erroneous. First, “damages” are a form of financial compensation. However, as laid out above, what needs to be repaired is the “harm” suffered in its various forms, and this is to what the draft article should refer. Second, in the UN Basic Principles, material and moral damage are referenced specifically in relation to compensation only, meaning only one form of reparation.³⁰ It is incoherent, as well as potentially limiting, to restrict the right to reparation to “material and moral damage.” Therefore, we also suggest that “physical and other forms of harm” be added to the types of harm listed, in line with the UN Basic Principles.³¹

c. Recommendation

The reparations provisions in the Draft Crimes Against Humanity Convention should be strengthened and clarified in consultation with victims and survivors. At a minimum, present Draft Article 12(3) should be revised as follows (proposed additional words bolded):

“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 **prompt, full, and effective** reparation, **including through administrative or other reparation programs**, for ~~material and moral damages~~ **any physical, mental, moral, material, legal or**

²⁷ UNGA Preliminary Findings of the Global Reparations Study, Executive Summary, p. 2, 6.

²⁸ UNGA Preliminary Findings of the Global Reparations Study, p. 2, 6.

²⁹ For the notion that reparations should strive to have a transformative effect on inequalities, rather than reinstate or reinforce the structural conditions within society that uphold unequal practices and beliefs and that inform the perpetration of sexual violence, see e.g. CEDAW GR 35, article 33b; OHCHR Guidance on Reparations for Conflict Related Sexual Violence, principle 4, at: <https://www.ohchr.org/sites/default/files/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>; Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo, A/HRC/14/22, para. 31; Inter-American Court on Human Rights, *Case of González et al. (“Cotton Field”) v. Mexico*, Preliminary objection, merits, reparations and costs, 16 November 2009, para. 450; Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, Principle 3.H; see also ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations (Feb. 2021) at para 222, among others pointing out that “a gender-sensitive approach should be applied when determining the manner in which reparations are to be applied.”

³⁰ Basic Principles, principle 20.

³¹ Basic Principles, principle 8: “harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights”.

other harm, on an individual or collective basis, consisting, as appropriate, of one or more of the following forms or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.”

IV. Other areas for consideration

There are numerous additional opportunities to improve the Draft Crimes Against Humanity Convention so that it is more survivor-centric that are not explained in this brief, and states should meaningfully consult with victim/survivor groups to determine what their priorities are. For example, other areas for consideration include:

- Adding survivor-centric language to the preamble that ensures victims and survivors³² are understood in an intersectional manner and on a range of grounds, and recognizing explicitly their rights to justice, truth, and reparation, their agency and courage, and the contributions they can make towards meaningful justice, as well as the importance of survivor groups and networks;³³
- Ensuring that language recalling that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*) remains in the preamble;
- Adding reference to ‘survivors’ where appropriate throughout the Draft Crimes Against Humanity Convention, such as in the preamble or in the title of present Draft Article 12;
- Ensuring robust state obligations relating to prevention of crimes against humanity;
- Adding language in the present Draft Article 3 (“General Obligations”), to recognize the importance of states giving particular consideration to the rights and interests of victims and survivors of crimes against humanity, including to assistance, protection, redress, and reparation, and that their perspectives and rights are integrated into investigation, prosecution, and broader justice strategies;
- Adding a provision in present Draft Article 6 stating that nothing in the Convention shall affect a state party’s existing obligations under international law;
- Adding a provision setting out states’ obligations to ensure the right of victims and survivors of crimes against humanity and their families to access information regarding violations and reparations mechanisms;
- Adding a provision imposing an obligation on states to examine promptly and impartially complaints lodged by victims or their representatives, or to initiate an investigation *ex officio*, when there are reasonable grounds to believe that acts constituting crimes against humanity have been or are being committed;³⁴
- Adding provisions that set out the minimum rights of victims and obligations of the state at all phases of the criminal justice process, including the right to initiate a prosecution, access

³² For example, the preamble of 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 refers to “the plight of victims, survivors and future human generations”.

³³ See for example, preambular para 6 of the Mutual Legal Assistance (Ljubljana-The Hague) Convention: “Recognizing the rights of victims, witnesses and other persons in relation to the crimes to which this Convention applies, the vital part they play in the judicial process and the need to protect their physical and psychological well-being and to adopt a survivor-centered approach as well as access to justice and adequate redress, including through reparative justice where appropriate”.

³⁴ See for example, CAT article 13 (“proceed to a prompt and impartial investigation”); ECPPED article 12 (“shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation”).

documentation and evidence, present evidence, and where appropriate participate in the proceedings;

- Adding a provision requiring states to inform victims of the progress and results of the examination of the complaint and any subsequent investigation;
- Adding provisions to ensure that victims and survivors have the right to effective and holistic participation in justice and accountability processes, and in any monitoring mechanisms that may be established, including to present evidence, and a requirement to provide information about proceedings in a manner that victims and survivors can understand;³⁵
- Adding a provision to clarify that victims of crimes against humanity should be provided with legal representation when presenting their views and concerns at appropriate stages of criminal proceedings;
- Adding provisions to ensure adequate support for victims and survivors in the most robust sense (including both physical and mental health support, and to allow for meaningful and safe participation in proceedings);
- Ensuring that the Draft Article 12(1)(b) protections for complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in proceedings, include post-trial protection;
- Present Draft Article 12(2), which references national laws that enable the views and concerns of victims of a crime against humanity to be presented and considered at “appropriate stages of criminal proceedings,” should oblige states to ensure that national laws referenced in this provision must allow for meaningful participation and elaborate further the rights contained in this provision;
- Dividing present Draft Article 12³⁶ into separate articles, to expand distinct elements that focus on the definition of victims and more broadly enumerate their and others’ concrete rights, and deal with other issues concerning “[v]ictims, witnesses and others” in a more robust and comprehensive way, for example by setting out separate and expanded provisions on reparations;
- Identifying good practices and lessons learned from other international tribunals and domestic proceedings to inform the substantive provisions of the draft articles and how best to empower victims and survivors in the treaty-making and treaty implementation processes.

³⁵ See for example, CRPD article 34(4), under which “participation of experts with disabilities” is one element to take into consideration in the election of members to the Committee on the Rights of Persons with Disabilities.

³⁶ Draft Article 12 contains many necessary and welcome elements, but does so in a summary fashion while omitting others. Drafters could therefore also consider dividing Draft Article 12. Draft Article 12 at present contains the right to bring a complaint; to be protected against retaliation when doing so; to be heard in criminal proceedings; and to obtain reparations. In comparison, the Mutual Legal Assistance (Ljubljana-The Hague) Convention, in its Part VI, distinguishes between definition of victims (article 81), the specific right of victims, witnesses and others to protection (article 82) and other rights of victims (article 83). Furthermore, article 82 of the Ljubljana-The Hague Convention expands the groups to be protected to “experts”; gives more details on how to afford this protection; and clarifies that the right to be protected also applies to the rights-holder’s privacy during proceedings, among others (see also articles 57(3)(c) and 68 of the Rome Statute). Further important elements to consider in this overall context are the rights of victims and survivors of crimes against humanity to access information regarding violations and reparations mechanisms; to have complaints examined; to be informed of the progress and results of this examination and any subsequent investigation; and to legal representation (see below Section IV.).