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# REPARATIONS

## **ABILA STUDY GROUP** **CRIMES AGAINST HUMANITY**



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## REPARATIONS

### *Proposed Revised Text for Article 12 of the Draft Articles on Prevention and Punishment of Crimes against Humanity [ILC Draft]*

#### **Article 12      Victims, witnesses and others**

1. Each State shall ~~take the necessary measures to ensure that:~~

(a) any person who alleges that acts **or omissions** constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities, **with a view to obtaining urgent measures of protection in the case of ongoing acts or omissions, as well as redress for all such acts as elaborated in paragraph 3 of this draft article;** and

(b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, **and, where appropriate, others at risk on account of any complaint, information, testimony or other evidence given by witnesses,** shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall ~~take the necessary measures to ensure in its legal system that the victims of a crime against humanity, committed through acts or omissions attributable to the State under international law or committed in any territory under its jurisdiction~~ **by any person or group under its jurisdiction, control, direction, or influence, have the right to obtain redress and have an enforceable right to full and effective** reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate **and proportional to the gravity of the violations and circumstances of each case,** ~~of one or more of the following or other forms:~~ restitution; compensation; ~~satisfaction;~~ rehabilitation; **satisfaction;** cessation and guarantees of non-repetition. **Each State shall take the necessary measures to preclude any statute of limitations on civil claims related to reparations.**

4. In designing and implementing programs of reparations for crimes against humanity, States should ensure the meaningful participation of victims and their representatives, as well as other members of the public.

5. For purposes of the draft articles, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that constitute crimes against humanity. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim, persons who have suffered harm in intervening to assist victims in distress or to prevent victimization, and any other indirect victim.

### *Explanatory Notes*

1. Reparations is a critical component of justice, reconciliation, as well as the restoration of peace and security. It is in States’ own interests to ensure that they meet their obligations to guarantee and provide effective reparations systems. Drawing on best practices in the field, this proposal seeks to clarify and bolster the ways in which States can enable reparation in the event of crimes against humanity.
2. The proposed text of **Article 12(1)(a)** seeks to add further protection to the rights of victims and witnesses by clarifying that they can complain to States Parties in order to trigger an investigation, protection for complainants and witnesses from retaliation, and urgent action to stop ongoing crimes against humanity. In this sense, the proposed text complements States Parties’ general obligation to prevent crimes against humanity set forth in Draft Article 4 as well as other provisions. Moreover, by emphasizing victims’ right to complain with a view to seeking protection, the proposed addition would minimize Draft Article 12(1)’s apparent redundancy with Draft Article 8, which calls for “a prompt, thorough, and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed”.
3. The International Law Commission (ILC) commentary to Draft Article 12(1) notes that the proposed text draws, *inter alia*, on the precedents of international conventions

on torture and disappearance, which also use the word “complain”.<sup>1</sup> Draft Article 12(1)(b) improves on these treaty precedents by extending the protections set forth in Draft Article 12 to complainants other than the alleged victim. The proposed amendment to **Article 12(1)(b)** further extends these protections in line with best practices of international and international(ized) tribunals.<sup>2</sup>

4. **Article 12(3)** sets forth States Parties’ obligation to ensure victims’ fundamental right to seek and obtain reparations. Because the words “redress”, “remedy”, and “reparations” are often used interchangeably or inconsistently, it is noted that this proposal follows the approach set forth in paragraph 11 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles), which specifies that the right to a remedy includes each victim’s procedural right of “[e]qual and effective access to justice,” as well as the substantive right to obtain “[a]dequate, effective and prompt reparation for harm suffered”.<sup>3</sup> In line with this approach, the ILC commentary to Draft Article 12(3) suggests that it intends the word “reparation” to connote both “procedural and substantive” aspects of State obligations to provide redress.<sup>4</sup> The proposed revision underscores both dimensions of States’ obligations in this respect.

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<sup>1</sup> UNGA, ‘Report of the International Law Commission (71<sup>st</sup> Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto’ (20 August 2019) UN Doc A/74/10 [hereinafter “ILC Draft Articles”] art 12, commentary para 7, referring to Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Torture Convention) art 13 (“Each State Party shall ensure that any individual who alleges *he has been subjected to torture* in any territory under its jurisdiction *has the right to complain to*, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”) (emphasis added); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (Enforced Disappearance Convention) art 12 (elaborating similarly but in somewhat greater detail the obligations of States Parties in response to a complaint, which include instituting a prompt, thorough, and impartial investigation and protecting complainants and others from retaliation—obligations explicitly addressed in Draft Articles 12(1) and 12(3)).

<sup>2</sup> See Rules of Procedure and Evidence before the Kosovo Specialist Chambers (30 April 2020) KSC-BD-03/Rev3/2020, Rule 80(1).

<sup>3</sup> UNGA Res 60/147 (16 December 2005) UN Doc A/Res/60/147 (Basic Principles) para 11(a)-(b). See also Committee against Torture, ‘General Comment No. 3 (2012): Implementation of Article 14 by States Parties’ (13 December 2012) UN Doc CAT/C/GC/3 (Committee against Torture General Comment No. 3) para 2 (considering that “redress” in article 14 of the Torture Convention “encompasses the concepts of ‘effective remedy’ and ‘reparation’”).

<sup>4</sup> ILC Draft Articles (n 1) art 12, commentary para 18, referring to Committee against Torture General Comment No 3 (n 3) para 5.

5. As the ILC commentary to the Draft Articles notes, the right to a remedy is recognized in numerous international instruments, including the Universal Declaration of Human Rights,<sup>5</sup> as well as regional human rights treaties, as well as key international humanitarian law (IHL) conventions; it is also well established under customary international law.
6. Particularly important guidance on this right as it pertains to victims of crimes against humanity is provided in the Basic Principles, which were adopted by the UN General Assembly in 2005.<sup>6</sup> The resolution to do so was co-sponsored by 59 States and was adopted without a vote.<sup>7</sup> Commanding the widespread support of a cross-section of the global community, the Basic Principles are now the leading reference clarifying how States can meet their existing obligations to ensure redress with respect to gross violations of human rights law and serious violations of international humanitarian law.<sup>8</sup>
7. Although Draft Article 12(3) evokes portions of the Basic Principles, it is more restrictive than the Basic Principles, and problematically so. In particular, Draft Article 12(3) frames the scope of reparation due to victims more narrowly than the

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<sup>5</sup> UNGA Res 217 (III) A (10 December 1948) UN Doc A/810, art 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”). See also ECOSOC, ‘Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’ (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, principles 1, 31-34.

<sup>6</sup> See n 3 above.

<sup>7</sup> See UNGA Meeting Record (16 December 2005) UN Doc A/60/PV.64, p 10 (adoption without a vote); UNGA Third Committee Report (1 December 2005) UN Doc A/60/509/Add.1, para 8 (co-sponsorship by Albania, Argentina, Armenia, Austria, Azerbaijan, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Chile, Congo, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Estonia, Finland, France, Georgia, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Kenya, Latvia, Liechtenstein, Luxembourg, Mexico, Monaco, Netherlands, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Moldova, Romania, Sierra Leone, Slovenia, South Africa, Spain, Sweden, Switzerland, Timor-Leste, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela, and the former Yugoslav Republic of Macedonia). In addition to these 59 co-sponsoring States, a further 16 States voted in favour of the Basic Principles as they advanced towards the General Assembly. See UN Commission on Human Rights Report (19 April 2005) UN Doc E/CN.4/2005/L/10/Add.11, para 68 (adopting the resolution advancing the Basic Principles by 40 votes to none, with 13 abstentions, and including votes in favour by Bhutan, Burkina Faso, Canada, China, Cuba, Gabon, Guinea, Indonesia, Malaysia, Pakistan, Republic of Korea, Russian Federation, Sri Lanka, Swaziland, Ukraine, and Zimbabwe).

<sup>8</sup> The Basic Principles take a comprehensive approach, with Principle 19 stipulating that restitution “should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred” and “includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property”.

Basic Principles. A side-by-side comparison of relevant text in Draft Article 12(3) and Basic Principle 18 highlights key differences in this respect (emphasis added):

Draft Article 12(3)

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.

Basic Principle 18

In accordance with domestic and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, **as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation [...] which include the following forms:** restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

8. While both texts use the phrase “as appropriate”, Basic Principle 18 helpfully recognizes, in line with long-established law, that States’ discretion is not unlimited. Instead, what is “appropriate” must also be “proportional to the gravity of the violations”.
9. Also of concern, Draft Article 12(3) introduces the phrase “one or more of the following” before enumerating the forms of reparation that may be “appropriate” in a given case. In contrast, Basic Principle 18 emphasizes that reparations must be “full and effective”. While “one or more” can be interpreted to mean simply that, in specific circumstances, one form of reparation may fully satisfy victims’ right to reparation, the omission of “full and effective” in Draft Article 12(3) could invite Governments to insist that a single form of reparation, such as an apology, fully discharges their responsibility to provide reparation even if it is not in fact adequate.
10. This risk is compounded by the fact that, in line with the approach taken in the Basic Principles, Draft Article 12(3) includes guarantees of non-recurrence as a type of reparation. Should a Government undertake a measure aimed at preventing a



recurrence of crimes against humanity, the current draft text may invite that Government to argue it has discharged its obligation to provide “one or more” measure of reparation. Yet as the first UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff, has rightly emphasized, what is distinctive about the right to a remedy is that it provides benefits to victims directly, and not just indirectly, as part of a State’s broader efforts to ensure human rights through guarantees of non-recurrence.<sup>9</sup>

11. Unfortunately, the “scandalous” gap<sup>10</sup> between international legal norms on reparation and implementation of those norms is due in no small part to Governments’ reluctance to provide reparations even when able to do so.<sup>11</sup> Draft Article 12(3)’s flexibility may all too easily be exploited by Governments to avoid their responsibility to provide adequate reparations. The ILC commentary to the Draft Articles reinforces this concern. While recognizing that, in the aftermath of crimes against humanity “all traditional forms of reparation are potentially relevant”,<sup>12</sup> it also states that various factors make it appropriate to provide States “some flexibility and discretion to determine the appropriate form of reparation”, including the limited resources of a State “struggling to rebuild itself”.<sup>13</sup>
12. State practice demonstrates, however, that such concerns need not preclude effective reparation. For instance, since 2007 Peru has provided material, symbolic, individual, and collective reparations to victims of the civil conflict (1980-2000) through its *Plan Integral de Reparaciones*,<sup>14</sup> several aspects of which represent best practices in reparations, including: (i) extensive consultations with victims’ organizations and other sectors of civil society; (ii) comprehensiveness; and (iii) explicit acknowledgment that reparations are a moral, political and legal obligation of the State and that recognition of victims as human beings whose fundamental

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<sup>9</sup> Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (14 October 2014) UN Doc A/69/518, paras 10, 21.

<sup>10</sup> Ibid paras 6, 80.

<sup>11</sup> Ibid paras 48-61.

<sup>12</sup> ILC Draft Articles (n 1) art 12, commentary para 20.

<sup>13</sup> Ibid art 12, commentary para 21.

<sup>14</sup> Ley que crea el Plan Integral de Reparaciones (Ley No. 28592) (28 July 2005) <<https://ihl-databases.icrc.org/en/national-practice/law-creating-programme-comprehensive-reparation-law-no-28592>>. See Fiorella P Vera-Adrianzen, ‘Reclaiming Justice from Below: Victim Participation and Reparations in Post-Conflict Peru’, University of Mechanism Digital Repository (December 2022). <[https://digitalrepository.unm.edu/pols\\_etds/96](https://digitalrepository.unm.edu/pols_etds/96)> viii.



rights were violated is “the central goal” of reparations.<sup>15</sup> In Colombia, legislation adopted in 2011 provided for land restitution and reparations in both national and transitional justice procedures, and while challenges remained, by 2020 this had “produced tangible results as over two million internally displaced persons [...] have returned, resettled or have been integrated locally”.<sup>16</sup>

13. Other aspects of Draft Article 12(3) could also be improved.<sup>17</sup> In particular, the introductory language, “Each State shall take the necessary measures to ensure in its legal system that [...]”, could be strengthened by borrowing language from the Convention on Enforced Disappearance that: “Each State Party *shall guarantee* the right of victims of enforced disappearance to an effective remedy”.<sup>18</sup> Another model, which this proposal adapts, is Article 14 of the Convention against Torture, which begins similarly to Draft Article 12(3) but continues with more robust language:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress *and has an enforceable right* to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.<sup>19</sup>

14. **Proposed Article 12(4)** reflects a broad consensus, reflected in standard-setting instruments and other sources, that the participation of victims and other members of the public is crucial to the effective design and implementation of programs of reparations. As former Special Rapporteur Pablo de Greiff noted in his 2014 report on reparations, “[t]here are many reasons for including participatory processes in the design and implementation of reparation programmes”,<sup>20</sup> among them ensuring that reparations respond to victims’ actual needs. As with participation in criminal and other proceedings, ensuring victims’

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<sup>15</sup> ECOSOC, ‘Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher’ (27 February 2004) UN Doc E/CN.4/2004/88, paras 58-60.

<sup>16</sup> Olympia Bekou, ‘State of Play for Existing Instruments for Combating Impunity for International Crimes’, European Parliament Directorate-General for External Policies, EP/EXPO/B/COMMITTEE/FWC/2019-01/LOT6/R01 (13 August 2020) 47.

<sup>17</sup> For explanation of the changes to refer to “acts **or omissions** attributable to the State under international law or committed **by any person or group under its jurisdiction, control, direction, or influence**”, see ABILA Study Group Proposal on Prevention (17 November 2025) <[https://www.ila-americanbranch.org/wp-content/uploads/2025/11/Prevention-art.-1-3-4\\_ABILA\\_CAH\\_final.pdf](https://www.ila-americanbranch.org/wp-content/uploads/2025/11/Prevention-art.-1-3-4_ABILA_CAH_final.pdf)>.

<sup>18</sup> Enforced Disappearance Convention (n 1) art 8(2) (emphasis added).

<sup>19</sup> Torture Convention (n 1) art 14(1) (emphasis added).

<sup>20</sup> Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence (n 9) 74. See also *ibid* paras 75-80, 91-92.

meaningful participation in the design and implementation of reparations programmes “requires guaranteeing their safety”.<sup>21</sup>

15. This principle is also reflected in the United Nations Updated Principles to Combat Impunity, which provide the following guidance with respect to collective reparations processes:

Victims and other sectors of civil society should play a meaningful role in the design and implementation of such programmes. Concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes.<sup>22</sup>

As the quoted language suggests, “meaningful participation” must include the participation of those who are often excluded, or whose interests are frequently underrepresented, in the design and implementation of programs of repair. “Meaningful participation” should be understood to be inclusive, culturally appropriate, gender-sensitive, trauma-informed, and intergenerational, involving good-faith dialogues with affected communities, including children consistent with their evolving capacities, in order to design and implement reparations measures that are adequately funded and led by affected populations.

16. **Proposed Article 12(5)** comports with the emerging trend to provide a definition of “victim” in new treaties.<sup>23</sup> The Basic Principles, for the reasons described above, represent an ideal core for any such definition, and are used as such here.<sup>24</sup> As highlighted in the ILC commentary, the enumerated classes of harm find support in practice associated with comparable treaties and under customary international law,<sup>25</sup> including the jurisprudence of international criminal courts

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<sup>21</sup> Ibid para 91.

<sup>22</sup> ‘Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’ (n 5) principle 32. This principle recognizes that, when it comes to societies that have endured crimes against humanity and other mass atrocities, there is no “one-size-fits-all” response. See Report of the Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (23 August 2004) UN Doc S/2004/616, p 1; ‘Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher’ (n 15) para 5.

<sup>23</sup> See Enforced Disappearance Convention (n 1) art 24(1); Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39, art 2(1).

<sup>24</sup> See Basic Principles (n 3) paras 8-9.

<sup>25</sup> ILC Draft Articles (n 1) art 12, commentary paras 3-5; Convention on Cluster Munitions (n 23) art 2(1); Committee against Torture General Comment No. 3 (2012) (n 3) para 3; African Commission on Human and Peoples’ Rights, ‘General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel,

and tribunals.<sup>26</sup> The fact that reparations can not depend on action taken against the perpetrator enjoys similar acceptance and support.<sup>27</sup> Finally, the idea that victims include the family or dependants of the direct victim, and, more generally, that victim status can derive from both direct and indirect harm, are principles supported by treaty and tribunal practice.<sup>28</sup>

## **Conclusion**

17. Several of the above proposals seek to strengthen the text of Draft Articles 12(1) and 12(3) by clarifying the language of those provisions. The proposed revisions would also bring Draft Article 12(3) into line with the established international law on reparations, which already incorporates appropriate flexibility.
18. Likewise, proposed Article 12(4) would reflect the strong international consensus that victims and other members of civil society should participate in the design and implementation of programs of reparation following mass atrocities. The proposed text also complements the guarantees set forth in Draft Articles 12(1)(b)

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Inhuman or Degrading Punishment or Treatment (Article 5)' (4 March 2017) (ACHPR General Comment No 4) para 16.

<sup>26</sup> ILC Draft Articles (n 1) art 12, commentary para 6; *Prosecutor v Lubanga* (Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008) Case No ICC-01/04-01/06 (11 July 2008) para 39; *Prosecutor v Ongwen* (Reparations Order) Case No ICC-02/04-01/15 (28 February 2024) para 168 (discussing physical harm, moral harm, material harm, community harm, and transgenerational harm).

<sup>27</sup> ILC Draft Articles (n 1) art 12, commentary paras 4-5; Committee against Torture General Comment No. 3 (n 3) para 3 ("A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted"); ACHPR General Comment No 4 (n 25) para 17 ("An individual is a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted").

<sup>28</sup> ILC Draft Articles (n 1) art 12, commentary paras 4-6; Committee against Torture General Comment No. 3 (n 3) para 3; *Vallianatos and Others v Greece* (Grand Chamber Judgment) ECtHR app nos 29381/09 and 32684/09 (7 November 2013) para 47; *Çakici v Turkey* (Grand Chamber Judgment) ECtHR app no 23657/94 (8 July 1999) para 98; *Elberte v Latvia* (Judgment) ECtHR app no 61243/08 (13 January 2015) para 137; *Villagrán Morales et al v Guatemala* (Judgment) IACtHR (19 November 1999), paras 174-177, 238; *Bámaca Velásquez v Guatemala* (Judgment) IACtHR (25 November 2000) paras 159-166. See *Prosecutor v Lubanga* (Decision on "Indirect Victims") Case No ICC-01/04-01/06 (8 April 2009) paras 44-52. In the context of the destruction of cultural heritage, an ICC Trial Chamber has identified persons "affected" by the crime as "not only the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community". *Prosecutor v Al Mahdi* (Reparations Order) Case No ICC-01/12-01/15 (17 August 2017) para 51. The Chamber, however, limited its assessment for the purpose of reparations "only to the harm suffered by or within the community of Timbuktu, i.e. organisations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes or otherwise so closely related to the city that they can be considered to be part of this community at the time of the attack". Ibid para 56.

and 12(2), which addresses the participation-related rights of victims and others in criminal proceedings.

19. Finally, given the central importance of victims, adding the definition of “victim” in Article 12(5) is inclusive and embodies the emerging trend of setting forth a treaty definition of “victim”.