

Symposium on Ljubljana – The Hague Convention on Mutual Legal Assistance: Critical Reflections – Victims’ Rights under the Ljubljana – The Hague Convention: Revisiting the Travaux Préparatoires

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The author attended the Ljubljana Diplomatic Conference and the observations contained here reflect his personal notes taken during the negotiations.

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 (“the Convention”), adopted on 26 May 2023 in Ljubljana, Slovenia, is an important step towards strengthening the international protection of victims, having three provisions on the subject: Article 81 contains a definition of victims; Article 82 obliges states parties to “take appropriate measures within its means to provide

effective protection from potential retaliation or intimidation” of victims, witnesses, experts, and other persons; and, finally, Article 83 deals with reparations and the victims’ participation in criminal proceedings.

These three provisions gave rise to intense debate between state delegates and between them and non-governmental organizations (“NGOs”) during the Ljubljana Diplomatic Conference. Some delegations, including France, United Kingdom (“UK”), Austria, and Germany, stressed the need to ensure flexibility in the implementation of the provisions on victims as well as a clear indication that Articles 81-83 were limited to the restricted scope of the Convention and could not serve as a legal basis to compel states parties to carry out comprehensive changes in their domestic legal systems. In other words, the Convention should adapt to existing national laws and not the other way around.

The goal of this piece is to analyse the drafting history of Articles 81-83 of the Convention, in order to determine how this general concern with flexibility and deference to states informed the legal content of these provisions during the negotiations in Ljubljana. Five points will be discussed: (1) the definition of victims; (2) the meaning and purpose of Article 81(2) of the Convention; (3) the possibility of granting reparations on an individual or collective basis; (4) the applicable modalities of reparations; and (5) the scope of application of reparations.

Definition of Victims

Following the general drafting approach of the Convention, the definition of victims in Article 81 reflects existing language, that is, Rule 85 of the Rules of Procedure and Evidence of the International Criminal Court (“ICC RPE”). The justification for including a definition in the Convention was the need for greater certainty and worldwide uniformity with regards to the protection of victims. Rwanda, Democratic Republic of the Congo, Sierra Leone, Austria, Amnesty International, Redress, among others, were in favour of adding the definition.

However, some delegations, such as Switzerland, Australia, Canada, and the UK, questioned the need for the inclusion of such a definition. Three main arguments were raised in this regard. First, due to the focus of the Convention on interstate criminal cooperation, a definition of victims is unnecessary. Second, Rule 85 of the ICC RPE is not sufficiently comprehensive, failing to encompass some “entities” treated as victims by some states, such as future generations and legal persons at large. Third, states with different definitions in their national laws might feel discouraged to join the Convention.

In the 2019 Draft Articles on Prevention and Punishment of Crimes against Humanity (“DACaH”), the International Law Commission (“ILC”) decided to not include a definition of victims. The ILC based this choice on the perception that this definition may hinder the universality of the future convention on crimes against humanity and the fact that widely-adhered-to treaties relating to crimes typically do not define victims (here, paras. 222-

223). Yet, the ILC's decision is still object of debate in the Sixth Committee of the United Nations General Assembly ("UNGA Sixth Committee"), with some states arguing for the inclusion of a definition (here, at 24).

The way forward in Ljubljana was flexibility. The definition from Rule 85 of the ICC RPE was included in Article 81(1) of the Convention, but with two important caveats. The expression "for the purposes of this Part of the Convention" was added in the chapeau of Article 81(1), in order to placate the states that wanted to restrict the provision to the limited scope of the Convention. The goal was to prevent this treaty from being used as a legal basis for wide transformations on the legal status of victims in the domestic jurisdiction of states.

The second caveat was the expression "Without prejudice to broader definitions under domestic law", also located in the chapeau of Article 81(1). It indicates that the definition of victims in this provision is the minimum that states parties should apply. States with a broader definition, going beyond the persons and entities listed in Article 81(1), can still apply it, but states that have a more restrictive definition in their domestic laws are prevented from enforcing it for the purposes of the Convention. Pursuant to what has been said in the previous paragraph, these narrower definitions could continue to be used in matters unrelated to the Convention, such as civil litigation.

On a final note, one wonders whether Article 81(1) of the Convention could lead to the inclusion of a definition of victims in the DACaH by the UNGA Sixth Committee. The state delegations in New York might rely on the Convention to argue for the insertion of the definition in April 2024, when the DACaH is once again under discussion before the Sixth Committee.

The Meaning and Purpose of Article 81(2) of the Convention

An element of Article 81 of the Convention that might give rise to confusion is its second paragraph, which was proposed by the UK: "This article shall be applied in accordance with domestic law". At first sight, this broad language appears in conflict with the expression "Without prejudice to broader definitions under domestic law" in Article 81(1), since Article 81(2) could be read as allowing states to use, for the purposes of the Convention, any definition of victim existing in their domestic legislation, even when it is narrower than the one in Article 81(1). In fact, the Drafting Committee of the Ljubljana Conference formally proposed to the Plenary the deletion of Article 81(2).

The UK opposed the Drafting Committee's suggestion and insisted on keeping Article 81(2) in the Convention. The British delegation clarified that this paragraph's purpose is to highlight that the identification of the victims in specific cases must follow the procedures applicable under the domestic law of each state party. The UK seemed concerned with the inclusion of a definition in isolation, without the proper procedural framework to concretely identify the victims of the crimes in specific cases. Thus, Article 81(2) ensures that the definition in Article 81(1) does not exist in a vacuum, but it should be implemented following the procedures existing in the national laws of the state.

In order to avoid any conflict between the two paragraphs of Article 81 of the Convention, it should be understood that Article 81(2) does not relate to the scope of the definition of victims, but only to the procedural identification of the victims in concrete cases. In other words, Article 81(2) refers exclusively to the practical implementation of the definition in Article 81(1), without affecting the latter's material scope. Article 81(2) cannot be interpreted as to allow states to adopt or apply, for the purposes of the Convention, a definition of victims that is more restrictive than the one found in Article 81(1).

It is also important to evaluate the legal effects of Article 81(2) when a state party lacks, in its criminal procedural law, any provision on the identification of victims. The central question here could be formulated as follows: the absence of rules for the identification of victims in the domestic legal system of the state should mean that the victims are not entitled to exercise the rights and guarantees recognised in the Convention?

This inquiry is relevant because some aspects pertaining to victims addressed in the Convention were not formulated in the form of rights enforceable *vis-à-vis* the state, but as obligations to establish procedures, such as for the physical protection of victims, witnesses, and their family and representatives (art. 82(2)(a)); safe deposition in proceedings (art. 82(2)(b)); and participation in the trials (art. 83(2)). This might entail that these aspects are not enforceable immediately upon the Convention's entry into force, but the states parties will have a reasonable time to adopt the necessary procedures in their domestic jurisdiction. On the other hand, protection from retaliation or intimidation and the right to reparation (arts. 82(1) and 83(1)) were framed in a more direct and prescriptive language, which could be seen as giving rise to immediate enforceability. Accordingly, can Article 81(2) be interpreted as blocking the exercise of these rights until the moment the state party establishes the proceedings for the identification of the victims of the crimes?

In practical and logical terms, it is expected that states adopt, in their domestic statutes, criteria and procedures for the identification of the victims in specific cases. However, in accordance with the canons of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties, it would be unreasonable to use the absence of such rules as a valid justification to not comply with the obligations established in the Convention, in particular denying victims their recognized rights. Interpreting Article 81(2) in a different manner would severely diminish the practical effects of Articles 81-83, emptying the *telos* that states intended to achieve with these provisions, that is, the effective protection of victims.

This approach does not render Article 81(2) superfluous or meaningless, but it offers an interpretation that harmonizes its legal content with the other provisions on victims in the Convention. In this sense, Article 81(2) operates as a reminder that states parties should seek transparency in the identification of victims and, once the requirements and procedures for this purpose are in place, the domestic authorities must follow them.

The Possibility of Granting Reparations on an Individual or Collective Basis

Similar to Article 12(3) of the DACaH, Article 75(1) of the Zero Draft for the negotiations in Ljubljana indicated that victims “have the right to seek reparation for material and moral damages, on an individual or collective basis”. Pursuant to this provision, in addition to each victim receiving reparations individually, entire communities may be the beneficiaries of reparation programs with a collective scope, such as mass compensation, reconstruction of common buildings, and communal rehabilitation programs. In fact, international tribunals often award a combination of individual and collective reparations to address atrocity crimes covered by the Convention (International Criminal Court: [here](#), [paras. 281-295](#); [here](#), [para. 83](#); [here](#), [paras. 7-8](#); Inter-American Court of Human Rights: [here](#), [paras. 168-218](#); [here](#), [para. 125](#)).

However, the granting of reparations on a collective basis triggered debate in the Conference. Germany and Switzerland opposed this possibility because the domestic legal system of some states, including theirs, do not allow requesting reparations on a collective basis, but only via individual claims. Contrariwise, Sierra Leone and Palestine argued that, as some of the crimes covered by the Convention have a collective character, in particular genocide and crimes against humanity, this treaty should expressly recognize collective reparations.

Given the sensitive nature of the matter, especially for Germany, the entire expression “individual or collective basis” was deleted, and the adopted Article 83(1) of the Convention (the former Article 75(1) of the Zero Draft) does not specify the types of reparations (individual or collective). This compromised solution still allows the granting of collective reparations if the state in question has such a possibility in its national legal system. Yet, an interpretation centred on the *travaux préparatoires* will likely conclude that the Convention does not create upon the states parties the obligation to award reparations on a collective basis.

Modalities of Reparations

Most conventions on crimes are silent on reparations to victims or recognize only financial compensation (e.g., [here](#), [art. 35](#); [here](#), [art. 14](#), [here](#), [art. 25](#); [here](#), [art. 8](#)). For the first time, Article 24 of the 2010 International Convention for the Protection of All Persons from Enforced Disappearance went far beyond: inspired by the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, this provision established a comprehensive system of reparations to the victims of enforced disappearance, covering compensation, restitution, rehabilitation, satisfaction, and guarantees of non-repetition. In Article 12(3) of the DACaH, the ILC proposed transplanting this wider reparations regime to crimes against humanity ([here](#), [paras. 190-195](#)).

Article 75(1) of the Zero Draft went even further, suggesting the application of restitution, compensation, satisfaction, rehabilitation, cessation, and guarantees of non-repetition to the victims of genocide, war crimes, crimes against humanity, and the other offenses covered in the Annexes of the Convention. This provision could be seen as an important

step (perhaps a pinnacle) in the gradual expansion, via international law, of reparations to victims in the context of domestic criminal prosecutions. However, this proposed significant expansion was not well received by all delegations in Ljubljana.

Adopting a pragmatic approach, Germany was very sceptical about how satisfaction, cessation, and guarantees of non-repetition could be practically awarded and enforced in the context of criminal proceedings. For instance, it would be unreasonable for a criminal judge to order a convicted person to issue an apology or express remorse as forms of satisfaction. Germany also stressed that states should have autonomy to select the types of reparations appropriate for each case. The UK expressed similar concerns with the practical implementation of a wide list of modalities of reparations, even proposing the return to the old reparations scheme, i.e., only recognizing financial compensation in the Convention.

However, most delegations and NGOs insisted on the inclusion of a comprehensive system of reparations. As a compromised way forward, Article 83(1) of the Convention (former Article 75(1) in the Zero Draft) mentions expressly only restitution, compensation, and rehabilitation, but it also indicates that this enumeration is merely exemplificative. States can award unlisted modalities of reparations if applicable in the case.

Scope of Application

Another point of debate (and confusion) during the negotiations was the scope of application of the reparations framework established in Article 83(1) of the Convention. The original text of Article 75(1) of the Zero Draft was unclear on whether the victims could seek reparations only in the context of criminal proceedings or whether the provision could also serve as a legal basis for civil proceedings. Another question was whether the victims could seek reparations *vis-à-vis* exclusively the individual convicted for the crimes or whether the responsible state could also be liable under the Convention.

Initially, some delegations, such as the UK, Germany, and Senegal, proposed replacing the text of Article 75(1) of the Zero Draft by the language of Article 12(3) of the DACaH. The replicated text had the following wording: “Each State shall take the necessary measures to ensure in its legal system that the victims of a crime [covered by the Convention], *committed through acts attributable to the State under international law...*” [emphasis added]. The highlighted expression intensified the discussion whether the Convention could serve as legal basis to demand reparations from the states parties.

The Netherlands, Switzerland, Canada, and Australia stressed that the scope of reparations under the Convention should be solely the financial liability of the convicted person in the criminal context, without addressing civil proceedings or imposing on states parties the obligation to pay reparations. Australia even proposed mentioning expressly, in the text of Article 83(1), that reparations should be implemented in accordance with the “domestic criminal law” of each state. On the opposite side of the debate, Rwanda,

Palestine and particularly NGOs emphasized the importance of also covering state responsibility, notably because states are often involved in the commission of core crimes.

Constructive ambiguity was the chosen path to secure the consensus adoption of the Convention: on the one hand, the expression “committed through acts attributable to the State under international law” was deleted and, on the other hand, the Australian proposal to add the expression “domestic criminal law” was set aside. The result was a watered-down and unqualified wording in Article 83(1) that may be interpreted to advance different legal approaches. The provision is sufficiently broad to allow its application in the context of individual and state responsibility as well as in criminal and non-criminal proceedings, depending on the domestic legal system of the state party and the interpretative choices of the deciding authority.

Final Remarks

The Convention constitutes a true milestone for the international protection of victims. For instance, it contains a broad definition of victims in Article 81, encompassing not only natural persons but also some organizations. Despite lacking a more complete list of modalities of reparations in Article 83(1), the latter unequivocally departed from a paradigm of reparations in the criminal context centred on compensation only. This outcome gives more latitude for victims and domestic authorities to use reparations in a more transformative and effective way, providing the much-needed redress to the victims. It is worth mentioning that the NGOs attending the Ljubljana Conference had a key role in securing this wider framework for reparations, as they argued and lobbied very effectively for its presence in the text.

However, there is no denying that the negotiation of Articles 81-83 of the Convention was tough, and multiple compromises were reached after protracted discussions. One can find numerous caveats that were added to the text of these provisions in order to ensure more flexibility to the states parties in the granting and implementation of the victims' rights. The result was a very intricate language that may give rise to complications and uncertainty during the interpretation and application of Articles 81-83. This was the price for the consensus adoption of the Convention. It remains to be seen how these provisions will be applied in practice and whether great disparities will emerge in the jurisprudence of different states parties worldwide.