

# REDRESS

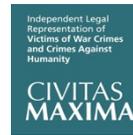
Ending torture, seeking justice for survivors



EUROPEAN CENTER FOR  
CONSTITUTIONAL AND  
HUMAN RIGHTS



WOMEN'S INITIATIVES  
FOR GENDER JUSTICE



## DRAFT MLA TREATY – ASSET RECOVERY Civil society submission, 18 February 2022

### INTRODUCTION

1. REDRESS, Amnesty International, the Global Survivors Fund, Hogan Lovells, Women's Initiatives for Gender Justice, TRIAL International, the European Center for Constitutional and Human Rights, Civitas Maxima and Human Rights Watch continue to welcome the initiative by States to draft a Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes ("**Draft MLA Convention**"). By enhancing international cooperation in criminal matters, the Draft MLA Convention has enormous potential as a valuable tool in conducting effective investigations and prosecutions in relation to international crimes.
2. We encourage States to give further consideration to incorporating provisions on State cooperation regarding asset recovery for the purpose of providing reparations to victims of international crimes.
3. Perpetrators of international crimes often acquire significant wealth through nefarious means, including through corruption perpetuated through abusive and repressive practices. This wealth is then used to fund their criminality, while evading the payment of reparations to their victims. Often, perpetrators live in luxury with assets spirited abroad, while their victims remain vulnerable and without the means to rebuild their lives.
4. For example, former Chadian dictator Hissène Habré, who was convicted of crimes against humanity, war crimes and torture, reportedly embezzled millions, if not billions, of dollars out of Chad while he was in power, which he funnelled into real estate and shares. Upon conviction in the Extraordinary African Chambers, he was ordered to pay approximately 150 million US dollars in compensation to his victims. However, they have not yet received any of these funds.<sup>1</sup>

<sup>1</sup> On Hissène Habré's failure to provide reparations to victims of his crimes, see statements here: <https://www.rfi.fr/fr/afrique/20130709-tchad-biens-hissene-habre-repertories-vue-indemnisation-victimes>; <https://www.hrw.org/tag/hissene-habre>; <https://redress.org/news/chad-the-african-union-and-the-international-community-must-not-abandon-hissene-habres-victims-now/>; <https://www.amnesty.org/en/latest/news/2021/01/african-union-no-reparations-for-ex-chad-presidents-victims/>.

5. The Draft MLA Convention presents a unique opportunity to encourage States to cooperate in securing the payment of reparations for victims through freezing and seizing the assets of perpetrators. The benefit of this cooperation is threefold:
  - i) Victims' rights to reparations are upheld;
  - ii) Perpetrators do not profit from their illicit conduct and/or do not evade accountability; and
  - iii) The financial burden on States to comply with their obligation to provide reparations to victims of international crimes is alleviated.
6. On 8 March 2019, 10 NGOs submitted a joint letter to the Core Group and Co-Sponsoring States which recommended that the Draft MLA Convention include articles related to reparations to victims, as well as provisions which:
  - a) Include an obligation on States Parties to enforce valid domestic and foreign legal judgments for reparation against individuals or entities liable for the harm suffered in accordance with domestic law and international legal obligations and;
  - b) Ensure that any proceeds of crime confiscated under the Draft Convention be returned to the requesting State so they may be provided to the victims of the crime by way of reparation.
7. In our view, the adoption of a comprehensive multilateral convention which includes such provisions would go a long way towards addressing a significant legal gap in the international legal framework which currently hampers efforts to ensure full and effective reparations for victims of crimes under international law.
8. We propose that Articles 23 and 60(3) of the Draft MLA be amended to encourage States to facilitate the transfer of property or assets for the purpose of providing reparations to victims, in addition to returning the proceeds of crime.

## **VICTIMS' RIGHTS TO REPARATIONS**

9. Investigation and prosecution of those accused of committing the gravest violations of human rights and international humanitarian law is fundamental in pursuing justice and accountability for victims. The significance of holding perpetrators accountable cannot be overestimated. Effective investigations and prosecutions provide victims with redress and establish recognition of the wrongs committed against them. They also serve as a reaffirmation of the importance of respect for human rights and the rule of law, and as a deterrent against future atrocities. In circumstances where international courts are unable to address crimes under international law, recourse to national courts is crucial in the pursuit of justice. A strong framework for international cooperation is essential, whether those national courts are in the State where the crimes were committed or in a third State exercising universal or extraterritorial jurisdiction to prosecute crimes committed abroad.
10. Victims play an important and often vital role in investigations and prosecutions of international crimes before domestic courts and tribunals. Without the courage and determination of those victims who act as complainants or witnesses, many such cases would never reach trial. As such, States at the forefront of investigating and prosecuting international crimes at the domestic level are increasingly recognising that supporting, protecting and empowering victims is crucial to building strong cases.
11. Moreover, States are coming to appreciate that victims are not a homogeneous group and that they must ensure expertise in investigations and prosecutions involving sexual and gender-based violence and involving children. The EU's Genocide Network has recognised this trend, recommending that measures be taken by national authorities to address the rights and needs

of victims and witnesses, and that victims' perspectives and their rights be integrated into investigation and prosecution strategies.

12. The right of victims to an effective remedy, including reparations, is a well-established right in international human rights law and international humanitarian law, and is enshrined in various international treaties. These include: Article 8 of the Universal Declaration of Human Rights ("**UDHR**"); Article 2 of the International Covenant on Civil and Political Rights ("**ICCPR**"); Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination ("**CERD**"); Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearances ("**ICPPED**"); Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**UNCAT**"); Article 75 of the Rome Statute of the International Criminal Court ("**Rome Statute**"); Article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land ("**Hague Convention (IV)**"); and Rule 150 of ICRC Customary International Humanitarian Law.<sup>2</sup>
13. Part IX 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*<sup>3</sup> ("**the Basic Principles**") outlines the different forms of reparation that should be available to victims, including: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Principle 20 states that compensation should be provided for economically assessable damage, such as physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs for legal or expert assistance, medicine and medical services, and psychological and social services.

#### STATE COOPERATION – ASSET RECOVERY FOR REPARATIONS

14. State cooperation in relation to asset recovery for reparations is increasingly recognised under international law as critical to the realisation of the right of victims to reparations. This is particularly important given the often transnational and extraterritorial nature of the investigation and prosecution of crimes under international law.
15. Principle 17 of the Basic Principles states:  
*"States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements."*
16. EU Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders<sup>4</sup> ("**the Regulation**") sets out the rules under which Member States must recognise and execute freezing and confiscation orders issued by another Member State in relation to proceedings in criminal matters. The Regulation addresses victims' needs to get compensation for damages or

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<sup>2</sup> Also see the analysis of Hogan Lovells, Global Survivors Fund, REDRESS and Goldsmith Chambers in their report: 'Finance for Restorative Justice: Volume II', 19 June 2021. Available here:

[https://www.hoganlovells.com/-/media/hogan-lovells/pdf/2021-pdfs/2021\\_06\\_25\\_finance\\_for\\_restorative\\_justice\\_-\\_volume\\_ii\\_stage\\_5.pdf](https://www.hoganlovells.com/-/media/hogan-lovells/pdf/2021-pdfs/2021_06_25_finance_for_restorative_justice_-_volume_ii_stage_5.pdf)

<sup>3</sup> Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

<sup>4</sup> Regulation (EU) 2018/1805 of the European Parliament and of the Council, of 14 November 2018. Available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018R1805>.

to have stolen assets restituted in cross-border confiscation cases.<sup>5</sup> It includes a duty for States to recognise and execute the order even where there is no comparable domestic measure.<sup>6</sup> It also requires that the disposal of frozen or confiscated property should give priority to the compensation of, and restitution of property to victims.<sup>7</sup> Moreover, it proposes that Member States should consider establishing a national fund to guarantee appropriate compensation for victims of crime and earmark a portion of confiscated assets for that purpose.<sup>8</sup>

17. Similarly, Article 57(3)(e) of the Rome Statute provides that the International Criminal Court (“**ICC**”) Pre-Trial Chamber may “*seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims*” [emphasis added].<sup>9</sup>
18. The ICC Appeals Chamber has held that, “*There is no requirement that property and assets subject to a Chamber’s request for cooperation under articles 57(3)(e) and 93 (1)(k) of the Statute be derived from or otherwise linked to alleged crimes within the jurisdiction of the Court*”.<sup>10</sup> Accordingly, the judgement confirms that State cooperation can be required for the purpose of recovering the assets of a suspect or accused person which may be subject to reparations orders, and not solely for the forfeiture of proceeds of crime as a penalty under article 77(2)(b). In this vein, State Parties to the Rome Statute are legally required, pursuant to article 86, to “cooperate fully” with the Court, including, where appropriate, through necessary adjustments to their domestic procedures as articulated by article 88.<sup>11</sup>
19. In the instance of corruption and embezzlement, the United Nations Convention Against Corruption (“**UNCAC**”) requires States Parties to provide mutual legal assistance for the purpose of recovering assets<sup>12</sup> to be returned to legitimate owners or compensating victims.<sup>13</sup>

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<sup>5</sup> Eurojust, Note on the Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders, section 2.8. Available here :

[https://www.eurojust.europa.eu/sites/default/files/assets/20201207\\_note\\_on\\_regulation\\_eu\\_2018\\_1805.pdf](https://www.eurojust.europa.eu/sites/default/files/assets/20201207_note_on_regulation_eu_2018_1805.pdf)

<sup>6</sup> Recital 13: “*While such orders might not exist in the legal system of a Member State, the Member State concerned should be able to recognise and execute such an order issued by another Member State.*”

<sup>7</sup> Articles 26(2), 30(7)

Recital 45: “*Rules for the disposal of frozen or confiscated property should give priority to the compensation of, and restitution of property to, victims.*”

<sup>8</sup> Recital 48: “*Each Member State should consider establishing a national fund to guarantee appropriate compensation for victims of crime, such as families of police officers and public servants killed or permanently disabled in the line of duty. Member States could earmark a portion of confiscated assets for that purpose.*”

<sup>9</sup> Rome Statute Article 93(1)(k) reads: (1) States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions [...] (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties

<sup>10</sup> Judgment on the appeal of the Prosecutor against the decision of [REDACTED], ICC-ACRed-01/16, 15 February 2016, Appeals Chamber Decision.

<sup>11</sup> Articles 86 and 88 Rome Statute. See also: International Criminal Court, Financial Investigation and Recovery of Assets, [https://www.icc-cpi.int/news/seminarBooks/Freezing\\_Assets\\_Eng\\_Web.pdf](https://www.icc-cpi.int/news/seminarBooks/Freezing_Assets_Eng_Web.pdf), p. 11; International Criminal Court, Workshop Report on Cooperation Challenges faced by the Court with Respect to Financial Investigations, (26-27 October 2015), <https://www.icc-cpi.int/iccdocs/other/161027-ICC-Rep-Eng.pdf>, p.3.

<sup>12</sup> Article 46(3)(k).

<sup>13</sup> Article 57.

## STATE PRACTICE – ASSET RECOVERY FOR REPARATIONS

20. Legal mechanisms to confiscate or forfeit assets in order to provide reparations for victims exist in some domestic jurisdictions, and are becoming increasingly common. In particular, the corruption context provides some illustrative examples.
21. In 2021, France adopted provisions allowing the return of ill-gotten gains to victims, following the conviction of Vice President Nguema Obiang of Equatorial Guinea on corruption charges, which left France with over 150 million euros in stolen assets to be returned to the people of Equatorial Guinea.<sup>14</sup> The law establishes that where a politically exposed person has been convicted in the French courts of laundering embezzled public funds or the proceeds of corruption, their assets can be seized, confiscated, and sold. The proceeds will be returned to the population from which they were stolen.<sup>15</sup> Moreover, following the conviction of Rifaat Al Assad, Syrian president Bashar Al Assad's uncle, for money laundering, French authorities are looking to sell his luxury properties and return the proceeds to victims in Syria.<sup>16</sup>
22. Switzerland's Foreign Illicit Assets Act allows for assets deposited in Switzerland by foreign corrupt officials or their close associates to be frozen, confiscated and restituted.<sup>17</sup> Once the assets have been confiscated, Switzerland can seek to restore the assets to the country of origin for the purpose of improving *"the living conditions of the inhabitants of the country of origin,"* and strengthening *"the rule of law in the country of origin and thus...[contributing] to the fight against impunity."*<sup>18</sup>
23. Similarly, the UK has used its non-conviction based mechanisms to confiscate Chadian money recovered from corrupt oil transactions in order to provide £4.4 million in aid for vulnerable people of Chad.<sup>19</sup>
24. More broadly, the US has seized millions of dollars in cryptocurrency used to finance terrorism related to al-Qassam Brigades, al-Qaeda and Islamic State of Iraq and the Levant, which may be directed to the United States Victims of State Sponsored Terrorism Fund at the conclusion of the case.<sup>20</sup>

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<sup>14</sup> HRW, 'France: Equatorial Guinea Vice President's Conviction Upheld', 28 July 2021, available here: <https://www.hrw.org/news/2021/07/28/france-equatorial-guinea-vice-presidents-conviction-upheld>

<sup>15</sup> Insights from U4 Anti-Corruption Resource Centre. 'The ill-gotten gains of corruption: a possible French model for restitution', 27 April 2021. Available here: <https://medium.com/u4-anti-corruption-resource-centre/ill-gotten-gains-of-corruption-french-model-restitution-932a7452baaa>

<sup>16</sup> The National News. 'Frozen, the disputed European property empire of Rifaat Al Assad', 23 November 2021. Available here: <https://www.thenationalnews.com/world/uk-news/2021/11/23/frozen-the-disputed-european-property-empire-of-rifaat-al-assad/>  
<https://www.bbc.co.uk/news/world-europe-53077818>

<sup>17</sup> Available at UNODC, CAC/COSP/WG.2/2016/CRP.2, 16 August 2016. <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1605154e.pdf>

<sup>18</sup> Hogan Lovells, 'Finance for Restorative Justice: Using sanctions and terrorist financing legislation to fund reparations for victims of sexual violence in conflict', January 2020, p.23. [https://www.hoganlovells.com/-/media/hogan-lovell/pdf/2020-pdfs/2020\\_01\\_29\\_rethinking-reparations-report.pdf?\\_cf\\_chl\\_jschl\\_tk\\_=AZqpxoaQlo66HA0UfasHWfyzkMJMnitvOsr7h7dhv74-1643034337-0-gaNycGzNCf0](https://www.hoganlovells.com/-/media/hogan-lovell/pdf/2020-pdfs/2020_01_29_rethinking-reparations-report.pdf?_cf_chl_jschl_tk_=AZqpxoaQlo66HA0UfasHWfyzkMJMnitvOsr7h7dhv74-1643034337-0-gaNycGzNCf0)

<sup>19</sup> 'UK aid Supports Vulnerable People in Chad Using Millions of Pounds Recovered During Corruption Case', 29 November 2021. Available here: <https://www.gov.uk/government/news/uk-aid-supports-vulnerable-people-in-chad-using-millions-of-pounds-recovered-during-corruption-case>; <https://www.sfo.gov.uk/2018/03/22/sfo-recovers-4-4m-from-corrupt-diplomats-in-chad-oil-share-deal/>

<sup>20</sup> <https://www.justice.gov/opa/pr/global-disruption-three-terror-finance-cyber-enabled-campaigns>

25. In another example, Italy's 'Anti-Mafia Code' allows for the confiscation of assets and funds related to organised crime, without the conviction of the perpetrator, to be repurposed as compensation for victims of such crimes.<sup>21</sup>

#### **DRAFTING PROPOSAL COMMENTARY**

26. We propose that the Draft MLA Convention should provide a basis for a State Party (A) to take necessary measures to trace, identify, freeze, and seize assets (including, but not limited to, the proceeds of crime) for the purpose of eventual forfeiture or confiscation for reparations for victims, when requested by another State Party (B) in relation to criminal proceedings, including investigations and final judgments against an accused, in that State Party (B).
27. The articles should provide a basis for confiscation or forfeiture of assets as a provisional measure, as well as for the purpose of enforcing a final (foreign) legal judgment, including an order for reparations to victims.
28. Where perpetrators of international crimes have acquired significant wealth through their corrupt and abusive conduct, it may be difficult, or even impossible, to link their wealth directly to their crimes, to prove that their assets are the 'proceeds of crime'. Accordingly, we propose that the confiscation or forfeiture of assets under the Draft MLA Convention not be limited to the proceeds of crime, but encompass any assets that can be legally secured for the purposes of reparations.
29. We propose that Articles 23 and 60(3) of the Draft MLA Convention be amended to encourage States to facilitate the transfer of property or assets for the purpose of providing reparations to victims, in addition to the purpose of returning the proceeds of crime.
30. The proposed language is largely drawn from Article 13 of the United Nations Convention against Transnational Organized Crime ("UNTOC")<sup>22</sup> relating to international cooperation for purposes of confiscation of proceeds of crime, property or other instrumentalities and Part 9 of the ICC Rome Statute relating to international cooperation and judicial assistance between State Parties and the Court.<sup>23</sup>
31. The term 'reparation' encompasses the five forms of reparation outlined in the Basic Principles.
32. The terms 'freezing' and 'seizing' of assets for the purpose of eventual 'forfeiture' or 'confiscation' reflect the wording of Article 13(2) of UNTOC and Article 93(1)(k) of the ICC Rome Statute. They are intended to reflect the different domestic mechanisms to secure assets both provisionally and finally.

#### **DRAFT ARTICLE 23: CONFISCATION - PROPOSED LANGUAGE**

##### **Paragraph 1**

A State Party that has received a request for the purpose of confiscation of proceeds of crimes covered by this Convention, or of property, equipment or other instrumentalities used in or destined for use in such crimes, or of assets for the purpose of forfeiture or confiscation for

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<sup>21</sup> Hogan Lovells, 'Finance for Restorative Justice: Using sanctions and terrorist financing legislation to fund reparations for victims of sexual violence in conflict', January 2020, pp. 23-26. Available here: [https://www.hoganlovells.com/-/media/hogan-lovellis/pdf/2020-pdfs/2020\\_01\\_29\\_rethinking-reparations-report.pdf](https://www.hoganlovells.com/-/media/hogan-lovellis/pdf/2020-pdfs/2020_01_29_rethinking-reparations-report.pdf), and [https://www.hoganlovells.com/-/media/hogan-lovellis/pdf/2021-pdfs/2021\\_06\\_25\\_finance\\_for\\_restorative\\_justice\\_-\\_volume\\_ii\\_stage\\_5.pdf](https://www.hoganlovells.com/-/media/hogan-lovellis/pdf/2021-pdfs/2021_06_25_finance_for_restorative_justice_-_volume_ii_stage_5.pdf) pp. 26-33.

<sup>22</sup> See e.g., UNTOC Article 13, paras. 1-4, 8.

<sup>23</sup> See e.g., Rome Statute Articles 86, 88, 93.

reparation in accordance with article 60(3), situated in any territory under its jurisdiction or on board a vessel or aircraft registered in that State, shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a competent authority in the territory of the requesting State Party, insofar as it relates to proceeds of crime, property, equipment or other instrumentalities in or destined for use in the crimes covered by this Convention, or assets for the purpose of forfeiture or confiscation for reparation in accordance with article 60(3) situated in any territory under the jurisdiction of the requested State Party.

## **Paragraph 2**

Following a request made by another State Party having jurisdiction over a crime covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize assets for the purpose of forfeiture or confiscation for reparation in accordance with article 60(3), or the proceeds of crimes, property, equipment or other instrumentalities in or destined for use in the crimes covered by this Convention, for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1, by the requested State Party. Such measures can include provisional measures for the purpose of forfeiture or confiscation.

## **Paragraph 3**

The provisions of article 18 are applicable, *mutatis mutandis*, to this article. In addition to the information specified in article 18, requests made in accordance with this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a), a description of the property or assets to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b), a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts, and information as to the extent to which execution of the order is requested;

(c) In the case of a request pertaining to paragraph 2, a statement of the facts relied upon by the requesting State Party and a description of the actions requested.

## **Paragraph 4**

When acting on the request made by another State Party in accordance with this article, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to transferring the confiscated proceeds of crime or property, or assets for the purpose of forfeiture for reparation pursuant to article 60(3) to the requesting State Party over other potential uses of that property or assets, so that the State Party can provide reparation to victims of crimes covered in this Convention or return such proceeds of crime or property to their legitimate owners.

## **Paragraph 5**

The decisions or actions provided for in paragraphs 1 and 2 shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral Convention, agreement or arrangement to which it may be bound in relation to the requesting State Party.

**Paragraph 6**

The provisions of this article shall not be construed to prejudice the rights of bona fide third parties, nor the rights of the defendant, including the right to due process.

**Paragraph 7**

To the extent that all forms of cooperation specified in this Article are not possible within the domestic legal systems of State Parties, such State Parties shall take measures to introduce such procedures, mechanisms and other provisions under their national law that may be necessary to facilitate such cooperation.

**DRAFT ARTICLE 60(3): VICTIMS' RIGHTS - PROPOSED LANGUAGE**

**Paragraph 3**

Each State Party shall ensure that, in its legal system, the victims of a crime covered by this Convention have the right to obtain reparation, on an individual or collective basis, in the course of any criminal proceedings brought in connection with any of the crimes covered by this Convention, consisting, as appropriate, of the following or other forms: restitution; compensation; satisfaction; rehabilitation; and guarantees of non-repetition.

**Paragraph 5**

Each State Party shall, to the greatest extent possible within its domestic legal system and if so requested, give effect to a judgment or order in criminal proceedings, issued in accordance with the national law of the requesting State, to provide reparations in article 60(3) to victims of crimes covered in this Convention by complying with the provisions in Article 23.

- 33. We remain available to provide additional information on this submission and look forward to collaborating further on the negotiation of the Draft Convention.

Yours sincerely,

**REDRESS**

**Amnesty International**

**Global Survivors Fund**

**Hogan Lovells**

**Women's Initiatives for Gender Justice**

**TRIAL International**

**European Center for Constitutional and Human Rights**

**Civitas Maxima**

**Human Rights Watch**