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HUMAN RIGHTS WATCH**WOMEN'S INITIATIVES FOR GENDER JUSTICE**

10 May 2023

Joint NGO Letter to the Core Group and Co-Sponsoring States of the Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes (“MLA Convention”) in response to version 30/11/2022 of the Draft MLA Convention and in advance of the Diplomatic Conference for the Adoption of the MLA Convention to be held in Ljubljana on 15-26 May 2023

To the Core Group and Co-Sponsoring States to the MLA Convention,

The undersigned non-governmental organizations welcome a number of improvements made in the most recent version of the Draft MLA Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes.

Among them, we are pleased to see several amendments incorporated as proposed by civil society organizations. In particular, and based on our last suggestions, we appreciate the exclusion of 'dual criminality' as a requirement for cooperation (draft Art. 7); the addition of 'sexual orientation' as a new ground for refusal of mutual legal assistance and extradition; the amendment to the heading of Part VI; draft Art. 74 (2)(b) and (c) on establishing procedures relating to the participation and safety of victims and witnesses; and the inclusion of definitions of 'proceeds of crimes' as well as 'seizure', 'freezing' and 'confiscation'.

That said, there are a number of further amendments which we believe are necessary for the Draft MLA Convention to become a powerful instrument for cooperation and a useful tool for effective investigations and prosecutions of crimes under international criminal law.

In particular, we would respectfully call on the Core Group and the Co-sponsoring States of the MLA Convention to amend the Draft in the following ways:

Preamble

- The Preamble should mention that the prohibition of genocide, crimes against humanity, war crimes, torture and enforced disappearance is a peremptory norm of general international law (*jus cogens*).¹ This would emphasize the absolute and non-derogable character of the prohibitions.

¹ Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN Doc. A/74/10, Chapter V. See Conclusion 23, non-exhaustive list, and its Commentary.

- It should also include an explicit reference to victims' rights to justice, truth and reparations, which is enshrined in various international instruments, case law and customary international law.
- The reference to “*children, women and men*” having been victims of unimaginable atrocities could be replaced by more inclusive language such as “*individuals from all ages and in all their diversities.*”

Material scope of the Convention and the extension of its scope (Draft Arts. 2-3)

- We welcome the inclusion of crimes such as torture and enforced disappearance in draft Art. 3, providing States with the option of extending the scope of the Convention and draft Art. 4 on the *ad hoc* application of the Convention.

While we appreciate that it may no longer be feasible to include these crimes under draft Art. 2 to form stand-alone crimes (together with genocide, crimes against humanity and war crimes), we would still like to emphasise that their prohibitions are part of customary international law and have attained the status of *jus cogens*. A violation thereof generates an *erga omnes* obligation – rather than an option – to prosecute (or extradite) upon all States.²

For this reason, we suggest applying an opt-out principle, rather than opt-in.

- In relation to the definition of enforced disappearance as a crime against humanity included in draft Art. 2.4(i), we strongly recommend deleting the expression ‘with the intention of removing them from the protection of the law for a prolonged period of time’. Such expression adds an additional restrictive element which is at odds with the definition contained in the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). Additionally, we recommend the inclusion in Annex G of a clause reflecting the language of Article 3 of the ICPPED, by which States shall take appropriate measures to investigate acts of enforced disappearance committed by non-State actors and to bring those responsible to justice.

Grounds for refusal (Draft Art. 27)

- We believe drafters should entirely remove draft Art. 27(2)(b), which provides for a vague and subjective set of grounds for refusal of mutual legal assistance (‘sovereignty, security, *ordre public* or other essential interests’) – such unspecified provisions leave States with a large margin of discretion to refuse cooperation under any- even illegitimate-reason and simply phrase it within these broad and vague grounds.
- We highly appreciate the extended grounds upon which the cooperation shall be refused according to draft Art. 27(1)(a). Nevertheless, we would strongly suggest expanding it to include gender in the following order: “(…) *sex, gender and sexual orientation* (...)”. While sex refers to biological physical differences, gender refers to the socially constructed

² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 7; International Convention for the Protection of All Persons from Enforced Disappearance, Arts. 9-11; ICJ, Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment, 20 July 2012, ICJ Reports 2012, pp. 422, paras. 68-69. See also EU Guidelines, para. 39; Declaration on the Protection of all Persons from Enforced Disappearance, Art. 14; UN Human Rights Committee General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Convention (29 March 2004), paras. 17-18; Updated Set of Principles for the Protection of Human Rights Through Action to Combat Impunity, Principles 19 and 21 and definition B (serious crimes under international law).

roles, behaviours, and expressions. As such, this difference is important to incorporate to include all forms of discrimination.

- The term 'pardoned' should be deleted from draft Art. 27(1)(c), as pardons, bar very few exceptions, should not apply to those suspected of criminal responsibility for crimes under international law or those found guilty of such crimes, the prohibition of which is absolute.

Transit (Draft Art. 57)

- Draft Art. 57(5) lists grounds for avoiding the transit of extradited persons “*through any territory where there is a reason to believe that his or her life may be threatened or if there is a high risk of his or her rights being violated by reasons of his or her race, sex, sexual orientation, religion, nationality, ethnic origin, political opinions or other grounds that are universally recognized as impermissible under international law.*” For the same reasons explained above, we recommend the addition of “*gender*” to this list.

Definition of Victims and Victim’s rights (Draft Arts. 73-75)

- We appreciate the amendment of the heading of Part VI to read “*Victims, Witnesses and Others*” and the corresponding heading of draft Art. 74 as well as the inclusion of “*or cooperating with*”. We would like to reiterate our suggestion to extend the provision of draft Art. 74(1) to: “*(...) victims, witnesses, and their relatives and representatives, experts, as well as other persons participating in or cooperating with any investigation, prosecution, extradition or other proceeding within the scope of this Convention shall be protected against violence, threats of violence or any other form of intimidation, secondary victimisation or reprisal as a consequence of such participation or cooperation.*”³
- We appreciate the inclusion of certain victims’ rights in the Draft MLA Convention. However, the draft still falls short of enumerating those rights concretely. This is the case for the rights to receive information on ongoing investigations, and access to support services. As such, we would like to reiterate our suggestion to add another paragraph to draft Art. 75 on Victims’ rights as follows: “*Each State Party shall take the necessary measures to ensure that the following rights of victims are also safeguarded: (a) the right to receive information on the rights and remedies they are entitled to and of all available legal, medical, psychological, social, administrative and other services to which victims have a right; b) the right to receive information on an ongoing investigation and the progresses thereto, prosecution or judicial proceedings in a language they understand; (c) the right to access support services when needed.*”
- While we note that draft Art. 9 provides for a ‘right to report’ to the competent authorities, other treaties which enshrine such rights – to complain or to report – also include obligations that, following a complaint, ‘*a case [will be] promptly and impartially examined by [...] competent authorities*’⁴ or that, having received a report, the competent authorities ‘*shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation.*’⁵ With these examples in mind, the current formulation in the Draft MLA Convention of the right to report could be further

³ See Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (“EU Directive”), Arts. 18-24. See also EU Guidelines, p. 29.

⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 13.

⁵ International Convention for the Protection of All Persons from Enforced Disappearance, Article 12.

strengthened, with reference to the obligation to initiate an investigation *ex officio*, as well as to examine complaints with promptness and impartiality.

- Draft Art. 75(1) has been amended and reads “victims of crimes covered by this Convention have a right to *seek* reparation for *material and moral damages*” (italics added). The provision, as currently drafted fails to articulate victims’ right to reparation or to confer an obligation on States parties to provide such reparation. This right is also limited by jurisdiction in sub-paragraphs (a) and (b). While draft Art. 75(3) does mention reparations, as outlined above, it is unclear how those reparations could be delivered in practice. 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 instruments.⁶ Providing for a right to ‘seek’ reparations, rather than a right to reparations, risks a regression in international law on victims’ rights.
- Further, this provision as currently drafted appears to contain a vocabulary error: “damages” are a form of financial compensation. We believe the draft article actually refers to the notion of “harm”. We suggest that physical and other forms of harm be added to the types of harm listed. 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* (“**the Basic Principles**”) recognize emotional suffering, economic loss, and substantial impairment of fundamental rights as types of harm.
- As a result, we suggest the following language to replace the current draft Art. 75(1): “Each State Party shall take the necessary measures to ensure in its legal system that the victims of a crime covered by this Convention have the **right to reparation** for any **physical, mental, moral, material, legal or other harm**, on an individual or collective basis, consisting of but not limited to, as appropriate, restitution; compensation (including material and moral damages); satisfaction; rehabilitation; cessation and guarantees of non-repetition insofar as (...).”

Asset Recovery and Victims’ Rights (Draft Arts. 41 and 74)

The current drafting does not enable asset recovery for the purpose of providing reparations to victims and creates an inconsistency between draft Arts. 41 and 74.

- *Property capable of being confiscated*: Draft Art. 41 on ‘Restitution and Confiscation’ only enables the confiscation of assets that are the proceeds of crimes covered by the Convention, or which represent the value of such proceeds, or which are destined for use in such crimes. However, it may be difficult, or even impossible, to link the wealth of perpetrators directly to their crimes. Accordingly, **it is critical that the confiscation or forfeiture of assets under the Draft MLA Convention not be limited to the proceeds of crimes, but encompass any assets that can be legally secured for the purposes of reparations.** This could include fines and penalties imposed due to breaches of sanctions regimes and terrorist financing legislation and

⁶ 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

associated accrued interest.⁷ Doing so would bring the MLA Convention in line with the position of, among others, the International Criminal Court.⁸

- *Full reparations, not solely restitution:* Draft Art. 41 does not provide for the confiscation of assets for the purpose of providing full reparations to victims. Rather, it is limited to ‘restituting’ the proceeds of crime to the victim and/or its prior legitimate owner. It is difficult to envisage many circumstances in which the proceeds of genocide, crimes against humanity, war crimes, or other crimes under international law would be restituted to a victim, beyond circumstances of pillage and misappropriation of land. In any event, **a provision premised solely on restitution would not amount to meaningful and full reparations** in accordance with the Basic Principles. Restitution is only one of the five forms of reparation outlined in the Basic Principles.
- *Removing contradictions:* Draft Art. 75(3) on ‘Victims’ rights’ requires States Parties (to the greatest extent possible within their domestic legal systems) to provide reparations to victims in accordance with a judgement or order in criminal proceedings of the requesting State party, by complying with the provisions in Art. 41. It is unclear how a requested State could provide reparations to the victim, via the requesting State, relying on a provision which exclusively covers restitution. **Addressing the matters in relation to draft Art. 41 outlined above would remove this contradiction.**
- *Rights of defendants:* The current draft does not make any reference to **the rights of defendants to due process in the context of asset recovery procedure**. To ensure the integrity of the MLA Convention, we would urge participating States to ensure that these are explicitly recognised.

We reiterate our appreciation for this renewed opportunity to provide comments on the Draft MLA Convention, as well as the openness to ample NGO participation in the Diplomatic Conference. We are ready to support the Core Group and Co-sponsoring States in any way as deemed beneficial to advance the formal negotiations and the final adoption of this highly important MLA Convention.

Amnesty International

Civitas Maxima

European Center for Constitutional and Human Rights (ECCHR)

Global Survivors’ Fund

Human Rights Watch

International Federation for Human Rights (FIDH)

Parliamentarians for Global Action

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⁷ Hogan Lovells, Global Survivors Fund, REDRESS and Goldsmith Chambers. ‘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.

⁸ Judgment on the appeal of the Prosecutor against the decision of [REDACTED], ICC-ACRed-01/16, 15 February 2016, Appeals Chamber Decision.