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Dear Member of the Assembly of the Portuguese Republic,

Amnesty International would like to submit for your consideration some comments relating to the attachment to draft law n° 72/9 adapting the Portuguese criminal legislation to the Rome Statute, defining conduct that constitutes crimes under international law.

First, we would like to welcome the important initiative of Portugal in drafting this legislation. Portugal has consistently played a leading role as a member of the like – minded group of states in the establishment of the International Criminal Court (Court) in ratifying the Rome Statute of the International Criminal Court (Rome Statute) on 5 February 2002. We hope to see Portugal as an example to encourage other countries to support the full implementation of the Rome Statute.

We would like to mention some provisions that we consider very positive. We are pleased to note that draft Article 7° specifically states that criminal prosecutions and punishment for crimes of genocide, against humanity and war crimes are not subject to statutes of limitations.

We note the inclusion in the draft of the war crime in Article 11°, g) “declaring or threatening, on an official capacity, that shelter will not be given”, as well as Articles 17° (publicly and in a repeated way to instigate hate against people with the purpose to start a war) and 18° (recruitment of mercenaries).

We also welcome the extension of the application of certain war crimes that in the Rome Statute are limited to international armed conflict (Articles 8 (2) (b) (ii), (v), (vii), (xiv), (xvii), (xviii), (xix), (xx), (xxiii) and (xxv) of the Rome Statute) in draft Articles 11°, b) and c), 14°, 16°, 12° and 11° e) and f), to non – international armed conflict.

We would now like to discuss some matters of concern that we would like to draw to your attention.

As a preliminary matter, we are extremely disappointed that Portugal did not follow a transparent process involving a broad consultation with civil society in preparing this draft.

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Although Amnesty International requested the chair of the working group that prepared the draft to provide it with the names of the members of the working group and information about the drafting process, it received no reply. In contrast, other states, such as Argentina, Brazil, the Democratic Republic of the Congo, Gabon, Senegal, Spain and the United Kingdom, did conduct such a transparent drafting process and broad consultation with civil society before completing a draft for submission to parliament. In each such case, the draft submitted to parliament was improved in significant respects. We hope that the Portuguese Parliament will conduct a broad consultation with civil society before taking any final decision on the draft so that all concerns can be addressed before the legislation is adopted.

## **Defining crimes**

We note that draft Article 8° on genocide does not seem to include the element “causing mental harm” as in Article 6° (b) of the Rome Statute and in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide that Portugal acceded on 9 February 1999. On the word “agreement” to commit genocide, on draft Article 8°, 3), we ask for clarification on the scope of its application and whether it is broader or more restrictive than in Article 25 of the Rome Statute.

Regarding draft Article 9°, g), we would like to mention that the Trial Chamber of the ICTR in the *Akayesu* case has noted that coercive circumstances in rape cases do not need to be shown by physical force. Sexual violence should cover not only situations of physical attacks but also situations of psychological attacks. With regard to the crime of enforced prostitution we ask for clarification if there is a definition of prostitution in Portuguese legislation and in which terms, noting that this crime should cover cases in which a person is compelled to perform sexual acts not only to obtain something for survival, but also to avoid further harm.

We welcome the inclusion of draft Article 9°, g), (1) but we would like to express our concern regarding the fact that “rape” is not specifically mentioned in the draft.

There does not appear to be any provision in the draft corresponding to Article 7 (2) (a) of the Rome Statute, on the definition of “attack directed against any civilian population”. It is not clear whether this omission was intended to broaden the scope of crimes against humanity.

Draft Article 9°, b) appears to have a more restrictive definition than Article 7 (2) (b) of the Rome Statute, regarding the crime of extermination as it seems to us that it is the only situation accepted as extermination, contrary to that provision of the Rome Statute..

With regard to draft Article 9°, c), which relates to Article 7 (2) (c) of the Rome Statute, we would like to mention that it seems that Article 159° of the Penal Code, to which draft Article 9°, c) refers, does not define “state or condition of slave”. We would like to recommend a definition consistent with international law, including the definition in the 1926 Slavery Convention.

Regarding draft Article 9°, g), iv), it seems that it only applies to conducts with the intent to affect the ethnic composition of the group, rather than “carrying out other grave violations of international law” as in Article 7 (2) (f) of the Rome Statute.

There does not appear to be any provision in the draft corresponding to Article 7 (3) of the Rome Statute on the definition of gender. We would like to recommend that persecution on sex grounds, as in draft Article 9°, g) should be interpreted in accordance with the United Nations recognised definition of gender.

Draft Article 15°, a), adds the element “or of a great value” which appears to be a significantly more restrictive definition than in Article 8 (2) (a) (iv) of the Rome Statute. On Article 8 (2) (a) (v) of the Rome Statute, which appears to correspondent to draft Article 10°, 2), b), the expression “forces” should be given a broad interpretation in order to include all entities listed in the First Additional Protocol to the Geneva Conventions, ratified by Portugal in 1992.

Draft Article 11°, d) does not seem to indicate what would be excessive the effects of “launching an attack that reaches the civilian population or civilian objects knowing that such attack will cause lost of civil lives or civil injuries or damage to civilian objects”, as in Article 8 (2) (b) (iv) of the Rome Statute. We would like to ask for clarification on the scope of its application and welcome this provision if it is broader than the definition in the Rome Statute.

Draft Article 10°, 2, a) does not appear to include the crime of “deportation” as in Article 8 (2) (b) (viii) of the Rome Statute.

Articles 8 (2) (b) (xii), (xiii) and (xv) of the Rome Statute do not seem to have corresponding provisions in the draft.

On draft Article 10°, 1, g), in regard to Articles 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Rome Statute, we would like to mention that the Trial Chamber of the ICTR in the *Akayesu* case has noted that coercive circumstances do not need to be shown by physical force. Sexual violence should cover not only situations of physical attacks but also situations of psychological attacks. With regard to the crime of enforced prostitution we ask for clarification if there is a definition of prostitution in Portuguese legislation and in which terms, noting that this crime should cover cases in which a person is compelled to perform sexual acts not only to obtain something for survival, but also to avoid further harm.

Draft Article 13°, b) does not include “in conformity with international law” as in Articles 8 (2) (b) (xxiv) and 8 (2) (e) (ii) of the Rome Statute. It is not clear whether this omission was intended to broaden the scope of application.

It does not appear to be any provision in the draft corresponding to Articles 8 (2) (e) (viii), (x), (xii) and 8 (3) of the Rome Statute.

### **Exercise of universal jurisdiction**

We welcome the provision on universal jurisdiction in draft Article 5°, but would like to mention that extradition should not be granted to countries with death penalty or to countries where there are no guarantees of fair trials consistent with international fair trial standards such as Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights and Articles 55 and 62 to 68 of the Rome Statute. We also recommend that Portugal should be able to have an extradited person returned to Portugal if the requesting state fails to conduct a prompt, thorough, independent and impartial investigation or, if there is sufficient admissible evidence, to prosecute the extradited person in a fair trial.

### **Principles of criminal responsibility and defences**

We note that there does not appear to be any provisions in the draft defining principles of criminal responsibility, except for Articles 28 (Responsibility of commanders and other superiors) and 29 (Non – applicability of statute of limitations) of the Rome Statute. In order to ensure an effective system of international justice, Amnesty International urges that principles of criminal responsibility in national legislations should be at least as strict as in Part 3 of the Rome Statute. Although principles of criminal responsibility under Portuguese law seem to apply to crimes defined in the draft, according to draft Article 4°, we would like to ask for clarification in what terms do they apply and if they guarantee that all principles of criminal responsibility in the Rome Statute will be fully implemented.

Regarding Article 28 of the Rome Statute, on responsibility of commanders and other superiors, which seems to be implemented in draft Article 6°, it appears that, regarding military commanders, this draft article only applies unless otherwise provided in the Code of Military Justice. As regards to the application of this Code, we note that, according to draft Article 3°, the dispositions of the draft seem to not exclude the application of the military code if the crimes are connected to the military interests of defence of the Portuguese state and other matters that the Constitution assigns to the Portuguese armed forces. On this subject, Amnesty International has opposed trials in military courts of members of armed forces accused of crimes under international law. Indeed, Article 16 (2) of the Declaration on the Protection of All Persons from Enforced Disappearances expressly provides that persons alleged to have committed enforced disappearances “shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts”.

In addition, the expression “as a result of his or her failure to exercise control properly over such forces” is missing in draft Article 6°, 1 and 2, as well as the expression “within his power”, regarding the taking of measures to prevent or repress the commission of the crimes. It is not clear whether these omissions were intended to broaden the scope of criminal responsibility or to restrict it and we would welcome clarification of this matter.

On Article 33 (Superior orders and prescription of law) of the Rome Statute, we note that there does not seem to be a corresponding provision in the draft. We would like to ask for clarification if there are corresponding provisions in the Penal Code and in which terms. Amnesty International believes that defences in national law should not be any broader than those permitted in the Rome Statute and, in some cases, should even be narrower in order to be consistent with customary international law.

For example, Article 33 of the Rome Statute prohibits superior orders as a defence for genocide and crimes against humanity. However, at the urging of the United States of America and a few other states, it permits superior orders as a defence to war crimes in certain circumstances in trials before the International Criminal Court. The defence of superior orders to war crimes has been prohibited in every international instrument concerning crimes under international law since the Nuremberg Charter and international law prohibits this defence in national courts. Therefore, should be expressly excluded as a defence in Portugal's implementing legislation.

### **Statutes of limitations, amnesties, pardons or similar measures of impunity and immunities**

On draft Article 7<sup>o</sup>, which appears to correspond to Article 29 of the Rome Statute, it does not seem to apply to crimes defined in Articles 17<sup>o</sup> and 18<sup>o</sup> regarding the crimes of incitement of hatred and recruitment of mercenaries.

There does not appear to be any provision in the draft regarding amnesties, pardons or other similar measures of impunity. Such measures are contrary to international law when they concern crimes under international law and states should not take such measures that prevent either the discovery of the truth, determination of guilt or innocence in a criminal trial, or full reparations. Other states, such as Brazil in Article 3<sup>o</sup> of its implementing legislation, have prohibited such measures.

Similarly, it does not appear to be anything corresponding in the draft regarding immunities of officials from prosecution. We note that the Portuguese Constitution seems to state several conditions regarding prosecution of the heads of state, members of parliament and members of the government. We would like to ask whether these conditions prevent the trial in a Portuguese court of nationals of Portugal or other states suspected of having committed a crime defined in the Rome Statute on the basis of the same evidence as might result in a conviction by the International Criminal Court.

### **Fair trials**

The draft does not seem to provide guarantees of fair trials, either with regard to cooperation with the Court or with regard to Portuguese criminal proceedings. We would like to ask for clarification if each of the international fair trial guarantees recognized in Articles 9, 14 and 15 of the International Covenant on Civil and Political Rights and Articles 55 and 62 to 68 of the Rome Statute have corresponding provisions in the Portuguese Constitution and in national legislation and in which terms. According to Article 20 (3) (b) of the Rome Statute, if trials in a national court of a person accused of genocide, crimes against humanity or war crimes were not conducted "in accordance with the norms of due process recognized by international law", the Court may conduct a new trial for the same crimes.

### **Cooperation**

We note that the draft does not include any provisions regarding cooperation with the Court. Once the Court has determined that it may exercise jurisdiction, states parties agree under Article 86 to cooperate fully with the Court. This means that they must guarantee that the Prosecutor and the defence can conduct investigations in territories under their jurisdictions, cooperating with Court orders and requests and facilitating and assisting Court investigations in obtaining documents, locating and seizing assets of the accused, conducting searches for and seizures of evidence, locating and protecting witnesses and arresting and surrendering accused persons. States parties must also recognize the legal personality of the Court and authorize it to sit in their territories and respect the privileges and immunities of the Court, its personnel, counsel, experts, witnesses and other persons whose presence is required.

In addition, they must ensure reparations for victims of crimes under international law, try cases of offences against the administration of justice, and provide for the enforcement of judgements and sentences.

Finally, states parties should provide a transparent process involving broad consultation with civil society for the nomination of candidates to be judges or prosecutor and should also provide for public education and training of officials on the provisions of the Rome Statute and the principles of the International Criminal Court

Only by providing for these guarantees in national legislation will effective implementation of the Rome Statute will be ensured, thus not allowing perpetrators of genocide, crimes against humanity and war crimes to escape justice.

We regret the fact that process of drafting Portuguese implementing legislation was not transparent and not open to the broad participation of civil society. This letter is being brought before you for your consideration in order to assist the common task to ensure that Portuguese legislation incorporates all the obligations undertaken under the Rome Statute and customary and conventional international law. Due to the lack of time we could not prepare a more detailed comment on the draft. It is, however, our intention to prepare a more detailed analysis of the draft Portuguese legislation. Nevertheless, we are not experts in Portuguese law, and we would, therefore, welcome clarification of a number of points raised in this letter. We think it would be useful to include these clarifications in the explanatory memorandum to accompany the legislation.

Amnesty International would like to express its interest in continuing this dialogue with all parties involved in this historic effort to bring an end to impunity for crimes of genocide, crimes against humanity and war crimes, wherever they may be committed.

Yours sincerely,

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