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President of the Commission of Constitutional Affairs, Rights, Liberties and Guarantees
Dra. Assunção Esteves
Palácio de São Bento
Assembleia da República
1249-068 Lisboa
PORTUGAL

10 November 2003

Dear President,

Amnesty International would like to submit for your consideration some comments relating to draft law n° 72/IX adapting the Portuguese criminal legislation to the Rome Statute of the International Criminal Court (Rome Statute), defining conduct that constitutes crimes under international law, and bills n° 224/IX and n° 262/IX modifying the Portuguese Penal Code with regard to crimes defined in the Rome Statute. These three bills were approved given a first reading by the Parliament in plenary session on 18 September 2003 and then transmitted to the Commission of Constitutional Affairs, Rights, Liberties and Guarantees (Commission) to be analysed in detail and voted on a second reading. According to paragraphs 1 and 2 of Article 168 of the Constitution of the Portuguese Republic “Debate of bills and draft legislation shall comprise a first reading general debate and a second reading debate on detail” and “Voting comprises a vote on the first reading, a vote on the second reading and a final overall vote”.

First, we would like to welcome the important initiative of Portugal in drafting legislation implementing the Rome Statute. 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) and by ratifying the Rome Statute on 5 February 2002. We hope that the Portuguese legislation, when enacted will serve as an example to encourage other countries to support the full implementation of the Rome Statute.

We would now like to discuss some matters of concern that we would like to draw to your attention. These matters of concern are better explained in the document attached. We would welcome clarification of a number of ambiguous provisions. In the report accompanying the draft of the Commission, it would be helpful to have a commentary explaining to Parliament how each article in the draft fulfils Portugal’s obligations under the Rome Statute and other international law or provides greater protection and more effective cooperation. Unless otherwise indicated, if we note the absence

of a provision implementing the Rome Statute, we recommend that a provision be included in the implementing legislation doing so.

Although there are a number of progressive elements in the three drafts, Amnesty International is deeply concerned that many of the definitions of crimes in the draft legislation are weaker than in the Rome Statute, the Elements of Crimes, adopted by the Assembly of States Parties at its first session in September 2002 pursuant to Article 9 of the Rome Statute, and other international law and that these weaker definitions could lead to impunity in Portugal for the worst crimes in the world.

These concerns are particularly marked with respect to war crimes and crimes against humanity involving sexual violence. The express recognition of these crimes in the Rome Statute was a major advance in the development of international law and it is disappointing that the drafts do not fully incorporate the definitions in the Rome Statute and the Elements of Crimes of these complex crimes. Amnesty International has prepared a *Checklist for Effective Implementation*, AI Index: IOR 40/019/2003, July 2000, a copy of which is enclosed, to assist states in fulfilling their obligations under the Rome Statute and other international law when drafting implementing legislation.

Regrettably, in contrast to other countries, such as Brazil, the Democratic Republic of the Congo, Senegal and the United Kingdom, Portugal did not conduct a transparent process of drafting these bills and involving a broad consultation with civil society from the very beginning of the drafting process. Although the working group that prepared draft law 72/IX did receive copies of the Amnesty International *Checklist*, it did not engage a dialogue with civil society before it began to draft. All of Amnesty International's concerns about the draft legislation could have been avoided if Portugal had conducted a transparent process and consulted civil society from the start.

We note that there are no provisions in any of the drafts regarding cooperation with the Court. We also note that Portugal has already enacted legislation with regard to the international justice cooperation under law n° 144/99 of 31 August 1999. We are reviewing that legislation in the light of Portugal's obligations under the Rome Statute and will raise any concerns with the Minister of Justice.

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 and we would 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.

States parties such as Argentina, Brazil, the Democratic Republic of the Congo, Gabon, Senegal, Spain and the United Kingdom conducted a transparent drafting process and broad consultation with civil society before completing a draft for submission to parliament and, in each such case, the draft submitted to parliament was improved in significant respects. We hope that the Commission and 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.

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. In the light of the great

importance of the matters discussed in this letter to Portugal and to the rest of the international community, Amnesty International is making it public on its website: <http://www.amnesty.org> and providing copies to the President of the Assembly of States Parties, all organs of the Court and civil society.

Yours sincerely,

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Portuguese draft implementing legislation on the Rome Statute of the International Criminal Court

Defining crimes

DRAFT LAW N ° 72/IX

We note that draft Article 8°, 1, b) on genocide seems to include only “causing serious bodily harm”, but not “causing serious 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 to which Portugal acceded on 9 February 1999. The definition in the Genocide Convention, which the International Court of Justice declared more than a half century ago to reflect customary international law, should not be weakened in any way. With regard to the word “agreement” to commit genocide, on draft Article 8°, 3), we would welcome clarification on the scope of its application and whether it is broader or more restrictive than in Article 25 of the Rome Statute.

We are deeply concerned that the crime “rape” is not expressly prohibited in the draft, either as a crime against humanity or as a war crime. Hundreds of thousands of women have been the victims of rape as a crime against humanity or as a war crime in the half century since Nuremberg.

This crime should be punished as rape, not simply as unspecified criminal conduct. The prohibited conduct in draft Article 9°, g), (i) and in draft Article 10°, 1, g) seems to be broader than the definition of rape used by the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu* case and in judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY). However, it is important to categorize this conduct, which has targeted women throughout history, as rape to send a powerful message to all would-be perpetrators that it is unequivocally condemned.

On the other hand, with regard to draft Article 9°, g) and draft Article 10°, 1, g), on coercive circumstances, we would like to mention that under international law, as evidenced by the Elements of Crimes, the Trial Chamber of the ICTR in the *Akayesu* case and other judgments of the ICTR and the ICTY, coercive circumstances in rape cases are not limited to physical force.

With regard to the identically worded definition of the crime against humanity of sexual slavery and the war crime of sexual slavery in draft Article 9°, g), (ii) and draft Article 10°, 1, g), it should include all the conduct prohibited in the Elements of Crimes and covered by the contemporary understanding of the scope of this crime. That conduct includes acts of a sexual nature where the perpetrator exercised any or all of the powers attaching to the right of ownership over persons. As the Elements of Crimes instrument makes clear, the definition should prohibit exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956, which includes debt bondage, serfdom, forced marriage and exploitation of children. This crime also includes trafficking in persons, particularly women and children.

We also would like to mention that the crime of sexual violence is not limited to a physical invasion of the human body, but, as the Elements of Crimes instrument makes clear, includes acts of a sexual nature induced by force or threats of force or coercion.

With regard to the crime of enforced prostitution we would like to ask for clarification if there is a definition of prostitution in Portuguese legislation and, if so, in what 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 as a result of threat of force or coercion.

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. If so, such a broader definition is to be welcomed.

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 Portuguese 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.

We note that draft Article 9°, f), does not include the second part of the definition of Article 7 (2) (e) of the Rome Statute “except that torture shall not include pain or suffering arising only from inherent in or incidental to, lawful sanctions”. This omission is to be welcomed. Although this phrase, which appears in Article 1 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, means lawful under international law, it has been cited erroneously to justify the use of the death penalty and corporal punishment.

Regarding draft Article 9°, g), iv), it seems that it only applies to conduct with the intent to modify the ethnic composition of a population, rather than “carrying out other grave violations of international law” as in Articles 7 (2) (f), 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Rome Statute. Thus, many war crimes or crimes against humanity of forced pregnancy could go unpunished in Portugal.

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 the grounds of gender, as in draft Article 9^o, h) should be interpreted in accordance with the definition of gender recognized by the United Nations. That definition refers to the socially constructed roles played by men and women that are attributed to them based on their sex. The term “sex” refers to physical and biological characteristics of men and women. The term “gender” refers to the explanations for observed differences between men and women based on socially assigned roles. For more information about these terms as recognized in the United Nations, see Implementation of the outcome of the 4th World Conference on Women, Report of the Secretary-General, U.N. Doc. A/51/322 (1996), para. 9 (citing the Report of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995)); for the leading commentary on all of the war crimes and crimes against humanity of sexual violence more information with regard to the crimes of sexual slavery, enforced prostitution, sexual violence and the definition of gender in the Rome Statute, see Machteld Boot, *Article 7, in Otto Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 142-145 and 171-172 (Baden-Baden: Nomos Verlagsgesellschaft 1999).

We welcome the definition in draft Article 15^o, a), which appears to be a broader definition than Article 8 (2) (a) (iv) of the Rome Statute, adding the element “or of a great value”, as an alternative to the requirement of “extensive”.

With regard to draft Article 10^o, 2), b), which is intended to implement Article 8 (2) (a) (v) of the Rome Statute, the expression “forces” should be given a broad interpretation in order to include all entities covered by the First Additional Protocol to the Geneva Conventions (Protocol I), ratified by Portugal on 27 May 1992.

Draft Article 11^o, d) does not seem to indicate what would be excessive effects of “launching an indiscriminate attack that harms the civilian population or civilian objects knowing that such attack will cause loss of civilian lives or civilian 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^o, 2), a) does not appear to include the crime of “deportation” as in Article 8 (2) (b) (viii) of the Rome Statute.

With regard to draft Article 11^o, g), we note that the war crime of “declaring that no quarter shall be given” in Article 8 (2) (b) (xii) and Article 8 (2) (e) (x) of the Rome Statute extends to include conducting hostilities on the basis that there should be no survivors, even in the absence of a declaration.

Draft Article 13^o, 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.

There does not appear to be any provision in the draft corresponding to Articles 8 (2) (b) (xiii) and (xv) of the Rome Statute, nor to Articles 8 (2) (e) (viii) and (xii). The failure to include these four war crimes is a serious omission. The omission of a provision corresponding to Article 8 (3) of the Rome Statute, however, is to be welcomed as it is an unnecessary provision.

We welcome the extension of the application of certain war crimes in draft law n^o 72/IX 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^o, b) and c), 14^o, 16^o, 12^o and 11^o e) and f), to non-international armed conflict.

We note the inclusion in the draft of the war crimes in Articles 17° of draft law n° 72/IX (publicly and in a repeated way to incite hatred against people with the purpose to start a war) and 18° (recruitment of mercenaries).

BILL N° 224/IX

Draft Article 241°, 1, and 2, which does not include “in particular” in the expression “as part of a plan or policy or as part of a large-scale commission” as in Article 8 (1) of the Rome Statute, is very troubling as it would restrict Portugal’s jurisdiction over war crimes to only the war crimes that would be the primary focus of the Prosecutor of the Court, thus excluding the very cases that should be the primary responsibility of states.

With regard to draft Article 241°, 2, d), it does not seem to include “damage to civilian objects” as in Article 8 (2) (b) (iv) of the Rome Statute.

It does not appear that draft Articles 241°, 2, i) and 241°, 4, j) include “dental or hospital treatment” as in Articles 8 (2) (b) (x) and 8 (2) (e) (xi) of the Rome Statute.

With regard to draft Articles 241°, 2, k) and 241°, 4, i) we note that the war crime of “declaring that no quarter shall be given” in Article 8 (2) (b) (xii) and Article 8 (2) (e) (x) of the Rome Statute extends to include conducting hostilities on the basis that there should be no survivors, even in the absence of a declaration.

Draft Article 241°, 2, m) does not seem to include “actions” of the nationals of the hostile party as in Article 8 (2) (b) (xiv) of the Rome Statute, thus denying persons in occupied territories their right to a judicial remedy for violation of their other rights.

The word “unlawful” in Article 7 (2) (f) of the Rome Statute, which includes violations of both international and national law, is replaced in draft Articles 241°, 2, u) and 239° - A, g) by “in violation of the norms or the principles of international law”. The concept of a violation of norms or principles of international law would seem to be broader than unlawful under international law, but it would not necessarily include all conduct that was unlawful under national law as in the Rome Statute.

Draft Article 241°, 4, e), corresponding to Article 8 (2) (e) (vi) of the Rome Statute, does not seem to include a definition of the war crime, not of an international character, of forced pregnancy.

Draft Article 241°, 5) does not extend “to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups” as in Article 8 (2) (f) of the Rome Statute, which was designed to cover the majority of armed conflicts occurring today.

Article 8 (3) of the Rome Statute does not seem to have any corresponding provision in the draft. This omission is to be welcomed as Article 8 (3) of the Rome Statute is unnecessary.

We note that the crime against humanity of sexual slavery listed in Article 7 (1) (g) of the Rome Statute does not seem to be specifically mentioned in the draft. Even if it was intended that this crime be covered in draft Article 239° - A, g), it is essential that all conduct prohibited by this crime against humanity be included, as discussed above.

Article 7 (2) (a) of the Rome Statute does not seem to have corresponding provision in the draft. To the extent that this omission was intended to broaden the scope of prohibited conduct, it is to be welcomed.

Article 7 (3) of the Rome Statute does not seem to have corresponding provision in the draft. The legislation should make clear that the term “gender” is consistent with the definition of gender recognised by the UN, as discussed above.

BILL N° 262/IX

There does not appear to be any provision in the draft corresponding to the crime of genocide defined in Article 6° of the Rome Statute. We note that the crime of genocide already defined in Article 239° of the Portuguese Penal Code seems to include only “causing serious bodily harm”, but not “causing serious 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, as discussed above. With regard to the word “agreement” to commit genocide, on Article 239°, 3) of the Portuguese Penal Code, we would welcome clarification on the scope of its application and whether it is broader or more restrictive than in Article 25 of the Rome Statute.

We note that draft Article 241° - A, f), does not include the second part of the definition of Article 7 (2) (e) of the Rome Statute “except that torture shall not include pain or suffering arising only from inherent in or incidental to, lawful sanctions”. This omission is to be welcomed. Although this phrase, which appears in Article 1 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, means lawful under international law, it has been cited erroneously to justify the use of the death penalty and corporal punishment.

Draft Article 241° - A, i) does not include persecution on “other grounds that are universally recognized as impermissible under international law” as in Article 7 (1) (h) of the Rome Statute.

Article 7 (2) (a) of the Rome Statute does not seem to have a corresponding provision in the draft. To the extent that this omission was intended to broaden the scope of prohibited conduct, it is to be welcomed.

Article 7 (3) of the Rome Statute does not seem to have corresponding provision in the draft. The legislation should make clear that the term “gender” is consistent with the definition of gender recognised by the UN.

With regard to draft Article 241° - B, 2, l) and Article 241° - B, 4, j), we note that the war crime of “declaring that no quarter shall be given” in Article 8 (2) (b) (xii) and Article 8 (2) (e) (x) of the Rome Statute extends to include conducting hostilities on the basis that there should be no survivors, even in the absence of a declaration.

It appears that draft Article 241° - B, 2, t) should mention the Rome Statute when referring to Articles 121° and 123° that seem to refer to this Statute.

It seems that draft Article 241° - B, 5, does not extend “to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups” as in Article 8 (2) (f) of the Rome Statute, which was designed to cover the majority of armed conflicts occurring today.

Exercise of universal jurisdiction

We welcome the provision on universal jurisdiction in Article 5° of draft law n° 72/IX and in Article 5° of bills n° 224/IX and n° 262/IX. We note, however, that none of these provisions expressly authorizes investigations and requests for extradition without the suspect ever having been in Portugal.

Such a provision should be included in the Portuguese implementing legislation, to clarify that Portugal may fully exercise its complementarity obligations under the Rome Statute and other international law, including the Geneva Conventions of 1949 and Protocol I.

We recognize that it was not necessary in these draft articles to prohibit extradition to a place where a person could face the death penalty since paragraph 6 of Article 33° of the Constitution of the Portuguese Republic prohibits extradition “(...) for crimes that carry the penalty death or any other penalty causing irreversible damage to the physical integrity of the person under the law of the requesting State”. Amnesty International believes that the death penalty violates the right to life recognized in Article 3 of the Universal Declaration of Human Rights (UDHR) and is the ultimate cruel, inhuman and degrading punishment, contrary to the prohibition of Article 5 of the UDHR.

Extradition should not also be granted 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, ratified by Portugal on 15 June 1978, and Articles 55 and 62 to 69 of the Rome Statute. We recommend that Portugal should be able to ensure that it can 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.

With regard to Article 5° of drafts n° 224/IX and n° 262/IX, we would like to ask for clarification if the expression “unless otherwise provided in treaty or international convention” would prevent the prosecution in a Portuguese court of a person suspected of having committed a crime defined in the Rome Statute when there is sufficient admissible evidence to prosecute that person.

Principles of criminal responsibility and defences

We note that there do not appear to be any provisions in any of the three drafts regarding principles of criminal responsibility, except Article 6° of draft law n° 72/IX, which corresponds to the weak principle found only in Article 28 of the Rome Statute (Responsibility of commanders and other superiors), and not in other international instruments. This provision, if it were enacted, would put Portugal in breach of its solemn treaty obligations under Article 87 of Protocol I and other international law. In order to ensure an effective system of international justice, Amnesty International urges that principles of criminal responsibility in national legislation 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 draft law n° 72/IX, according to Article 4° of draft law n° 72/IX, we would like to ask for clarification in what terms do they apply and if they guarantee that each principles of criminal responsibility in the Rome Statute will be fully implemented.

Regarding Article 6°, n° 1) of draft law n° 72/IX, corresponding to Article 28 of the Rome Statute (Responsibility of commanders and other superiors) it appears that this draft article only applies unless otherwise provided in the Code of Military Justice. As regards to the application of the Code, we note that, according to Article 3° of draft law n° 72/IX, the provisions of the draft seem not to exclude the application of the 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 Article 6º, 1 and 2 of draft law nº 72/IX, 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.

With regard to Article 33 of the Rome Statute (Superior orders and prescription of law), we note that there does not seem to be a corresponding provision in any of the drafts. We would like to ask for clarification if there are corresponding provisions in the Portuguese 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

We are pleased to note that Article 7º of draft law nº 72/IX specifically states that criminal prosecutions and punishment for crimes of genocide, against humanity and war crimes are not subject to statutes of limitations. However, we note that this article does not seem to apply to crimes defined in draft Articles 17º and 18º regarding the crimes of incitement of hatred and recruitment of mercenaries.

Draft 262/IX does not seem to include any provisions with regard to non – applicability of statutes of limitations. We would like to mention that Article 29 of the Rome Statute provides that “crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”. Therefore, states parties must ensure that their legislation is consistent with Article 29 of the Rome Statute.

There do not appear to be any provisions in the drafts prohibiting 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 neither take such measures that prevent either the discovery of the truth, determination of guilt or innocence in a criminal trial or full reparations nor recognize them if taken by other states. Other states parties, such as Brazil in Article 3º of its draft implementing legislation (available on Amnesty International’s website: <http://www.amnesty.org>), have prohibited such measures.

Similarly, it does not appear to be any provision corresponding to Article 27 of the Rome Statute in the drafts regarding immunities of officials from prosecution. We note that the Portuguese Constitution includes several provisions with regard to the prosecution of the heads of state, members of parliament, members of the government and judges of the Constitutional Court, namely:

- paragraphs 1 and 2 of Article 130: “**1.** The President of the Republic shall be answerable before the Supreme Court of Justice for offences committed in the performance of his or her duties. **2.** It is the duty of the Assembly of the Republic to initiate the proceedings on proposal of one-fifth, that is supported by two-thirds, of the Deputies entitled to vote”;
- paragraphs 2 and 3 of Article 157: “**2.** Deputies may not be heard as witnesses or as defendants without the permission of the Assembly. In the latter case permission shall be

obligatory where there is strong evidence that a serious crime has been committed that is punishable with a maximum sentence of imprisonment for more than three years. **3.** Deputies shall not be detained or arrested unless on the authority of the Assembly or when found in flagrante delicto committing a felony punishable by imprisonment as set out in the above paragraph”;

- paragraph 1 of Article 196; “**1.** No member of the Government may be detained or imprisoned without the permission of the Assembly of the Republic, except for a felony punishable with a maximum sentence of imprisonment for more than three years and in flagrante delicto”;
- paragraphs 5 and 6 of Article 222: “**5.** Judges of the Constitutional Court enjoy the same guarantees as to independence, security of tenure, impartiality and immunities, and are subject to the same disqualifications, as judges of the other courts. **6.** The law may prescribe the immunities and other rules with respect to the status of judges of the Constitutional Court”.

We would like to ask whether these provisions prevent the trial in a Portuguese court of persons suspected of having committed a crime defined in the Rome Statute who could be tried on the basis of the same evidence in the International Criminal Court.

Fair trials

Guarantees of fair trials, either with regard to cooperation with the Court or with regard to Portuguese criminal proceedings, do not seem to be provided in any of the drafts. We welcome the fact that Article 32 of the Portuguese Constitution and Article 61 of the Portuguese Penal Code provide guarantees of fair trials with regard to Portuguese criminal proceedings. However, 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 69 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. The International Criminal Tribunal for the former Yugoslavia has excluded evidence taken by national police in violation of guarantees recognised in its Rules of Procedure and Evidence that are incorporated in Article 55 of the Rome Statute.