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Benin

Comments on the *Avant Projet de Loi Portant Mise en Œuvre du Statut de la Cour Pénale Internationale au Bénin*

INTRODUCTION

Amnesty International would like to submit its comments on the *Avant Projet de Loi Portant Mise en Oeuvre du Statut de la Cour Pénale Internationale au Bénin*, which implements the Rome Statute into national legislation. Amnesty International has previously commented on draft and enacted legislation of many countries, not only in Africa but also in other regions of the world.¹ The organization urges you to consider the following recommendations in examining the draft legislation.

Amnesty International understands that the draft legislation is at present being considered by the Supreme Court. The organization urges Beninese authorities to enact the draft legislation, with the amendments recommended below, as soon as possible.

Amnesty International's general position and recommendations on implementation are set out in *Cour pénale internationale: Liste des principes à respecter en vue d'une mise en oeuvre efficace de la Cour pénale internationale*, AI Index IOR 40/011/2000 (available on our website at <http://web.amnesty.org/pages/icc-implementation-fra>). The *Liste des principes* indicates both what states parties are *required* to do under the Rome Statute of the International Criminal Court (Rome Statute) and what Amnesty International recommends that they *should* do to ensure that the International Criminal Court (Court) is an effective complement to national courts and that their authorities are legally prepared to cooperate fully with the Court. It is designed to assist states in determining quickly whether their courts and other authorities can implement particular statutory requirements or whether they need to draft new - or amend existing - legislation. The *Checklist* does not suggest particular solutions, as these will vary depending on each state's legal system.

Some and non-exhaustive comments on the Beninese *Avant Projet* follows.

¹ See web.amnesty.org/pages/icc-implementation-fra

I. POSITIVE COMMENTS ON THE DRAFT LEGISLATION

Amnesty International welcomes several provisions contained in the *Avant Projet*. In particular, Amnesty International welcomes that the draft does not provide for the death penalty as a legitimate punishment for those responsible of committing genocide, crimes against humanity and war crimes. The exclusion of the death penalty, which Amnesty International considers a violation of the right to life and the right not to be subjected to the ultimate cruel, inhuman and degrading punishment (contrary to Articles 3 and 5 of the Universal Declaration of Human Rights and other international human rights instruments), would also bring Benin (should this Draft legislation become law) - into line with the increasing abolition of the death penalty in Africa. Currently, 13 African countries have abolished the death penalty *de jure* (Angola, Cape Verde, Côte d'Ivoire, Djibouti, Guinea-Bissau, Liberia, Mauritius, Mozambique, Namibia, São Tome and Príncipe, Senegal, Seychelles and South Africa) and 11 countries have abolished *de facto* (Benin, Burkina Faso, the Central African Republic, Congo (Republic of), Gambia, Kenya, Madagascar, Mali, Mauritania, Niger and Togo).

Africa reflects the world wide trend away from the use of the death penalty. Capital punishment has now been abolished, in law or practice, in 122 countries, over half the world's countries. Only a tiny minority of countries now carry out state killings. Amnesty International believes that the death penalty should be removed from – in practice *and* law too – all nations.

The positive approach taken by the *Avant Projet* – which complies with the highest international standards – is also consistent with the exclusion of the death penalty as a punishment in international criminal courts, such as in the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court of Sierra Leone, the Special Panels in Dili, East Timor and the legislation establishing the Extraordinary Chambers for Cambodia. If these decisions are read together with the well-established standards that the death penalty should be used only for the most serious crimes in countries that have not yet abolished it, the implication is that the death penalty should not be used at all. Therefore, if the use of the death penalty is excluded for the most serious of international crimes (including genocide), it can hardly be countenanced for lesser crimes.

In this respect, Amnesty International is concerned that capital punishment still remains in ordinary legislation in Benin although no execution has taken place since 1987. The organization urges the Beninese authorities to abolish the death penalty for all crimes.

Another provision to be welcomed that is contained in the Draft is Article 12, which, in keeping with customary international law, excludes statutory limitations and rejects amnesties and pardons for those responsible for genocide, crimes against humanity and war crimes. These provisions, in line with many other drafts in Africa and Latin America, are fundamental tools in the fight against impunity.

Provisions contained in Articles 6 and 21 of the *Avant Projet* on the irrelevance of the official position eliminate immunities based on the official capacity of any alleged perpetrators of genocide, crimes against humanity and war crimes and are in accordance with Article 27 of the Rome Statute. Such provisions will make possible to prosecute any official under national law for crimes under international law and, in accordance with the Statute too, to surrender any official to the Court.

The recognition of the rights of persons under an investigation, through Article 28 of the *Avant Projet* is also in compliance with the Rome Statute and a positive step, as well as the insertion of a provision providing for privileges and immunities for the Court, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, and other staff of the International Criminal Court, as well as facilities for counsels, experts and witnesses and any other person required to be present at the seat of the Court (Article 33, *Avant Projet*).

II. CONCERNS REGARDING THE DRAFT LEGISLATION

Amnesty International is deeply concerned about a number of provisions in the *Avant Projet*. The organization's main concerns can be summarized as follows:

a) Definition of crimes

Unfortunately, the *Avant Projet* maintains the distinction between war crimes committed in international and non-international armed conflicts. Amnesty International considers that it is indefensible that certain acts are defined as war crimes when they are committed in an international armed conflict, but not when committed in a non-international armed conflict, apart from a limited number of war crimes that can only be committed in one type of armed conflict, such as the delayed repatriation of prisoners of war.

The reference to "Article 18" in Article 17 (a) and (h) is mistaken, as it should read as "Article 16", which provides the right sense to the sentence.

Amnesty International also regrets the draft legislation to the extent that it does not broaden the definition of certain war crimes under the Rome Statute or encompass crimes which – although they were defined in other international instruments - were excluded from the Rome Statute. These crimes, some of which seen by Amnesty International in an early version of this very Draft, include attacks against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive loss of life, injury to civilians,

or damages to civilians objects; the unjustifiable delay repatriation of prisoners of war and civilians; attacks on non-defended localities and demilitarized zones, among others.

Amnesty International is particularly disappointed to learn that the definition of the war crime of conscripting or enlisting children in international and non-international armed conflicts has not been drafted in accordance to international conventional law. As it is known, the Rome Statute sets the age of the prohibition at children under fifteen years, thus weakening the protection of children in comparison with the highest international standards, such as the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts. Not only is Benin a state party to it (Benin ratified it on January 2005) – bearing the duty to comply with it - but also made a remarkable declaration upon ratifications, which reinforces its duty. It reads as follows:

“The Government of the Republic of Benin declares that the minimum age at which it permits the recruitment of volunteers into the armed forces and the national gendarmerie is eighteen (18) years (cf. article 13 of Act No. 63-5 of 30 May 1963 on recruitment in the Republic of Benin)”.

Recommendation:

- Bearing in mind the aforementioned declaration and taking into account the duties arising out the Optional Protocol – which ensure that persons who have not attained the age of 18 years are not compulsorily recruited into the armed forces - the *Avant Projet* should also amend the definition of the war crime of conscripting or enlisting children to prohibit recruitment or use of child soldiers under the age of 18.

b) Scope of jurisdiction

Amnesty International welcomes the introduction into the *Avant Projet* of a provision on universal jurisdiction over the crimes of genocide, crimes against humanity and war crimes, as set out in Article 13 of the draft legislation. However, Amnesty International is concerned that Article 13 (2) introduces a restriction on the scope of universal jurisdiction so as to requests the physical presence of the person on the territory of Benin before an investigation can be opened (“*Dans ce cas, les poursuites ne peuvent avoir lieu que si l’inculpé ou l’un des inculpés se trouve sur le territoire national au moment de la plainte*”). Not only is this restriction not required by any rule of customary international law, but also it is inconsistent with the system of repression of grave breaches of the Geneva Conventions of 1949, which envisage states parties seeking the extradition of persons suspected of grave breaches who have never been in the requesting state.

Amnesty International recommends that all states parties to the Rome Statute should enact the broadest jurisdiction possible under international law, consistently with the

Preamble of the Rome Statute, in which states parties recall that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. This includes each state’s jurisdiction under international law, and should not limit such jurisdiction to certain classes of persons. By enacting the broadest jurisdiction possible, Beninese police and prosecutors will be able to act before a person suspected of such crimes enters Beninese territory and will be able to work effectively with other states in the shared responsibility to investigate and prosecute international crimes wherever they are committed.

Recommendation:

- The provision contained in Article 13 (2) should be deleted.

c) Ne bis in idem principle

Amnesty International is concerned that the current draft adopts a problematic definition with regard to the principle of *ne bis in idem*. Article 3 takes into account only persons already tried by the International Criminal Court. In addition, Article 3 omits the third paragraph of Article 20 of the Rome Statute, which provides for an exception to the *ne bis in idem* principle. From Amnesty International perspective the Beninese Draft – which keeps silent on this - should provide for the national jurisdiction when the proceedings before another national court were not conducted independently or impartially, or were conducted inconsistently with an intent to bring the person concerned to justice.

Recommendation:

- Amnesty International recommends that Article 3 should be amended so as to allow proceedings before Beninese national courts when proceeding before other national courts were not conducted independently or impartially, or were conducted inconsistently with an intent to bring the person concerned to justice.

d) Defence of superior orders

Amnesty International is disappointed to see that the current draft legislation, in its Articles 9 and 10, permits the defence of superior orders coming from a military or a civilian supervisor. The current draft mirrors Article 33 of the Rome Statute, which was included in the Statute for trials only before the Court at the insistence of the United States of America and a few other states, despite the fact that the defence of superior orders is prohibited under customary and conventional international law in all other international criminal courts.

Recommendation:

- Amnesty International recommends that the defences in national law should not be any broader than those permitted in the Rome Statute and, in some cases, as in the present case, should be narrower to be consistent with customary and conventional international law. Therefore, Articles 9 and 10 should be amended.

e) The Court must be authorized to sit in Benin

Amnesty International encourages all states parties to incorporate provisions in their law to facilitate the Court, particularly the Pre-Trial and Trial Chambers, sitting in their territory, as provided for Article 3 (3) of the Rome Statute. They should also facilitate the use of audio and video links in their territory to permit testimony and examination of witnesses unable to travel to the seat of the Court. The *Avant Projet* does not include a provision permitting the Court to sit in Benin. The lack of provisions authorizing the Court to sit in its territory is worrying and a new provision in such a sense should be added to the *Avant Projet*.

Recommendation:

- The *Avant Projet* should include a provision authorizing in advance – without any further approval – the Court to sit in any territory subject to Beninese jurisdiction.

f) Beninese legislation should not contain grounds for refusal of requests for assistance by the Court in connection with investigations and prosecutions.

Amnesty International understands that the provisions contained in Articles 37 and 38 of the *Avant Projet* – at first sight not referred to the exceptional cases based on confidential information - do not specify under which circumstances or in which cases may Benin reject its cooperation with the Court. Such broad provision, which seems to reflect a discretionary power, would allow national authorities to reject any request from the Court.

Recommendation:

- The draft should amend these provisions so as to ensure that there are no legal or political bars to cooperation and that there are procedures available under national legislation for all the forms of cooperation which are specified under Part 9 of the Rome Statute.

g) The National Trust Fund must be an effective tool for the benefit of victims

Amnesty International finds that the provision contained in Article 22 of the Draft, although well inspired, looks to be insufficient. Article 22 states that the Fund for the benefit of victims will collect its funds exclusively through fines and forfeitures, which does not seem to be fully adequate for the purposes of benefiting victims. Without a strong governmental and budgetary support the National Trust Fund will become purely theoretical and will not help victims or their relatives.

Recommendation:

- The National Trust Fund should obtain its funds not only from fines and forfeitures but also, and mainly, from the national budget.

III. ADDITIONAL RECOMMENDATIONS

Amnesty International also urges Beninese authorities to take other essential steps to ensure that the investigation and prosecution of crimes under international law before domestic courts are fully effective, including:

- implementing the Agreement on Privileges and Immunities of the International Criminal Court recently ratified by Benin, unless Beninese authorities believe such implementation is not necessary and the Agreement provisions are self-executing;
- declining to ratify the bilateral impunity agreement with the United States of America;

CONCLUSION

Amnesty International hopes that the draft legislation implementing the Rome Statute into national law in Benin will be included on the parliamentary agenda and discussed before Parliament as soon as possible. Amnesty International also hopes that Beninese parliamentarians will incorporate the recommendations outlined above into the draft legislation before it is enacted by Parliament.