AMNESTY INTERNATIONAL

# Memorandum from Amnesty International to the government of the Democratic Republic of the Congo

**February 2011**

Amnesty International's comments and recommendations on the second draft of the *Avant-Projet de Loi relative aux Chambres spécialisées pour la répression des violations graves du droit international humanitaire* (the Avant-Projet de Loi).

Amnesty International has worked for 50 years to end grave abuses of human rights. The organisation has particular expertise on ensuring effective national efforts to address impunity.

In the last decade, for example, Amnesty International has monitored and provided detailed input on the establishment of internationalised criminal courts operating within national justice systems supported by international judges, prosecutors, staff and other experts. These internationalised courts include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Chamber in Bosnia Herzegovina, the Panels of the Dili District Court in East Timor and the Panels in the Courts of Kosovo. The Specialised Chambers proposed in the Avant-Projet de Loi follow the internationalised criminal court model.

The success of the Specialised Chambers will depend in particular on several key elements:

- The chambers must be able to try all crimes under international law, and those crimes must be defined in accordance with international standards.
- The chambers must be able to try any accused person, including members of the armed forces. Existing constitutional and legal provisions that give military courts exclusive jurisdiction over crimes committed by members of the armed forces must be repealed.
- The chambers must be able to investigate and prosecute crimes under the principle of superior responsibility, which should be defined in the Avant-Projet de Loi as equally applicable to military commanders and civilian superiors.
- The chambers must be part of a long-term initiative to rebuild the national justice system.

Amnesty International further recommends that the legislation establishing these Specialised Chambers and governing their work reflect the following 10 essential principles. In this Memorandum, we analyse the current Avant-Projet de Loi, testing it against each of these principles. We offer detailed recommendations for improving the draft legislation. We also identify other changes that are needed in order to end impunity and secure justice, access to the truth, and full reparations for victims of crimes under international law.

## 1. Internationalised criminal courts must form part of a broader national effort to ensure justice for all victims of crimes under international law

The internationalised criminal court model has been increasingly employed in the last decade in response to large-scale crimes under international law, in particular where national justice system are weak or have been severely damaged. The experience of the last ten years demonstrates that internationalised criminal courts are not effective solutions to impunity on their own. Such courts can only pursue a small number of cases. If the national justice system does not take up the remaining cases, whose number frequently reaches the thousands, the effect is to entrench impunity instead of addressing it effectively.

For example, the Special Court for Sierra Leone has prosecuted only nine persons for crimes committed in the conflict. Sierra Leone's national justice system remains weak, and it has failed to prosecute any of the thousands of other suspects. Most perpetrators of crimes in Sierra Leone continue to enjoy complete impunity, both because of inadequate legislation—war crimes and crimes against humanity are not defined as crimes in national law—and because of an amnesty, in contravention of international law.

It is essential that the establishment of Specialised Chambers in the Democratic Republic of the Congo does not repeat the flaws of other internationalised criminal courts. The Specialised Chambers must form part of a comprehensive plan to address impunity.

The goal of ending impunity is best served by an approach that includes the following elements:

- The Democratic Republic of the Congo should develop a long-term initiative to ensure that victims of crimes under international law have access to justice through the national justice system, including ordinary civilian courts. The Specialised Courts should be seen as a part of this initiative.
- Such an initiative should reflect close consultation with civil society, including women and members of minority groups, following the recommendations of the UN Secretary-General in a 2004 report, *The rule of law and transitional justice in conflict and post-conflict societies* (U.N. Doc. S/2004/616, 23 August 2004).
- The long-term initiative should reflect the principle of complementary jurisdiction by ordinary courts over crimes under international law. A component of the initiative should be to enable ordinary courts to take on an increasing number of such cases during the time (currently envisaged as up to a 10-year period) that the Specialised Chambers carry out their functions. Articles 18 and19 of the Avant-Projet de Loi should be amended to note that the Specialised Chambers and the ordinary courts will have complementary jurisdiction over crimes under international law.
- The Specialised Chambers' judges and other personnel must not be isolated from the rest of the criminal and civil justice system—the investment in and experienced gained from the Specialised Chambers must have a positive impact on the national justice system as a whole.
- The short-term gain in expertise that foreign judges, prosecutors and other experts may bring, either as participants or as advisers, must benefit the whole justice system by building the capacity of local judges and lawyers in this specialised area of law.

In short, the Specialised Chambers must be part of, and not detract from, the long-term goal of rebuilding the national justice system.

## 2. Internationalised criminal courts must be impartial and independent

Independence and impartiality are essential for any criminal court. Without these attributes, the right of the accused to a fair trial cannot be ensured. Moreover, adequately addressing large-scale crimes under international law requires even-handed investigation and prosecution of crimes by all sides and equal access to justice for all victims.

Because internationalised criminal courts are established to support weak national justice system, they must have particularly strong safeguards to guarantee their impartiality and independence. The failure to do so can undermine the credibility of the institution and its efforts to ensure justice for victims, as the experience with the Extraordinary Chambers in the Courts of Cambodia notably demonstrates.

The fragility of the civilian and military justice systems in the Democratic Republic of the Congo has been well documented, including by the United Nations Office of the High Commissioner in the *Report of the Secretary-General's Investigative Team Charged with Investigating Serious Violations of Human Rights and International Humanitarian Law in the Democratic Republic of Congo* (U.N. Doc. S/1998/581, annex, 29 June 1998),and by the United Nations Special Rapporteur on the Independence of Judges and Lawyers in his April 2008 report [A/HRC/8/4/Add.2].

Resolving these issues requires comprehensive reform. The Democratic Republic of the Congo should reinforce the national justice system, including in the following ways:

- Move immediately to end political and military interference in the justice system.
- Establish systems to protect those who work within the justice system from reprisals.
- Take steps to ensure respect for the tenure of judges.
- Guarantee the financial security that is required for the effective operation of the courts.

International judges and prosecutors, working closely with national judges and prosecutors in an advisory, training and monitoring role, could help to protect the impartiality and independence of the Specialised Chambers and contribute to the effectiveness and efficiency of the Specialized Chambers. Such involvement of international judges and prosecutors could act as a check against political interference. In addition, the involvement of experienced international prosecutors in advising, training and monitoring prosecution teams may provide important support to national prosecutors, who may face threats and intimidation in the course of their work.

If international judges and prosecutors are also to serve as judges and prosecutors in the Specialized Chambers, as envisaged in Articles 3 and 9 of the Avant-Projet de Loi, we recommend a number of changes in the Avant-Projet de Loi to ensure that the best possible persons are selected for such posts and to strengthen protections of their independence and impartiality:

- The independence of foreign judges appointed as ad litem judges should be guaranteed by terms of appointment of a length sufficient to allow them to see cases through from beginning to end. Based on the experience of other internationalised criminal courts, these terms should be at least five years. If article 5 specifies a term of office, it should further provide for automatic extension for such time as is necessary to conclude all matters before the judge ad litem.
- Article 5 should also provide that the terms of judges ad litem may only be shortened on the basis of purely neutral criteria—for example, where all matters before that judge ad litem are concluded.

- The selection process for foreign judges and prosecutors should be the same as that for Congolese judges and prosecutors.

## 3. Internationalised criminal courts should not have unduly restrictive mandates

The mandates of internationalised criminal courts must be sufficiently broad to enable them to fulfil the goal of ending impunity for crimes under international law.

Unfortunately, some internationalised criminal courts have been arbitrarily precluded from investigating and prosecuting many crimes due to limits placed on the period in which the crimes were committed or on the individuals they can prosecute. For example, the Special Court for Sierra Leone was only mandated to prosecute "those bearing the greatest responsibility" for crimes under international law, which was interpreted by the Court's prosecutors to mean only a few of the very senior leaders.

Article 19 of the second version of the Avant-Projet de Loi defines the Specialised Chambers' temporal jurisdiction to acts occurring between 1990 and "ce jour," which may be interpreted to foreclose consideration by the chambers of acts that continue into the future.

Article 22 notes that the Specialised Chambers may consider cases against members of the armed forces, police forces, and armed groups. (This article does not specify that the Specialised Chambers may also consider cases against civilian superiors; we examine the implications of this omission in section 5, below.)

The Avant-Projet de Loi does not address the fact that under article 156 of the National Constitution, the military courts have jurisdiction over crimes committed by members of the armed forces and national police. The Code Penal Militaire specifies that the military courts' jurisdiction in such cases is exclusive. (See Loi No. 024/2002 du 18 novembre 2002 portant Code pénal militaire, art. 161 ["En cas d'indivisibilité ou de connexité d'infractions avec des crimes de génocide, des crimes de guerre ou des crimes contre l'humanité, les jurisdictions militaires sont seules compétentes."])

If the provision of the Avant-Projet de Loi is found to contradict the constitutional provision, the result would be a two-tier system of justice, with damaging consequences. As the UN Mapping Report notes, "Some of the problems that affect the whole of the Congolese judicial system seem to be exacerbated by the very nature of military justice, which is characterised by a strict hierarchy, internal solidarity between members of the forces, and top-down control over any criminal trial of members of the armed forces or the police"; the result is "almost total impunity." (UN Mapping Report ¶ 950.)

The jurisdictictional provisions of the Code of Military Justice are a serious obstacle to justice and should be revised. The National Constitution should also be amended and the Avant-Projet de Loi should clarify that article 156 of the National Constitution is not an obstacle to the investigation and prosecution of members of the armed forces and police by the Specialised Chambers.

The following steps are critical in order to ensure that the Specialised Chambers are able to exercise jurisdiction over members of the armed forces:

- Amend article 156 of the National Constitution to provide that military courts do not have jurisdiction to investigate and prosecute crimes under international law.
- Amend article 161 of the Code of Military Justice to provide that the investigation and prosecution of crimes under international law are not within the jurisdiction of military courts.

- Specify in article 18 of the Avant-Projet de Loi that the Specialised Chambers shall not defer or transfer proceedings involving crimes by the armed forces or the national police to military courts.
- Amend article 19 to remove its current second paragraph, consistent with the prohibition in international law on statutes of limitations for crimes under international law.

## 4. Internationalised criminal courts must investigate and prosecute crimes as defined in international law

Internationalised criminal courts should be mandated to investigate and prosecute crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances. Omitting crimes or defining them inconsistently with international law could contribute to impunity.

The phrase "grave violations of international humanitarian law" ("violations graves du droit international humanitaire") appears in the title of the Avant-Projet de Loi and throughout its text. This phrase is commonly understood in international criminal law as a sub-category of war crimes.

Moreover, the current draft sets out "applicable law" (articles 15 and 17) and elsewhere notes the crimes that fall under the jurisdiction of the Specialised Chambers (article 18). This approach creates the risk of confusion, particularly because the crimes listed as falling within the court's subject-matter jurisdiction are not the same as those identified in the provisions that set forth "applicable law."

For the avoidance of doubt, the Avant-Projet de Loi should be revised in the following ways to clarify that the remit of the Specialised Courts extends to all crimes under international law:

- Articles 15, 17, and 18 should be combined into a single article that sets forth the Specialised Court's subject-matter jurisdiction.
- The new article should specify that the Specialised Chambers have jurisdiction over:
    - all war crimes in international and non-international armed conflict. The reference to war crimes should incorporate (1) the crimes set forth in article 8 of the Rome Statute, (2) the crimes contained in other international humanitarian law treaties ratified by the Democratic Republic of the Congo, and (3) the crimes identified by the rules of customary international law.
    - crimes against humanity, as defined in article 7 of the Rome Statute
    - genocide, as defined in article II of the Convention on the Prevention and Punishment of the Crime of Genocide, and ancillary forms of genocide, as listed in article III of that convention
    - torture, as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
    - extrajudicial executions,
    - enforced disappearances, as defined in the International Convention for the Protection of All Persons from Enforced Disappearance
- Each of these crimes should be defined with precision in the Avant-Projet de Loi.

## 5. Internationalised criminal courts must apply principles of criminal responsibility in accordance with international law

International law provides that statutes of limitations, amnesties and immunities should never apply to crimes under international law. Traditional elements of extradition treaties such as the principle of double criminality should not prevent prosecution of crimes under international law, nor should the principle of *ne bis in idem* (that one cannot not be tried twice for the same crime) be applied in a way that results in impunity. Under the principle of superior responsibility, military and civilian commanders are subject to prosecution for crimes under international law that result from their orders, actions or inaction, or negligence, as well as when they fail to respond effectively to crimes that have been committed. Subordinates, in turn, may not escape responsibility for crimes under international law by relying on the defence that they were acting on orders.

The principle of double criminality appears in many extradition agreements. Under this principle, the alleged crime for which extradition is sought must be criminal in both the state that makes the extradition request and the state that receives the request. This principle does not apply when the allegations amount to a crime under international law. All states have a shared obligation to investigate and prosecute conduct that amounts to crimes under international law, by doing so in their own courts, by extraditing the suspect to another state, or by surrendering that person to an international criminal court. States cannot escape this obligation by refusing to extradite on the basis of double criminality. Article 33(a) of the Avant-Projet de Loi does not reflect this important limitation on the principle of double criminality.

The obligation to extradite or try (*aut dedere aut judicare)* is triggered by the suspect's presence in the state. This obligation is not conditioned on other factors—the state's obligation to try is immediate and does not depend on the existence of an extradition request by another state or a surrender request by the International Criminal Court. If, then, a suspect is found in the Democratic Republic of the Congo, the state must submit the case of the person concerned to its prosecuting authorities for the purposes of prosecution unless it can without delay extradite or surrender the person. Articles 33(b) and (c) are not consistent with the Democratic Republic of the Congo's *aut dedere aut judicare* obligations.

Article 33(c) raises an additional potential obstacle to prosecution. This provision is the final of three cumulative conditions necessary for the prosecution for crimes committed abroad. This provision requires two elements: (1) that "under Congolese law, the act could give rise to extradition" ("selon le droit congolais, l'acte peut donner lieu à l'extradition,") but (2) the suspect was not extradited. This provision could preclude the prosecution of crimes under international for reasons that should not apply to such crimes. For example, these obstacles could include a prohibition on the extradition of nationals, recognition of a foreign statute of limitations, recognition of a foreign amnesty or pardon, a prohibition of extradition for political offences, or recognition of foreign immunities.

The principle that one cannot be tried twice for the same crime is a fundamental principle of law and is affirmed in the International Covenant on Civil and Political Rights, Additional Protocol I, the constitutive instruments establishing the ICTY, ICTR and the Special Court for Sierra Leone, and other treaties. This principle prohibits retrial in the same jurisdiction after acquittal. The Human Rights Committee has concluded that article 14(7) of the ICCPR "does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this prohibition prohibits double jeopardy only with regard to an offence adjudicated in a given State." (*A.P. v. Italy,* No. 204/1986, 2 November 1987.) The Trial Chamber in the *Tadić* case reached the same conclusion, noting that the principle "is generally applied so as to cover only double prosecution in the same State." (*Prosecutor v. Duško Tadić,* Case No. IT-94-1-A, 15 July 1999.) This limitation on the scope of the principle of *non bis in idem* serves international justice by permitting other states to step on when the

territorial state or the suspect's state conducts a sham or unfair trial. This important limitation on the principle of *non bis in idem* is not reflected in article 32.

The principle of superior responsibility in international law is found in Articles 86 (2) and 87 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), to which the DRC is a party; Article 6 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind; and, in part, Article 28 of the Rome Statute, applicable in trials before the International Criminal Court, which falls short of other international law by establishing a lesser standard for civilian superiors than for persons acting as military commanders. In addition, the Committee against Torture has concluded that superiors cannot escape criminal responsibility for torture committed by their subordinates.

The principle of superior responsibility as set forth in the second draft of the proposal does not clearly set forth in sufficient detail the principle as incorporated in Protocol I and reflected in the Draft Code of Crimes. Further, the second draft does not provide that the same strict standard of responsibility applies to military commanders and to civilian superiors.

- Amend article 23 to provide a definition of superior responsibility that is consistent with the strictest standards of international law, including that in Protocol I. This definition should explicitly note that superior responsibility applies to both military commanders and civilian superiors.
- Amend article 22 to note that the Specialised Chambers may hear matters against civilians as well as members of military and police forces and armed groups.
- Revise article 27 to clarify that superior orders may not be used as a defence to any of the crimes over which the Specialised Chambers have jurisdiction.
- Revise article 33 to remove potential barriers to the investigation of crimes under international law and to comply with the Democratic Republic of the Congo's obligation to extradite or try those suspected of committing crimes under international law.
- Revise article 32 to provide that a final judgement in another jurisdiction for acts that amount to crimes under international law does not preclude prosecution in the Democratic Republic of the Congo for those acts.
- Specify in articles 18 and 20 that no immunity applies to crimes under international law. In particular, the reference in article 20 to international treaties concluded or ratified by the Democratic Republic of the Congo should clarify that no such treaty shall be read to confer immunity on any individual who is charged with a crime under international law.

## 6. Internationalised criminal courts must not apply the death penalty or any other cruel, inhuman or degrading treatment or punishment

Amnesty International opposes the death penalty in all cases as a cruel, inhuman and degrading punishment. We note that no contemporary internationalised criminal court or international criminal court has provided for this punishment.

The Democratic Republic of the Congo retains the death penalty. The Avant-Projet de Loi does not explicitly foreclose sentences of death in cases brought before the Specialised Chambers.

- At a minimum, the Avant-Projet de Loi should provide that the Specialised Chambers shall not apply the death penalty in any case.

## 7. Internationalised criminal courts must respect the right to fair trials

Respecting the right to a fair trial is a fundamental requirement of any criminal court, internationalised or national. Amnesty International therefore welcomes the inclusion of a number of fair trial guarantees in articles 39 and 40 of the Avant-Projet de Loi that must be respected by the Specialised Chambers, including the presumption of innocence, the right to silence, the right to legal representation and interpretation (if required) and the prohibition of coercion, torture or other cruel, inhuman or degrading treatment punishment.
However, articles 39 and 40 omit many of the necessary fair trial guarantees. In particular, it is not clear from Article 39(b) whether indigent suspects will be provided with legal aid to pay for their defence, a particular concern in light of the UN Mapping Report's finding of the "poor organization of legal aid." (See UN Mapping Report ¶ 918.)

- The legislation should provide clearly whether and how defendants can access legal aid.
- The list of fair trial guarantees should be expanded, drawing from the rights of all persons connected with the investigation and the accused listed in articles 55 and 67 of the Rome Statute. These rights include the right to adequate time and facilities for the preparation of the defence, the right to be tried without undue delay, and the right to be present at trial.

## 8. Internationalised criminal courts must protect witnesses

The investigation and prosecution of crimes under international law, in particular in situations where crimes continue to be committed, inevitably raises serious risks for witnesses (including victims) of the crimes who participate in various stages in the investigations and proceedings. Most internationalised criminal courts, including the Special Court for Sierra Leone, have established special units within the court to provide effective witness protection.

Amnesty International is deeply concerned that, according to the UN Mapping Report, there is currently "no witness protection mechanism in the DRC" (¶ 922). The draft legislation fails to address this issue, although it makes a general commitment in article 43 to the protection of victims, without establishing a victim and witness protection unit. An effective system of witness protection must be in place to support the work of the Specialised Chambers from the beginning.

- A special witness protection unit or units should be established to ensure the protection and support of witnesses. Initially, these units should be managed by experts on witness protection, drawing on the best possible experience from around the world, with national staff who can be trained to continue building a long-term witness protection system throughout the Democratic Republic of the Congo.
- The legislation would benefit from a separate section for witness protection.

## 9. Internationalised criminal courts should allow victims to participate in the criminal process and be mandated to award full and effective reparations to victims of crimes convicted by the court

Victims of crimes under international law should play an active and empowered role in the justice process beyond simply providing testimony.

Internationalised criminal courts have a mixed practice in relation to victims. A number have denied victims to participate or to provide for awarding reparations to the victims. The Extraordinary Chambers in the Courts of Cambodia, however, does provide for participation in the process and for awarding reparations to victims.

Article 43 of the Avant-Projet de Loi recognizes the role of the Specialised Chambers in "rendering effective access to justice for the victims, to respond to their needs for truth, security, rehabilitation and reparations." This recognition is useful, but it should be framed in terms of rights rather than needs.

The legislation fails to define how the Specialised Chambers will achieve these goals. Noting the serious challenges victims face in accessing justice in the Democratic Republic of the Congo, including their often long distance from courtrooms, their inability to pay the costs of legal advice for seeking reparations and difficulties in enforcing reparations orders if they are awarded (including orders against the state), it is essential that effective mechanisms and procedures are put in place to facilitate and ensure their access to the justice process and full and effective reparations before the Specialised Chambers.

In developing the Avant-Projet de Loi further, the government should consult with civil society and victims' representatives. They should be guided in particular by articles 68 and 75 of the Rome Statute of the International Criminal Court, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law and the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity.

At a minimum, the Avant-Project de Loi should be revised to include the following:

- Victims of crimes prosecuted by the Specialised Chambers should be notified about proceedings at every stage.
- They should have access to the courtroom and should have the ability to present their views at appropriate stages in the process, with legal assistance to enable them to do so.
- They should receive psychological support, as necessary, throughout the process. Practical measures should be taken to identify appropriate organisations and institutions that provide psychological support and to refer appropriate cases for such support.
- The second paragraph of article 43 should be revised to require the Specialised Chambers in each case to determine the scope and extent of any damage, loss and injury to or in respect of victims and award full and effective reparations to victims and their families. The article should expressly recognise that the Specialised Chambers may award all forms of reparations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
- Specific strategies for effective outreach should be incorporated into the Specialised Chambers process, to ensure that victims fully understand the Specialised Chambers and the opportunities it offers them for seeking justice and reparations. Outreach should inform affected communities about the work and decisions of the Specialised Chambers.
- Article 43 should note that the measures it provides for "ne doivent être ni préjudiciables ni contraires aux droits de la défense et aux exigences d'un procès équitable et impartial."

## 10. Internationalised criminal courts should be adequately funded by the national government with the assistance of the international community

Internationalised criminal courts must have sufficient resources to function effectively in all areas. Most internationalised criminal courts have experienced serious financial difficulties,

both from insufficient investment by the national authorities and inconsistent voluntary contributions by the international community.

The justice system in the Democratic Republic of the Congo has long suffered from a lack of investment. Between 2004 and 2009, the government spent an average of 0.6% of its national budget on the justice system, as compared to between 2 and 6% in most other countries. Much more is required to address the serious problems that exist and restore the rule of law.

Amnesty International urges the government to invest significantly in the Specialised Chambers process as well as other efforts to rebuild the national justice system.
Supplementary financial contributions from other states should also be sought. Such contributions should be in addition to the government's own increased investment.