



Ref: TG/AFR 62/06.09
AI Index: AFR 62/004/2006

London, 14 February 2006

Dear Deputy,

Amnesty International would like to submit its comments on the September 2005 draft legislation to implement the obligations of the Democratic Republic of Congo (DRC) under the Rome Statute of the International Criminal Court (Rome Statute) (*Loi modifiant et complétant certaines dispositions du code pénale, du code d'organisation et de la compétence judiciaires, du code penal militaire et du code judiciaire militaire, en application du statut de la cour penale internationale*). Amnesty International has previously commented on the 2002 and 2003 versions of the draft legislation (*République Démocratique du Congo: Commentaires et recommandations du projet de loi de juillet 2003 portant mise en oeuvre du Statut de Rome de la Cour pénale internationale*, AI Index: AFR 62/008/2004, 28 May 2004 and *République Démocratique du Congo: Commentaires et analyse du projet de loi de la RDC portant mise en œuvre du Statut de Rome de la Cour pénale internationale*, AI Index: AFR62/031/2003, 29 September 2003; both available at <http://web.amnesty.org/pages/icc-implementation-fra>). The organization welcomes the transparency and consultation with civil society with which the government has drafted this legislation. We urge Congolese parliamentarians to consider our recommendations in examining the draft legislation.

Amnesty International understands that the draft legislation will be considered at the next parliamentary session. The organization urges Congolese parliamentarians to prioritize consideration of the draft legislation as soon as possible. Amnesty International is seriously concerned that none of the three states in which the International Criminal Court (Court) has announced investigations (the DRC, Uganda and Sudan) have enacted legislation implementing the Rome Statute into national law. For the DRC, this is a matter of the utmost urgency as the Prosecutor of the Court announced in December 2005 that the investigation was in its “advanced stages”. The failure of the DRC so far to enact implementing legislation has led to complications and delays in the Court’s ability to investigate crimes that fall within its jurisdiction. It is important that implementing legislation be enacted before any indictments are issued by the Court.

Positive comments on the draft legislation

Amnesty International welcomes certain provisions in the September 2005 draft legislation. Article 1 guarantees certain habeas corpus rights. Article 5, containing proposed Article 21-3 of the Penal Code, eliminates official immunities for the perpetrators of genocide, war crimes and crimes against humanity, while Article 6, containing proposed Article 34 bis of the Penal Code, rejects the possibility of amnesty or pardon for these crimes. Amnesty International also welcomes the draft legislation to the extent that it broadens the definition of crimes under the Rome Statute. For

example, Article 10, containing proposed Article 221 of the Penal Code, broadens the definition of the crime of genocide to include the forced transfer of children or members of a group to another group. Importantly, the draft legislation also brings the war crime of recruiting or conscripting child soldiers into line with international law standards by defining child soldiers as those under 18 years of age (Article 10, containing proposed Article 224 (2) (z) of the Penal Code). In addition, the draft legislation contains welcome provisions regarding the protection of victims, including their physical and psychological well-being, their dignity and their right to privacy (Article 14, containing proposed Article 11-1 of the Penal Code). Amnesty International also welcomes the re-insertion of a provision providing for privileges and immunities of the staff of the Court, which was deleted from the July 2003 draft (now Article 15, containing proposed Article 121-1 of the Penal Code).

Concerns regarding the draft legislation

However, Amnesty International continues to be concerned about a number of provisions in the draft legislation. The organization's main concerns can be summarized as follows:

Death penalty The draft continues to provide for the death penalty for genocide and crimes against humanity (this penalty was introduced in the 2003 draft legislation). While Amnesty International takes note of the explanation set out in the *exposé des motifs* that the penalty for crimes under the Rome Statute should be consistent with other penalties under Congolese law, the organization considers that the situation should actually be the other way around: the penalty for crimes under Congolese law should be consistent with international standards, which exclude the death penalty as a sanction. The organization, therefore, recommends that the DRC should replace the death penalty with a term of imprisonment reflecting the grave nature of crimes under international law. To do so would be consistent with the exclusion of this penalty as a punishment that can be imposed in international criminal courts in the Rome Statute, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Statute of the Special Court of Sierra Leone, the regulation establishing the Special Panels in Dili, East Timor and the legislation establishing the Extraordinary Chambers for Cambodia.

Exclusion of the death penalty, which Amnesty International considers to violate the right to life and to constitute the ultimate cruel, inhuman and degrading punishment, contrary to Articles 3 and 5 of the Universal Declaration of Human Rights, would also bring the DRC into line with the increasing abolition of this penalty in Africa where it has been abolished *de jure* in 13 countries (Angola, Cape Verde, Côte d'Ivoire, Djibouti, Guinea-Bissau, Liberia, Mauritius, Mozambique, Namibia, São Tome and Príncipe, Senegal, Seychelles and South Africa) and *de facto* in 11 others (Benin, Burkina Faso, the Central African Republic, Congo (Republic of), Gambia, Kenya, Madagascar, Mali, Mauritania, Niger and Togo). The death penalty has now been abolished in law or practice in 122 countries; 60 per cent of all the countries of the world.

Recommendation: Amnesty International recommends that draft Article 10, containing proposed Articles 221 and 222 of the Penal Code, should be amended to replace the death penalty with a term of imprisonment reflecting the grave nature of the crimes of genocide and crimes against humanity.

Definition of crimes While Amnesty International welcomes the inclusion in the draft legislation of a wider range of war crimes than was included in the 2003 draft, the organization is still concerned that not all crimes that are defined as war crimes under the Rome Statute and under the Geneva Conventions and their Additional Protocols are included in the draft legislation. For example, the draft legislation (Article 10, containing proposed Article 224 of the Penal Code) does

not include the war crimes of unjustified delay in repatriation of prisoners of war once hostilities have ceased, nor does it include the war crime of attacks on demilitarized zones.

In addition, the draft legislation 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.

Recommendation: Amnesty International recommends that a single standard should be adopted with regard to war crimes, and the draft legislation should remove the distinction between war crimes committed in international and non-international armed conflict, apart from the narrow exceptions indicated.

Ambiguous language The draft contains language which is similar but in places not identical to that used in the Rome Statute. For example, the draft uses '*le commerce*' rather than '*la traite*' when defining the crime against humanity of enslavement (Article 10, containing proposed Article 222 (3) of the Penal Code). Such changes, which appear to be restrictive, are not explained in the *exposé des motifs*. This ambiguity of language could allow national courts to interpret these crimes in a way that falls short of their definition in the Rome Statute.

Recommendation: Amnesty International recommends that all crimes in the draft legislation should be defined consistently with the definitions in the Rome Statute or other stricter international law, or an explanatory note should be attached to the *exposé des motifs* to ensure that these crimes are interpreted correctly.

Universal jurisdiction Amnesty International welcomes the introduction into Congolese national legislation of universal jurisdiction over the crimes of genocide, crimes against humanity and war crimes, as set out in the *exposé des motifs* and Article 4 of the draft legislation. However, Amnesty International is concerned that Article 4 introduces an ambiguity as to whether such jurisdiction will be subject to a requirement that the person be present on the territory of the DRC before an investigation can be opened and extradition requested.

Recommendation: 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, Congolese police and prosecutors will be able to act before a person suspected of such crimes enters Congolese 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.

Ne bis in idem Amnesty International is concerned that the current draft continues to adopt the problematic definition of the July 2003 draft with regard to the principle of *ne bis in idem*. Article 3, containing proposed Article 2 ter and quarter of the Penal Code, takes into account only persons already tried by national courts, not those already tried by the Court. In addition, Article 3 omits the second part of Article 20 (3) of the Rome Statute, which provides for an exception to the *ne bis in idem* principle when the proceedings before another 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 to be fully consistent with Article 20 of the Rome Statute.

Defence of superior orders Amnesty International is disappointed to see that the current draft legislation 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 and national courts.

Recommendation: Amnesty International recommends that Article 5, containing proposed Article 23-1 of the Penal Code, be replaced with Articles 12 and 13 of the 2003 version of the draft legislation.

Pre-trial rights Amnesty International is concerned that the current draft still does not include sufficient pre-trial rights. States parties to the Rome Statute enacting implementing legislation must ensure that they fully implement all the provisions of Article 55, which guarantees fair trial rights from the earliest stages of criminal proceedings, both for suspects and others. The current legislation (Article 14, containing proposed Article 11 of the Penal Code) contains some, but not all, of the pre-trial rights recognized in Article 55.

Recommendation: Amnesty International recommends that Article 14 should be revised to be consistent with the provisions of Article 55 of the Rome Statute.

Penalties Amnesty International is concerned that the draft legislation introduces a distinction in the severity of the penalty for different war crimes. Amnesty International recommends that all war crimes should be capable of being punished by the maximum sentence, subject to appropriate mitigating factors, as set out in Rule 145 of the Rules of Procedure and Evidence of the International Criminal Court. In addition, Amnesty International is concerned that the draft legislation provides for lesser penalties for some offences against the administration of justice than those provided in the Rome Statute, which states that a term of imprisonment of up to five years may be imposed.

Recommendation: Some offences in the draft legislation are punishable only by up to three years imprisonment; Amnesty International recommends that these penalties should be made consistent with those which can be imposed by the Court under the Rome Statute.

Other recommendations

Amnesty International also urges the DRC to take several other essential steps to ensure that the investigation and prosecution of crimes under international law in the DRC is effective, including:

- ratifying and implementing the Agreement on Privileges and Immunities of the International Criminal Court;
- declining to ratify or implement the executive impunity agreement with the United States of America;
- developing and implementing a long-term national action plan to end impunity for all crimes under international law committed in the DRC, no matter how long ago and no matter what the official status of those who committed them. Such a plan should include rebuilding the national justice system throughout the country, with the view of

investigating and prosecuting all crimes under international law, wherever feasible, in fair proceedings without the death penalty. It should also establish effective procedures to ensure reparations for victims, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, to help them rebuild their lives;

- providing the fullest possible assistance to the Court in the protection of victims, witnesses and Court investigators, in sharing and safeguarding evidence, and in arresting and surrendering persons indicted by the Court without delay.

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

Yours sincerely,

Martin Macpherson,
Director, International Organizations
International Law and Organizations Program