

BRAZIL:

IMPLEMENTATION OF THE
ROME STATUTE OF THE
INTERNATIONAL CRIMINAL
COURT IN NATIONAL
LEGISLATION

AMNESTY
INTERNATIONAL



Amnesty International Publications

**First published in March 2009 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org**

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**Index: AMR 19/005/2009
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom**

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BRAZIL: IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT IN NATIONAL LEGISLATION

Amnesty International welcomes the submission to National Congress of the draft legislation to implement the Rome Statute of the International Criminal Court (Rome Statute), six years after Brazil ratified it on 20 June 2002.¹ The draft legislation, if enacted, would be first in a Portuguese-speaking country to address both obligations to cooperate and complementarity obligations and the 5th in the Americas to do so.² The draft legislation, which is, at the moment, being analysed by the Comissão de Constituição e Justiça e de Cidadania in Câmara dos Deputados, has a number of positive elements. However, it also has some serious flaws, including the failure to include rape as a crime against humanity or as a war crime, which should be remedied if Brazil, which played an important role in the drafting of the Rome Statute, is to fulfil its obligations under that landmark treaty.

The organization is particularly pleased with some matters included in the bill that we consider to be very positive, which include, among others, the absence of statutes of limitations for genocide, crimes against humanity and war crimes and the inapplicability of amnesties, pardons or privileges to these crimes in draft Article 11 and the absence of any immunity for their perpetrators in draft Article 6. In addition, Amnesty International welcomes the inclusion of a provision providing for the application of the "*aut dedere aut judicare*" principle in draft Article 128, on Article 7, para. 4, (I), (c), which is in accordance with international law.

The organization is also pleased to note that the two separate crimes of association with and incitement to the practice of genocide (draft Articles 15 and 16) have been included, and that the death penalty does not apply to the crimes specified in the draft. In addition, the inclusion of the chapter relating to crimes against the administration of justice by the International Criminal Court (Court), as provided in Title V of the draft, is to be welcomed.

In 2003, Amnesty International submitted a public document with comments and suggestions related to the first draft of the implementing legislation, which was, returned to the Working Group for reformulation, due to constitutional concerns raised by the Civil House.

However, the organization notes with concern the existence in the current bill of certain serious flaws and omissions that, if retained in the enacted legislation, could undermine the effective exercise of the principle of complementarity by Brazilian courts and the cooperation with the ICC as laid down in Part 9 of the Rome Statute. These include omission of certain war crimes, as well as restricted definitions of crimes against humanity and war crimes and principles of criminal responsibility, such as responsibility of commanders and other superiors and superior orders, among others. Amnesty International would like to draw to the attention of the authorities of Brazil the subjects raised in this document and recommend that they be taken into consideration in the version of the legislation that becomes into force.

¹ PL – 4038/2008.

² Although Portugal has defined genocide, crimes against humanity and war crimes as crimes under national law, it has yet to enact effective cooperation legislation. In the Americas, only Argentina, Canada, Trinidad and Tobago and Uruguay have enacted legislation addressing both their cooperation and complementarity obligations.

PART 1. COMPLEMENTARITY:

I. DEFINING CRIMES, PRINCIPLES OF CRIMINAL RESPONSIBILITY AND DEFENCES

1. LEGISLATION SHOULD PROVIDE THAT THE CRIMES IN THE ROME STATUTE, INCLUDING OTHER CRIMES UNDER INTERNATIONAL LAW, ARE CRIMES UNDER NATIONAL LAW

Article 6 of the Rome Statute: genocide

Amnesty International welcomes draft Article 14, implementing the prohibition of genocide, draft Article 15 defining as a crime the association of more than three people to commit genocide and draft Article 16, recognising the jurisdiction of the Court over persons who directly and publicly incite others to commit genocide, implementing Article 25 (3) (e) of the Rome Statute and Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide.

Article 7 of the Rome Statute: crimes against humanity

Although the draft broadens the scope of a few crimes against humanity, Amnesty International is concerned that the draft omits certain crimes against humanity, including rape, and, in contrast to most states parties to the Rome Statute, defines many of these crimes more restrictively than in the Rome Statute and in other international law, which could lead to impunity for the worst imaginable crimes.

Article 7 (1) (b) and 7 (2) (b) of the Rome Statute, on extermination, is implemented in draft Article 19. The draft definition does not include the phrase “inter alia the deprivation of access to food and medicine”, in Article 7 (2) (b) of the Rome Statute. Amnesty International welcomes clarification if the draft definition is as broad as Article 7 (2) (b) of the Rome Statute and, if not, recommends that the language of the Rome Statute be used. It is important to categorize the conduct of deprivation of access to food and medicine as a crime, to send a powerful message to all would-be perpetrators that it is unequivocally condemned.

Article 7 (1) (c) and 7 (2) (c) of the Rome Statute, on slavery, is implemented in draft Article 20. The draft definition specifies the conduct to be considered a crime. However, it is not clear that, in including this specification, the provision is as broad as Article 7 (2) (c) of the Rome Statute. If not, the provision should be amended in accordance with the Rome Statute. In addition, the phrase “in particular women and children” is missing in the draft definition. On the other hand, the draft provision includes “trafficking of persons”, which appears to broaden the scope of the provision. Amnesty International asks for clarification if the rights of women and children are protected in the legislation of Brazil according to international human rights standards and, if not, recommend that the enacted legislation include definitions of crimes under international law committed against women and children according to the Rome Statute and the Geneva Conventions. The draft provision also includes trafficking in “human organs”. This inclusion is to be welcomed as it clarifies that the concept of other inhumane acts, which are not expressly defined in Article 7, include trafficking of organs.

Article 7 (1) (d) and 7 (2) (d) of the Rome Statute, on deportation or forcible transfer of population, is implemented in draft Article 21. The phrase “forced displacement of the persons concerned by expulsion or other coercive acts” in Article 7 (2) (d) of the Rome Statute is replaced in the draft provision by “[t]o promote . . . through violence, threat or any other form of coercion, the

deportation or the displacement of persons". Amnesty International asks for clarification if the draft provision fully covers all the prohibited conduct in the provision of the Rome Statute and, if not, recommends its amendment according to international criminal law standards.

Article 7 (1) (e) of the Rome Statute, on imprisonment or other severe deprivation of physical liberty, is implemented in draft Article 22. The definition of the Rome Statute is replaced in the draft by "[to] determine, execute or maintain measure of deprivation of liberty of movement, infringing fundamental norms of international law". Amnesty International would welcome clarification if the scope of application of the draft provision is more or less broad than the prohibited conduct defined in the corresponding provision of the Rome Statute and recommend that the broadest definition be included in the enacted version of the legislation.

Article 7 (1) (f) and (2) (e) of the Rome Statute, on torture, is only partially implemented in draft Article 23, defining torture as "to submit someone, under his, or her, guardianship, power or authority to intense physical or mental suffering, by means of violence or grave threat, or after having reduced his, or her capacity of resistance by any other means". The omission of the word "pain" and the requirement that the suffering be inflicted by means of "violence or grave threat", restricts the scope of Article 7 (2) (e) of the Rome Statute and the bill should be amended to ensure that it is fully consistent with the strictest requirements of international law.

Amnesty International welcomes the inclusion of the crime against humanity of degrading or inhuman treatment, which expands the list of crimes against humanity of the Rome Statute.

Articles 7 (1) (g) of the Rome Statute, on sexual crimes, is only partially implemented in draft Articles 25 to 31. However, the draft does not specifically mention "rape". Amnesty International recommends that in this matter those articles of the Rome Statute be interpreted in accordance with the Elements of Crimes definition:

'1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.'

Amnesty International encourages states to use this definition in implementing legislation of the Rome Statute and domestic criminal law because it is gender neutral and also it is comprehensive of the different forms of penetrative assault which can constitute rape. Furthermore, international human rights law has developed the concept of a right to sexual autonomy, which requires the penalisation and effective prosecution of any sexual act which is not genuinely and freely agreed to.

Draft Article 28, implementing the crime against humanity of sexual slavery in Article 7 (1) (g) of the Rome Statute, specifies the conduct to be considered slavery. However, it is not clear that, including this specification, the provision is as broad as Article 7 (1) (g) of the Rome Statute. If not, the provision should be amended in accordance with the Rome Statute.

Draft Article 30, implementing Article 7 (1) (g) and 7 (2) (f) of the Rome Statute, does not include the phrase "or carrying out other grave violations of international law", which severely restricts the scope of the crime. Amnesty International recommends that this draft provision be as broad as the

corresponding provision in the Rome Statute.

In connection with the final part of Article 7 (1) (g) of the Rome Statute, there does not appear to be any corresponding provision in the draft for “any other form of sexual violence of comparable severity” applicable to situations of sexual violence which are not only physical, but also mental. Amnesty International recommends its inclusion in the enacted legislation, in accordance with Article 7 (1) (g) of the Rome Statute.

In addition, draft Articles 25, 26, 27, 29 and 30 include the requirement of “violence or serious threat”, which restricts the scope of the crimes and sometimes would be difficult, if not impossible, to prove. Amnesty International recommends that the enacted version does not include such requirement.

Draft Article 32, implementing Articles 7 (1) (h) and 7 (2) (g) of the Rome Statute, on persecution, does not include either the “national” ground, or the phrase “or other grounds that are universally recognized as impermissible under international law”, which seriously restricts the scope of the crime. Amnesty International recommends that this draft provision be as broad as the corresponding provision in the Rome Statute. The draft definition does not include the phrase “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.” In this case, the omission appears to broaden the scope of the crime, and, therefore, is to be welcomed.

Article 7 (1) (k) of the Rome Statute, on other inhumane acts, appears to be implemented in draft Article 35. However, Amnesty International asks for clarification if the draft provision fully covers all the prohibited conduct in Article 7 (1) (k) of the Rome Statute and, if not, recommend its amendment accordingly.

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 deprivation of fundamental right on the grounds of gender, as in draft Article 32, 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 Christopher K. Hall, *Article 7*, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Second Edition, pp. 206-216 and 273 (C.H.Beck . Hart . Nomos 2008) and Michael Cottier, *Article 8*, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Second Edition, pp. 431-454 (C.H.Beck . Hart . Nomos 2008).

Article 8 of the Rome Statute: war crimes

Although the draft includes most war crimes, Amnesty International is concerned that the draft

omits certain war crimes, including rape, and, in contrast to most states parties to the Rome Statute, defines many of these crimes more restrictively than in the Rome Statute and in other international law, which could lead to impunity for the worst imaginable crimes.

Article 8 (1) of the Rome Statute, which recommends priorities for the Prosecutor of the ICC and is not part of the definitions of the crimes, does not appear to have any corresponding provision in the draft legislation. The organization welcomes the decision to omit it as it would have led to impunity in national courts for war crimes that did not meet this high threshold.

The prohibitions of torture, in Article 8 (2) (a) (ii) of the Rome Statute, and wilfully causing great suffering, or serious injury to body or health, in Article 8 (2) (a) (iii) of the Rome Statute, both appear to be implemented in part in draft Article 46, which does not seem to cover the full scope of application of both provisions of the Rome Statute. According to Knut Dörmann, *Article 8, in Otto Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Second Edition, pp. 310 (C.H.Beck . Hart . Nomos 2008), "In accordance with the case law of the ICTY, [the element of the crime] recognizes that the crime is not limited to causing physical suffering or pain, but includes also the causing of mental suffering or pain". In addition, the draft provision includes the phrase "with the use of violence or serious threat, or after having reduced, by any other means, the capacity of resistance", which restricts the scope of application and is not in accordance with international criminal law standards, namely the definition of the crime against humanity of torture in Article 7 (2) (e) of the Rome Statute and Article 1 (1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Brazil on 28 September 1989. Amnesty International recommends that the enacted version of the implementing legislation fully cover the scope of application of Article 8 (2) (b) (ii) and (iii) of the Rome Statute.

The war crime of inhuman treatment in Article 8 (2) (a) (ii) of the Rome Statute is defined in draft Article 47. The draft definition includes the phrase "offending his, or her, dignity or decency, exposing him, or her, to mockery or public curiosity, or constraining him, or her, to not doing what the legislation allows, or to do what the legislation does not require". The draft definition, in listing the conditions that will be considered crime, appears to be more restrictive than the definition of the Rome Statute. Amnesty International recommends that this draft definition be revised in accordance with the corresponding definition in the Rome Statute and the provisions international criminal law.

Article 8 (2) (a) (v) of the Rome Statute, on compelling a prisoner of war or other protected person to serve in the forces of a hostile power, is implemented in draft Article 50. However, the draft definition includes the phrase "through violence or threat", which appears to restrict the scope of application. Amnesty International welcomes clarification if this draft provision fully covers the prohibited conduct in the corresponding provision of the Rome Statute and, if not, recommends its amendment to be as broader as international law standards.

Article 8 (2) (b) (viii) of the Rome Statute, on transfer or deportation, is implemented in draft Article 60. However, the draft provision does not include the word "deportation", with regard to "all or parts of the population of the occupied territory". Amnesty International welcomes clarification if this prohibited conduct in the Rome Statute is covered by draft Articles 52 and 40 (I) (c) and, if not, recommends its amendment according to Article 8 (2) (b) (viii) of the Rome Statute.

Article 8 (2) (b) (xi) and 8 (2) (e) (ix) of the Rome Statute seem to have been implemented in draft Article 59 referring to the war crime of perfidy. The draft definition does not include the requirement of “killing or wounding . . . individuals belonging to the hostile nation or army”, but “to obtain advantage from the enemy”, which appears to broaden the scope of application of the prohibited conduct.

Article 8 (2) (b) (xiv) of the Rome Statute, on the rights and actions of the nationals of the hostile party, does not appear to have any corresponding provision in the draft legislation. Amnesty International recommends the inclusion of such a provision in the enacted legislation.

Article 8 (2) (b) (xv) of the Rome Statute, on compelling the nationals of the hostile party to take part in the operations of war directed against their own country, is implemented in draft Article 50. However, the draft definition includes the phrase “through violence or threat”, which appears to restrict the scope of application. Amnesty International welcomes clarification if this draft provision fully covers all the prohibited conduct in the corresponding provision of the Rome Statute and, if not, recommends its amendment to be as broad as in international law.

Article 8 (2) (b) (xvii) and (xviii) of the Rome Statute, on employing poison and other materials, is implemented in draft Article 67. However, the draft provision includes the phrase “able to cause death or serious damage to other’s health”, which restricts the scope of application. Amnesty International recommends that the definition of these provisions of the Rome Statute in national legislation, be as broad as in international criminal law.

Article 8 (2) (b) (xx) of the Rome Statute, on employing prohibited materials and methods of warfare, is implemented in draft Article 69. However, the draft definition includes the requirement that the use of the prohibited arms, projectiles, materials or war methods be a violation of treaty to which Brazil is a state party. Since it is not likely that such an annex will be adopted in the near future, this approach is to be welcomed as it permits Brazil to implement such treaties automatically as soon as it ratifies them.

Article 8 (2) (b) (xxi) and 8 (2) (c) (ii) of the Rome Statute, on committing outrages upon personal dignity, appear to be implemented in draft Article 47. Amnesty International would welcome clarification if the draft provision fully covers all the prohibited conduct in these provisions of the Rome Statute and, if not, recommend its amendment according to those provisions.

Article 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Rome Statute, on sexual crimes, are only partially implemented in draft Articles 70 to 76. However, the draft does not specifically mention “rape”. 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. Amnesty International recommends that in this matter those articles of the Rome Statute be interpreted in accordance with the Elements of Crimes definition. See the recommendations above for the definitions of the corresponding crimes against humanity.

Draft Article 73, defining the war crime of sexual slavery in Article 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Rome Statute, specifies the conduct to be considered slavery. However, it is not clear that, in including this specification, the provision be as broad as Article 7 (1) (g) of the Rome Statute. If not, the provision should be amended in accordance with the Rome Statute.

Draft Article 75, defining the war crimes of forced pregnancy in Article 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Rome Statute, does not include the phrase "or carrying out other grave violations of international law", which severely restricts the scope of the crime, as in the definition of Article 7 (2) (f) of the Rome Statute. Amnesty International recommends that this draft provision be as broad as the corresponding provision in the Rome Statute.

In connection with the final part of Article 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Rome Statute, there does not appear to be any corresponding provision in the draft for "any other form of sexual violence" applicable to situations of sexual violence which are not only physical, but also mental. Amnesty International recommends its inclusion in the enacted legislation, in accordance with Article 8 (2) (b) (xxii) and 8 (2) (e) (vi) of the Rome Statute.

In addition, draft Articles 70, 71, 72, 74 and 75 include the requirement of "violence or serious threat", which restricts the scope of the crimes and would sometimes be difficult, if not impossible, to prove. Amnesty International recommends that the enacted version does not include such requirement.

Article 8 (2) (b) (xxvi) of the Rome Statute, on conscripting or enlisting children under the age of fifteen years, is implemented in draft Article 79. The inclusion of the threshold of 18 years, incorporating the age definition of child found in Article 1 of the Convention on the Rights of the Child ratified by Brazil on 24 September 1990, in draft Article 79 is to be welcomed.

Article 8 (2) (c) (iv) of the Rome Statute, on the passing of sentences and the carrying out of executions without previous judgment, which reproduces the war crime in common Article 3 of the Geneva Conventions, does not appear to have any corresponding draft provision. Amnesty International recommends that the enacted legislation includes such a provision.

Article 8 (2) (e) (viii) of the Rome Statute, on ordering the displacement of the civilian population for reasons related to the conflict, does not appear to have any corresponding draft provision. Amnesty International recommends that the enacted version includes such provision.

With regard to draft Article 13, on the subsidiary application of the Military Penal Code and the Military Code of Criminal Procedure, when the crimes defined in the draft legislation are investigated and prosecuted by the Military Justice, Amnesty International opposes trials by military courts of members of armed forces or security forces charged with crimes under international law. Trials of persons suspected of committing enforced disappearances in military courts are prohibited in Article 16 (2) of the UN Declaration on the Protection of all Persons from Enforced Disappearance and in article IX of the Inter American Convention on Forced Disappearance of Persons, to which Brazil is a signatory State. Amnesty International recommends that Brazil's implementing legislation of the Rome Statute, specifically states that all crimes under the legislation shall be investigated and prosecuted by ordinary courts, as other countries, such as Argentina and Uruguay, have already done.

2. NATIONAL COURTS SHOULD BE ABLE TO EXERCISE UNIVERSAL JURISDICTION IN ALL CASES OF CRIMES UNDER INTERNATIONAL LAW

Amnesty International welcomes the provision included in draft Article 128, amending Article 7 (III) of the Penal Code, providing for the exercise of Brazil's jurisdiction over genocide, crimes against humanity, war crimes, crimes against the administration of the Court and others to be added to the jurisdiction of the Court with the approval of Brazil, even if they were committed outside Brazilian

territory and by a non-Brazilian.

3. PRINCIPLES OF CRIMINAL RESPONSIBILITY IN NATIONAL LEGISLATION FOR CRIMES UNDER INTERNATIONAL LAW SHOULD BE CONSISTENT WITH CUSTOMARY INTERNATIONAL LAW

Article 22 of the Rome Statute: *nullum crimen sine lege*

Article 23 of the Rome Statute: *nulla poena sine lege*

Article 24 of the Rome Statute: non-retroactivity *ratione personae*

The draft legislation does not have any provisions regarding the principles of *nullum crimen sine lege*, *nulla poena sine lege* and non-retroactivity *ratione personae* for crimes under international law. According to paragraph 67 of the legal memorandum in the 2007 publication of the Military Prosecutor's Office, the draft legislation does not intend to repeat the general part of the Penal Code, which has subsidiary application regarding the crimes defined in the draft legislation. It also states that it was intended not to repeat the Rome Statute, whose provisions are applicable independent of the draft legislation and with a higher hierarchical status. Amnesty International would welcome clarification if such principles are guaranteed in Brazil for crimes under international law. If not, the organization recommends that the implementing legislation includes provisions guaranteeing the principles in Articles 22, 23 and 24 of the Rome Statute except that, consistent with Article 15 (2) of the 1966 International Covenant on Civil and Political Rights, it should define as crimes under national law genocide, crimes against humanity and war crimes regardless when they were committed since these crimes have been considered crimes under international law since the Second World War. Article 15 (2) of the ICCPR provides:

"Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

Article 25 of the Rome Statute: individual criminal responsibility

The draft legislation does not appear to provide for all principles of individual criminal responsibility for crimes under international law, as detailed in Article 25 of the Rome Statute, namely Article 25 (2) and (3) (a), (b), (c) and (d) (i) and (ii) of the Rome Statute.

Article 25 (3) (e) of the Rome Statute is implemented in draft Article 16 and the attempt to commit the crime is implemented in draft Article 2. However, it is not clear that draft Article 2, fully implements Article 25 (3) (f), by including the requirement of exceptional gravity. In addition, it does not include the phrase "but the crime does not occur because of circumstances independent of the person's intentions", which appears to restrict the scope of application. Amnesty International would request clarification if the draft provision is as broad as Article 25 (3) (f) of the Rome Statute and, if not, recommends its amendment according to the Rome Statute.

The penalty cannot be reduced solely on the ground that the convicted person expressed remorse for committing the crime. Amnesty International welcomes draft Article 3, stating that the penalty cannot be reduced solely because of subsequent remorse for having committed genocide, crimes against humanity and war crimes.

Amnesty International recommends that the enacted version of the implementing legislation

include all principles of individual criminal responsibility for crimes under international criminal law as listed in Article 25 of the Rome Statute to ensure that no person who would be convicted in the Court for certain conduct would be acquitted in a national court for the same conduct.

Article 26 of the Rome Statute: exclusion of jurisdiction over persons under eighteen

Given the wide range of ages of criminal responsibility in more than 192 national legal systems around the world, states could not agree at the Rome Diplomatic Conference on an age of criminal responsibility for crimes under international law. As a result of this impasse, at the initiative of the United Kingdom, a compromise was reached which avoided answering this difficult question. They simply provided that the Court would not have jurisdiction over crimes under international law committed by persons under the age of 18, leaving the question of the age of criminal responsibility of minors for such crimes to individual states. Thus, it was envisaged that states would be free to investigate and prosecute crimes by persons under the age of 18 but over the age of criminal responsibility under national law. States parties should ensure that national law governing criminal responsibility of persons who have committed crimes under international law when under the age of 18 is consistent with the rights of the child under international law, including the Convention on the Rights of the Child, which requires that judicial proceedings be appropriate for minors and prohibits the death penalty for such persons.

States parties should ensure that the rights of victims and their families to reparations for crimes under international law committed by persons under the age of 18 are fully respected. When persons are convicted of crimes under international law committed when they were under the age of 18 or otherwise are found responsible for such crimes, they should make reparations to the victims and their families. To the extent that they are unable to do so, their state of nationality should ensure that victims and their families obtain reparations.

There is no draft provision regarding the age of criminal responsibility. According to draft Article 13, the Penal Code is subsidiary applicable to crimes defined in the draft legislation, when prosecuted and judged by the Federal Justice and the Military Penal Code when investigated and prosecuted by the Military Justice. According to Article 27 of the Penal Code, persons under the age of 18 years do not have criminal capacity, because they are subject to norms established in special legislation. According to Article 50 of the Military Penal Code, persons under the age of 18 years do not have criminal capacity, unless if they are 16 years or older, reveal enough psychic development to understand the illicit character of the conduct and behave according to this understanding. Amnesty International would welcome clarification if those provisions apply to crimes defined in the draft legislation. The organization would also welcome clarification if the legislation of Brazil is fully consistent with the above principles and, if not, recommends that it ensure that the rights recognized in international law and standards of any minor involved in judicial proceedings, whether as a suspect, accused, victim or witness, are fully respected.

Article 28 of the Rome Statute: responsibility of commanders and other superiors

Article 28 of the Rome Statute is implemented in draft Article 7. As regards the factors determining the responsibility of superiors, the principles included in the draft are not quite as strict as the provisions of customary international law and conventional law which require that civilian superiors be subject to the same standards and responsibility as military commanders. In order to ensure that the international justice system is as effective as possible, Amnesty International recommends that the standards of criminal responsibility in national legislation should be as strict as those in

customary and conventional international law. Brazil has been a party to the First Additional Protocol to the Geneva Conventions since 5 May 1992, Article 87 of which does not provide a lesser standard of criminal responsibility for civilian superiors. The rule in Article 28 of the Rome Statute, which contains a weaker standard of criminal responsibility for civilian superiors and was included at the insistence of the United States and some other states, is limited to trials before the International Criminal Court. In addition, the term “deliberately” in Article 7 (1) and (III) (a) of the draft may to some extent weaken the responsibility of superiors, thus leading to impunity. In order to ensure that the international justice system is as effective as possible, Amnesty International recommends that national legislation should include principles of criminal responsibility which are as strict as those present in conventional and customary international law.

Article 30 of the Rome Statute: mental element

The draft legislation does not have any provisions regarding the mental element for crimes under international law. According to paragraph 67 of the legal memorandum, the draft legislation does not intend to repeat the general part of the Penal Code, which has subsidiary application regarding the crimes defined in the draft legislation. It also states that it was intended not to repeat the Rome Statute, whose provisions are applicable regardless of the draft legislation and with a higher hierarchical status. In addition, according to draft Article 13, the Penal Code and the Code of Criminal Procedure are applicable to crimes under the draft legislation, as well as the Penal Military Code and the Military Criminal Procedure Code. Amnesty International would welcome clarification if the principle contained in Article 30 of the Rome Statute is guaranteed in Brazil for crimes under international law and, if not, recommend that the enacted version of the implementing legislation includes such provision to ensure that it does not lead to impunity.

Article 31 of the Rome Statute: grounds for excluding criminal responsibility

Article 32 of the Rome Statute: mistake of fact or mistake of law

The draft legislation does not appear to have any corresponding provision to Articles 31 and 32 of the Rome Statute. Amnesty International would request clarification concerning whether the principles of criminal responsibility laid down in Articles 31 and 32 of the Rome Statute are envisaged in the Brazilian legislation, and in what terms. Amnesty International would like to request clarification whether each of these principles as specified in Brazilian legislation could give rise to acquittal in the Brazilian courts on the basis of the same evidence which might result in conviction by the Court.

4. DEFENCES IN NATIONAL LAW TO CRIMES UNDER INTERNATIONAL LAW SHOULD BE CONSISTENT WITH CUSTOMARY INTERNATIONAL LAW

Article 33 of the Rome Statute: superior orders and prescription of law

Article 33 of the Rome Statute, which is intended to apply only in trials in the ICC, permits a defence of superior orders in certain limited situations which are prohibited under customary international law, as reflected in Article 8 of the Nuremberg Charter. It provides:

“The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires.”

The Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as the instruments establishing the Special Court for Sierra Leone, the Extraordinary Chambers for

Cambodia and the Special Panels for Dili, Timor-Leste contain the same rule.

Amnesty International is deeply concerned that Article 33 of the Rome Statute is reproduced in draft Article 5. Amnesty International recommends that the national legislation of Brazil be fully consistent with international customary law, by expressly excluding the defence of superior orders, not only for genocide and crimes against humanity, but also for war crimes.

II. ELIMINATION OF BARS TO PROSECUTION

5. NO STATUTES OF LIMITATIONS ARE PERMITTED

6. NO AMNESTIES, PARDONS OR SIMILAR MEASURES OF IMPUNITY BY ANY STATE SHOULD BE RECOGNIZED

Article 29 of the Rome Statute: non-applicability of statute of limitation

Amnesty International welcomes draft Article 11 stating that genocide, crimes against humanity and war crimes are not subject to statutes of limitations, amnesties or pardons.

7. IMMUNITY OF OFFICIALS FROM PROSECUTION FROM CRIMES UNDER INTERNATIONAL LAW SHOULD BE ELIMINATED

Article 27 of the Rome Statute: irrelevance of official capacity

Amnesty International notes draft Article 6 stating that the exercise of public, civil or military functions does not exclude the crime, does not exempt the agent from punishment and does not constitute by itself a reason for reduction of the penalty. However, Amnesty International seeks clarification whether this provision applies both to Brazilian nationals and to non-Brazilian nationals and if not, recommends its amendment in order to include citizens from all countries.

III. ENSURING FAIR TRIALS WITHOUT THE DEATH PENALTY

8. TRIALS MUST BE FAIR

The draft legislation does not contain any guarantees concerning the right to a fair trial at each stage of the proceedings, from the moment a person is suspected of committing a crime under international law until the completion of all proceedings. According to draft Article 13, the Penal Code and the Code of Criminal Procedure are applicable to crimes under the draft legislation, as well as the Penal Military Code and the Military Criminal Procedure Code. Amnesty International would welcome clarification whether fair trial guarantees in the legislation of Brazil are consistent at all stages of the proceedings with international fair trial standards, such as Articles 9, 14 and 15 of the International Covenant of Civil and Political Rights and Articles 55 (rights of persons during an investigation) and 62 to 68 of the Rome Statute. To the extent that these guarantees have been omitted or not fully guaranteed under Brazil's law, that law should be amended to include each of the omitted guarantees or to make such guarantees fully consistent with international law and standards.

With regard to the prohibition of provisional release, with or without bail, in draft Article 11, it appears to be contrary to Article 9 (3) of the International Covenant on Civil and Political Rights (ICCPR), which expressly states:

"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be

detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.”

Even though the right to pre-trial release, with effective guarantees for appearance at trial, is not as fully protected as in Article 9 (3) of the ICCPR, the International Criminal Tribunal for the former Yugoslavia has routinely released persons from pre-trial detention and in all cases the accused have returned to face trial. Article 9 (3) of the ICCPR is binding on Brazil.

With regard to the application of the military codes, see the recommendation on page 14.

9. TRIALS SHOULD EXCLUDE THE DEATH PENALTY

Amnesty International welcomes the exclusion of the death penalty for all crimes in the draft.

PART 2. COOPERATION

I. BASIC OBLIGATION TO COOPERATE

Amnesty International welcomes the provision in draft Article 99 stating that the cooperation with the Court does not depend of ratification or *exequatur*. Draft Article 103 further states that the cooperation cannot be refused under the sole argument of the absence of any national procedure governing the execution of the requested measure. Amnesty International also notes draft Article 106, defining as a crime the conduct of a civil servant in delaying or not carrying out, without reason, an official act, or carrying it out against express provision of the law, with the purpose to obstruct or undermine cooperation with the Court or its bodies.

10. NATIONAL COURTS AND AUTHORITIES MUST COOPERATE FULLY WITH COURT ORDERS AND REQUESTS

Article 87 (1) (a) of the Rome Statute authorizes the Court to make requests to states parties for cooperation through diplomatic channels or any other appropriate channel which they designate at the time of ratification or later. Draft Article 100, provides that a request for cooperation from the Court shall be received by diplomatic channel and sent in five days to the Ministry of Justice, who will send it in no later than 30 days to the relevant authority for its execution. This provision could delay implementation of Court requests for up to 35 days, a lengthy delay that is contrary to Brazil's obligations under the Rome Statute. Many requests will require immediate compliance, such as for freezing assets or arresting a person. These provisions should be replaced with a requirement that the request be sent not through the cumbersome diplomatic channels but to the appropriate law enforcement officials designated by Brazil, requiring them to implement the requests without delay.

Amnesty International welcomes draft Article 101 providing that the request for cooperation from the Prosecutor of the Court, under Article 54 of the Rome Statute, shall be directly addressed to the Prosecutor-General of the Republic. According to Note 259 of the legal memorandum accompanying the draft, the working group considered that the adequate and effective coordination between the Prosecutor of the Court and the equivalent national authority requires

the relationship without intermediaries.

Article 87 (3) of the Rome Statute requires the requested state to “keep confidential a request for cooperation and any documents supporting the request”. Draft Article 102 provides that the authority in charge of providing the cooperation shall keep the confidentiality in its execution, when necessary, and shall guarantee the security, and the physical and psychological integrity of the person being investigated, the victim the possible witness and relatives. It does not appear to be entirely clear who decides on the necessity to keep a request confidential. It is for the Court to decide on this matter.

According to sole paragraph of draft Article 102, it is applicable to the cooperation with the Court, the restriction to the disclosure of confidential information foreseen in the legislation. Amnesty International welcomes clarification if the provisions in the legislation of Brazil could undermine the cooperation with the Court, on grounds of confidentiality. Considering the guarantees provided in Article 72 of the Rome Statute, states should feel confident in providing any information or evidence or in serving documents when requested by the Court.

If a state party identifies problems which may impede or prevent the execution of a request from the Court, Article 97 of the Rome Statute requires that the state “shall consult with the Court without delay in order to resolve the matter”. Draft Article 105 provides for the consultation with the Court, through the cumbersome system of diplomatic channels, except in the case foreseen in draft Article 101, rather than directly with the officials concerned or their superiors, when difficulties in the execution of the cooperation request arise.

According to draft Article 105 (IV), providing for the consultation between the national authority and the Court, in case of apparent conflict between the execution of a Court’s request and another international obligation assumed by Brazil by means of treaty, including in relation to immunities of a third state or diplomatic immunity of person or asset, Amnesty International wishes to make clear that under international law, the official position of an accused does not absolve him or her from criminal responsibility for crimes under international law. In addition, it would not be consistent with Brazil’s obligation under international law to surrender an accused, regardless of that person’s official position, whether that person is a Brazilian national or not. If the Court were to decide that it is precluded by such an interstate agreement from proceeding with the request, then Brazil should exercise jurisdiction over the case or extradite the person to another state able and willing to do so in fair proceedings without the possibility of the death penalty.

With regard to draft Article 105 (V), providing for the consultation with the Court, if execution of a Court’s request would interfere with an ongoing investigation or prosecution, Article 94 (1) of the Rome Statute provides that a state must not postpone execution of the request beyond the period of time which is necessary to complete the investigation or prosecution, as agreed by the Court. However, given the gravity of the crimes within the jurisdiction of the Court, it would be better if Brazil in all cases granted the request by the Court, suspending its own proceedings until after a final judgment by the Court.

Article 95 of the Rome Statute provides that states may also not postpone execution of a request by the Court while an admissibility challenge under Article 18 or 19 is pending if the ICC has ordered that the Prosecutor may take certain investigative steps under one of those two articles. It does not appear that the draft legislation includes any provision corresponding to Article 95. Amnesty

International recommends that the enacted version include such provision.

II. STATUS OF THE COURT IN NATIONAL LAW

11. THE COURT MUST BE AUTHORIZED TO SIT IN THE STATE

Article 3 (3) of the Rome Statute provides that, although the seat of the Court is at The Hague, the "Court may sit elsewhere, whenever it considers it desirable". States must, therefore, incorporate provisions in their law to facilitate the Court sitting in their territories. The draft legislation does not appear to include such provisions. Amnesty International recommends that the enacted legislation includes provisions authorizing the Court to sit in the territory of Brazil, whenever the Court decides to do so.

12. THE LEGAL PERSONALITY OF THE COURT MUST BE RECOGNISED

Article 4 (1) of the Rome Statute provides that the "Court shall have international legal personality" and that it "shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". Article 4 (2) states that the "Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party".

Each state party must ensure that the Court has the necessary legal capacity under national law so that the Court can exercise its functions and powers effectively on the territory of the state. The draft legislation does not appear to include such provisions. The legislation of Brazil should incorporate provisions recognizing the legal personality and capacity of the Court and the exercise of its functions and powers in the territory of Brazil.

13. THE PRIVILEGES AND IMMUNITIES OF THE COURT, ITS PERSONNEL, COUNSEL, EXPERTS, WITNESSES AND OTHER PERSONS WHOSE PRESENCE IS REQUIRED AT THE SEAT OF THE COURT MUST BE FULLY RESPECTED

In addition to Article 48 of the Rome Statute, the Agreement on Privileges and Immunities of the Court (APIC), adopted by the Assembly of States Parties in September 2002, further defines the scope of the Court's privileges and immunities. The draft legislation does not appear to include provisions on such privileges and immunities. Brazil signed APIC on 17 May 2004, but has not ratified it yet. Brazil should ratify APIC as soon as possible and its national legislation should incorporate such provisions on privileges and immunities.

III. NOMINATION OF CANDIDATES TO BE JUDGES OR PROSECUTOR

14. STATES SHOULD ENSURE THAT THEY NOMINATE CANDIDATES TO BE JUDGES AND PROSECUTOR IN AN OPEN PROCESS WITH THE BROADEST POSSIBLE CONSULTATION

The draft legislation does not appear to have provisions on the processes of nominating candidates to be judges or Prosecutor of the Court. Article 36 (4) (a) of the Rome Statute provides that any state party may nominate candidates to be judges of the Court and Article 36 (3) (a) describes the necessary qualifications of judges. Article 42 (3) spells out the qualifications of the Prosecutor and Article 42 (4) describes the manner of electing the Prosecutor, but it does not explain how states should select nominees. In making such nominations and selecting judges, states should do so only after consultation in an open process with civil society, law faculties, bar associations and other non-governmental organizations concerned with criminal justice and human rights, including

women's rights. For further recommendations concerning nominations of judges, please consult Amnesty International document: *International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges* (AI Index: IOR 40/026/2005), available on <http://web.amnesty.org/library/index/engior400262005>.

IV. FACILITATING AND ASSISTING COURT INVESTIGATIONS

15. WHEN THE PROSECUTOR HAS DEFERRED AN INVESTIGATION, STATES SHALL COMPLY WITHOUT DELAY TO REQUESTS FOR INFORMATION

Article 18 (5) of the Rome Statute provides that when the Prosecutor has deferred an investigation at the request of a state pursuant to Article 18 (2) on the ground that it is investigating or has investigated its nationals or others within its jurisdiction, which the Prosecutor has informed states he or she is investigating, the state shall respond to requests by the Prosecutor to be informed "of the progress of its investigations and any subsequent prosecutions" and to do so "without undue delay".

The draft legislation does not appear to have any provision corresponding to Article 18 (5). Amnesty International recommends that the enacted version of the legislation includes such provision.

16. STATES SHALL GIVE EFFECT TO ACTS OF THE PROSECUTOR OR WARRANTS ISSUED BY THE COURT PRIOR TO AN ARTICLE 19 CHALLENGE TO JURISDICTION OR ADMISSIBILITY AND TO ACTIONS BY THE PROSECUTOR TO PRESERVE EVIDENCE OR PREVENT AN ACCUSED PERSON ABSCONDING PURSUANT TO ARTICLES 18 (6) AND 19 (8)

Article 18 (6) of the Rome Statute provides that pending a ruling by the Pre-Trial Chamber or when the Prosecutor has deferred an investigation under Article 18, "the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence". Article 19 (8) provides that, pending a ruling by the Court on challenges to admissibility or jurisdiction pursuant to Article 19, the Prosecutor may seek authority from the Court for some activities.

The draft legislation does not appear to have any provisions corresponding to Articles 18 (6) and 19 (8). Amnesty International recommends that the enacted version of the legislation includes such provisions.

17. STATES SHOULD FACILITATE THE ABILITY OF THE OFFICE OF THE PROSECUTOR AND THE DEFENCE TO CONDUCT INVESTIGATIONS IN THE STATE WITHOUT ANY HINDRANCE

Article 54 (3) of the Rome Statute permits the Prosecutor to take a certain number of investigative steps and Article 54 (2) permits the Prosecutor to conduct investigations on the territory of a state in accordance with Part 9 or as authorized by the Pre-Trial Chamber under Article 57 (3) (d). Amnesty International welcomes draft Article 123, providing for the investigation of the Prosecutor in Brazil's territory, according to Articles 54 (2) and (3) and 57 (3) (d) of the Rome Statute.

18. NATIONAL AUTHORITIES SHOULD PROVIDE A BROAD RANGE OF ASSISTANCE TO THE COURT

■ *Locating and providing documents and records, information and physical evidence requested or ordered by the Court*

Article 93 (1) (a) of the Rome Statute requires states parties to assist in the location of items and Article 93 (1) (i) requires them to comply with requests for assistance in "[t]he provision of records

and documents, including official records and documents". Amnesty International welcomes draft Article 99 (III) (a) and (d), providing for the localization of items and the request, authentication and transmission of records and documents, including official, public and judicial records and documents.

■ ***Confidential information and provision of national security information under safeguards***

Article 72 of the Rome Statute provides a comprehensive and detailed system of safeguards for the protection of information sought by the Court, which in the opinion of the state concerned, if disclosed, might prejudice its national security.

Amnesty International notes draft Article 104 providing for the consultation with the Court, under Article 72, if the cooperation request consists in the submission of documents, information or disclosure of evidence that affects the interest of national security. According to sole paragraph of same draft provision, in case of absolute impossibility to provide for the cooperation, the Court shall be informed, without delay, of the reasons of the refusal to cooperate.

Given the carefully drafted safeguards in Article 72, states should feel confident that they can supply any information or evidence which is requested by the Court. States should endeavour to provide any information or evidence which the Court requests.

■ ***Preserving such evidence from loss, tampering or destruction***

Article 93 (1) (j) of the Rome Statute provides that states parties must comply with requests for "the preservation of evidence". Amnesty International notes that draft Article 99 (III) (h) implements Article 93 (1) (j).

■ ***Serving any documents requested by the Court***

Article 93 (1) (d) of the Rome Statute requires states parties to provide for the "service of documents, including judicial documents". The draft legislation does not appear to have any corresponding provision to Article 93 (1) (d). Amnesty International recommends it be included in the enacted legislation.

■ ***Assisting the Court in locating witnesses***

Article 93 (1) (a) of the Rome Statute requires states parties to assist in the "identification and whereabouts of persons". Amnesty International notes that draft Article 99 (III) (a) implements Article 93 (1) (a).

■ ***Provide victims and witnesses with any necessary protection***

Article 93 (1) (j) of the Rome Statute provides that states parties must provide for the "protection of victims and witnesses". Amnesty International notes draft that Article 99 (III) (h) implements Article 93 (i) (j).

■ ***Fully respecting the rights of persons questioned in connection with investigations of crimes within the Court's jurisdiction***

Article 93 (1) (c) of the Rome Statute provides that states parties shall comply with requests to provide assistance in the "questioning of any person being investigated or prosecuted". Article 93 (1) (b) provides that states should comply with requests for the taking and production of evidence.

Each of these provisions must be read together with Article 55, which recognizes a number of important rights that apply to any person during an investigation.

Amnesty International notes draft Article 99 (III) (c), implementing Article 93 (1) (c) and draft Article 99 (III) (b) implementing Article 93 (1) (b). With regard to the rights guaranteed in Article 55 of the Rome Statute, Amnesty International welcomes clarification if these rights are guaranteed in the legislation of Brazil for persons being investigated or prosecuted for crimes under international law and, if not, recommend that the enacted version of the legislation includes such rights. Failure to guarantee these rights, could mean that a person who has committed such crimes could have the charges dismissed pursuant to Article 69 (7) (b) of the Rome Statute on the ground that his or her statement to the national authorities was taken without having been informed of his or her rights.

■ ***Assisting the Court by compelling witnesses to testify, subject to any lawful privilege, at the seat of the Court or in the state***

Article 93 (1) (e) of the Rome Statute requires states to comply with requests to facilitate “the voluntary appearance of persons as witnesses or experts before the Court” and Article 93 (1) (f) and (7) deal with the specific circumstances of persons in national custody. In addition, Article 93 (1) (l) provides that states parties shall comply with requests to provide any “other type of assistance which is not prohibited by the law of the requested state, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court”. In addition to facilitating the voluntary appearance of persons before the Court, for example in providing the necessary travel documents, states parties are obliged under Article 64 (6) (b) to assist the Court in compelling “the attendance and testimony of witnesses and production of documents and other evidence”. Therefore, states parties not only must provide for the voluntary appearance of witnesses at the seat of the Court, but they also should provide for compulsory attendance, if necessary, before the Court.

Amnesty International notes draft Article 99 (III) (e) implementing Article 93 (1) (e) and draft Article 99 (III) (f) and 121, providing for the temporary transfer of detained person, in accordance with Article 93 (7) of the Rome Statute and Rule 192 of the Rules of Procedure and Evidence. According to sole paragraph of draft Article 121, if the person to be transferred is detained in Brazil by sentence of the Court, Rule 193 of the Rules of Procedure and Evidence applies.

■ ***Facilitating searches and seizures of evidence by the Court, including the exhumation of graves, and the preservation of evidence***

Article 93 (1) (h) requires states parties to comply with requests by the Court to provide assistance in the “execution of searches and seizures”. Article 93 (1) (g) requires states parties to provide assistance in the “examination of places or sites, including the exhumation and examination of grave sites”. Amnesty International notes that draft Article 99 (III) (g) implements Article 93 (1) (h) and draft Article 99 (III) (b) implements Article 93 (1) (g).

■ ***Assisting in tracing, freezing, seizing and forfeiting assets of accused persons***

Article 93 (1) (k) of the Rome Statute requires states parties to provide assistance in connection with an investigation and prosecution in the “identification, tracing, and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice of the rights of bona fide third parties”. Amnesty International notes that draft Article 99 (III) (i) implements Article 93 (1) (k). However, Amnesty International recommends that these

provisions be extended to include requests by states in connection with prosecutions of crimes under international law.

■ ***Providing any other assistance requested or ordered by the Court***

Article 93 (1) (l) of the Rome Statute provides that states parties shall provide any “other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court”. Amnesty International notes that draft Article 99 (III) (j) implements Article 93 (1) (l), but urges that any provisions of Brazilian law that would prohibit assistance to the Court be repealed.

V. ARREST AND SURRENDER OF ACCUSED PERSON

19. STATES PARTIES SHOULD ENSURE THAT THERE ARE NO OBSTACLES TO ARREST AND SURRENDER

In contrast to extradition between states, there are no substantive grounds permitted under the Rome Statute for refusal to surrender a person to the Court. In addition, according to Article 91 (2) (c) of the Rome Statute, states parties should establish a procedure for surrender of persons to the Court less burdensome than that used for extradition to other states. Article 91 (4) requires a state party, upon a request by the Court, to consult with it, “either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under [Article 91 (2) (c),]” and, during such consultations, to “advise the Court of the specific requirements of its national law”.

The draft legislation does not appear to have corresponding provisions to Article 91 (2) (c) and (4) of the Rome Statute. Amnesty International recommends that the enacted version of the legislation includes such provisions.

20. NATIONAL COURTS AND AUTHORITIES MUST ARREST ACCUSED PERSONS AS SOON AS POSSIBLE AFTER A REQUEST BY THE COURT

Article 89 (1) of the Rome Statute requires that states parties “shall, in accordance with the provisions of [Part 9] and the procedure under their national law, comply with requests for arrest and surrender”. Article 92 provides for provisional arrest in urgent cases, pending presentation of the request for surrender and supporting documents. Article 59 (1) provides that a state party “which has received a request for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9”.

According to the sole paragraph of draft Article 108, the detention (pending surrender) will last until final decision of the Federal Supreme Court. Amnesty International recommends that any decision to release the person sought by the Court, be taken in close consultation with Court’s authorities and that the length of arrest takes in consideration the rights of the person arrested, according to international standards. In addition, Article 108 should require that Brazilian courts arrest persons named in arrest warrants immediately and take all subsequent steps in the surrender proceedings without delay.

21. NATIONAL COURTS AND AUTHORITIES MUST FULLY RESPECT THE RIGHTS OF THOSE ARRESTED AT THE REQUEST OR ORDER OF THE COURT

Article 55 of the Rome Statute requires that the rights of persons be respected during the course of an investigation and that persons suspected of being responsible for crimes within the Court’s

jurisdiction should be informed of those rights before being questioned. The rights identified in that article necessarily apply with equal force after a person has been charged.

The draft legislation does not have provisions regarding the rights of persons arrested at the request or order of the Court, in accordance with Article 55 of the Rome Statute. Amnesty International welcomes clarification if the legislation of Brazil provides for the protection of those persons, according to Article 55 of the Rome Statute and, if not, recommends its inclusion in the enacted version of the legislation.

Article 67 (1) (a) of the Rome Statute requires that an accused "be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks". Article 59 (2) requires that a person who has been arrested by a state party on request of the Court "shall be brought promptly before the competent judicial authority in the custodial State, which shall determine, in accordance with the law of that State, that: (a) The warrant applies to that person; (b) The person has been arrested in accordance with the proper process; and (c) The person's rights have been respected". The draft legislation does not have provisions corresponding to those articles of the Rome Statute. Amnesty International welcomes clarification if the legislation of Brazil provides for these rights and, if not, recommends its inclusion in the enacted version of the legislation.

If the person sought for surrender brings a challenge in a national court on the basis of *ne bis in idem*, Article 89 (2) of the Rome Statute provides that the requested state "shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility". If the Court has determined that the case is admissible, then "the requested State shall proceed with the execution of the request". If the Court is still considering the question of admissibility, then "the requested State may postpone the execution of the request for surrender of the person until the Court makes a ruling on admissibility". Draft Article 114 provides that if the defence brings a challenge on the basis of *ne bis in idem*, the Federal Supreme Court shall suspend the procedure and proceed with the consultation with the Court, through the appropriate channel, according to Article 89 (2) of the Rome Statute.

22. NATIONAL COURTS AND AUTHORITIES MUST SURRENDER ARRESTED PERSONS PROMPTLY TO THE COURT

Article 59 (7) of the Rome Statute provides that once "ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible". If a person who has been provisionally arrested consents to surrender before the expiration of the time limits for the arrival of the request for surrender and supporting documents, Article 92 (3) requires that the requested state "shall proceed to surrender the person to the Court as soon as possible".

The draft legislation does not appear to have provisions expressly requesting the authorities of Brazil to deliver to the Court, the person arrested at its request, as soon as possible. In addition, according to the sole paragraph of draft Article 108, the detention may last until final decision of the Federal Supreme Court, with no indication of time limits for the Federal Supreme Court to take a decision. Amnesty International recommends that the enacted version of the legislation includes guarantees that the person arrested at the request of the Court be delivered to the Court as soon as possible and consistent with his or her rights, according to international standards and any decision to release the person be taken in close consultation with Court's authorities.

According to Article 101 (1) of the Rome Statute, the Court will not proceed against, punish or

detain a surrendered person for conduct committed prior to surrender, other than that which forms the basis of the request. However, Article 101 (2) authorizes states parties to provide a waiver and states that they "should endeavour to do so". The draft legislation does not appear to have any provision corresponding to Article 101 (2) of the Rome Statute. Amnesty International recommends that the enacted version of the legislation includes such a provision.

23. STATES SHOULD GIVE PRIORITY TO REQUESTS FOR SURRENDER BY THE COURT OVER COMPETING REQUESTS BY OTHER STATES

Article 90 of the Rome Statute spells out the obligations of states parties when they receive competing requests for surrender. Amnesty International notes that draft Article 110 provides that the request for surrender shall prevail over the extradition request, according to Article 90 of the Rome Statute.

In addition, according to sole paragraph of draft Article 110, the denial of extradition in the situation described in Article 90 (8) of the Rome Statute, will be reported to the Prosecutor of the Court, according to Rule 186 of the Rules of Procedure and Evidence.

Article 90 of the Rome Statute reflects the principle of complementarity that it is the primary duty of states to bring persons suspected of genocide, crimes against humanity and war crimes to justice, but when they are unwilling or unable to do so, then the Court should be able to exercise jurisdiction. States parties should ensure that to the maximum extent possible, they give priority to requests from the Court over competing requests from states, particularly when it has made a determination that the case is admissible because no state is willing and able genuinely to carry out an investigation or prosecution. Article 90 ensures that such a finding would take into account the situation in the requesting state. States parties should also seek to avoid lengthy delays in determining whether to give priority to a request by the Court over a competing request. One way to do this would be to provide in all bilateral and multilateral extradition agreements and arrangements - both with states parties and non-states parties - that Court requests should have priority over state requests.

24. STATES MUST PERMIT TRANSFERS OF ACCUSED PERSONS THROUGH THEIR TERRITORY TO THE SEAT OF THE COURT

Article 89 (3) of the Rome Statute requires each state party to authorize transportation through its territory of a person being surrendered to the Court by another state and paragraph (c) requires that the person be detained in custody during the period of transit. Paragraph (e) provides that in the case of an unscheduled landing in a state party, that state "shall detain the person being transported until the request for transit is received and the transit is affected" for a maximum period of 96 hours, unless a request for extension is received before that time.

The draft legislation does not appear to have any corresponding provision to Article 89 (3) of the Rome Statute. Amnesty International recommends that the enacted version of the legislation includes such provision.

25. STATES MUST NOT RETRY PERSONS ACQUITTED OR CONVICTED BY THE COURT FOR THE SAME CONDUCT

Article 20 (2) of the Rome Statute provides that no person shall be tried by another court for a crime under the Rome Statute, for which that person has already been convicted or acquitted by the Court.

The draft legislation does not appear to have any provision corresponding to Article 20 (2) of the Rome Statute. Amnesty International welcomes clarification if the legislation of Brazil provides for the application of the principle of *ne bis in idem* for crimes under international law to decisions of the Court and, if not, recommend that the enacted version of the legislation includes such provision. However, the legislation of Brazil should provide for retrial of a person with respect to same conduct, for example if the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility or were not conducted independently or impartially in accordance with the norms of due process recognized by international law.

VI. ENSURING EFFECTIVE REPARATIONS TO VICTIMS

26. NATIONAL COURTS AND AUTHORITIES MUST ENFORCE JUDGMENTS AND DECISIONS OF THE COURT CONCERNING REPARATIONS FOR VICTIMS AND SHOULD PROVIDE FOR REPARATIONS IN NATIONAL LAW FOR ALL VICTIMS OF CRIMES UNDER INTERNATIONAL LAW IN ACCORDANCE WITH INTERNATIONAL STANDARDS, INCLUDING THE GENERAL PRINCIPLES ESTABLISHED BY THE COURT RELATING TO REPARATIONS

The draft legislation does not provide for reparations for victims of crimes in proceedings in Brazil's courts for crimes under international law. Amnesty International urges Brazil to ensure that the provisions of national law guarantee the right of victims and their families to reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and effective judicial procedures to obtain such reparations in proceedings in national courts of crimes under international law. Amnesty International also urges Brazil to contribute to the Trust Fund for Victims specified by Article 79 of the Rome Statute, and establish a similar fund at the national level.

VII. TRYING CASES OF OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE

27. LEGISLATION MUST PROVIDE FOR PUNISHMENT OF OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE BY THE COURT

Article 70 (1) provides that the Court has jurisdiction over several offences against the administration of justice when committed intentionally.

Amnesty International welcomes draft chapter on crimes against the administration of justice of the International Criminal Court, but urges that it authorize Brazilian courts to exercise jurisdiction over such offences, independent of the place where they occurred.

VIII. ENFORCEMENT OF JUDGEMENTS AND SENTENCES

28. LEGISLATION MUST PROVIDE FOR ENFORCEMENT OF FINES AND FORFEITURE MEASURES

Article 109 (1) of the Rome Statute requires states parties to "give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties". Paragraph (2) of this article provides that if "a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of third parties". Paragraph (3) provides that "[p]roperty, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as the result of a judgement of the Court shall be transferred to the Court".

According to draft Article 127, the execution of fines and the forfeiture of assets and other effects of

Court's penalties shall be taken in accordance with national legislation and the amounts recovered shall be transmitted immediately to the Court, after deduction of expenses with their collection, administration and sending. It does not appear that this draft provision fully implements Article 109 of the Rome Statute, namely with regard to the requirement of "without prejudice to the rights of bona fide third parties" in Article 109 (1), as well as the requirement in Article 109 (2). Amnesty International welcomes clarification if the legislation of Brazil includes proper safeguards to the rights of bona fide third parties, with regard to fines or forfeitures ordered by the Court under Part 7 of the Rome Statute and, if not, recommends its inclusion in the enacted version of the implementing legislation, as well as a provision corresponding to Article 109 (2) of the Rome Statute.

29. LEGISLATION SHOULD PROVIDE FOR THE ENFORCEMENT OF SENTENCES BY THE COURT, IN ACCORDANCE WITH THE REQUIREMENTS SET FORTH BELOW

■ ***Conditions of detention must fully satisfy the requirements of the Statute and other international standards***

Article 106 (1) of the Rome Statute provides that the "enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted treaty standards governing treatment of prisoners". Paragraph (3) requires that "[c]ommunications between a sentenced person and the Court shall be unimpeded and confidential."

■ ***Legislation should provide for release of the convicted person on completion of sentence or on order of the Court***

Article 110 (1) of the Rome Statute provides that the state of enforcement "shall not release the person before the expiry of the sentence pronounced by the Court" and paragraph (2) of that article states that only the Court has the right to decide on any reduction of the sentence.

■ ***Legislation should provide for the transfer of persons on completion of sentence***

Article 107 (1) of the Rome Statute states that a person who is not a national of the state of enforcement after having served the sentence "may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State". Paragraph (3) of this article states that, "[s]ubject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence."

■ ***Legislation should limit prosecutions and punishment for other offences***

Article 108 (1) of the Rome Statute states that "[a] sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement". Paragraph (2) of that article provides that the Court shall hear the views of the sentenced person before ruling on the matter and paragraph (3) states that paragraph (1) ceases to apply if the person does not leave within 30 days or returns after leaving the state.

■ ***Legislation should address the question of escape***

Article 111 of the Rome Statute authorizes a state of enforcement, after consultation with the Court, to request the surrender of a sentenced person who has escaped from the state where the person is located pursuant to existing arrangements between states or ask the Court to seek the person's surrender pursuant to Part 9. It may ask that the person be returned to the state of enforcement or to another state designated by the Court.

Amnesty International welcomes draft Article 124 stating that the execution in Brazil of a Court's penalty, shall be executed in accordance with Articles 103 to 111 of the Rome Statute and Rules 198 to 225 of the Rules of Procedure and Evidence.

In addition, draft Article 126 further states that the penalty shall not be modified by a Brazilian judicial authority, it shall be for the Court to decide all requests and matters related to the execution of the penalty, including the transfer to prison in another country, the Brazilian authorities shall permit the free and unconditional communication between the sentenced person with his or her lawyer and the Court and any requirement from the sentenced person or from his or her lawyer shall be transmitted to the Court.

IX. PUBLIC EDUCATION AND TRAINING OF OFFICIALS

30. STATES PARTIES SHOULD DEVELOP AND IMPLEMENT EFFECTIVE PROGRAMS OF PUBLIC EDUCATION AND TRAINING FOR OFFICIALS ON THE IMPLEMENTATION OF THE STATUTE

The draft legislation does not provide for training on Court issues. Amnesty International recommends that Brazil develop and implement programmes to train judges, prosecutors, defence lawyers, police, army and court officials and foreign affairs officials concerning their respective obligations under the Rome Statute, and to proceed with the updating of military codes, as many states have already done. In addition, Brazil should establish an effective public education program to educate the general public and students at all levels about the Court and Brazil's obligations under the Rome Statute and the Agreement on Privileges and Immunities of the Court.

FINAL NOTE

This paper aims to provide a useful tool for those involved in the implementation process of the Rome Statute and the Agreement on Privileges and Immunities of the Court, when it is ratified, in the legislation of Brazil by identifying particular areas of the draft legislation that need to be amended regarding an effective implementation. Amnesty International has made the greatest efforts when preparing the comments in this paper. Nevertheless, the organization would like the questions which are raised in this paper to be clarified. This paper is being published for consideration in order to assist the common task to ensure that the legislation of Brazil incorporates all the obligations undertaken under the Rome Statute and customary and conventional international law.

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