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Democratic Republic of Congo

Comments and recommendations of the July 2003 draft law implementing the Rome Statute of the International Criminal Court

I. POSITIVE ELEMENTS OF THE DRAFT

The draft implementing legislation contains a number of positive provisions, such as the prohibition of statutes of limitations for genocide, crimes against humanity and war crimes (Article 15 (1)), the rejection of amnesties and pardons for these crimes (Article 15 (2)), and the elimination of immunities for the perpetrators (Article 8).

Definitions of crimes. We also welcome the inclusion of the definitions of certain crimes that are broader than those in the Rome Statute, including the definition of the war crimes of recruiting and using of child soldiers in international and non-international armed conflict, which applies to all children under the age of 18 (draft Article 17, containing proposed Article 224 (2) (z) of the Penal Code and (5) (g)) and the definition of the crime against humanity of deportation or forcible transfer (draft Article 17, containing proposed Article 222 (4) of the Penal Code), which omits the requirement that the deportation or forcible transfer be from an area where the persons were lawfully present, minimizing the risk of courts excluding refugees and asylum seekers from the protection of this article by a restrictive - and improper - interpretation that "lawfully present" did not mean lawful under international law.

Similarly, the war crime of wilfully causing great suffering or serious injury to health (Article 8 (2) (a) (iii)) refers not only to physical but also to mental integrity (draft Article 224 (1) (c) of the Penal Code). The definition of the crime against humanity of sexual violence contained in draft Article 17, containing proposed Article 222 (6) of the Penal Code, is broader in the draft legislation than in the Rome Statute (Article 7 (1) (g)), since it also mentions sexual abuse and harassment and, as far as the crime of forced pregnancy is concerned, it does not require the detention of the woman to be illegal. The same can be said about the definition of the war crime of sexual violence in non-international armed conflicts in draft Article 17, containing proposed Article 224 (5) (f) of the Penal Code, which implements Article 8 (2) (e) (vi) of the Rome Statute. However, proposed Article 224 (2) (v), which deals with the

same war crime with regard to international armed conflicts, does not mention "sexual harassment", although it does not require that any other form of sexual violence be a grave breach of the Geneva Conventions. An explanation about these differences would be welcome.

As to the crime against humanity of apartheid, the draft legislation takes into account institutionalised oppression and domination not only on racial, but also on political, national, ethnic, cultural, religious, sexist and other grounds. The draft's definition of the crime of genocide is also broader than that contained in Article 6 of the Rome Statute, since it qualifies as such the forced transfer of *any* (even one) member of a group (not just children) to another group (draft Article 17, containing proposed Article 221 (5) of the Penal Code).

Procedural provisions. The inclusion in the draft legislation of the enforcement of fines and forfeiture measures (draft Article 27, containing proposed Article 121-3 of the Criminal Procedure Code), and authorization of the transfer of accused persons through the territory of the DRC (draft Article 25, containing proposed 47-6 of the Criminal Procedure Code) is to be welcomed. Similarly, the provisions on locating, serving and providing documents and records, information and physical evidence requested by the Court (draft Article 26, containing proposed Article 47-8 (1) to (11) of the Criminal Procedure Code); preserving such evidence from loss or tampering (draft Article 26, containing proposed Article 47-8 (10) of the Criminal Procedure Code); assisting the Court in locating witnesses (draft Article 26, containing proposed Article 47-8 (1) of the Criminal Procedure Code); compelling witnesses to testify (draft Article 26, containing proposed Article 47-8 (3) and (5) of the Criminal Procedure Code); facilitating searches and seizures (draft Article 26, containing proposed Article 47-8 (7) and (8) of the Criminal Procedure Code); and respecting the rights of the persons questioned in connections with investigations of crimes within the Court's jurisdiction (draft Article 23, containing proposed Article 11 (1) (a) to (e) of the Criminal Procedure Code) are also to be welcomed, with some qualifications, as discussed below.

Complete exclusion of superior orders as a defence. Unlike its previous version, the new draft legislation excludes superior orders, either coming from a military or a civilian superior, as a defence to all crimes within the jurisdiction of the Court. Articles 12 and 13 of the draft law are thus broader than Article 33 of the Rome Statute. This change is very welcome, since this defence is prohibited under customary and conventional international law. It was included in the Rome Statute as

a defence at the insistence of the United States of America (USA) and a few other states and applies solely to trials in the Court.

II. CONCERNS ABOUT THE DRAFT

We would now like to bring to your attention some major concerns about the draft legislation. We have attached for your convenience a chart that indicates in summary form how the draft legislation compares with Amnesty International's paper *The International Criminal Court: Checklist for Effective Implementation* (AI Index: IOR 40/11/00, July 2000), a more detailed chart which takes into account each article of the Rome Statute, and a chart that compares the July 2003 draft to its previous version (as modified by the meetings organized by the Ministry of Justice from the 21 to 23 October in Kinshasa and 24 to 25 October 2002 in Lubumbashi).

A. Introduction of the death penalty

It is of great concern that, in the July 2003 draft implementing legislation, death penalty has replaced life imprisonment as the sanction for the crime of genocide and for crimes against humanity. The exclusion of the death penalty could be a major step forward for international law and would be consistent with the exclusion of this penalty in the Rome Statute, the Statute of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Regulation establishing the East Timor Special Panels for Serious Crimes, the Statute of the Special Court of Sierra Leone, the law establishing the Extraordinary Chambers in Cambodia and national draft and enacted implementing legislation for the Rome Statute. 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 be consistent with the increasing abolition of this penalty in Africa, where by 2002 it has been abolished *de jure* in ten countries (South Africa, Angola, Cape Verde, Côte d'Ivoire, Djibouti, Guinea-Bissau, Mauritius, Mozambique, Namibia, São Tome and Príncipe) and *de facto* in nine others (Benin, Burkina Faso, Gambia, Madagascar, Mali, Niger, the Central African Republic, Senegal, Togo). The death penalty has also been abolished in law or practice in more than half of all the countries of the world. Draft Article 17, containing proposed Articles 221 and 222 of the DRC Penal Code should therefore be amended by introducing imprisonment instead of death penalty for such crimes.

B. Definition of crimes

1. Genocide

Draft Article 17, containing proposed Article 221 of the Penal Code, criminalizes genocide as defined in both Article 6 of the Rome Statute and Article II of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention), to which the DRC is a party.

We would recommend that Article 221 should include all the principles of criminal responsibility in Article III of the Genocide Convention. The Rome Statute does not include all of these principles of the Convention to their fullest extent, especially with respect to conspiracy, which is set out in Article III (b) of the Convention. Similarly, the draft should incorporate acts which are committed not only by the principal offender, but also those committed by others in the form of complicity, conspiracy, attempt and direct and public incitement to the extent that they are not otherwise covered in DRC law. Further, Article III (c) of the Convention creates the offence of incitement that is distinct from incitement as a form of complicity, in that "direct and public incitement" within the meaning of the Convention may occur even if no one is in fact incited.

2. Crimes against humanity

Although most of the crimes against humanity listed in Article 7 of the Rome Statute seem to be included in draft Article 17, containing proposed Articles 222 and 223 of the Penal Code, we are, however, concerned that some of the crimes are not defined consistently with the Rome Statute and with the Elements of Crimes (to the extent that they are consistent with the Statute or with other international law). Thus, it is possible that in some instances persons who would be convicted in the International Criminal Court for certain conduct could be acquitted in the DRC courts for exactly the same conduct.

Extermination. The crime against humanity of extermination, which was included in the Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter) and all subsequent international instruments defining crimes against humanity, has been omitted from the draft legislation. It is possible that some elements of the crime against humanity of extermination would be addressed by draft Article 17, containing proposed Articles 222 (1) (murder) and 222 (2) of the Penal Code (imposing conditions leading to the total or partial destruction of a population).

However, the crime against humanity of murder does not reflect the enormity of the crime against humanity of extermination, which involves mass killing, as evidenced by the second element of this crime.¹ The act of imposing conditions does not expressly cover intentional destruction of a population and it also uses different wording from Article 7 (2) (b) of the Rome Statute ("*devant entraîner*", which appears to be modelled on Article 6 (c) (genocide) of the Rome Statute, instead of "*calculée pour entraîner*"). Article 7 (2) (b) of the Rome Statute explains that the term "extermination" includes the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of the population.² The reason for the different wording in proposed Article 222 (2) of the Penal Code is not clear and it is not known whether the different wording would lead to more or less conduct being a crime in the DRC. Amnesty International recommends that the draft legislation be amended to include the crime of extermination, and to ensure that the crime is fully consistent with the Rome Statute and the Elements of Crimes, or extended in scope to provide greater protection.

Enslavement. The crime against humanity of enslavement is treated differently in draft Article 17, containing proposed Article 222 (3) of the Penal Code, which contains three categories of enslavement, from the way it is treated in Article 7 (2) (c) of the Rome Statute and in the Elements of Crimes.³ Although it is to be welcomed that trafficking in human beings, particularly women and children, is

¹ Elements of the crime against humanity of extermination:

- "1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of the population.
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that that conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

² Article 7 (2) (b) of the Rome Statute provides:

"'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."

³ The elements of crime of enslavement are:

- "1. The perpetrator exercised any or all the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against any civilian population."

included as a crime, it is a matter of concern that the word trafficking (*la traite*) has been replaced with commerce (*le commerce*), which could be interpreted more restrictively to trafficking with a commercial motive and thus exclude trafficking for other reasons. The third category, reduction of a person in any manner into slavery may have been intended to be a residual category to cover all other forms of enslavement. We would hope that the intent of the drafters was to include all contemporary forms of slavery. However, without an explanatory memorandum, the reason for these changes is not clear and we are concerned that the definition in the draft could be more restrictive than in international law, with the risk that persons could be acquitted of enslavement for conduct for which they would be convicted in the International Criminal Court. We recommend that the word "*le commerce*" be replaced by "*la traite*", that the crime be clearly identified as enslavement and that the legislation and explanatory memorandum make clear that all conduct covered by this crime in the Rome Statute is covered.

Torture. The crime against humanity of torture is defined differently in draft Article 17, containing proposed Article 222 (5) of the Penal Code, from the way it is defined in Article 7 (2) (e) of the Rome Statute and in the elements of that crime in the Elements of Crimes. It is not clear why the language of the Rome Statute, "*d'infliger intentionnellement une douleur ou des souffrances aiguës, physiques ou mentales*", was changed to "*infligeant des atteintes graves à l'intégrité physiques ou mentale*". If it was intended to broaden the scope of prohibited conduct it is, of course, to be welcomed, but it is not clear why the change was made. Amnesty International recommends that the legislation and explanatory memorandum make clear that all conduct covered by this crime in the Rome Statute is covered.

Finally, as noted above with regard to the crime of genocide, draft Article 17, containing proposed Article 222 of the Penal Code, should be amended by replacing the death penalty with imprisonment, consistently with the Rome Statute.

3. War crimes

Regarding war crimes, draft Article 17, containing proposed Articles 224 and 225 of the Penal Code, appears to include all the war crimes listed in Article 8 of the Rome Statute, although the definitions are not in all cases exactly the same as in the Rome Statute or in other international humanitarian law instruments. Why this is so is not clear. As recommended in point 1 of the Amnesty International *Checklist for Effective Implementation*, the DRC should ensure that the definitions of war crimes should be consistent with the strongest possible protections, whether in the Rome Statute or

other international humanitarian law. In addition, the DRC should define as crimes under DRC law certain grave breaches and other serious violations of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of International Armed Conflict (Protocol I) and of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of Non-International Armed Conflict (Protocol II), as well as certain other serious violations of international humanitarian law in non-international armed conflicts. The DRC is a party to both Protocol I and Protocol II.

War crimes in international armed conflict. There are a number of international humanitarian law prohibitions which are not provided in the Rome Statute or are much weaker than in other international humanitarian law instruments.

For example, Article 57 (2) (a) (iii) of Protocol I prohibits "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage". The definition of this crime in Article 8 (2) (b) (iv) of the Rome Statute is much weaker because, at the urging of the United States of America (USA), it replaces the narrow term "concrete and direct military advantage" with the expansive term, "concrete and direct *overall* military advantage". Draft Article 17, containing proposed Article 224 (2) (d) of the Penal Code, not only does not follow the definition in Protocol I, but it also uses slightly different wording from the wording in the Rome Statute. It does not take civilian property into account (inconsistently with Article 51 (5) (b) of Additional Protocol I and Article 8 (2) (b) (iv) of the Rome Statute). However, the draft article mentions damage to natural environment (which is not included in Article 57 (2) (a) (iii) of Additional Protocol I, but instead in Articles 35 and 55 of that treaty). Draft Article 224 (2) (d) also requires the damage to civilians and to the natural environment to be "manifestly" excessive: this might be an oversight, but we would welcome clarification. It may be that the reason for changing "deliberate" (*delibérée*) to "intentionally" (*intentionnellement*) was simply to conform this provision to the normal principles of criminal responsibility in the DRC without any restriction in the scope of this crime. However, the draft legislation is not consistent in replacing "deliberate" with "intentionally" in other Rome Statute definitions.⁴

⁴ For example, the word "intentionally" is retained in draft Article 224 (2) (i) of the Criminal Procedure Code, based on Article 8 (2) (b) (ix) of the Rome Statute; in draft Article 224 (2) (x) of the Criminal Procedure Code, based on Article 8 (2) (b) (xxiv) of the Rome Statute; in draft Article 224 (5) (a) and (b) of the Criminal Procedure Code, based on Article 8 (2) (e) (b) of the Rome Statute. It is changed to

The Rome Statute also does not criminalize unjustified delays in repatriating or freeing prisoners of war or interned civilians once active hostilities have ceased. This conduct has been defined as a "grave breach" and, thus, a war crime under the provisions of Article 85 (4) (b) of Protocol I. Similarly, the prohibition of an attack on demilitarized zones, is not expressly defined as a crime in the Rome Statute, but such conduct is prohibited in Article 85 (3) (d) of Protocol I. These war crimes should be prohibited in DRC law.

War crimes in non-international armed conflict. The draft implementing legislation's omissions in relation to crimes committed within the context of non-international armed conflict are also striking. For example, the ban on causing starvation to civilians as a method of combat, prohibited in Article 14 of Protocol II, has no equivalent provision in the Rome Statute, even though this crime is committed most often in non-international armed conflict and even though it is defined as a war crime in Article 8 (2) (b) (xxv) of the Rome Statute when committed in an international armed conflict. This war crime should be prohibited in DRC law.

Prohibited weapons. The Rome Statute envisages including the employment of certain prohibited weapons. However, it does not exhaustively list the prohibitions and restrictions on other weapons prohibited or restricted by treaties. As has been suggested by the International Committee of the Red Cross (ICRC), the guardian of international humanitarian law, states enacting laws to implement the Rome Statute should take the opportunity of incorporating the specific provisions on weapons included in other treaties that they have ratified. For instance, the Brazilian draft legislation on the implementation of the Rome Statute (available at: www.amnesty.org/icc), incorporates provisions on weapons not included in the Rome Statute.

4. Extrajudicial executions, enforced disappearances and torture

Extrajudicial executions, enforced disappearances and torture not amounting to genocide, crimes against humanity or war crimes are not defined as crimes under DRC law or in the draft legislation implementing the Rome Statute.

Extrajudicial executions. The draft legislation appears to cover extrajudicial executions amounting to murder as acts of genocide, murder as crimes against

"deliberately" in draft Article 224 (5) (c) and (d) of the Criminal Procedure Code, based on Article 8 (2) (e) (iii) and (iv) of the Rome Statute.

humanity and murder as war crimes in both international and non-international armed conflict, but not in other circumstances.

Enforced disappearances. Regarding enforced disappearances, draft Article 17, containing proposed Article 222 (7) of the Penal Code, includes the definition of this crime as a crime against humanity in Article 7 (1) (i) and 7 (2) (i) of the Rome Statute, but it does not include enforced disappearances not amounting to a crime against humanity.

Torture. Torture as a crime against humanity is defined in draft Article 17, containing proposed Article 222 (5) of the Penal Code, which corresponds in part to Article 7 (1) (f) and 7 (2) (e) of the Rome Statute. However, clarification will be welcomed as to whether by putting " *infligeant des atteintes graves à l'intégrité physiques ou mentale*" in the draft text will cover " *d'inflinger intentionnellement une douleur ou des souffrances aiguës, physiques ou mentales*", as provided for in the Rome Statute. Torture seems to be the only crime to be defined by the DRC Penal Code amongst these crimes. Nevertheless, the definition of torture in Article 67 of the Penal Code appears to be inconsistent with that provided in the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention against Torture), to which the DRC became party to in 1996. The DRC therefore, should re-define this crime in the Penal Code - where it does not amount to genocide, crimes against humanity or war crimes - to be consistent with its obligations under the Convention against Torture.

As Amnesty International explained in point 1 (1) of its *Checklist for Effective Implementation*, these crimes should be defined as crimes in themselves in national law, where they do not also amount to genocide, crimes against humanity or war crimes, either in the legislation implementing the Rome Statute or in other legislation.

C. Enforcement of international law through universal jurisdiction

The inclusion of universal jurisdiction in Article 16 of the draft implementing legislation over genocide, crimes against humanity and war crimes is to be welcomed as far as it goes. However, this falls short of what is permitted under both international and current national law.

As documented in Amnesty International's study of state practice at the international and national level in more than 125 countries around the world, *Universal Jurisdiction: The duty of states to enact and implement legislation*, AI

Index: IOR 53/002-018/2001, September 2001 (a copy of which is enclosed as a CD-ROM), states may exercise universal jurisdiction over any crime under international law, as well as ordinary crimes, without any requirement that the suspect be in the state at the time the investigation is opened or up until the trial. For more than half a century the Geneva Conventions of 1949 have envisaged that states parties without any link to the person suspected of grave breaches of those Conventions which have made out a *prima facie* case after an investigation can seek the extradition of suspects from states unable or unwilling to investigate or prosecute.

Article 3 of the current DRC Penal Code has provided for universal jurisdiction since 1960 over persons suspected of crimes carrying a sentence of two or more months of imprisonment. This article does not require that the suspect be present when the investigation is opened and the DRC has even exercised such jurisdiction over persons at the trial stage when they are not present in the country.

However, Article 3 (2) of the current Penal Code requires a political authority to initiate investigations or proceedings on universal jurisdiction basis. We welcome the elimination of this requirement in Article 16 of the draft implementing legislation. This amendment should be extended to Article 3 of the Penal Code.

In addition, Article 16, paragraph 2 of the draft implementing legislation which would require - for the first time in DRC history - that the suspect or one of the suspects be present at the time the investigation is opened should also be omitted. Such a requirement will undermine the DRC's ability to fulfil its responsibilities under the Geneva Conventions and as a member of the international community in the repression of the worst possible crimes in the world. The Preamble of the Rome Statute recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". This reference in the Preamble to criminal jurisdiction includes not only a state's jurisdiction under its national law, but also its jurisdiction under international law.

D. Principles of criminal responsibility and defences

Superior responsibility. The principles of criminal responsibility in the implementing legislation should satisfy the highest standards of both customary and conventional international law. Article 14 of the draft law fails to hold a superior to the same standard of criminal responsibility as a result of his or her failure to exercise proper control over his or her subordinates as the standard applicable to a commander.

The implementing legislation should include a single standard of criminal responsibility for both military and civilian leaders as required by customary international law, as reflected by Article 86 (2) of Protocol I, Article 6 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 7 (3) of the Statute of the ICTY and Article 6 (3) of the Statute of the ICTR. In particular, the draft legislation does not include "knew" - "should have known" standard for civilian authorities. It is regrettable that the Rome Statute - at the insistence of the USA and a few other states - included a separate, weaker standard for civilian superiors, in derogation of customary and conventional international law. However, that standard applies only in trials in the International Criminal Court. No state should include this lesser standard of criminal responsibility in its own legislation.

The DRC became party to Protocol I on 3 June 1982 and it is obliged to implement that treaty in its national law. The DRC should therefore ensure that its national legislation incorporates the principles of criminal responsibility as broad as in customary and conventional international law.

Prohibition of extension by analogy and requirement of strict interpretation.

The draft law does not include the principles according to which the definition of a crime shall not be extended by analogy and law shall be strictly interpreted (although the latter is envisaged in the draft's introduction). Furthermore, unlike its previous version, the July 2003 draft does not contain the principle of non-retroactivity *ratione personae* (Article 24 of the Rome Statute).

According to draft Article 11, a mistake of fact and of law is a ground for excluding criminal responsibility when it is "*invincible*", i.e. when the mistake could have been made by a person of average diligence, taking into accounts the interests and the circumstances of the case. To be a ground for excluding criminal responsibility, Article 32 of the Rome Statute requires the mistake to negate the mental element. Draft Article 11 seems to establish a lower threshold and gives the judge more discretion in deciding whether or not the mistake excludes criminal responsibility. Thus, in some instances persons who would be held criminally responsible in the International Criminal Court for certain conduct could be acquitted in the DRC courts for exactly the same conduct. An explanation of why the wording has been changed in the new draft legislation would be therefore welcome.

The *nullum crimen sine lege* principle is codified in Article 2 of the draft law. Nonetheless, it is not exactly clear why the wording is different. By keeping the term "*la loi*", which applies only to the DRC implementing legislation, and not to

international criminal law ("*droit international penal*"), DRC courts would not be able to investigate and prosecute the millions of crimes under international law committed in the DRC in the decades before that date, even though such conduct was criminal under international law. Article 15 (2) of the International Covenant on Civil and Political Rights (ICCPR) permits national courts to exercise jurisdiction over conduct "which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". Retaining the term "*la loi*" would even prevent the DRC from giving effect to the implementing legislation for national investigations and prosecutions between 1 July 2002 and the date the implementing legislation goes into effect.

As to the *ne bis in idem* principle, unlike the previous draft (Article 7, first paragraph), the July 2003 draft only takes into account persons already tried by a national court (Article 5), but not persons already tried by the Court. Further, Article 5 of the July 2003 draft omits the second part of Article 20 (3) of the Rome Statute, which provides for the exception to the *ne bis in idem* principle when the proceedings before another court were not conducted independently or impartially or inconsistently with an intent to bring the person concerned to justice. Clarification of these changes would be welcome.

E. Fair trials

National courts should ensure that their procedures at all stages of criminal proceedings are consistent with international law and standards for fair trials, particularly for crimes under international law in national courts. This law and these standards include Articles 9, 14 and 15 of the ICCPR and Articles 55 and 62 to 68 of the Rome Statute.

There are also a broad range of other international standards concerning the right to fair trial which should be incorporated in DRC law, including those in Articles 9, 10 and 11 of the Universal Declaration of Human Rights, the UN Standard Minimum Rules for the Treatment of Prisoners (UN Standard Minimum Rules), the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (UN Body of Principles), Articles 7 and 15 of the UN Convention against Torture, the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors.

The fair trial guarantees in the Geneva Conventions of August 12, 1949, and Additional Protocol I and II should also be taken into consideration. These standards include those found in the Third Geneva Convention, Articles 129-131; Fourth Convention, Articles 54, 64-75, and 117-126; Additional Protocol I, Article 75; and Additional Protocol II, Article 6.

In addition, regional law and standards concerning fair trials should be incorporated directly or by reference in the body of the draft implementing legislation of the Rome Statute. These include the European Convention on Fundamental Rights and Human Freedoms and its Protocols, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights and African Commission on Human and Peoples' Rights Resolution on the Right to Fair Trial, adopted at its 11th session in March 1992.

Although some of the pre-trial rights and rights at trial are guaranteed under the DRC Constitution and legislation, not all of these rights are expressly guaranteed.

Pre-trial rights. Draft Article 23, containing proposed Article 11 (1) and (2) of the Criminal Procedure Code, has incorporated some fair trials provisions of Article 55 of the Rome Statute. However, Article 11 fails to include the full range of rights recognized in Article 55. These omissions are particularly troubling since Article 55 is a mini-human rights convention for the earliest stages of criminal proceedings, not just for suspects, but also for other persons. Article 11 also does not make it clear that it applies to investigations by the Court as well as to DRC criminal proceedings.

For instance, Article 11 (1) does not guarantee the rights in Article 55 (1) during an investigation under the Rome Statute to any person, but limits these rights to persons suspected of committing a crime under the draft legislation. It should provide that all rights listed in Article 55 (1) apply to *any* person during an investigation.

Article 11 (1) (e), which is modelled on Article 55 (1) (d) of the Rome Statute and Article 9 (1) of the ICCPR, omits the second part of Article 55 (1) (d) stating that no person "shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute". This second part is an additional guarantee and it should be included in the legislation, perhaps reworded to say "as established by law, including the Rome Statute".

In addition, if as it appears to do, this article applies to investigations by DRC authorities of crimes under DRC law with a view to possible prosecution in DRC courts, then this article is welcome, but it will then be essential to ensure that it also applies, as Article 55 does, to investigations being conducted at the request of the Court. It is not entirely clear whether Article 11 was intended to apply to such investigations. Given the deletion of the final part of the corresponding Article 55 (1) (d) of the Rome Statute when drafting Article 11 (1) (e), we would like to know whether this language will apply to investigations at the request of the Court or will be limited only to national investigations in DRC law.

Although Article 55 (2) of the Rome Statute provides that suspects must be informed of all of their rights in that paragraph, in draft Article 11 (2) this requirement is omitted for the rights provided in Article 55 (2) (c) and (d). It is axiomatic that a person cannot exercise his or her rights if the person is not aware of those rights. The legislation should require that suspects be informed of these rights.

Draft Article 23, containing proposed Article 11 (2) of the Criminal Procedure Code, does not contain the second part of Article 55 (2) (d) of the Rome Statute stating that anyone suspected of a crime under the Statute must be questioned in the presence of counsel "unless that person has voluntarily waived his or her right" to counsel. It is possible that this right may be incorporated in Article 11 (1) (a) with regard to the period after an the arrest, but it is not clear that it would apply to any questioning by the authorities before that stage. We would welcome clarification of this point.

Finally, the July 2003 implementing legislation does not include Article 28 of the previous draft, which guaranteed the rights of persons in custody.

Rights at trial. In addition, the implementing legislation should incorporate the following minimum guarantees that are recognized in the Rome Statute: the right of the accused to be present during trial (Article 63), the right to a public trial (Article 64 (7)), the obligation to ensure the accused understands the nature and consequences of an admission of guilt (Article 65), and the presumption of innocence (Article 66).

The implementing legislation should ensure that the accused is given adequate time and facilities for the preparation of defence, to be tried without undue delay, to examine and have examined the witnesses against him or her, to make an unsworn oral or written statement in his or her defence, not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal, and for the provision by the

national prosecutor of information which tends to show the innocence of the accused or to mitigate the guilt of the accused to the accused's defence counsel (Article 67).

The above mentioned guarantees should be included in any national criminal justice system as essential components of the right to fair trial. As a safeguard of these rights, Article 20 (3) of the Rome Statute provides that the Court may conduct a new trial for crimes of genocide, crimes against humanity and war crimes when the trials for these crimes are not conducted independently or impartially.

Draft Articles 29-31 of the July 2003 draft would amend the Military Judicial Code (*Code judiciaire militaire*) in order to include military judges in the national court (the Court of Appeal or the Supreme Court of Justice) whenever a member of the military is charged with crimes under the International Criminal Court's jurisdiction. The military judges must have the same rank as or higher than that of the accused. It is a positive step forward that for certain crimes (ICC crimes) military will be prosecuted before civilian courts: if this provision of the draft is passed, it would be a great breakthrough. However, the presence of military judges in the court (which is explained in the draft's introduction by the traditional argument that military are best prosecuted by military) could lead to undue pressure on the civilian ones, especially considering that there could be other ways to bring military lawyers into the trial, e.g. by employing independent military experts.

The role of victims in the proceedings. The protection of victims and witnesses and their participation in the proceedings is an essential component of justice and must be assured in a manner that guarantees fair trials. Draft Article 23, containing proposed Article 11-1 of the Criminal Procedure Code, should include a provision requiring that the exercise of jurisdiction over the crimes covered by the legislation must conform to Article 68 of the Rome Statute (as did the 2002 draft) or, even better, expressly incorporate into the legislation each of the provisions of Article 68. This step would provide courts with greater clarity about how the rights of victims and witnesses can be assured consistently with the rights of the accused to a fair trial. It is of particular concern that draft Article 11-1 of the Criminal Procedure Code mentions victims, but not witnesses, who would not then be protected by the Criminal procedure Code. This might be an oversight, but we would welcome clarification on this point.

In addition, the DRC should incorporate other provisions of the Rome Statute applicable to proceedings in the Court that are relevant to the participation of victims in national proceedings. For example, the legislation should provide for the

appointment of legal experts on specific issues as in Article 42 (9) of the Rome Statute, and the establishment of a victim and witnesses unit within the national legal system of the DRC to facilitate investigations and reparations where crimes within the Court's jurisdiction are committed. Another such example that could be a useful model for national proceedings is the requirement in Article 15 (6) of the Rome Statute that if the Prosecutor decides after a preliminary examination not to seek authorization for an investigation the Prosecutor must inform those who provided the information of this decision.

Fines and forfeiture. Provisions implementing Article 77 (2) (a) and (b) of the Rome Statute on fines and forfeiture of proceeds, property and assets derived from crime, to the extent not included in the draft, should as well be incorporated in the implementing legislation.

F. Basic obligation to cooperate with the International Criminal Court

We note that the draft does not appear to implement some basic obligations in the Rome Statute relating to cooperation. The obligations in Articles 87 (2) and (4) and 94 of the Rome Statute are not in the draft, and they should, therefore, be incorporated unless they are self-executing. We would welcome confirmation that these provisions are self-executing in a legal memorandum to accompany the draft legislation when it is submitted to Parliament. If this view is not correct, then, we would recommend the incorporation of provisions implementing these articles in the draft legislation, as suggested above.

Articles 38 and 39 of the draft implementing legislation, relating to postponement of a request if contested, appear to be inconsistent with the Rome Statute. Article 95 of the Rome Statute makes clear that states must continue to provide certain types of cooperation even when a state has made challenges to jurisdiction or admissibility under Articles 18 or 19 of the Rome Statute. Article 95 expressly provides that a state may not postpone execution of a request during such proceedings when the Court "has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to Article 18 or 19". In addition, the Pre-Trial Chamber has certain powers under Article 54 which it can exercise even when a challenge is pending under Articles 18 or 19, and states parties must comply with any request by the Pre-Trial Chambers in such circumstances. It may be that Articles 18 (5) and (6), 19 (8) and 95 are self-executing. If that is the case, it would be helpful to clarify this point in an explanatory memorandum. If that is not the case, Articles 38 and 39 of the draft should be amended to provide that the Prosecutor General may

postpone execution of a request by the Court during challenges to jurisdiction and admissibility only to the extent permitted by the Rome Statute and that the national authorities should comply with all requests by the Court during such proceedings that are permitted by the Rome Statute.

G. Status of the Court in national law

It is a matter of deep concern that, unlike the previous draft (Article 34), there is no provision in the July 2003 draft implementing law that recognizes the privileges and immunities of the Court, its personnel, counsel, experts and other persons whose presence is required at the seat of the Court according to Article 48 of the Rome Statute. In addition, the implementing legislation should include the recognition of the legal personality of the International Criminal Court in the DRC, as provided in Article 4 of the Rome Statute. There is also no provisions stating that the International Criminal Court may exercise its functions and powers, as provided in the Rome Statute, on the territory of the DRC. Among other advantages, such recognition will facilitate the International Criminal Court in entering into contracts under DRC law.

An article permitting the Court to sit in the DRC should be included to be consistent with the provisions of Article 3 (3) of the Rome Statute, which permits the Court to sit outside the seat of the Court, including in the DRC, whenever the Court considers it desirable. Such a provision is included in the South African implementing legislation.⁵ According to point 11 in the Amnesty International *Checklist for Effective Implementation*, states parties should incorporate provisions in their national law to facilitate the Court sitting in their territory, as well as to ensure that the Court can exercise its functions and powers effectively on the territory of the state. The ability of the Court to sit in the DRC will be essential if, as expected, the Court opens an investigation based on the referral of the situation in the country to the Court.

H. Facilitating and assisting investigations by the Court

Draft Article 32 provides that the DRC shall cooperate fully with the Court in its investigations and prosecutions. This commitment is certainly to be welcomed, but it appears to be limited in two respects. First of all, it does not expressly provide for full

⁵ Chapter 3 of the South African Implementation Legislation of the Rome Statute, on the Functioning, Privileges and Immunities of the Court in South Africa, provides as follows:

Seat of the Court in Republic;

6. "The President may, at the request of the Court and by proclamation in the Gazette, declare any place in the Republic to be a seat of the Court."

cooperation in preliminary examinations undertaken by the Court before a formal investigation is opened. Given that the Prosecutor is now conducting a preliminary examination with regard to the situation in the DRC and to the scale of the crimes, clear statutory requirements on cooperation at this early stage would be welcome. Much of what the Prosecutor will need will be similar to what is required in state-to-state cooperation, but it would facilitate cooperation by courts and officials if there was a clear statutory requirement to cooperate at this crucial early stage. Second, the obligation to cooperate in draft Article 32 is subject first to the draft legislation and other national law and then to the Rome Statute. It would ensure smooth cooperation, as well as be consistent with the Vienna Convention on the Law of Treaties, if the legislation made clear that the international obligations have priority over any inconsistent national law.

Regarding the carrying out of independent investigations by the Prosecutor, as provided for in article 54 (2) of the Rome Statute, we note that there does not appear to be any corresponding article in the draft. However, it is not clear whether Article 34 in the draft, which says that the national public prosecutor can handle a request for cooperation in the presence of the Prosecutor or his representative, was intended to cover this provision. If this is the case, Amnesty International is concerned that the current wording of draft Article 34 could impede or delay the investigation. It would be preferable if a provision were incorporated to permit the Prosecutor to conduct independent investigations in the DRC pursuant to Article 54 (2) of the Rome Statute. As explained in point 17 of the *Checklist for Effective Implementation*, the organization believes that the DRC should permit the Office of the Prosecutor and defence to conduct on-site investigations without hindrance in all cases.

Article 96 (3) of the Rome Statute does not seem to have any corresponding provision in the draft. It would facilitate the work of the Court if the DRC were not to wait for a request from the Court concerning requirements of national law related to forms of cooperation with the Court, but, instead, provided comprehensive information on current requirements and update them as they change. Such a course would improve the preparedness, speed and effectiveness of the Court. Article 36 of the draft legislation authorizes the national prosecutor to consult with the Court where a request from the latter presents difficulties. However, it does not mention the basis on which this request (such as a concurrent investigation or prosecution, or an admissibility challenge) can be postponed or delayed, as in Articles 94 and 95 of the Rome Statute. For the reasons indicated in the *Checklist for Effective Implementation*, priority should be given to investigations or prosecutions by the Court of cases of

genocide, crimes against humanity and war crimes over national investigations or prosecutions, particularly of less serious crimes.

There appears to be no provision in the draft expressly implementing Article 72 of the Rome Statute concerning national security information. Amnesty International believes that to ensure effective investigation and prosecution of cases before the Court, states parties should expressly provide that if, after the extensive consultation procedures in that Article have been implemented, the Court concludes pursuant to Article 72 (7) (a) (ii) that the state is not complying with its obligations under the Rome Statute, the state shall comply with the Court's request to provide the information under the safeguards envisaged under the Statute as well as with any decisions pursuant to Article 87 (7) of the Assembly of States Parties or the Security Council. In this connection, the draft amendments to the Senegalese Code of Criminal Procedure concerning implementation of Article 72 of the Rome Statute may provide a useful model.⁶

Further, unlike its previous version (Articles 50 and 51), there appears to be no provision implementing Article 93 (7) of the Rome Statute, which deals with the temporary transfer to the Court of a person in custody for purposes of identification or for obtaining testimony or other assistance.

Draft Article 26, containing proposed Article 47-8 (3) of the Criminal Procedure Code, does not appear to require expressly that the DRC will compel a person to attend a hearing of the Court at its seat or through video-conferencing facilities and to provide testimony and the production of documents and other evidence when the Court so requires pursuant to Article 64 (6) (b). To ensure that the purposes of the Rome Statute are served, at a minimum, the implementing legislation should provide, in accordance with the DRC's obligations under Article 64 (6) (b) to

⁶ The Senegalese draft implementing legislation provides in a new Article 677-16 of the Code of Criminal Procedure:

« Conformément aux articles 93(4) et 72 du Statut, le Procureur Général ne peut rejeter totalement ou partiellement une demande d'entraide de la Cour pénale internationale prévue par l'article 677-15 du présent Code que si cette demande d'entraide a pour objet la production de documents ou la divulgation d'éléments de preuve qui touchent à la sécurité nationale.

Lorsque les autorités sénégalaises chargées de l'exécution de la demande estiment que la divulgation de renseignements porte atteinte aux intérêts de la sécurité nationale, elles en avisent la Cour et prennent, en liaison avec le Procureur, la défense, la Chambre préliminaire ou la Chambre de première instance, selon le cas, toutes les mesures raisonnablement possibles pour trouver une solution par la concertation. A l'issue des consultations, le Sénégal est tenu de respecter la décision finale de la Cour pénale internationale. »

assist the Court to require the attendance and testimony of witnesses, for compulsory testimony in the DRC by video-conferencing of any prisoner who refuses consent to transfer to the seat of the Court.

As recommended by Amnesty International in its *Checklist for Effective Implementation*, the implementing legislation should provide that DRC courts and authorities are able to provide any form of assistance requested by the Court, as well as other states, in connection with the investigation and prosecution of the crimes within its jurisdiction.

I. Arrest and surrender of accused persons

Amnesty International, in point 20 of its *Checklist for Effective Implementation*, urges states to ensure that they cooperate fully in accordance with Article 89 of the Rome Statute with any demands for arrest and surrender of accused persons to the Court. The DRC should ensure that its courts or national authorities do not have any substantive grounds to refuse surrender of persons to the Court and that their procedure for the surrender of persons to the Court is simple, speedy and less burdensome than exists for extradition. In this connection, it is a matter of deep concern that the DRC signed an impunity agreement with the USA after it ratified the Rome Statute prohibiting the surrender of US nationals and others to the Court. Such agreements are contrary to international law and the agreement should not be submitted to Parliament or ratified.⁷

Although Article 40 of the draft law provides that requests for arrest and surrender are to be addressed to the national prosecutor and Article 41 of the draft law provides that the national prosecutor shall respond promptly (*répond promptement*) to every such request, neither article appears expressly to require compliance with such request. The obligation to comply with such requests may be included in Article 32 of the draft law (see comment on this article). The draft does not appear to have a

⁷ Article 98 (2) applies only to pre-existing Status of Forces Agreements (SOFAs) that are in force, not to any such agreements that may be established after a state becomes a signatory or party to the Rome Statute. Article 98 (2), therefore, obliges states either to investigate and prosecute or hand over persons suspected of genocide, crimes against humanity or war crimes to the Court. As emphasized by Amnesty International in two recent documents, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes*, AI Index: IOR 40/025/2002, August 2002, and *International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements*, AI Index: IOR 40/030/2002, October 2002, (both available at www.amnesty.org/icc), these agreements are contrary to the object and purpose of the Rome Statute and other international law instruments.

provision for the DRC, as a requested state, to consult with the Court, for the surrendering of a person sought by the Court for a different crime other than that which the person might be serving a sentence or proceeded against in the requested state (Article 89 (4) of the Rome Statute). This should be provided in the implementing legislation.

As far as Article 89 (2) of the Rome Statute is concerned, it appears that it would be implemented by draft Article 25, containing proposed Article 47-5 (2) of the Criminal Procedure Code. However, the provision does not restrict the scope of its application to challenges by the accused to surrender on the basis of the *ne bis in idem* principle. Further, draft Article 25, containing proposed Article 47-6 of the Criminal Procedure Code, does not follow the corresponding provision in the Rome Statute (Article 89 (3)) as it omits the exception of transit that would impede or delay the surrender. The draft provision does not implement Article 89 (3) (d) and (e), which deal with aerial transportation of the person.

There appears to be no provision expressly implementing Article 90 of the Rome Statute. The DRC implementing legislation should provide that priority will be given to requests for surrender by the Court over competing requests by other states, both in the situations required by Article 90 of the Rome Statute and in all other instances.

In addition, as stated in Article 101 (2) of the Rome Statute, states parties should endeavour to waive restrictions at the time of surrender on prosecution by the Court for conduct other than that which forms the basis of the request. There is no draft article implementing this provision.

Finally, in the July 2003 draft implementing legislation there are no provisions corresponding to Articles 50 and 51 of the previous draft, which provided for the transfer to the Court of a person in custody with his consent. If this means that DRC courts can require appearance before the Court pursuant to Article 64 (6) (b), we would welcome it.

J. Ensuring effective reparations to victims

The draft provides for reparations to victims of genocide, crimes against humanity and war crimes as ordered by the Court in draft Article 27, containing proposed Articles 121-3 and 121-4 of the Criminal Procedure Code. However, as Amnesty International stated in point 27 of its *Checklist for Effective Implementation*, states should also

make sure that their national law permits victims to exercise all their rights under national and international law. The DRC implementing legislation should also provide that the DRC would contribute to the Trust Fund established pursuant to Article 79 of the Rome Statute and also establish a similar fund at the national level.

K. Enforcement of judgments and sentences

We welcome the inclusion of draft Article 27, containing proposed Article 121-1 of the Criminal Procedure Code, which provides for sentenced persons to serve their sentences in the DRC. However, not all aspects of a state's obligation under Part 10 of the Rome Statute with regard to such persons are included in the draft. For instance, the implementing legislation does not provide that sentenced persons may not be impeded from applying to the Court to be transferred from the state of enforcement as required in Article 104 (2) of the Rome Statute. Draft Article 121-1 fails to provide that sentences passed by the Court shall be binding on the DRC when they accept sentenced persons from the Court in accordance with Article 105 of the Rome Statute.

In addition, there are no draft provisions expressly regarding unimpeded and confidential communications between the sentenced person and the Court. As required in Article 106 (3) of the Rome Statute, the implementing legislation must permit the Court to have access to persons and places where persons are serving Court sentences. Article 106 (2) of the Rome Statute requires that these places meet internationally recognized standards for places of detention with no more or less favourable treatment for persons serving sentences arising from the same crime. This provision is partially implemented by draft Article 27, containing proposed Article 121-1 of the Criminal Procedure Code.

Finally, Article 55 of the previous draft, which provided for the right of sentenced persons to submit a request for release on parole to the Court through the national prosecutor, does not appear in the present version.

Articles 107, 108 and 111. The draft does not contain provisions implementing Articles 107, 108 and 111 of the Rome Statute. The implementing legislation should provide for the transfer of persons who have completed their sentences and are not nationals of the state of enforcement. It should provide that there be no prosecution, punishment or extradition of a sentenced person in DRC custody in the absence of the Court's approval.

The implementing legislation should also make provisions where a convicted person escapes from custody, as required by Article 111 of the Rome Statute.

We understand that Articles 107, 108, 111 of the Rome Statute may be self-executing, but we would welcome confirmation of this view, which could be included in a legal memorandum to accompany the draft legislation when it is submitted to Parliament. If this view is not correct, then we would recommend amending the draft legislation as suggested above.

L. Nomination of candidates for judges and Prosecutor

We note that the draft has no provisions regarding the nomination of judges and the Prosecutor pursuant to Article 36 of the Statute. Amnesty International in point 14 of its *Checklist for Effective Implementation*, recommends that states ensure that when they nominate candidates to be judges or Prosecutor, they do so in an open process with the broadest possible consultation. Depending on the national legal system, such a procedure could be established by constitutional amendment (if necessary), legislation or administrative regulations.

The recommendations on how these consultations should be carried out are provided in the public document, "*International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges*," AI Index: IOR 40/023/2002 (available at www.amnesty.org/icc). In this document, Amnesty International suggested, among other things, that the executive should make a public call for all possible nominations for the selection process; that the nomination of the greatest number of candidates should be encouraged; that civil society and other interested parties should have an opportunity to comment on the knowledge and experience of each of the candidates. The Organisation recommends that the process for proposing candidates to post of judge or prosecutor within the Court should be governed by legislation in the DRC, on the basis of the guidelines already mentioned. Amnesty International sent a request to all states parties in August 2002 requesting information about their procedures for nomination of candidates to be judges to the Court. The DRC had not responded to this request as of May 2004.

M. Training

As recommended in point 31 of Amnesty International *Checklist for Effective Implementation*, states parties should develop and implement programs for the training of 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 their military manuals to incorporate the appropriate references of the Statute. If a provision is not included in the draft legislation, the DRC should ensure that effective training programs are developed and implemented.

III. CONCLUSION

Amnesty International welcomes the fact that the DRC has signed and ratified most of the treaties and conventions on human rights protection and international humanitarian law. These signatures and ratifications demonstrate a commitment by the DRC as a part of the international community to put an end to impunity. This goal can only be achieved where effective implementation legislation for the Rome Statute with the strongest international legal standards derived from the treaties that the DRC has signed and ratified, as well as customary international law, are put in place to punish perpetrators of these horrendous crimes.

Amnesty International hopes that the above suggestions will be incorporated in a revised version of the draft legislation and that it will be submitted promptly to Parliament for its consideration and adoption.

ANALYSIS OF THE DRC JULY 2003 DRAFT LEGISLATION, IN ACCORDANCE WITH THE "CHECKLIST FOR EFFECTIVE IMPLEMENTATION" PREPARED BY AMNESTY INTERNATIONAL, AI INDEX: IOR 40/11/00

PART 1. COMPLEMENTARITY

1. DEFINITION OF 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.

Rome Statute	DRC July 2003 Draft Statute
Article 6	Article 17 of the July 2003 draft; draft Article 221 to the Penal Code. This article incorporates the definition of genocide in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to which the DRC became party in 1962, and in Article 6 of the Rome Statute, but neither the Rome Statute nor the draft fully incorporates the forms of ancillary criminal responsibility in Article III of the 1948 Genocide Convention. In the new draft, death penalty replaces life imprisonment. Paragraph (5) of the draft is broader than Article 6 (e) of the Rome Statute, since it qualifies as genocide the forced transfer of <i>any</i> member of a group (not just of children) to another group. " <i>Comme tel</i> " does not appear in the draft.
Article 7 (1)	Article 17 of the July 2003 draft; draft Article 222 of the Penal Code. The wording

	is broader than in the chapeau of Article 7 (1) of the Rome Statute as it omits the last phrase of the definition - with knowledge of the attack. (" <i>en connaissance de cette attaque</i> "). Death penalty replaces life imprisonment in the 2003 draft.
Article 7 (1) (a)	Article 17 of the July 2003 draft; draft Article 222 (1) of the Penal Code. The definition is consistent with the Rome Statute.
Article 7 (1) (b)	Article 17 of the July 2003 draft; draft Article 222 (2) of the Penal Code. The draft omits the crime against humanity of extermination, which has been included in every international instrument defining crimes against humanity since Nuremberg. This paragraph of the draft includes only a limited number of aspects of the crime of extermination.
Article 7 (1) (c)	Article 17 of the July 2003 draft; draft Article 222 (3) of the Penal Code. This article of the draft is worded differently from Article 7 (1) (c) and 7 (2) (c) of the Rome Statute and certain aspects appear to be more restrictive. The reasons for the changes are not known.
Article 7 (1) (d)	Article 17 of the July 2003 draft; draft Article 222 (4) of the Penal Code. The definition in the draft does not clearly distinguish between deportation (transfer across a national border) and forcible transfer (movement within a country). It also replaces the phrase "by expulsion or other coercive acts" (" <i>en les expulsant ou par d'autres moyen coercitifs</i> ") in Article 7 (2) (d) of the Rome Statute with " <i>en les déplaçant ... ou en employant d'autres mesures de contrainte</i> ". The reason for the

	<p>change and whether it was to expand or restrict the scope of this crime are not known. The definition in the draft is broader in two respects than in the Rome Statute: it omits the requirement that the victims have been forced out of a region where they were lawfully present and that the reasons for the transfer have been without grounds permitted under international law.</p>
<p>Article 7 (1) (e)</p>	<p>Article 17 of the July 2003 draft; draft Article 223 (1) of the Penal Code. In certain respects, the draft is broader than the Rome Statute. It does not require that the deprivation of liberty be "severe" ("<i>grave</i>"), be a physical deprivation or be "in violation of fundamental rules of international law" ("<i>en violation des dispositions fondamentales du droit international</i>").</p>
<p>Article 7 (1) (f)</p>	<p>Article 17 of the July 2003 draft; draft Article 222 (5) of the Penal Code. The definition of the crime against humanity of torture in the draft is not consistent with Article 7 (1) (f) and (2) (e) of the Rome Statute. The draft replaces the phrase "<i>d'infliger intentionnellement une douleur ou des souffrances aiguës, physiques ou mentales</i>" in Article 7 (2) (e) with the phrase "<i>infligeant des atteintes graves à l'intégrité physiques ou mentale</i>". The reason for the change and whether it was intended to broaden or restrict the scope of the crime is not known. The following disappears in the new draft: "<i>dépassant les conséquences des sanctions admises par le droit international</i>".</p>
<p>Article 7 (1) (g)</p>	<p>Article 17 of the July 2003 draft; draft Article 222 (6) of the Penal Code. The addition of sexual abuse ("<i>abuse</i></p>

	<p><i>sexuellement d'une personne</i>") broadens the scope of crimes against humanity of sexual violence. However, in the light of the extensive drafting history in New York and Rome, it is not clear why other changes were made. These include changing the order of the other crimes, changing forced prostitution ("<i>prostitution forcée</i>") to "<i>la contraint à la prostitution</i>", sexual slavery ("<i>esclavage sexuel</i>") to "<i>la soumet à l'esclavage sexuel</i>" and forced sterilization ("<i>sterilization forcée</i>") to "<i>lui ôte sa capacité de procréer</i>". The change in the definition crime of forced pregnancy from that in Article 7 (2) (f), however, clearly broadens its scope by dropping the requirement that the woman be detained illegally. Similarly, the addition of the crime of "any other sexual assault" also broadens the scope of crimes in this provision. "<i>Harcèle</i>" (harasses) is also added in the new draft.</p>
<p>Article 7 (1) (h)</p>	<p>Article 17 of the July 2003 draft; draft Article 223 (2) of the Penal Code. The dropping of the word "any" in the phrase "any group or identifiable collectivity" ("<i>tout groupe ou de toute collectivité identifiable</i>") may have been intended to narrow the scope of the crime of persecution, but nothing in this paragraph suggests that any such entities would be excluded. "<i>Les membres d'un groupe</i>" also replaces "<i>un groupe</i>". Also, "<i>inadmissible</i>" should be plural. Other aspects of the definition in the draft make it broader than in the Rome Statute. The requirement in Article 7 (2) (g) of the Rome Statute that the denial of fundamental rights be intentional and severe ("<i>intentionnel et grave</i>") is omitted, the requirement in Article 7 (1) (h)</p>

	<p>of the Rome Statute that the other criteria be "universally recognized as inadmissible" ("<i>universellement reconnus come inadmissibles</i>") has been replaced by "<i>inadmissible(s) par les règles générales du droit international</i>", the use of the definition in Article 7 (3) of the term "gender" has been dropped and the requirement found in Article 7 (1) (h) that the persecution be linked with other crimes against humanity, war crimes or genocide is omitted.</p>
<p>Article 7 (1) (i)</p>	<p>Article 17 of the July 2003 draft; draft Article 222 (7) of the Penal Code. Efforts to define the complex crime against humanity of enforced disappearance have lasted for more than a decade and they continue, most recently in the drafting of the UN Convention on the subject. It is, therefore, surprising that the draft definition does not follow the structure of either Article 7 (1) (i) or (2) (i) of the Rome Statute or the Elements of Crimes. Although it appears that the intent of the drafters was to cover all aspects of the crime, it is not clear whether it fully does so. "<i>Pendant une durée prolongée</i>" does not appear in the draft, which is then broader than the definition contained in Article 7 (2) (i) of the Rome Statute. Further, unlike the latter, the draft takes also into account subjects different from political organisations ("<i>ou autre</i>").</p>
<p>Article 7 (1) (j)</p>	<p>Article 17 of the July 2003 draft; draft Article 222 (9) of the Penal Code. The draft closely follows the Rome Statute, but is also broader, since, unlike its previous version, it also takes into account oppression and domination by political, national, ethnic, cultural, religious, sexist and other groups.</p>

	This might be the reason why the term " <i>apartheid</i> " is not employed in the draft.
Article 7 (1) (k)	Article 17 of the July 2003 draft; draft Article 222 (8) of the Penal Code. This paragraph fails to mention the words "other inhumane acts of a similar character". These crimes against humanity have been included in every international instrument defining crimes against humanity since the Nuremberg Charter. Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Elements of Crimes, demonstrate that this crime satisfies the requirements of legality. Indeed, the Rome Statute and the Elements of Crimes contain an even narrower definition of the crime.
Article 7 (2) (a)	Article 17 of the July 2003 draft; draft Article 222 of the Penal Code, chapeau. See comments above on Article 7 (1) of the Rome Statute.
Article 7 (2) (b)	Article 17 of the July 2003 draft; draft Article 222 (2) of the Penal Code. See comments above on Article 7 (1) (b) of the Rome Statute.
Article 7 (2) (c)	Article 17 of the July 2003 draft; draft Article 222 (3) of the Penal Code. See comments above on Article 7 (1) (c) of the Rome Statute.
Article 7 (2) (d)	Article 17 of the July 2003 draft; draft Article 222 (4) of the Penal Code. See comments above on Article 7 (1) (d) of the Rome Statute.
Article 7 (2) (e)	Article 17 of the July 2003 draft; draft Article 222 (5) of the Penal Code. See comments above on Article 7 (1) (f) of the Rome Statute.

Article 7 (2) (f)	Article 17 of the July 2003 draft; draft Article 222 (6) of the Penal Code. See comments above on Article 7 (1) (g) of the Rome Statute.
Article 7 (2) (g)	Article 17 of the July 2003; draft Article 223 (2) of the Penal Code. See comments above on Article 7 (1) (h) of the Rome Statute.
Article 7 (2) (h)	Article 17 of the July 2003 draft; draft Article 222 (9) of the Penal Code. See comments above on Article 7 (1) (j) of the Rome Statute.
Article 7 (2) (i)	Article 17 of the July 2003 draft; draft Article 222 (7) of the Penal Code. See comments above on Article 7 (1) (i) of the Rome Statute.
Article 7 (3)	The omission of this paragraph ensures that courts will use the generally accepted international definition of gender, rather than the definition in Article 7 (3) of the Rome Statute, which has been criticized by some as more restrictive.
Article 8 (1)	There does not appear to be any corresponding article in the draft legislation. This omission is to be welcomed because Article 8 (1) simply is designed to suggest that the Prosecutor of the International Criminal Court give priority in preliminary examinations and investigations to war crimes that are not committed as part of a plan or policy or as part of a large scale commission of such crimes.
Article 8 (2) (a)	Article 17 of the July 2003 draft; draft Article 224 (1) of the Penal Code. This provision follows the Rome Statute, but it also includes the 1977 Additional Protocols.
Article 8 (2) (a) (i)	Article 17 of the July 2003 draft; Article

	224 (1) (a) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (a) (ii)	Article 17 of the July 2003 draft; draft Article 224 (1) (b) of the Penal Code. This provision follows the Rome Statute, but it is broader in that, it also encompasses cruel and degrading treatments (in addition to torture and inhuman treatments). Degrading treatments are also prohibited by draft Article 224 (2) (u).
Article 8 (2) (a) (iii)	Article 17 of the July 2003 draft; Article 224 (1) (c) of the Penal Code. This provision follows the Rome Statute but it also encompasses <i>mental</i> integrity.
Article 8 (2) (a) (iv)	Article 17 of the July 2003 draft; draft Article 224 (1) (d) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (a) (v)	Article 17 of the July 2003 draft; draft Article 224 (1) (e) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (a) (vi)	Article 17 of the July 2003 draft; draft Article 224 (1) (f) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (a) (vii)	Article 17 of the July 2003 draft; draft Article 224 (1) (g) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (a) (viii)	Article 17 of the July 2003 draft; draft Article 224 (1) (h) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b)	Article 17 of the July 2003 draft; draft Article 224 (2) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (i)	Article 17 of the July 2003 draft; draft Article 224 (2) (a) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (ii)	Article 17 of the July 2003 draft; draft

	Article 224 (2) (b) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (iii)	Article 17 of the July 2003 draft; draft Article 224 (2) (c) of the Penal Code. This provision follows the Rome Statute but it also adds the reference to humanitarian and peacekeeping/peace enforcement missions of the African Union.
Article 8 (2) (b) (iv)	Article 17 of the July 2003 draft; draft Article 224 (2) (d) of the Penal Code. This provision of the draft not only does not follow the definition in Protocol I, but it also uses significantly restrictive wording rather than the wording in the Rome Statute. The reason for this change is not entirely clear, but it may be that the reason for changing "deliberate" (<i>deliberée</i>) to "intentionally" (<i>intentionnellement</i>) was simply to conform this provision to the normal principles of criminal responsibility in the DRC without any restriction in the scope of this crime. However, the draft is not consistent in replacing "deliberate" with "intentionally" in other Rome Statute definitions. The draft mentions losses and harm to civilian persons and damage to the natural environment, but not damage to civilian property (unlike the previous draft). The wording echoes Article 51 (5) (b) of the of the 1977 Additional Protocol I to the Geneva Conventions, but it does not take civilian property into account and requires the collateral damage to be "manifestly" excessive.
Article 8 (2) (b) (v)	Article 17 of the July 2003 draft; draft Article 224 (2) (e) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (vi)	Article 17 of the July 2003 draft; draft

	Article 224 (2) (f) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (vii)	Article 17 of the July 2003 draft; draft Article 224 (2) (g) of the Penal Code. This provision follows the Rome Statute, but, consistently with Articles 224 (1) and 224 (2) (c), it also encompasses the African Union and all other international organizations, as well as the 1977 Additional Protocols.
Article 8 (2) (b) (viii)	Article 17 of the July 2003 draft; draft Article 224 (2) (h) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (ix)	Article 17 of the July 2003 draft; draft Article 224 (2) (i) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (x)	Article 17 of the July 2003 draft; draft Article 224 (2) (j) of the Penal Code. This provision follows the Rome Statute, but it is broader because it replaces " <i>d'une partie adverse</i> " with " <i>se trouvant sous le contrôle d'une partie adverse</i> ".
Article 8 (2) (b) (xi)	Article 17 of the July 2003 draft; draft Article 224 (2) (k) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xii)	Article 17 of the July 2003 draft; draft Article 224 (2) (l) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xiii)	Article 17 of the July 2003 draft; draft Article 224 (2) (m) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xiv)	Article 17 of the July 2003 draft; draft Article 224 (2) (n) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xv)	Article 17 of the July 2003 draft; draft Article 224 (2) (o) of the Penal Code. This

	provision follows the Rome Statute.
Article 8 (2) (b) (xvi)	Article 17 of the July 2003 draft; draft Article 224 (2) (p) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xvii)	Article 17 of the July 2003 draft; draft Article 224 (2) (q) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xviii)	Article 17 of the July 2003 draft; draft Article 224 (2) (r) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xix)	Article 17 of the July 2003 draft; draft Article 224 (2) (s) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xx)	Article 17 of the July 2003 draft; draft Article 224 (2) (t) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xxi)	Article 17 of the July 2003 draft; draft Article 224 (2) (u) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xxii)	Article 17 of the July 2003 draft; draft Article 224 (2) (v) of the Penal Code. This provision is broader than its counterpart in the Rome Statute since it does not require other forms or sexual attacks and violence to constitute a grave breach of the Geneva Conventions. However, unlike draft Article 222 (6) and Article 224 (5) (f) (which deals with the same crime with regard to conflicts of a non-international character) sexual harassment is not mentioned.
Article 8 (2) (b) (xxiii)	Article 17 of the July 2003 draft; draft Article 224 (2) (w) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xxiv)	Article 17 of the July 2003 draft; draft Article 224 (2) (x) of the Penal Code. This provision follows the Rome Statute.

	However, the word " <i>lancer</i> " in Article 8 (2) (b) (iv) of the Rome Statute has been changed in the draft to " <i>diriger</i> ". The reason for the change is not known.
Article 8 (2) (b) (xxv)	Article 17 of the July 2003 draft; draft Article 224 (2) (y) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (b) (xxvi)	Article 17 of the July 2003 draft; draft Article 224 (2) (z) of the Penal Code. This provision follows the Rome Statute but it is broader since it does not require the armed forces to be "national", and might, therefore, also include a prohibition to conscript or enlist children into paramilitary forces. The age limit in the draft is eighteen, while in the Rome Statute is fifteen.
Article 8 (2) (c)	Article 17 of the July 2003 draft; draft Article 224 (3) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (c) (i)	Article 17 of the July 2003 draft; draft Article 224 (3) (a) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (c) (ii)	Article 17 of the July 2003 draft; draft Article 224 (3) (b) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (c) (iii)	Article 17 of the July 2003 draft; Article 224 (3) (c) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (c) (iv)	Article 17 of the July 2003 draft; draft Article 224 (3) (d) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (d)	Article 17 of the July 2003 draft; draft Article 224 (4) of the Penal Code. This provision follows the Rome Statute. " <i>Conflits armés présentant un caractère international</i> " must be a misprint for

	" <i>conflits armés ne présentant pas un caractère international</i> ".
Article 8 (2) (e)	Article 17 of the July 2003 draft; draft Article 224 (5) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (e) (i)	Article 17 of the July 2003 draft; draft Article 224 (5) (a) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (e) (ii)	Article 17 of the July 2003 draft; draft Article 224 (5) (b) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (e) (iii)	Article 17 of the July 2003 draft; draft Article 224 (5) (c) of the Penal Code. This provision follows the Rome Statute. Consistently with draft Article 224 (2) (c), it also encompasses the African Union.
Article 8 (2) (e) (iv)	Article 17 of the July 2003 draft; draft Article 224 (5) (d) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (e) (v)	Article 17 of the July 2003 draft; draft Article 224 (5) (e) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (e) (vi)	Article 17 of the July 2003 draft; draft Article 224 (5) (f) of the Penal Code. This provision follows the Rome Statute, but it is broader, since it also mentions " <i>le harcèlement sexuel</i> " (sexual harassment).
Article 8 (2) (e) (vii)	Article 17 of the July 2003 draft; draft Article 224 (5) (g) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (e) (viii)	Article 17 of the July 2003 draft; draft Article 224 (5) (h) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (e) (ix)	Article 17 of the July 2003 draft; draft Article 224 (5) (i) of the Penal Code. This provision follows the Rome Statute.

Article 8 (2) (e) (x)	Article 17 of the July 2003 draft; draft Article 224 (5) (j) of the Penal Code. This provision follows the Rome Statute.
Article 8 (2) (e) (xi)	Article 17 of the July 2003 draft; draft Article 224 (5) (k) of the Penal Code. This provision follows the Rome Statute, but is broader because it replaces " <i>d'une partie adverse</i> " with " <i>d'une autre partie au conflit</i> ".
Article 8 (2) (e) (xii)	Article 17 of the July 2003 draft; draft Article 224 (5) (l) of the Penal Code. This provision follows the Rome Statute but the outdated terms " <i>de l'ennemi</i> " and " <i>de la guerre</i> " are replaced with " <i>d'un adversaire</i> " and " <i>du conflit</i> ".
Article 8 (2) (f)	Article 17 of the July 2003 draft; draft Article 224 (6) of the Penal Code. This provision follows the Rome Statute.
Article 8 (3)	Article 17 of the July 2003 draft; draft Article 225 of the Penal Code. This provision follows the Rome Statute, but Article 8 (3) was not a necessary provision and it would have been better to omit draft Article 225.

2. National courts should be able to exercise universal jurisdiction in all cases of crimes under international law.

Preamble, sixth paragraph	Article 16. This article provides for universal jurisdiction, but falls short of the Preamble by not giving DRC courts the ability to exercise universal jurisdiction to the full extent permitted by international law, including the Geneva Conventions and Protocol I, as well as under the current DRC Penal Code, by requiring for the first time under DRC law the presence of the accused
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	in DRC's territory before the opening of an investigation (" <i>l'ouverture de l'enquête</i> ").
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3. Principles of criminal responsibility in national legislation for crimes under international law should be consistent with customary international law.

Article 22 (1)	Article 2 (2). It is not exactly clear why the wording is different. By keeping the term " <i>la loi</i> ", which applies only to the DRC implementing legislation, and not to international criminal law (" <i>droit international penal</i> "), DRC courts would not be able to investigate and prosecute the millions of crimes committed in the DRC in the decades before the legislation takes effect, even though such conduct was criminal under international law. Article 15 (2) of the International Covenant on Civil and Political Rights (ICCPR) permits national courts to exercise jurisdiction over conduct "which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". Retaining the term " <i>la loi</i> " would even prevent the DRC from giving effect to the implementing legislation for national investigations and prosecutions between 1 July 2002 and the date the implementing legislation goes into effect.
Article 22 (2)	Article 3. However, it fails to provide that the definition of a crime shall not be extended by analogy and that law shall be strictly interpreted (although this is envisaged in the draft's introduction).
Article 22 (3)	There does not appear to be a corresponding provision in the draft.
Article 23	Article 2 (1). This provision is formulated

	differently and is not as precise as its counterpart in the Rome Statute.
Article 24	There does not appear to be a corresponding provision in the 2003 draft (unlike its previous version: Article 5). The principles of non-retroactivity (which is different from retrospectivity of national legislation concerning conduct that was criminal under general principles of law - see comment above on Article 2 (2) of the July 2003 draft law) and of the application of the more favourable law in case of a change in the legislation should therefore be included in the DRC law.
Article 25 (1)	Article 4 (2).
Article 25 (2)	Article 4 (1). This paragraph states that criminal responsibility is individual. Presumably, the intent of the drafters is to limit criminal responsibility, as in Article 25 (1) of the Rome Statute to natural persons (" <i>personnes physiques</i> "): this is specified in Article 4 (2).
Article 25 (3) (a-f)	Article 4 (2), which follows Article 25 (3) (a-f) of the Rome Statute. The previous draft referred to Articles 4, 21 and 22 of the current DRC Penal Code.
Article 25 (4)	Article 6. This article follows Article 25 (4) of the Rome Statute.
Article 26	Article 7. This draft article takes a different approach to criminal responsibility of minors from that in the Rome Statute. Article 26, as a result of a political compromise when states could not agree on the age of criminal responsibility, simply avoids the question by excluding crimes by minors under the age of 18 from the jurisdiction of the International Criminal Court, thus leaving the question of

	<p>how to deal with persons under that age who commit genocide, crimes against humanity or war crimes to national law. Similarly, the Statute of the Special Court for Sierra Leone excludes jurisdiction over minors under the age of 15, but it permits the Special Court to exercise jurisdiction over persons between the ages of 15 and 17. Article 7 of the draft provides that persons under the age of 18 are not criminally responsible, although it is silent on the question of the right of victims to reparations from such persons.</p>
Article 27	<p>Articles 8 and 28. The former article is an important reaffirmation of the fundamental principle, recognized in Article 27 of the Rome Statute, that no one is immune from criminal responsibility for genocide, crimes against humanity or war crimes in any court, national or international. Draft Article 8 (2) applies the irrelevance of any official capacity even for the crimes not envisaged in the draft legislation ("<i>en ce qui concerne les infractions non visées par la présente loi</i>").</p>
Article 28	<p>Article 14. This provision follows the regressive approach in Article 28 of the Rome Statute to command and superior responsibility, adopted at the urging of the United States of America (USA) and a few other states, to impose with regard to trials in the International Criminal Court a lesser standard of superior responsibility than found in all other international instruments, including Protocol I, to which the DRC is a party, that impose the same standard for commanders and superiors. If this two-tiered provision were retained, the DRC would be in breach of its obligations under Protocol I. Two oversights in paragraph 1: "<i>de</i>" should</p>

	be " <i>des</i> ", and " <i>sous son contrôle effectifs</i> " should be added after " <i>son autorité</i> ", as in paragraph 2 and in Article 28 of the Rome Statute.
Article 29	Article 15. The first paragraph follows Article 29 of the Rome Statute in excluding statutes of limitations for crimes in the draft. The second paragraph, which excludes amnesties, pardons and other measure of clemency for such crimes, is fully consistent with international law. See, for example, the Sierra Leone Special Court decision of 13 March 2004 (Case No.SCSL-2004-15-AR72 (E) and Case No.SCSL-2004-16-AR72 (E), Decision No.SCSL-04-15-PT-060-I and Decision No.SCSL-04-15-PT-060-II), and <i>Special Court for Sierra Leone: Denial of Right to Appeal and Prohibition of Amnesties for Crimes under International Law</i> , AI Index: AFR/51/012/2003, 1 November 2003.
Article 30	Article 9. This draft article follows Article 30 (1) and (2) of the Rome Statute with regard to mental elements of crimes, but inexplicably omits Article 30 (3), which explains the meaning of " <i>connaissance</i> ".
Article 31 (1)	Article 10, chapeau. The chapeau is based on the chapeau in Article 31 (1) of the Rome Statute. However, it is not entirely clear whether there are any other grounds for excluding criminal responsibility provided for in the draft (" <i>motifs d'exonération de la responsabilité pénale prévus par la loi</i> ") that would be inconsistent with the grounds listed in the Rome Statute or other international law.
Article 31 (1) (a)	Article 10 (1). This provision follows Article 31 (1) (a) of the Rome Statute.

Article 31 (1) (b)	Article 10 (2). This paragraph follows Article 31 (1) (b) of the Rome Statute.
Article 31 (1) (c)	Article 10 (3). This paragraph follows Article 31 (1) (c) of the Rome Statute. Drafting mistake: " <i>disproportionnée</i> " should be replaced by " <i>proportionnée</i> ". Article 31 (1) (c) and (d) of the Rome Statute should not have been incorporated without clarifying that they should be interpreted as narrowly as possible. A reformulation of this provision, which clearly rules out the unwarranted defences of military necessity and of duress, would probably have been better.
Article 31 (1) (d)	Article 10 (4). Death is not required to be imminent. Further, unlike the previous draft, the last part of Article 31 (1) (d) is omitted (" <i>Cette menace peut être soit exercée par d'autres personnes, soit constituée par d'autres circonstances indépendantes de sa volonté</i> ").
Article 31 (2)	There does not appear to be a corresponding provision in the draft.
Article 31 (3)	There does not appear to be a corresponding provision in the draft, thus ensuring that national courts cannot expand the scope of grounds for excluding criminal responsibility for crimes under international law.
Article 32 (1) (2)	Article 11. A mistake of fact or of law is a ground for excluding criminal responsibility when it is " <i>invincible</i> ", i.e. when the mistake could have been made by a person of average diligence, taking into accounts the interests and the circumstances of the case. Article 32 of the Rome Statute requires the mistake to negate the mental element to be a ground for excluding criminal responsibility. Draft Article 11 seems to establish a lower

	threshold and gives the judge more discretion in deciding whether or not the mistake excludes criminal responsibility. Thus, in some instances persons who would be held criminally responsible in the International Criminal Court for certain conduct could be acquitted in the DRC courts for exactly the same conduct. An explanation of why the wording has been changed in the draft legislation would be welcome.
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4. Defences in national law to crimes under international law should be consistent with customary international law.

Article 33 (1) (a-c)	Article 12. This article is different from its previous 2002 version, since it provides that superior orders are never a defence to war crimes. It is thus broader than Article 33 (1) (a-c) of the Rome Statute, included at the urging of the United States and a few other countries, and is consistent with all other conventional international law instruments and customary international law.
Article 33 (2)	Article 13. This article provides that an order to commit genocide or a crime against humanity is illegal.

II. ELIMINATION OF BARS TO PROSECUTION

5. No statutes of limitation

Article 29	Article 15, first paragraph. This paragraph follows the Rome Statute by excluding statutes of limitation for crimes in the draft.
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6. No amnesties pardons or similar measures of impunity by any state should be recognized.

Article 29	Article 15, second paragraph. This paragraph, which excludes amnesties, pardons and other measure of clemency for such crimes, is fully consistent with international law. See, for example, the Sierra Leone Special Court decision of 13 March 2004 (Case No.SCSL-2004-15-AR72 (E) and Case No.SCSL-2004-16-AR72 (E), Decision No.SCSL-04-15-PT-060-I and Decision No.SCSL-04-15-PT-060-II), and <i>Special Court for Sierra Leone: Denial of Right to Appeal and Prohibition of Amnesties for Crimes under International Law</i> , AI Index: AFR/51/012/2003, 1 November 2003.
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7 . Immunity of officials from prosecution for crimes under international law should be eliminated.

Article 27	Article 8 and Article 28. The former article is an important reaffirmation of the fundamental principle, recognized in Article 27 of the Rome Statute, that no one is immune from criminal responsibility for genocide, crimes against humanity or war crimes in any court, national or international. Draft Article 8 (2) affirms the irrelevance of any official capacity even for the crimes not envisaged in the draft legislation (" <i>en ce qui concerne les infractions non visées par la présente loi</i> ").
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III. ENSURING FAIR TRIALS WITHOUT THE DEATH PENALTY

8. *Trials must be fair*

Article 55	Article 23 of the July 2003 draft; draft Article 11 of the Criminal Procedure Code. Article 11 does not make it clear that it applies to investigations by the International Criminal Court as well as to DRC criminal proceedings.
Article 55 (1)	Article 23 of the July 2003 draft; draft Article 11 (1) of the Criminal Procedure Code. This paragraph does not guarantee the rights in Article 55 (1) during an investigation under the Rome Statute to any person, but limits these rights to persons suspected of committing a crime under the draft legislation.
Article 55 (1) (a-d)	Article 23 of the July 2003 draft; draft Article 11 (1) (b-e) of the Criminal Procedure Code. Article 11 (1) (e), which is modelled on Article 55 (1) (d) of the Rome Statute and Article 9 (1) of the ICCPR, omits the second part of Article 55 (1) (d) stating that no person "shall be deprived of his or her liberty <i>except on such grounds and in accordance with such procedures as are established in this Statute</i> ".
Article 55 (2)	Article 23 of the July 2003 draft; draft Article 11 (2) of the Criminal Procedure Code. Although Article 55 (2) of the Rome Statute provides that suspects must be informed of all of their rights in that paragraph, this requirement is omitted in Article 11. Article 28 of the previous draft, which dealt with the rights of a person in custody, does not appear in the new draft.
Article 55 (2) (a)	Article 23 of the July 2003 draft; draft

	Article 11 (2) (a) of the Criminal Procedure Code.
Article 55 (2) (b)	Article 23 of the July 2003 draft; draft Article 11 (2) (b) of the Criminal Procedure Code.
Article 55 (2) (c)	Article 23 of the July 2003 draft; draft Article 11 (1) (a) of the Criminal Procedure Code.
Article 55 (2) (d)	Article 23 of the July 2003 draft, containing proposed Article 11 (2) of the Criminal Procedure Code, does not contain subparagraph (d) of Article 55 (2) of the Rome Statute, which provides that anyone suspected of a crime under the Statute must be questioned in the presence of counsel "unless that person has voluntarily waived his or her right" to counsel. It is possible that this right may be incorporated in Article 11 (1) (a) in the period following an arrest, but it is not clear that it would apply to any questioning by the authorities before that stage.
Articles 62 to 68	There does not appear to be a corresponding provision in the draft.
Article 63	There does not appear to be a corresponding provision in the draft.
Article 64	There does not appear to be a corresponding provision in the draft.
Article 65	There does not appear to be a corresponding provision in the draft.
Article 66	There does not appear to be a corresponding provision in the draft.
Article 67	There does not appear to be a corresponding provision in the draft.
Article 68	Article 23 of the July 2003 draft, containing proposed Article 11-1 of the Criminal

	<p>Procedure Code, echoes Article 68 of the Statute, even though in a much shorter manner (in contrast, the previous draft expressly referred to Article 68 of the Rome Statute). Moreover, witnesses are not taken into account in the 2003 draft.</p>
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9. Trials should not include the death penalty.

<p>Article 77 (1) (a) and (b)</p>	<p>Article 17 of the July 2003 draft; draft Article 221 and 222 of the Penal Code. The draft includes the use of the death penalty for genocide and crimes against humanity. However, the introduction to the draft suggests that a discussion between civil society and institutions should take place on the topic. The exclusion of the death penalty could be a major step forward for international law and would be consistent with the exclusion of this penalty in the Rome Statute, the Statute of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Regulation establishing the East Timor Special Panels for Serious Crimes, the Statute of the Special Court of Sierra Leone, the law establishing the Extraordinary Chambers in Cambodia and national draft and enacted implementing legislation for the Rome Statute. 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</p>
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	be consistent with the increasing abolition of this penalty in Africa.
Article 77 (2) (a) and (b)	There does not appear to be a corresponding provision in the draft. Thus, there is no express authority in the draft, although it may exist in some other provision of national law, for DRC courts in DRC criminal proceedings to order the forfeiture of proceeds, property and assets derived directly or indirectly from crimes in the draft, without prejudice to the rights of <i>bona fide</i> third parties.

PART 2. COOPERATION

1. BASIC OBLIGATION TO COOPERATE

10. National courts and authorities must cooperate fully with Court orders and requests.

Article 86	Article 32. This article of the draft appears to implement Article 86 of the Rome Statute, but its effect is not clear since it subjects the general obligation to cooperate to the provisions of the draft and other national law, as well as the Rome Statute, which is listed last. Therefore, it is not clear whether the draft and other national law would prevail in the event of a conflict between them.
Article 87 (1) (a)	Article 33 (1) (2). This article expressly mentions only the most cumbersome and slow method of transmitting requests for cooperation – traditional diplomatic channels – rather than contemporary direct contacts with prosecutors and

	national officials, which are faster and more efficient. However, the latter method can be included in the wording " <i>ou par toute autre voie</i> " now included in the 2003 draft.
Article 87 (1) (b)	Article 33 (2). This paragraph does not follow Article 87 (1) (b) of the Rome Statute because it does not mention the possible role of the competent regional organizations.
Article 87 (2)	Covered in the ratification instrument (French will be the official language for requests for cooperation).
Article 87 (3)	Article 33 (3). This paragraph follows Article 87 (3) of the Rome Statute.
Article 87 (4)	There does not appear to be any corresponding draft article providing for the safety for victims, witnesses and their families with respect to requests for cooperation by the International Criminal Court. Although Article 23, containing proposed Article 11-1 of the Criminal Procedure Code, states that within the framework of the repression of the crimes provided for in the draft legislation, the judge must take every measure in order to protect the security, the physical and psychological well-being, the dignity and respect for the privacy of the victims, the legislation should require the executive authorities to do the same.
Article 88	Article 32 (2). See comment above with respect to Article 86 of the Rome Statute. As indicated in this chart, there are a number of aspects concerning cooperation that fall short of what is required by the Rome Statute or is desirable for the most

	effective cooperation possible.
Article 94	There does not seem to be any corresponding draft article dealing with concurrent DRC and International Criminal Court proceedings.
Article 95	Article 39. This draft article, which permits the national prosecutor to defer implementation of a request by the International Criminal Court when the jurisdiction of the Court is contested is not fully consistent with the Rome Statute and the intent of the drafters is not entirely clear. Article 95 of the Rome Statute permits a state to postpone execution of a request when there is an admissibility challenge (not a jurisdictional (<i>compétence</i>) challenge), unless the Court has specifically ordered that the Prosecutor may pursue the collection of evidence pursuant to Articles 18 and 19. Article 39 omits this essential qualification.
Article 97	Article 36. This article of the draft provides for consultations with the Court or its Prosecutor in case of difficulties in executing a request from the Court, but it fails to enumerate the illustrative grounds listed in paragraphs (a) to (c) of Article 97 of the Rome Statute.

II. STATUS OF THE COURT IN NATIONAL LAW

11. The Court must be authorised to sit in the state

Article 3 (3)	There does not appear to be any
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	corresponding article in the draft. Art. 34 (1) of the previous draft has in fact disappeared.
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12. *The legal personality of the Court must be recognized.*

Article 4 (1) and (2)	There does not appear to be any corresponding article in the draft.
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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.*

Article 48	There does not appear to be any corresponding article in the draft. Article 34 of the previous draft, which included some of the immunities and privileges in the Agreement on Privileges and Immunities of the International Criminal Court, but not all of them, does not appear in the July 2003 draft. Therefore, it would be essential for the DRC to sign, ratify and implement the Agreement if the Court is to be able to operate effectively on DRC territory during the current preliminary examination and during any subsequent investigation or trials.
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III. NOMINATION OF CANDIDATES TO BE JUDGES OR PROSECUTOR

14. *States should ensure that they nominate candidates to be Judges and the Prosecutor in an open process with the broadest possible consultation.*

Article 36	There does not appear to be a provision in the draft providing for selecting nominees
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	in an open process with the broadest possible consultation.
Article 42	There does not appear to be a provision in the draft providing for selecting nominees in an open process with the broadest possible consultation.

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)	There does not seem to be a corresponding provision in the draft. Articles 38 and 39 of the draft do not contain such a requirement.
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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)	There does not appear to be a corresponding provision in the draft. Articles 38 and 39 do not include such a requirement.
Article 19 (8)	There does not appear to be a corresponding provision in the draft. Articles 38 and 39 do not include such a requirement.

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 (2)	There does not appear to be a corresponding draft article. However, Article 34 mentions that the national prosecutor can carry out investigations in the presence of the ICC Prosecutor or his representative but does not provide that the Prosecutor can carry out independent investigations. There is no provision concerning investigations by the defence or investigations by the Pre-Trial Chambers pursuant to Article 56 of the Rome Statute.
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18. National legislation should not contain grounds for refusal of request for assistance by the Court in connection with investigations and prosecutions.

The grounds for refusal which often exist between states in their extradition treaties - such as the crime is a political offence, purely military offence, danger of unfair trial and death penalty, the crime is not a crime in the requested state, the person has already been tried for the crime requested, or granted an amnesty or pardon - should not be raised in connection with the Court's investigations and prosecutions.

There do not appear to be any provisions of the draft that would permit the DRC to refuse to comply on such grounds with a request for assistance by the Court.

19. National authorities should provide a broad range of assistance to the Court as outlined below.

Article 96 (3)	There does not appear to be a corresponding draft article. However, Article 36 authorizes the national prosecutor to consult with the Court where a request from the latter presents difficulties, but it does not restrict the basis on which this request (for instance, an existing fundamental legal principle of general application) can be refused, as provided in Article 96 (3) of the Statute.
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A. Assistance related to documents and records, information and physical evidence

a. Locating and providing documents and records, information and physical evidence requested or ordered by the Court.

Article 93 (1) (a-k)	Article 26 of the July 2003 draft; draft Article 47-8 (1-11) of the Criminal Procedure Code. Paragraph 1 of Article 47-8 does not state that the request of assistance by the Court should be in relation to investigations or prosecutions.
Article 93 (1) (l)	There does not seem to be a provision implementing sub-paragraph l, i.e. every other form of assistance not prohibited by the national legislation, even though the illustrative character of the list contained in Article 47-8 is proven by the use of the adverb " <i>notamment</i> ".

Confidential information

Article 68 (6)	There does not seem to be any corresponding draft article. Unlike its previous version, draft Article 23, containing proposed Article 11-1 of the Criminal Procedure Code, does not make reference to the entire Article 68.
Article 73	There does not appear to be a corresponding provision in the draft. In addition, the draft does not implement Amnesty International's recommendation that states parties should provide in agreements with other states involving the exchange of information which involves the national security of anyone of them that such information will be provided to the Court on its request, under the strict

	safeguards ordered by the Court in accordance with Article 72.
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Provision of national security information safeguards

Article 72	There does not appear to any corresponding draft article. The draft does not implement Amnesty International's recommendation that states should agree to provide any national information or evidence requested by the Court after it determines that it is essential to the case, under any necessary safeguards provided by the Court. The legislation should also provide that the DRC will comply with any decision of the Assembly of States Parties or the Security Council pursuant to Article 87 (7) of the Rome Statute.
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b. Preserving such evidence from loss, tampering or destruction

Article 93 (1) (j)	Article 26 of the July 2003 draft; draft Article 47-8 (10) of the Criminal Procedure Code.
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c. Serving any documents requested by the Court.

Article 93 (1) (d)	Article 26 of the July 2003 draft; draft Article 47-8 (4) of the Criminal Procedure Code.
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B. Assistance related to victims and witnesses

d. Assisting the Court in locating witnesses.

Article 93 (1) (a)	Article 26 of the July 2003 draft; draft Article 47-8 (1) of the Criminal Procedure
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	Code.
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e. Provide victims and witnesses with any necessary protection.

Article 93 (1) (j)	Article 26 of the July 2003 draft; draft Article 47-8 (10) of the Criminal Procedure Code. However, Article 11-1 of the Criminal Procedure Code, which is introduced by draft Article 23, does not provide protection for witnesses but only for victims.
Article 42 (9)	There does not appear to be a provision in the draft providing that DRC courts will follow the example of the Court by appointing advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.
Article 43 (6)	There does not appear to be a provision in the draft providing that DRC courts will follow the example of the Court by setting up a victims and witnesses unit. The DRC should set up a victims and witnesses unit within its national judicial system to ensure that victims and witnesses are effectively protected, able to participate in criminal proceedings and obtain full reparations.
Article 68 (1)	Article 23 of the July 2003 draft; draft Article 11-1 of the Criminal Procedure Code, appears to implement only the first sentence of Article 68 (1). In addition, witnesses are not taken into account.

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

Article 55

Article 23 of the July 2003 draft; draft Article 11 of the Criminal Procedure Code have incorporated some fair trials provisions of Articles 55 of the Rome Statute. However, Article 11 fails to include the full range of rights recognized in Article 55. Article 11 also does not make it clear that it applies to investigations by the Court as well as to DRC criminal proceedings. For instance, Article 11 (1) does not guarantee the rights in Article 55 (1) during an investigation under the Rome Statute to any person, but limits these rights to persons suspected of committing a crime under the draft legislation. It should provide that all rights listed in Article 55 (1) apply to any person during an investigation. Article 11 (1) (e), which is modelled on Article 55 (1) (d) of the Rome Statute and Article 9 (1) of the ICCPR, omits the second part of Article 55 (1) (d) stating that no person "shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute". Although Article 55 (2) of the Rome Statute provides that suspects must be informed of all of their rights in that paragraph, in draft Article 11 (2) this requirement is omitted for the rights provided for in Article 55 (2) (c) and (d). Article 11 (2) does not contain the second part of Article 55 (2) (d) of the Rome Statute that anyone suspected of a crime under the Statute must be questioned in the presence of counsel "unless that person has voluntarily waived his or her right" to counsel. It is possible that this

	right may be incorporated in Article 11 (1) (a) in the period following an arrest, but it is not clear that it would apply to any questioning by the authorities before that stage.
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g. 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) (c) and Article 64 (6) (b)	Article 26 of the July 2003 draft; draft Article 47-8 (3) of the Criminal Procedure Code. However, this provision does not appear to provide expressly that the DRC will compel a person to attend a hearing of the Court at its seat or through video-conferencing facilities and to provide testimony and the production of documents and other evidence when the Court so requires pursuant to Article 64 (6) (b).
Article 93 (1) (f)	Article 26 of the July 2003 draft; draft Article 47-8 (6) of the Criminal Procedure Code.
Article 93 (7)	Unlike the previous draft (Articles 50 and 51), there appears to be no corresponding provision in the July 2003 version.

C. Assistance related to searches and seizures

h. Facilitating searches and seizures of evidence by the Court, including the exhumation of graves, and the preservation of evidence

Article 93 (1) (g)	Article 26 of the July 2003 draft; draft Article 47-8 (7) of the Criminal Procedure Code. However, this provision does not expressly implement all of the Amnesty International recommendations concerning
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	examinations of places or sites, and it is not clear to what extent this provision would permit them to be implemented. It may be that Article 34 of the draft would do so.
Article 93 (1) (h)	Article 26 of the July 2003 draft; draft Article 47-8 (8) of the Criminal Procedure Code. However, this provision does not expressly implement all of the Amnesty International recommendations concerning searches and seizures, such as permitting Court investigators to be present and, where necessary, to conduct the searches themselves, and it is not clear to what extent this provision would permit these recommendations to be implemented. It may be that Article 34 of the draft would do so.

i. Assisting in tracing, freezing, seizing and forfeiting assets of accused persons

Article 93 (1) (k)	Article 26 of the July 2003 draft; draft Article 47-8 (11) of the Criminal Procedure Code. However, this provision does not include Amnesty International's recommendation that it should be extended to include requests by other states to trace, freeze, seize and forfeit assets in cases of crimes under international law.
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j. Providing any other assistance requested or ordered by the Court

Article 93 (1) (l)	There is no corresponding provision in the draft. However, the illustrative character of the list contained in Article 47-8 is proven by the use of the adverb " <i>notamment</i> ".
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V. ARREST AND SURRENDER OF ACCUSED PERSONS

20. States parties should ensure that there are no obstacles to arrest and surrender

Article 89 (1)	Articles 34, second paragraph, and 41. Unlike the corresponding provision in the previous draft (Article 43), draft Article 41 does not require that compliance with requests for arrest and surrender be in accordance with the provisions of Part 9 of the Rome Statute and the procedure under national law.
Article 89 (2)	Article 25 of the July 2003 draft; draft Article 47-5 (2) of the Criminal Procedure Code. However, this paragraph does not restrict its application to challenges by the accused to surrender on the basis of the <i>ne bis in idem</i> principle, as required in Article 89 (2).
Article 89 (3) (a) to (e)	Article 25 of the July 2003 draft; draft Article 47-6 of the Criminal Procedure Code. It does not follow the corresponding provision in the Rome Statute where it does not provide the exception of transit that would impede or delay the surrender. The draft provision does not reproduce Article 89 (3) (d) (e) which deal with aerial transportation of the person.
Article 89 (4)	There does not appear to be any corresponding provision in the draft.
Article 91 (2) (c)	There does not appear to be a corresponding provision in the draft.
Article 91 (4)	Article 36. However, this article does not require the DRC authorities to advise the Court of the specific requirements of its

	national law.
Article 98 (1)	There does not appear to be a corresponding provision in the draft.
Article 98 (2)	There does not appear to be a corresponding provision in the draft. It is a matter of great concern that the DRC reportedly has signed an impunity agreement with the United States of America, purportedly based on Article 98 (2). However, for the reasons explained in Amnesty International's legal memoranda, <i>International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes</i> , AI Index: IOR 40/025/2002, August 2002, and <i>International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements</i> , AI Index: IOR 40/030/2002, October 2002, such immunity agreements are contrary to the Rome Statute and other international law. Ratification by Parliament of the agreement giving US nationals impunity from international justice would violate the DRC's obligations under the Statute and other international law.

21. National courts and authorities must arrest accused persons as soon as possible after a request by the Court.

Article 89 (1)	Articles 34, second paragraph, and 41. Unlike the previous draft, the new provision does not require that compliance with requests for arrest and surrender be in accordance with the provisions of Part 9 of the Rome Statute and the procedure under national law.
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Article 92 (1) and (2)	Draft Article 42 (3) implements Article 92, but it is not entirely clear whether that article would prevail in all cases where national criminal procedure was in conflict. With respect to the previous draft, the new provision does not state that the provisional arrest is to be in accordance with Articles 89 and 92 of the Rome Statute
Article 92 (3)	This provision is partially implemented by Article 25, containing proposed Article 47-4 of the Criminal Procedure Code. However, unlike the previous draft (Article 50), there is no provision which provides that the arrested person may consent to surrender before the competent authority has received the request for surrender and the supporting documents requested by Article 91 of the Rome Statute.
Article 92 (4)	Article 42 (3). This article implements Article 92. However, it does not expressly say that a person who has been provisionally released can be re-arrested and surrendered after the presentation of supporting documents by the Court.
Article 59 (1)	Article 41. However, this article does not expressly state which law prevails in the case of a conflict between Chapter 9 of the Rome Statute and the Criminal Procedure Code. In the draft, " <i>immédiatement</i> " is replaced by " <i>promptement</i> ", which might allow more time to implement requests for surrender and arrest by the Court.

22. National courts and authorities must fully respect the rights of those arrested at the request or order of the Court.

Article 55	<p>Article 23 of the July 2003 draft; draft Article 11 of the Criminal Procedure Code have incorporated some fair trials provisions of Articles 55 of the Rome Statute. However, Article 11 fails to include the full range of rights recognized in Article 55. Article 11 also does not make it clear that it applies to investigations by the Court as well as to DRC criminal proceedings. For instance, Article 11 (1) does not guarantee the rights in Article 55 (1) during an investigation under the Rome Statute to any person, but limits these rights to persons suspected of committing a crime under the draft legislation. It should provide that all rights listed in Article 55 (1) apply to any person during an investigation. Article 11 (1) (e), which is modelled on Article 55 (1) (d) of the Rome Statute and Article 9 (1) of the ICCPR, omits the second part of Article 55 (1) (d) stating that no person "shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute". Although Article 55 (2) of the Rome Statute provides that suspects must be informed of all of their rights in that paragraph, in draft Article 11 (2) this requirement is omitted for the rights provided for in Article 55 (2) (c) and (d). Article 11 (2) does not contain the second part of Article 55 (2) (d) of the Rome Statute that anyone suspected of a crime under the Statute must be questioned in the presence of counsel "unless that person has voluntarily waived his or her right" to counsel. It is possible that this</p>
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	right may be incorporated in Article 11 (1) (a) since the arrest, but it is not clear that it would apply to any questioning by the authorities before that stage.
Article 67 (1) (a)	There are no provisions in the draft expressly requiring that DRC authorities must inform accused persons arrested at the request or order of the Court promptly and in detail of the nature, cause and content of the charge, in a language that the arrested person fully understands and speaks.
Article 59 (2)	Articles 43 (1) and 25 of the July 2003 draft; draft Article 47-1 (1) of the Criminal Procedure Code.
Article 59 (3)	Article 25 of the July 2003 draft; draft Article 47-1 (1) of the Criminal Procedure Code.
Article 59 (4)	Article 25 of the July 2003 draft; draft Article 47-2 of the Criminal Procedure Code. It is not specified that the competent national authority cannot consider whether the warrant of arrest was properly issued in accordance with Article 58 (1) (a) (b).
Article 59 (5)	Article 25 of the July 2003 draft; draft Article 47-1 (2) of the Criminal Procedure Code. Unlike the previous draft (Article 46 (3)), it is now not specified that the notification to the Pre-Trial Chamber must happen in conformity with Article 59 of the Rome Statute.
Article 59 (6)	Article 25 of the July 2003 draft; draft Article 47-1 (3) of the Criminal Procedure Code.
Article 89 (2)	Article 25 of the July 2003 draft; draft Article 47-5 (2) of the Criminal Procedure

	Code. However, this paragraph does not restrict its application to a challenges by the accused to surrender on the basis of the <i>ne bis in idem</i> principle, as required in Article 89 (2).
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23. National courts and authorities must surrender arrested persons promptly to the Court.

Article 59 (7)	Article 25 of the July 2003 draft; draft Article 47-5 (1) of the Criminal Procedure Code. However, the draft fails to require that the accused shall be delivered to the Court "as soon as possible."
Article 92 (3)	This provision is partially implemented by Article 25, containing proposed Article 47-4 of the Criminal Procedure Code. However, unlike the previous draft (Article 50), there is no provision which provides that the arrested person may consent to surrender before the competent authority has received the request for surrender and the supporting documents requested by Article 91 of the Rome Statute.
Article 101 (2)	There does not appear to be a corresponding provision in the draft.

24. States should give priority to request for surrender by the Court over competing request by other states.

Article 90	There does not appear to be a corresponding provision in the draft.
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25. States must permit transfers of accused persons through their territory to the seat of the Court.

Article 89 (3)	Article 25 of the July 2003 draft; draft Article 47-6 of the Criminal Procedure Code. It does not follow the corresponding provision in the Rome Statute where it does not provide the exception of transit that would impede or delay the surrender. The draft provision does not reproduce Article 89 (3) (d) (e) which deal with aerial transportation of the person.
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26. States must not retry persons acquitted or convicted by the Court for the same conduct.

Article 20 (2)	Unlike the previous draft (Article 7, first paragraph), there is no corresponding provision in the July 2003 draft, which only takes into account persons already tried by a national court (Article 5). Further, Article 5 omits the second part of Article 20 (3) of the Rome Statute, which provides for the exception to the <i>ne bis in idem</i> principle when the proceedings before another court were not conducted independently or impartially or inconsistently with an intent to bring the person concerned to justice.
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VI. ENSURING EFFECTIVE REPARATIONS TO VICTIMS

27. 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.

Article 75	Article 27 of the July 2003 draft,
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