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# **amnesty international**

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## **Comoros**

### **Analysis of the draft implementing legislation of the Rome Statute of the International Criminal Court**



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**INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED  
KINGDOM**



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## **Analysis of the Comoros' Draft Implementing Legislation of the Rome Statute of the International Criminal Court**

### **Part 1. Complementarity:**

#### **I. Defining crimes, principles of criminal responsibility and defences**

**Legislation should provide that the crimes in the Rome  
Statute, including other crimes under international law, are  
crimes under national law**

##### Article 6 of the Rome Statute: genocide

Amnesty International welcomes draft Article 2 revising the Penal Code (draft), implementing Article 6 of the Rome Statute.

##### Article 7 of the Rome Statute: crimes against humanity

Although the jurisdictional threshold in Article 7 (1) of the Rome Statute is included in draft Article 3, the more detailed threshold in Article 7 (2) has been omitted. If this omission was intended to broaden the scope of the crimes against humanity subject to prosecution in the Comoros, it is to be welcomed, but, if not, it would be advisable to ensure that all of the conduct constituting crimes against humanity under the Rome Statute are covered.

In draft Article 3 (h), corresponding to Article 7 (1) (h) of the Rome Statute, the word "publique" should be substituted by the word

“politique” and the words “racial” and “national” should be separated by a coma.

It should be clarified that the phrase “au sens du paragraph 3” refers to the corresponding paragraph of Article 7 of the Rome Statute or that it say that the definition is that used by the United Nations. In addition, there is no provision in the draft corresponding to Article 7 (3) of the Rome Statute on the definition of gender. The definition of gender recognized by the United Nations refers to the socially constructed roles played by men and women that are attributed to them based on their sex. The term “sex” refers to physical and biological characteristics of men and women. The term “gender” refers to the explanations for observed differences between men and women based on socially assigned roles. For more information about these terms as recognized in the United Nations, see Implementation of the outcome of the 4<sup>th</sup> World Conference on Women, Report of the Secretary-General, U.N. Doc. A/51/322 (1996), para. 9 (citing the Report of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995)); for the leading commentary on all of the war crimes and crimes against humanity of sexual violence more information with regard to the crimes of sexual slavery, enforced prostitution, sexual violence and the definition of gender in the Rome Statute, see Machteld Boot, *Article 7, in Otto Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article 142-145 and 171-172* (Baden-Baden: Nomos Verlagsgesellschaft 1999).

It is a matter of deep concern that the crime of apartheid, which caused so much suffering in an African country, which is considered as a crime against humanity in both the International Convention on the Suppression and Punishment of the Crime of Apartheid and in Article 7 (1) (j) of the Rome Statute has been omitted. It should be included. In addition, Article 7 (2) (a), (b), (c), (d), (e), (f), (g), (h) and (i) of the Rome Statute have been omitted from the draft. These articles provide invaluable definitions of the crimes in Article 7 (2) and should be included to avoid problems in interpretation by national courts. Amnesty International recommends the inclusion of these provisions of the Rome Statute in the enacted version of the implementing legislation.

### Article 8 of the Rome Statute: war crimes

According to draft Article 4, “Toute personne coupable de crime de guerre, tels que définis par la Convention de Genève du 12 août 1949, sera puni de travaux forcés à perpétuité.”

The draft legislation does not provide for the investigation and prosecution of all war crimes listed in Article 8 of the Rome Statute. Amnesty International recommends that the enacted version of the legislation includes all war crimes as listed in customary and conventional international criminal law, including Protocol I Additional to the Geneva Conventions of 12 August 1949 (Protocol I), ratified by Comoros on 21 November 1985, and Protocol II Additional to the Geneva Conventions of 12 August 1949 (Protocol II), ratified by Comoros on 21 November 1985, which are recognized as war crimes under the Statute of the International Criminal Tribunal for Rwanda and the Statute of the Special Court for Sierra Leone. These omissions are a matter of the utmost concern because almost all war crimes committed since the Second World War, in particular, in Africa, have been committed in non-international armed conflict and because Protocols I and II include prohibitions of war crimes not expressly covered by the Geneva Conventions. In addition, the Rome Statute does not include all war crimes under conventional and customary international law.

It would be better to provide, as certain countries have already done, such as Finland, that all conduct constituting a war crime in international armed conflict be defined as a crime in non-international armed conflict, apart from a limited number of crimes, such as those related to prisoners of war, which are not applicable or would require modification to apply to non-international armed conflict. It would be even better to include all war crimes listed in the Rome Statute and then to provide that national courts have jurisdiction over all other war crimes listed in international humanitarian law treaties and customary international law whether committed during an international or non-international armed conflict.

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

The Preamble of the Rome Statute recognizes the duty of each state “to exercise its criminal jurisdiction over those responsible for international crimes”. This jurisdiction is not simply jurisdiction under existing national law, but jurisdiction to the fullest extent permitted by international law.

The draft legislation does not have any provision regarding the exercise of universal jurisdiction for crimes under international law. Amnesty International does not have a copy of the Code de Procédure Pénale, so it is not clear whether national courts would be able to exercise the full universal jurisdiction over crimes under international law that is permitted under international law. Amnesty International would welcome clarification if the Code de Procédure Pénale or other legislation of Comoros provides for the exercise of universal jurisdiction for such crimes. If not, Amnesty International recommends that the enacted version of the implementing legislation of the Rome Statute includes a provision on universal jurisdiction requiring national courts to exercise such jurisdiction for crimes under international law where Comoros does not extradite the suspect to a country willing to prosecute those crimes in fair proceedings without the application of the death penalty.

**Principles of criminal responsibility in national legislation for crimes under international law should be consistent with customary international law**

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

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

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

The draft legislation does not have any provisions regarding the principles of *nullum crimen sine lege*, *nulla poena sine lege* and

non-retroactivity *ratione personae*, for crimes under international law. However, Article 4 of the Code Pénal states that “[n]ulle . . . crime ne peuvent être punis de peines qui n’étaient pas prévues par la loi avant qu’ils fussent commis.” Amnesty International would welcome clarification if the Code de Procédure Pénale or other legislation of Comoros also includes such principles. Amnesty International recommends that the enacted version of the implementing legislation of the Rome Statute includes provisions including the principles guaranteed in Articles 22, 23 and 24 of the Rome Statute except that, consistent with Article 15 (2) of the International Covenant on Civil and Political Rights (ICCPR), it should define as crimes under national law genocide, crimes against humanity and war crimes regardless when they were committed since these crimes have been considered crimes under international law since the Second World War. Article 15 (2) of the ICCPR provides:

“Rien dans le présent article ne s’oppose au jugement ou à la condamnation de tout individu en raison d’actes ou omissions qui, au moment où ils ont été commis, étaient tenus pour criminels, d’après les principes généraux de droit reconnus par l’ensemble des nations.”

#### Article 25 of the Rome Statute: individual criminal responsibility

Article 2 and livre deuxième of the Comoros’ Penal Code include some provisions regarding individual criminal responsibility. However, it does not appear that it provides for all principles of individual criminal responsibility for crimes under international law, as detailed in Article 25 of the Rome Statute, including Article 25 (3) (d) (contributing to the commission or attempted commission of a crime by a group acting with a common purpose) and (e) (direct and public incitement to genocide). Amnesty International recommends that the enacted version of the implementing legislation includes all principles of individual criminal responsibility for international crimes as listed in Article 25 of the Rome Statute to ensure that no person who would be convicted in the Court for certain conduct would be acquitted in a national court for the same conduct.

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

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

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

Article 51 of the Penal Code of Comoros provides for penalties for minors over 13 years old who have been convicted of crimes. Amnesty International does not have a copy of the Code de Procédure Pénale and, therefore, does not know whether it guarantees all the rights of minors in judicial proceedings recognized in international law and standards. It would welcome clarification if the legislation of Comoros is fully consistent with the

above principles and, if not, recommend that it ensure that the rights recognized in international law and standards of any minor involved in judicial proceedings, whether as a suspect, accused, victim or witness, are fully respected.

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

In some respects, the Rome Statute falls short of other international law. For example, principles of superior responsibility with regard to civilians in Article 28 (b) of the Rome Statute, which apply only to trials in the Court, are not as strict as required by customary international law, as well as conventional international law, such as Protocol I, ratified by Comoros on 21 November 1985, which holds civilian superiors to the same standards as military commanders or persons effectively acting as military commanders.

Neither the draft legislation nor the Code Pénal has any provision on responsibility of commanders and other superiors for crimes under international law. This omission means that commanders and superiors could escape criminal responsibility in the courts of Comoros for genocide, crimes against humanity and war crimes. Amnesty International recommends that the legislation of Comoros incorporate principles of criminal responsibility as strict as in customary and conventional international law, holding civilian superiors to the same standards as military commanders, to ensure that the international system of justice is as effective as possible.

#### Article 30 of the Rome Statute: mental element

Neither the draft legislation nor the Code Pénal has any provision corresponding to Article 30 of the Rome Statute. Amnesty International would welcome clarification if the legislation of Comoros contains a definition of the mental element of crimes that would ensure that no person who would be convicted in the Court for crimes under international law could be acquitted for the same conduct in the courts of Comoros. If not, Amnesty International

recommends that the enacted version of the implementing legislation of the Rome Statute includes a provision corresponding to Article 30 of the Rome Statute.

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

Certain parts of Article 31 (1) of the Rome Statute, which apply only to trials before the Court, should not be incorporated into national law since they fall short of stricter international law principles or could lead to unjustified acquittals for genocide, crimes against humanity and war crimes.

Article 31 (1) (c), for example, could be misinterpreted to include defence of a lawful military objective, such as an ammunition dump or tank, as a ground for excluding criminal responsibility for genocide, crimes against humanity or war crimes.

Similarly, Article 31 (1) (d) could be misinterpreted as a justification for committing certain crimes, such as torture or murder of one person, based on the assertion that they were necessary to prevent murders of more than one other person. Duress should never be a defence to genocide, crimes against humanity or war crimes, although it may be taken into account in mitigation of punishment. According to Article 49 of the Comoros' Penal Code, "[i]l n'y a ni crime ni délit lorsque le prévenu était en état de démence au temps de l'action ou lorsqu'il a été contraint par une force à laquelle il n'a pu résister". The enacted legislation should, therefore, provide that when the crime is a crime under international law, Article 49 should not apply, but that the duress can be taken into account in mitigation of punishment.

Although Article 31 (2) and (3) applies to Court procedures, we would recommend that the Comoros' legislation provide for a similar procedure in its national courts or a safeguard to ensure that any defence under national law is consistent with the strictest requirements of international law, including international human rights and humanitarian law.

Apart from Article 49 of the Code Pénal, neither that code nor the draft legislation has any provision on grounds for excluding criminal responsibility for crimes under international law. Amnesty International would welcome clarification if the legislation of Comoros' includes such provision and, if so, in a consistent manner with the above principles. If not, the organization recommends its implementation or amendment in accordance with the principles above.

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

Neither the Code Pénal nor the draft legislation has any provision corresponding to Article 32 of the Rome Statute. Amnesty International would welcome clarification if the legislation of Comoros provides for such principle for crimes under international law. If not, Amnesty International recommends that the enacted version of the implementing legislation of the Rome Statute includes a provision fully consistent with international law standards on mistake of fact or mistake of law for crimes under international law.

**Defences in national law to crimes under international law should be consistent with customary international law**

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

Defences in national law should not be any broader than those permitted in the Rome Statute and, in some cases, should even be narrower in order to be consistent with customary or conventional international law. Article 33 of the Rome Statute prohibits superior orders as a defence for genocide and crimes against humanity. However, it permits superior orders as a defence to war crimes in certain circumstances, but solely in trials before the Court. It should never be included as a defence to war crimes in a prosecution in national court. The defence of superior orders to war crimes has been prohibited in every international instrument

concerning crimes under international law since the Nuremberg Charter and international law prohibits this defence in national courts.

The draft legislation does not appear to have any provision on superior orders and prescription of law regarding crimes under international law. Amnesty International would welcome clarification if the legislation of Comoros is fully consistent with the above principles. If not, Amnesty International recommends that the enacted version of the implementing legislation incorporates principles of superior orders and prescription of law as strict as in customary and conventional international law, to ensure that the international system of justice is as effective as possible.

## **II. Elimination of bars to prosecution**

### **No statutes of limitations are permitted**

#### Article 29 of the Rome Statute: non-applicability of statute of limitations

Neither the Code Pénal nor the draft legislation has any provision corresponding to Article 29 of the Rome Statute, stating that genocide, crimes against humanity and war crimes shall not be subject to any statute of limitations. It is not clear whether the Code de Procédure Pénal or other legislation contains statutes of limitation that would apply to these crimes. Amnesty International would welcome clarification that there is not statute of limitations applicable to crimes under international law. If not, Amnesty International recommends that the enacted version of the implementing legislation, expressly prohibit the application of statutes of limitations for crimes under international law.

### **No amnesties, pardons or similar measures of impunity by any state should be recognized**

There does not appear to be any provision in the draft legislation prohibiting amnesties, pardons or similar measures of impunity for crimes under the Rome Statute. Article 12 of the Constitution provides that the President “a le droit de fair grace”. The

legislation of Comoros or, if necessary, the Constitution should make clear that amnesties, pardons or similar measures of impunity do not apply to crimes under international law, whether they were granted under the law of Comoros or another state.

### **Immunity of officials from prosecution for crimes under international law should be eliminated**

#### Article 27 of the Rome Statute: irrelevance of official capacity

The draft legislation does not appear to have any corresponding provision to Article 27 of the Rome Statute, providing that it applies equally to all persons without any distinction based on official capacity and that official capacity shall in no case exempt a person from criminal responsibility, nor shall it constitute a ground for reduction of sentence. International would welcome clarification the courts of Comoros will give no legal effect to any immunities, whether under the law of Comoros or of another state, with respect to criminal or civil proceedings concerning crimes under international law. If not, the legislation of Comoros should expressly state that any existing immunity under the law of Comoros or of any other state does not apply to any crimes under international law.

### **III. Ensuring fair trials without the death penalty**

#### **Trials must be fair**

#### Article 55 of the Rome Statute: rights of persons during an investigation

The draft legislation does not appear to have any provisions guaranteeing the rights recognized in Article 55 of the Rome Statute concerning the rights of persons during an investigation. Amnesty International would welcome clarification if the the Code de Procédure Pénal or other legislation of Comoros guarantees such rights for all persons during investigations by national authorities for crimes under international law, as detailed in Article 55 of the Rome Statute. If not, Amnesty International recommends that the enacted version of the implementing legislation provides

all such guarantees for crimes under international law, as detailed in Article 55 of the Rome Statute.

Article 63 of the Rome Statute: trial in the presence of the accused

Article 64 of the Rome Statute: functions and powers of the Trial Chamber

Article 65 of the Rome Statute: proceedings on an admission of guilt

Article 66 of the Rome Statute : presumption of innocence

Article 67 of the Rome Statute : rights of the accused

The draft legislation does not appear to contain provisions corresponding to Articles 63 to 67 of the Rome Statute, which reflect general principles of law recognized by the international community and incorporate many of the most protective guarantees of the right to fair trial under international law. It is not known if the rights guaranteed by these articles are guaranteed by the Code de Procédure Pénal or other legislation of Comoros. The degree to which national criminal proceedings conform to these guarantees will be taken into account by the Court under the principle of complementarity as reflected in Article 17 of the Rome Statute in determining whether a state is able and willing genuinely to investigate and prosecute crimes under international law. Therefore, all states should incorporate these guarantees in their national law to govern national investigations and prosecutions.

Amnesty International would welcome clarification if the legislation of Comoros, including the Code de Procédure Pénal, fully guarantees all fair trial rights for crimes under international law, as is largely expressed in Articles 63 to 67 of the Rome Statute and, if not, recommend the inclusion of the guarantees in those provisions in the enacted version of the implementing legislation.

Article 68 of the Rome Statute: protection of the victims and witnesses and their participation in the proceedings

Article 68 represents a major advance in the protection of the rights of victims and witnesses and its inclusion was strongly supported by African countries, including Comoros, at the Rome

Diplomatic Conference. Amnesty International recommends that the implementing legislation contain provisions guaranteeing the rights of victims and witnesses of crimes under international law as recognized in Article 68 and other international law and standards.

### **Trials should exclude the death penalty**

#### Article 77 of the Rome Statute: applicable penalties

Amnesty International welcomes the fact that the draft legislation does not include the punishment of the death penalty. If the enacted legislation excludes this penalty, it will be a major step forward in the campaign to abolish this cruel, inhuman and degrading punishment which also violates the right to life. Although Article 80 of the Rome Statute does not require states parties to impose any particular punishment, it would be inappropriate for national courts to impose a more severe penalty for a crime under international law than the one chosen by the international community for genocide, crimes against humanity and war crimes. Every international criminal court established since Nuremberg and Tokyo have excluded this punishment for these crimes. The United Nations Security Council excluded this penalty for such crimes from the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Other international criminal courts, including the Special Court for Sierra Leone, the Special Panels for Serious Crimes in Dili, East Timor (Timor-Leste), the Regulation 64 panels in Kosovo, the Cambodian Extraordinary Chambers and the War Crimes Chamber in Bosnia and Herzegovina, all exclude this penalty. Excluding this penalty would also be consistent with the trend to abolish the death penalty in Africa. At the end of 2005, 122 countries were abolitionist, either in law or practice. See Amnesty International Report 2006, page 20 (<http://web.amnesty.org/report2006/index-fra>). In addition, the death penalty violates the right to life recognized in Article 3 of the Universal Declaration of Human Rights and is the ultimate cruel, inhuman and degrading punishment, contrary to the prohibition in Article 5 of the above Declaration.

## **Part 2. Cooperation:**

### **I. Basic obligation to cooperate**

#### **National courts and authorities must cooperate fully with Court orders and requests**

##### Article 86 of the Rome Statute: general obligation to cooperate

According to Article 1 of the *Projet de loi relative à la Coopération avec la Cour Pénale International (Projet de loi)*:

“Pour l’application du statut de la Cour pénale internationale ratifié le 27 juin 2006, l’Union des Comores participe à la répression des infractions et coopère avec cette juridiction dans les conditions fixés par le présente titre. Les dispositions qui suivent sont applicables à toute personne poursuivie devant la Cour Pénale internationale ou condamnée par celle-ci à raison des actes qui constituent, au sens des articles 6 à 8 et 25 du statut un génocide, des crimes contre l’humanité ou des crimes de guerre”.

Amnesty International recommends that the Comoros’ implementing legislation expressly requires the full cooperation of Comoros’ authorities with the Court, in accordance with the provisions in Part 9 of the Rome Statute, as well as with Articles 18 (6) and 19 (8), and that national provisions do not affect in any way the cooperation with the Court as required by the Rome Statute.

##### Article 87 of the Rome Statute: requests for cooperation: general provisions

According to 1<sup>st</sup> paragraph of Article 2 of the *Projet de loi*, “Les demandes d’entraide émanant de la Cour pénale internationale sont adressées aux autorités compétentes en vertu de l’article 87 du statut en original ou en copie certifiée conforme accompagnées de toutes pièces justificatives”.

Although Article 87 (1) (a) of the Rome Statute permits a state to use the traditional, slow and cumbersome diplomatic channel to transmit requests, it would be preferable in the 21<sup>st</sup> century to use

the fastest, most direct, most flexible and most reliable method of direct communication to the relevant law enforcement officials capable of addressing the speed with which suspects can flee or conceal assets through electronic transfers. Amnesty International welcomes the designation of the Prosecutor as the normal competent authority rather than the diplomatic channel for normal requests.

The organization also welcomes 3<sup>rd</sup> paragraph of Article 2 of the *Projet de loi*, providing for a faster way for urgent requests and recommends the implementing legislation to be in accordance with Rule 180 of the Rules of Procedure and Evidence, which provides a simple way for Comoros to inform the Court of another appropriate channel or channels. The implementing legislation should provide that the Court should use any law enforcement official delegated by the Comoros' relevant authority to serve this function.

There is no provision in the draft stating that the competent authorities may receive Court's requests transmitted through the International Criminal Police Organization or any other appropriate regional organization pursuant to Article 87 (1) (b) of the Rome Statute. Amnesty International recommends that the enacted version of the Comoros' implementing legislation clarify that such requests will be treated in the same manner as requests sent directly to the competent authorities by the Court.

Article 87 (3) of the Rome Statute, on confidentiality of requests for cooperation and any documents supporting the request, does not appear to have any provision corresponding in the *Projet de loi*. Amnesty International recommends its inclusion in the enacted version of the Comoros' implementing legislation.

The draft legislation does not appear to have any provision corresponding to Article 87 (4) of the Rome Statute. Although this provision refers to Court procedures, Amnesty International recommends that the legislation of Comoros fully guarantees the protection of the safety and physical or psychological well-being of any victims, potential witnesses and their families, related to the protection of information with regard to any request of assistance presented by the Court under Part 9 of the Rome Statute, Article 18

(6), Article 19 (8) and any other provision of the Rome Statute pursuant to which the Court requests assistance.

Article 94 of the Rome Statute: postponement of execution of a request in respect of ongoing investigation or prosecution

Article 94 of the Rome Statute, regarding postponement of execution of a request in respect of ongoing investigation or prosecution, does not appear to have any corresponding provision in the draft legislation. States, as required by Article 94 (1), must permit their authorities to postpone the immediate execution of a request by the International Criminal Court that would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates only for a period of time agreed upon with the Court and only after they have considered whether the assistance may be immediately provided subject to certain conditions. Thus, the period of time of the postponement must be no longer than that agreed by the International Criminal Court. Any conditions must be consistent with the general duty to cooperate with the International Criminal Court set out in Article 86. Given the gravity of the crimes that would be the subject of the request by the International Criminal Court – genocide, crimes against humanity and war crimes – and the probability that the crimes subject to investigation or prosecution by the national authorities will be less serious, for example, car theft, states should agree with the Court on ways to provide immediate assistance in a manner that will permit the national investigation to continue or, if that is not possible, to preserve the evidence while the Court’s investigation proceeds. Any postponement should be a last resort when no conceivable alternative, such as confidential compliance with the request, for example, in the manner envisaged under Article 72 for national security information, is possible.

States, must, as required by Article 94 (1), ensure the postponement “shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State”. Given that criminal investigations in some national courts, even of serious crimes such as torture or murder, can take a long time and some national prosecutions of serious crimes, not counting appeals, can take a decade or more, states should not postpone the

immediate execution of a request by the International Criminal Court until a national investigation or prosecution has been completed. Any such postponement agreed with the International Criminal Court should only be for the length of time necessary to complete a particular phase of an investigation or prosecution without endangering the success of the investigation or prosecution or the safety of victims, witnesses and others associated with the proceedings.

States should, consistently with Article 94 (2), require their authorities during any postponement of the execution of a request by the International Criminal Court to assist the Prosecutor in carrying out measures to preserve evidence pursuant to Article 93 (1) (j). States should also not postpone any other request for cooperation pursuant to Articles 18 (6), 19 (8) or 93 where failure to provide immediate cooperation would lead to irreparable harm, for example, to victims or witnesses or to the ability to trace and freeze assets.

Article 94 outdated and ineffective state-to-state mutual legal assistance practice, as incorporated in Article 4 (3) of the United Nations Model Treaty on Mutual Assistance. It is an unnecessary provision which could result in delays in cooperation with the International Criminal Court, undermining of investigations by the Court or even the defeat of prosecutions in the Court. Unless states themselves provide for more effective cooperation with the Court in their own legislation and in practice, the Court's ability to investigate and prosecute the worst crimes in the world could be frustrated. Indeed, there is a serious risk that this provision could be misused by unscrupulous officials in bad faith to ensure impunity by prolonging for years or even decades sham investigations or prosecutions of less serious and ordinary criminal offences.

#### Article 95 of the Rome Statute: postponement of execution of a request in respect of an admissibility challenge

Article 95 of the Rome Statute, regarding postponement of execution of a request in respect of an admissibility challenge, does not appear to have any corresponding provision in the draft legislation. Amnesty International recommends the inclusion in the

enacted legislation of a provision guaranteeing that the Prosecutor of the Court can pursue the collection of evidence and that the authorities will provide full assistance to the Prosecutor as requested, pursuant to Articles 18 or 19 of the Rome Statute, if the Court has so specifically ordered.

#### Article 97 of the Rome Statute: consultations

Article 97 of the Rome Statute states that states parties must consult with the Court when they identify problems that may impend or prevent the execution of a request from the Court. According to 2<sup>nd</sup> paragraph of Article 4 of the Projet de loi:

“Le Procureur de l’Union des Comores transmet aux autorités compétentes, en vertu de l’article 87 du statut, toute difficulté relative à l’exécution de ces mesures, afin que soient menées les consultations prévues aux articles 93, paragraph 3 et 97 du statut”. Although the list of illustrative examples of problems in paragraphs (a), (b) and (c) of Article 97 of the Rome Statute is missing, it appears that the 2<sup>nd</sup> paragraph of Article 4 is sufficiently broadly worded to include any problem. However, it would be better guidance to the authorities and courts if this provision were to list these to provide that Comoros will do its utmost to eliminate any such obstacles, including legal obstacles.

## **II. Status of the Court in national law**

### **The Court must be authorized to sit in the state**

#### Article 3 of the Rome Statute: seat of the Court

According to Article 3 (3) of the Rome Statute, the Court may sit outside the seat of the Court in The Hague whenever it considers it desirable. States must incorporate provisions in their law to facilitate the Court to sit in their territories. The Projet de loi does not appear to include such provisions. The legislation of the Comoros should incorporate provisions authorizing the Court to sit in its territory.

### **The legal personality of the Court must be recognized**

#### Article 4 of the Rome Statute: legal status and powers of the Court

Article 4 (2) of the Rome Statute states that “La Cour peut exercer ses fonctions et ses pouvoirs, comme prévu dans le présent Statut, sur le territoire de tout État partie (...)”. Each state party must ensure that the Court has the necessary legal capacity under national law so that the Court can exercise its functions and powers effectively on the territory of the state.

The Projet de loi does not appear to have any provision expressly authorising the Court to exercise its functions and powers, under the Rome Statute, in Comoros’ territory. Amnesty International recommends that the enacted legislation includes such a provision that is consistent with Article 2 and with the obligations that Comoros will assume when it ratifies the Agreement on Privileges and Immunities of the Court (APIC).

### **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 of the Rome Statute: privileges and immunities

In addition to Article 48 of the Rome Statute, APIC, adopted by the Assembly of States Parties in September 2002, further defines the scope of the Court’s privileges and immunities. The Projet de loi does not appear to include provisions on such privileges and immunities. In addition, Comoros has not ratified APIC yet. Comoros should ratify APIC as soon as possible and its national legislation should incorporate provisions on privileges and immunities consistent with Article 48 and APIC.

### **III. Nomination of candidates to be judges or prosecutor**

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

The *Projet de loi* does not appear to have provisions on the processes of nominating candidates to be judges or Prosecutor of the Court. Article 36 (4) (a) of the Rome Statute provides that any state party may nominate candidates to be judges of the Court and Article 36 (3) (a) describes the necessary qualifications of judges. Article 42 (3) spells out the qualifications of the Prosecutor and Article 42 (4) describes the manner of electing the Prosecutor, but it does not require that states should follow any specific procedure to select nominees. In making such nominations and electing judges, states should do so only after consultation in an open process with civil society, including law faculties, bar associations and other non-governmental organizations concerned with criminal justice and human rights, including women's rights. For further recommendations concerning nominations of judges, please consult Amnesty International's document: [Cour Pénale Internationale: Principes à suivre pour la présentation des candidats aux postes de juges](http://web.amnesty.org/library/index/fraIOR400262005?open&of=fr a-385) (AI Index: IOR 40/026/2005), available in French on <http://web.amnesty.org/library/index/fraIOR400262005?open&of=fr a-385> .

### **IV. Facilitating and assisting court investigations**

#### **When the Prosecutor has deferred an investigation, states shall comply without delay to requests for information**

Article 18 (5) of the Rome Statute provides that when the Prosecutor has deferred an investigation at the request of a state pursuant to Article 18 (2) on the ground that it is investigating or has investigated its nationals or others within its jurisdiction with respect to crimes under the Rome Statute which the Prosecutor has informed states he or she is investigating, the state shall respond to requests by the Prosecutor to be informed of the progress of its investigations and any subsequent prosecutions and to do so "sans

retard injustifié”. The *Projet de loi* does not appear to have any provision corresponding to Article 18 (5) of the Rome Statute. Amnesty International recommends that the enacted legislation includes a provision implementing Article 18 (5) of the Rome Statute.

**States shall give effect to acts of the Prosecutor or warrants issued by the Court prior to an Article 19 challenge to jurisdiction or admissibility and to actions by the Prosecutor to preserve evidence or prevent an accused person absconding pursuant to Articles 18 (6) and 19 (8)**

Article 18 (6) of the Rome Statute provides that pending a ruling by the Pre-Trial Chamber or when the Prosecutor has deferred an investigation under Article 18 “le Procureur peut, à titre exceptionnel, demander à la Chambre préliminaire l’autorisation de prendre les mesures d’enquête nécessaires pour préserver des éléments de preuve dans le cas où l’occasion de recueillir des éléments de preuve importants ne se représentera pas ou s’il y a un risque appréciable que ces éléments de preuve ne soient plus disponibles par la suite”. Article 19 (8) of the Rome Statute provides that, pending a ruling by the Court on challenges to admissibility or jurisdiction pursuant to Article 19, the Prosecutor may seek authority from the Court to pursue certain investigative steps, to take statements or testimony or complete the collection and examination of evidence and, in cooperation with the relevant states, to prevent the absconding of persons.

Articles 18 (6) and 19 (8) of the Rome Statute, providing that some investigative steps may continue pending the outcome of an admissibility challenge or a challenge to jurisdiction, do not appear to have corresponding provisions in the *Projet de loi*. The enacted version of the implementing legislation should include such provisions.

**States should facilitate the ability of the office of the Prosecutor and the defence to conduct investigations in the state without any hindrance**

Article 54 (3) of the Rome Statute permits the Prosecutor to take certain investigative steps and Article 54 (2) permits the Prosecutor to conduct investigations on the territory of a state in accordance with Part 9, or as authorized by the Pre-Trial Chamber according to Article 57 (3) (d). In addition, Article 99 (4) authorizes the Prosecutor to take certain non-compulsory investigative measures in the territory of a state party, after consultation with the state concerned, even if the state fails to consent. The Projet de loi does not appear to include any provision on Articles 54 (2) and (3), 57 (3) (d) and 99 (4). Amnesty International recommends that the enacted legislation implements those provisions.

**National legislation should not contain grounds for refusal of requests for assistance by the Court in connection with investigations and prosecutions**

Article 93 (1) of the Rome Statute provides a broad range of cooperative measures that states shall implement, if so requested by the Court. These measures include the following:

- A. Assistance related to documents and records, information and evidence
- Locating and providing documents and records, information and physical evidence requested or ordered by the Court
  - Preserving such evidence from loss, tampering or destruction
  - Serving any documents requested by the Court
- B. Assistance related to victims and witnesses
- Assisting the Court in locating witnesses
  - Provide victims and witnesses with any necessary protection
  - Fully respecting the rights of persons questioned in connection with investigations of crimes within the Court's jurisdiction
  - Assisting the Court by compelling witnesses to testify, subject to any lawful privilege, at the seat of the Court or in the state
- C. Assistance related to searches and seizures

Facilitating searches and seizures of evidence by the Court, including the

exhumation of graves, and the preservation of evidence

Assisting in tracing, freezing, seizing and forfeiting assets of accused

persons

Providing any other assistance requested or ordered by the Court

According to Article 1 of the *Projet de loi*, “Pour l’application du statut de la Cour pénale internationale ratifié le 27 juin 2006, l’Union des Comores participe à la répression des infractions et coopère avec cette juridiction dans les conditions fixés par le présente titre. Les dispositions qui suivent sont applicables à toute personne poursuivie devant la Cour Pénale internationale ou condamnée par celle-ci à raison des actes qui constituent, au sens des articles 6 à 8 et 25 du statut un génocide, des crimes contre l’humanité ou des crimes de guerre”.

According to the 1<sup>st</sup> phrase of 1<sup>st</sup> paragraph of Article 4 of the *Projet de loi*, “L’exécution sur le territoire comorien des mesures conservatoires mentionnées au k du paragraphe I de l’article 93 du statut est ordonnée, aux frais avancés du Trésor et selon les modalités prévues par le code de procédure civile, par le Procureur de l’Union des Comores”. However, the *Projet de loi* does not include specific provisions regarding the measures of cooperation with the Court stated in Article 93 (1) of the Rome Statute. To avoid any misunderstandings, obstacles or delays, the enacted version of the implementing legislation should expressly state that Comoros’ authorities must cooperate fully and without delay with the Court in implementing all measures required pursuant to Article 93 of the Rome Statute.

In addition, the draft legislation does not appear to have any corresponding provision to Article 93 (1) (l) of the Rome Statute, providing for “Toute autre forme d’assistance non interdite par la législation de l’État requis propre à faciliter l’enquête et les poursuites relatives aux crimes relevant de la compétence de la Cour”. Amnesty International recommends that the enacted version of the Comoros’ implementing legislation includes a provision ensuring that its courts and other authorities are able to provide

any other form of assistance requested by the Court in connection with the investigation and prosecution of crimes within the Court's jurisdiction and that requests for such assistance will be carried out fully and without delay.

According to Article 93 (3) of the Rome Statute, where the execution of a request under Article 93 (1) "est interdite dans l'État requis en vertu d'un principe juridique fondamental d'application générale, ledit État engage sans tarder des consultations avec la Cour pour tenter de régler la question". Amnesty International notes 2<sup>nd</sup> paragraph of Article 4 of the *Projet de loi*, stating that "Le Procureur de l'Union des Comores transmet aux autorités compétentes, en vertu de l'article 87 du statut, toute difficulté relative à l'exécution de ces mesures, afin que soient menées les consultations prévues aux articles 93, paragraph 3 e 97 du statut".

According to Article 96 (3) of the Rome Statute, upon the request of the Court, the requested state party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under Article 96 (2) (e) (information that may be required under the requested state's law in order to execute a request) and during the consultations to advise the Court of the specific requirements of its national law that may apply to the execution of Court's requests. The *Projet de loi* does not appear to include any provision corresponding to Article 96 (3) of the Rome Statute. Amnesty International recommends that the implementing legislation implements Article 96 (3) of the Rome Statute and that the legislation limit the information required in Court requests to the absolute minimum necessary to implement the request, such as information necessary to verify the identity of the suspect.

## **V. Arrest and surrender of accused persons**

The *Projet de loi* contains in Articles 5 to 16 provisions regarding the arrest and surrender of persons to the Court. However, some aspects do not seem to have been fully implemented, as outlined in the following sections.

### **States parties should ensure that there are no obstacles to arrest and surrender**

In contrast to extradition between states, there are no substantive grounds permitted under the Rome Statute for refusal to surrender a person to the Court. In addition, under Article 91 (2) (c) of the Rome Statute, states parties are required to establish a procedure for surrender of persons to the Court that is not more burdensome than that used for extradition to other states and which should be less burdensome.

Article 91 (4) of the Rome Statute requires a state party, upon a request by the Court, to consult with it, “soit d’une manière générale, soit à propos d’une question particulière, des consultations sur les conditions prévues par sa législation interne qui pourraient s’appliquer selon le paragraphe 2, alinéa c). Lors de ces consultations, l’État Partie informe la Cour des exigences particulières de sa législation”. Article 91 (4) of the Rome Statute does not appear to have any corresponding provision in the *Projet de loi*. Amnesty International recommends its inclusion in the enacted version of the implementing legislation.

According to Article 59 (4) of the Rome Statute, “L’autorité compétente de l’État de détention ne peut pas examiner si le mandat d’arrêt a été régulièrement délivré”. Amnesty International notes 2<sup>nd</sup> paragraph of Article 10 of the *Projet de loi* stating that “La Chambre de l’Instruction statue par un arrêt rendu en audience publique et motivé par référence aux dispositions du paragraphe 4 de l’article 59 susvisé”. The scope of application of this provision does not appear to be clear. Amnesty International recommends that Article 59 (4) of the Rome Statute be effectively implemented in the enacted version of the legislation.

According to Article 59 (5) of the Rome Statute, “La Chambre préliminaire est avisée de toute demande de mise en liberté provisoire et fait des recommandations à l’autorité compétente de l’État de détention”, which “prend pleinement en considération ces recommandations, y compris éventuellement celles qui portent sur les mesures propres à empêcher l’évasion de la personne”. If interim release is granted, Article 59 (6) authorizes the Pre-Trial

Chamber to request periodic reports on the status of the interim release. Amnesty International notes 1<sup>st</sup> paragraph of Article 10 stating that “La mise en liberté peut être demandée à tout moment à la Chambre de l’Instruction de la Cour d’Appel de Moroni qui procède conformément à l’article 59 du statut et à la procédure prévue à l’article 21 et suivant du présent Code”. Amnesty International would welcome clarification if the procedure provided in Article 21 “et suivant” of the Penal Code of Comoros is fully consistent with Article 59 of the Rome Statute. If not, recommends that the national legislation of Comoros fully implements 2<sup>nd</sup> paragraph of Article 59 (5) of the Rome Statute and guarantees that Court’s requests of reports on the status of the interim release will be properly implemented, according to Article 59 (6) of the Rome Statute.

Amnesty International would welcome clarification on the scope of application of the following provisions of the *Projet de loi*: 1<sup>st</sup> paragraph of Article 7 stating that “(...) Le transfèrement doit avoir lieu dans un délai maximum de cinq jours à compter de sa présentation au Procureur de l’Union des Comores; faute de quoi la personne réclamée est immédiatement libérée sur décision du Président de la Chambre de l’Instruction de la Cour d’Appel de Moroni, à moins que le transfèrement ait été retardé par des circonstances insurmontables”; and 2<sup>nd</sup> paragraph of Article 11, stating that “La personne réclamée est remise dans un délai d’un mois à compter du jour où cette décision est devenue définitive, faute de quoi elle est immédiatement libérée sur décision du Président de la Chambre de l’Instruction, à moins que sa remise ait été retardée par des circonstances insurmontables”. The Prosecutor of the Court should be informed before any release of the person sought to be surrendered to the Court and permitted to make oral and written arguments concerning release. There should be effective guarantees to ensure that anyone who is released will not abscond. First paragraph of Article 7 and 2<sup>nd</sup> paragraph of Article 11 of the *Projet de loi* should be modified in order to be able to surrender the person to the Court as soon as possible, consistent with the rights of the person concerned.

According to 4<sup>th</sup> and 5<sup>th</sup> paragraphs of Article 15 of the *Projet de loi* “La personne qui a fait l’objet d’une arrestation provisoire dans les

conditions prévues à l'article 92 du statut et qui n'a pas consenti être remise à la Cour peut être libérée et si les autorités compétentes en vertu de l'article 87 du statut ne reçoivent pas de demande formelle de remise dans le délai prescrit par le règlement de procédure et de preuve de cette juridiction internationale. La libération est décidée par la Chambre de l'Instruction sur requête présentée par l'intéressé (...)" . The Prosecutor of the Court should be informed before any release of the person sought to be surrendered to the Court and permitted to make oral and written arguments concerning release.

Amnesty International notes Article 12 of the *Projet de loi* which appears to implement Article 89 (4) of the Rome Statute.

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

Article 92 of the Rome Statute provides for provisional arrest in urgent cases, pending presentation of the request for surrender and supporting documents. Article 59 (1) of the Rome Statute provides that "L'État Partie qui a reçu une demande d'arrestation provisoire ou d'arrestation et de remise prend immédiatement des mesures pour faire arrêter la personne dont il s'agit (...)" .

Amnesty International notes the second paragraph of Article 5 of the *Projet de loi* stating that:

"En cas d'urgence, ces demandes peuvent aussi être adressées directement et par tout moyen au Procureur de l'Union des Comores territorialement compétent. Elles sont ensuite transmises dans les formes prévues à l'alinéa précédent."

implementing Article 92 (1) of the Rome Statute. However, Article 59 (1) of the Rome Statute does not appear to have any corresponding provision in the *Projet de loi*. The enacted version of the implementing legislation should provide that Comoros' authorities must respond without delay to requests from the Court for arrest and surrender and immediately take steps to arrest pursuant to Article 59 (1) of the Rome Statute stating that:

"L'État Partie qui a reçu une demande d'arrestation provisoire ou d'arrestation et de remise prend immédiatement des

mesures pour faire arrêter la personne dont il s'agit conformément à sa législation et aux dispositions du chapitre IX”.

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

Article 55 of the Rome Statute requires that the rights of persons be respected during the course of an investigation and that persons suspected of being responsible for crimes within the Court's jurisdiction be informed of those rights before being questioned. The rights identified in Article 55 necessarily apply with equal force after a person has been charged. In addition, Article 59 (2) guarantees the rights of people arrested at the request of the Court.

Second paragraph of Article 6, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> paragraphs of Article 7 and 3<sup>rd</sup> paragraph of Article 8 of the Projet de loi provide guarantee certain rights of those arrested at the request or order of the Court. However, it appears that there may be gaps with regard to rights of persons during an investigation, as guaranteed in Article 55 of the Rome Statute. Amnesty International recommends that all the rights recognized in Article 55 be expressly guaranteed in the enacted version of the implementing legislation. In addition, the rights recognized in Article 59 (2) (a), (b) and (c) of the Rome Statute should be expressly guaranteed in the enacted version of the legislation.

According to Article 89 (2), “Lorsque la personne dont la remise est sollicitée saisit une juridiction nationale d'une contestation fondée sur le principe *ne bis in idem*, comme prévu à l'article 20, l'État requis consulte immédiatement la Cour pour savoir s'il y a eu en l'espèce une décision sur la recevabilité. S'il a été décidé que l'affaire est recevable, l'État requis donne suite à la demande. Si la décision sur la recevabilité est pendante, l'État requis peut différer l'exécution de la demande jusqu'à ce que la Cour ait statué”. This provision of the Rome Statute does not appear to have corresponding provision in the Projet de loi. Amnesty International recommends the inclusion of such a provision in the enacted version of the implementing legislation, in accordance with Article 89 (2) of the Rome Statute.

### **National courts and authorities must surrender arrested persons promptly to the Court**

According to Article 59 (7) of the Rome Statute, “Une fois ordonnée la remise par l’État de détention, la personne est livrée à la Cour aussitôt que possible”. There does not appear to be any provision corresponding to Article 59 (7) of the Rome Statute, in the *Projet de loi*. In addition, there are several provisions in the *Projet de loi* that may delay the surrender of the person to the Court, namely first paragraph of Article 8, second paragraph of Article 9 and second paragraph of Article 11. Given that the only reason for a decision not to surrender a person being sought by the Court in an arrest warrant is that the person is not the person named in the arrest warrant, these provisions should be modified in order to be able to surrender the person to the Court as soon as possible, consistent with the rights of the person concerned. Amnesty International recommends that the legislation of Comoros guarantees that the person ordered by the Court to be surrendered, be surrendered as soon as possible, in order to avoid any delays that could undermine the work of the Court.

If the national court determines that the arrest was not in accordance with the appropriate procedure or that the person’s rights were not respected, the legislation can provide a broad range of remedies other than refusing surrender to the Court, such as compensation and informing the Court of the decision to what it can be taken into account.

### **States should give priority to requests for surrender by the Court over competing requests by other states**

Article 90 spells out the obligations of states parties when they receive competing requests for surrender. Given that the crimes being investigated and prosecuted by the Court are the most serious in the world and that, as a general rule those being investigated or prosecuted in national courts less grave, States parties should ensure that to the maximum extent possible, they give priority to requests from the Court over competing requests from states. States parties should also seek to avoid lengthy delays

in determining whether to give priority to a request by the Court over a competing request. The draft legislation does not appear to have any corresponding provision to Article 90 of the Rome Statute. Amnesty International recommends its implementation in the enacted version.

### **States must permit transfers of accused persons through their territory to the seat of the Court**

Amnesty International welcomes Article 13 of the *Projet de loi* implementing Article 89 (3) (a) of the Rome Statute.

## **VI. Ensuring effective reparations to victims**

**National courts and authorities must enforce judgements 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 of the Rome Statute: reparations to victims

According to Article 17 of the *Projet de loi*:

“Lorsque la Cour Pénale Internationale en faite la demande, l’exécution des peines d’amende et de confiscation ou des décisions concernant les réparations prononcées par celle-ci est autorisée par le tribunal correctionnel de Moroni saisi, à cette fin, par le Procureur de la République. La procédure suivie devant le tribunal correctionnel obéit aux règles du présent code. Le Tribunal est lié par la décision de la Cour Pénale Internationale, y compris en ce qui concerne les dispositions relatives aux droits des tiers. Toutefois, dans le cas d’exécution d’une ordonnance de confiscation, il peut ordonner toutes les mesures destinées à permettre de récupérer la valeur du produit, des biens ou des avoirs dont la Cour a ordonné la confiscation, lorsqu’il apparaît que

l'ordonnance de confiscation ne peut pas être exécutée. Le Tribunal entend le condamné ainsi que toute personne ayant des droits sur les biens, besoin par commission rogatoire. Ces personnes peuvent se faire représenter par un avocat. Lorsque le Tribunal constate que l'exécution d'une ordonnance de confiscation ou de réparation aurait pour effet de porter préjudice à un tiers de bonne foi qui ne peut relever appel de ladite ordonnance, il en informe le Procureur de la République aux fins de renvoi de la question à la Cour Pénale internationale qui lui donne toutes suites utiles".

According to Article 18 of the *Projet de loi*:

"L'autorisation d'exécution rendue par le tribunal correctionnel en vertu de l'article précédent entraîne, selon la décision de la Cour Pénale Internationale, transfert du produit des amendes et des biens confisqués ou du produit de leur vente à la Cour ou au fond en faveur des victimes. Ces biens ou sommes peuvent également être attribués aux victimes, si la Cour en a décidé et a procédé à leur désignation. Toute contestation relative à l'affectation produit des amendes, des biens ou du produit de leur vente est renvoyée à la Cour Pénale Internationale qui lui donne les suites utiles".

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

## **VII. Trying cases of offences against the administration of justice**

### **Legislation must provide for punishment of offences against the administration of justice by the Court**

The Projet de loi does not appear to include any provision corresponding to Article 70 of the Rome Statute on offences against the administration of justice by the Court. Amnesty International recommends that Comoros amend existing legislation concerning offences against their criminal justice system to give its courts jurisdiction over each of the offences identified in Article 70 (1) of the Rome Statute, regardless where such offences were committed, and to provide full cooperation without delay with investigations and prosecutions of such offences by the Court in the same manner as it is required to cooperate with investigations and prosecutions of crimes in the Court. In addition, the legislation should provide for universal jurisdiction over offences against the administration of justice, so that there are no safe heavens for persons who have committed such offences and fled to Comoros.

## **VIII. Enforcement of judgements and sentences**

### **Legislation must provide for enforcement of fines and forfeiture measures**

#### Article 109 of the Rome Statute: enforcement of fines and forfeiture measures

Amnesty International notes Articles 17 and 18 of the Projet de loi on enforcement of fines and forfeiture measures.

With regard to the phrase “La procédure suivie devant le tribunal correctionnel obéit aux règles du présent code”, in 1<sup>st</sup> paragraph of Article 17 of the Projet de loi, Amnesty International would welcome clarification which code is to be applied and if its provisions are fully consistent with international criminal law standards. If not, Amnesty International recommend its amendment in accordance with international law standards.

**Legislation should provide for the enforcement of sentences by the Court, in accordance with the requirements set forth below**

Article 103 of the Rome Statute: role of States in enforcement of sentences of imprisonment

Article 105 of the Rome Statute: enforcement of the sentence

According to Article 103 (2) (a) of the Rome Statute:

“L’État chargé de l’exécution avise la Cour de toute circonstance (...) qui serait de nature à modifier sensiblement les conditions ou la durée de la détention. La Cour est avisée au moins 45 jours à l’avance de toute circonstance de ce type connue ou prévisible. Pendant ce délai, l’État chargé de l’exécution ne prend aucune mesure qui pourrait être contraire à ses obligations en vertu de l’article 110”.

The Projet de loi does not appear to have any corresponding provision to Article 103 (2) (a) of the Rome Statute. Amnesty International recommends its inclusion in the enacted version of the legislation.

Article 105 (1) of the Rome Statute provides that:

“Sous réserve des conditions qu’un État a éventuellement formulées comme le prévoit l’article 103, paragraphe 1, alinéa b), la peine d’emprisonnement est exécutoire pour les États Parties, qui ne peuvent en aucun cas la modifier”.  
Article 105 (2) provides that “La Cour a seule le droit de se prononcer sur une demande de révision de sa décision sur la culpabilité ou la peine. L’État chargé de l’exécution n’empêche pas le condamné de présenter une telle demande”.

Amnesty International notes first paragraph of Article 19 of the Projet de loi, implementing Article 105 (1) of the Rome Statute. With regard to Article 105 (2) of the Rome Statute, Amnesty International notes Article 21 of the Projet de loi, providing that the Court be informed:

“Si la personne condamnée dépose une demande de placement à l’extérieur, de semi-liberté, de réduction de

peine, de fractionnement ou de suspension de peine, de placement sous surveillance électronique ou de libération conditionnelle”.

However, it does not appear to refer the obligation of Comoros to inform the Court of any “demande de révision de sa décision sur la culpabilité”. Amnesty International recommends the inclusion of Articles 106 (1), (2) and (3) of the Rome Statute in the enacted version of the legislation.

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

Amnesty International notes that the second paragraph of Article 19 of the Projet de loi stating that “Sous réserve des dispositions du statut et de la présente section, l’exécution et l’application de la peine sont régies par les dispositions de la présente loi”. However, the Projet de loi does not appear to include any provisions relating to conditions of detention and imprisonment. Amnesty International would like to point out that in accordance with the provisions of Articles 106 (1) and (2) of the Statute, states must take steps to ensure access by the Court to places where persons serving sentences are to be found and that these places must comply with the international standards laid down for places of detention and imprisonment. In addition, Article 106 (3) of the Rome Statute, stating that “Les communications entre le condamné et la Cour sont libres et confidentielles” does not appear to have any corresponding provision in the Projet de loi. Amnesty International recommends the inclusion of those provisions in the enacted version of the legislation

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

Article 110 (1) of the Rome Statute provides that the state of enforcement “ne peut libérer la personne détenue avant la fin de la peine prononcée par la Cour” and, according to paragraph (2) of that article, “La Cour a seule le droit de décider d’une réduction de peine”.

Article 110 (1) and (2) of the Rome Statute does not appear to have any corresponding provision in the Projet de loi and 2<sup>nd</sup> paragraph of Article 19 of the Projet de loi does not appear to be sufficiently clear to implement those provisions. Amnesty International recommends its implementation in the enacted legislation.

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

Article 107 of the Rome Statute, on the transfer of persons on completion of sentence, does not appear to have any corresponding provision in the Projet de loi and 2<sup>nd</sup> paragraph of Article 19 of the Projet de loi does not appear to be sufficiently clear to implement this provision. Amnesty International recommends its implementation in the enacted legislation.

***d. Legislation should limit prosecutions and punishment for other offences***

Article 108 (1) of the Rome Statute states that “Le condamné détenu par l’État chargé de l’exécution ne peut être poursuivi, condamné ou extradé vers un État tiers pour un comportement antérieur à son transfèrement (...) à moins que la Cour n’ait approuvé ces poursuites, cette condamnation ou cette extradition (...)”. According to paragraph 2 of same provision “La Cour statue sur la question (...)”. Those provisions of the Rome Statute do not appear to have any corresponding provision in the Projet de loi and 2<sup>nd</sup> paragraph of Article 19 of the Projet de loi does not appear to be sufficiently clear to implement them. Amnesty International recommends its implementation in the enacted legislation.

***e. Legislation should address the question of escape***

Article 111 of the Rome Statute on the question of escape does not appear to have any corresponding provision in the Projet de loi and 2<sup>nd</sup> paragraph of Article 19 of the Projet de loi does not appear to

be sufficiently clear to implement this provision. Amnesty International recommends its implementation in the enacted legislation.

## **IX. Public education and training of officials**

### **States parties should develop and implement effective programs of public education and training for officials on the implementation of the Statute**

The draft legislation does not seem to require training of national authorities or education for the general public on Court issues. Amnesty International recommends that Comoros develop and implement programmes to train judges, prosecutors, defence lawyers, police, army and court officials and foreign affairs officials concerning their respective obligations under the Rome Statute and to proceed with the updating of military codes, as many states have already done. It should also provide educational materials for the general public.