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Cour pénale internationale

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THOSE ACCUSED OF INTERNATIONAL CRIMES MUST BE TRIED IN FRANCE AT LAST

Concerning new article 689-11 of the Criminal Procedure Code adopted by the Senate

Amendments proposed by the French Coalition for the International Criminal Court (CFCPI):

The CFCPI recommends rewriting paragraph 1 of the text adopted by the Senate as follows:

"To implement the Statute of the International Criminal Court, signed in Rome on 17 July 1998, regarding the prosecution and trial, under the conditions provided for in article 689-1, of all individuals guilty of one of the following offences:

- 1° Crimes against humanity and crimes of genocide defined in articles 211-1, 211-2, 212-1 to 212-4 of the Criminal Code;*
- 2° War crimes defined in articles 461-1 to 461-31 of the same Code;*
- 3° Serious breaches of the Geneva Conventions of 12 August 1949 and Protocol Additional I of 8 June 1977".*

The CFCPI recommends the deletion of paragraph 2 of the text adopted by the Senate.

The Senate has added article 689-11 to the Criminal Procedure Code. This article expands the territorial jurisdiction of the French courts in order to permit the prosecution and trial of those accused of genocide, war crimes and crimes against humanity committed abroad.

The CFCPI is delighted that, by introducing this measure, the legislative recognises the need and duty that our country has in bringing to justice those who commit the most serious crimes. It deplores however the fact that this mechanism of exercising overseas jurisdiction, fundamental in the struggle against impunity, has had its effectiveness severely weakened by the cumulative effect of the introduction of four excessively restrictive clauses. These four clauses impose so many restrictions that they make the implementation of this measure practically impossible:

1. Requirement that the person accused of the crime is usually resident on French territory;
2. Double incrimination;
3. Monopoly on prosecutions accorded to the public prosecutor;
4. Overturning of the complementarity rule.

No other legal system in Europe has placed so many obstacles in the way of prosecution of international criminals. The presence of the suspect on national territory is the only condition that is often required, in order to avoid proceedings *in absentia*. France would regrettably

make itself conspicuous amongst European States by not modifying the text adopted by the Senate.

The CFCPI asks that these clauses be removed in order that crimes under the Rome Statute are subjected to the same procedural regime as other crimes for which French courts already have extraterritorial jurisdiction, i.e. the simple presence of the accused individual on French territory (article 689-1 of the Criminal Procedure Code).

Restriction 1: Usual residence on French territory of accused individuals

- **The imposed condition is inconsistent with existing law that makes provision for the prosecution of those accused of international crimes as long as they are “present” in France**
- **It displays a benevolence shown by the legislative that increases with the seriousness of the crime**
- **It risks being practically impossible to implement**

As adopted by the Senate, the Criminal Procedure Code’s new article 689-11 does not allow the prosecution of the accused individual if they are “*present*” on French territory, as in articles 689-1 to 689-10, but only when they “*usually reside*” on said territory.

1) Criterion set by current French legislation: simple presence on the territory

The condition of “*usual residence*” is contrary to the consistent position of the French legislative regarding international crimes.

International conventions aimed at stamping out the most serious crimes uphold the concept that the suspected person should “*be present on the territory*” of the State Party to invoke the extraterritorial competence of that State’s courts.

Article 689-1 of the Criminal Procedure Code thus adopts this formula¹, which applies to all crimes listed in articles 689-2 to 689-10, notably crimes of torture or terrorist acts. There are more than twenty proceedings based on this rule currently being heard before the French courts for acts relating to crimes of torture.²

The criterion of the simple presence of the accused individual on French territory is also the case for those accused of crimes of genocide, crimes against humanity and war crimes committed during the conflict in the former Yugoslavia and during the Rwandan genocide.

Finally, this same criterion is also provided for in the International Convention for the Protection of All Persons from Enforced Disappearance, which the legislative has just voted to ratify (law of 17 July 2008): in applying this Convention, the French courts will be competent to hear cases of enforced disappearances committed abroad “*when the accused*

¹ Article 689-1 of the Criminal Procedure Code sets down that “*Pursuant to the international conventions referred to below, any person who renders himself guilty outside the territory of the Republic of any of the offences set out in those articles may, if in France, be prosecuted and tried by French courts.*”

² For example, it is due to his presence on French territory that French judges prosecuted the Mauritanian Captain Ely Ould Dah and sentenced him to 10 years in prison for torture and acts of barbarism committed in Mauritania (see <http://www.fidh.org/spip.php?rubrique701> (in French)).

individual, no matter their nationality, those of their victims, or the place that the offence was committed, is present in a territory under its jurisdiction”.

2) The “usual residence” condition displays a benevolence shown by the legislative that increases with the seriousness of the crimes

The crimes of genocide, crimes against humanity and war crimes are, according to the preamble of the Rome Statute, “grave crimes” that “threaten the peace, security and well-being of the world”. Situated as such at the top of the hierarchy of international offences listed in articles 689-2 to 689-11 of the Criminal Procedure Code, nothing can justify the legislative displaying an increased benevolence to the people who commit such offences by placing additional obstacles in the way of their prosecution.

In this way, an individual suspected of the crime of torture can be arrested and prosecuted due to their passing through France, but someone suspected of genocide or crimes against humanity can travel around freely as long as they do not decide to settle down more permanently. Applying the condition of “usual residence” thus accords better treatment to the individual who began a wave of torture and murder constituting crimes against humanity, than the person carrying out the torture itself.

In addition, while the French courts can declare themselves competent in the case of the Rwandan genocide, this would not be the case for perpetrators of genocides committed in other places and at other times. Whilst the legal incriminations are the same, legal intervention would be subject, in one case, to the simple presence, and, in another, to the usual residence of the suspect. This difference in treatment is inexplicable.

3) A condition practically impossible to put into effect

As the text voted by the Senate stands, individuals suspected of having committed genocide, crimes against humanity or war crimes will be able to come and go freely in France without hindrance, as long as they do not settle on French territory on a permanent basis, contenting themselves instead with relatively long stays.

The CFCPI thus fears that the condition of “usual residence” will never be met if it is interpreted, as in other areas of law, as settling in a stable, effective and permanent way with the core of an individual’s family ties and material interests in France³.

Restriction 2 : Double incrimination clause

- **By definition, international crimes constitute the violation of universal values recognised by the international community. The establishment of the double incrimination clause calls into question this universality.**

The Senate has introduced a double incrimination condition subjecting proceedings in France to the condition that the relevant acts should be punishable both by French law and by legislation in the State where they were committed.

³ Nationality: circular dated 27 April 1995.

This condition means that France will acknowledge the impunity, for example, of those committing genocide if such genocide is not punishable by law in their own country.

The double incrimination condition is only provided for under our law for misdemeanours and not for crimes (article 113-6 of the Criminal Code) as well as in the very specific case of the extradition process, where it is tending moreover to weaken progressively. This condition has notably been removed in the case of the European Arrest Warrant for the most serious offences (e.g. terrorism, arms trafficking and trafficking in human beings).

In addition, this condition is not required in any of the measures relating to the extraterritorial competence of French courts. The Court of Cassation has confirmed this in particular for the prosecution of torturers present in France (article 689-2 of the Criminal Procedure Code), judging that prosecutions can be carried out in France “*whatever may be, [in the States where the crimes have been committed], the existing penalties against torture, their limit period or their amnesty*⁴.”

The ICC’s Statute also does not make provision for this requirement.

This condition of double incrimination would also result in a step backwards in relation to the competence of French courts concerning crimes committed in former Yugoslavia and Rwanda. In effect, the cooperation laws with the International Criminal Tribunals do not contain this restriction.

Moreover, this double incrimination rule would have the consequence of forcing French courts to capitulate to a foreign legal decree in the case of offences that come under an international convention ratified by France. And yet this convention supposes the competence of the latter to prosecute the most serious crimes against international law.

The CFCPI recommends the removal of this condition which restricts the competence of the French courts beyond those conditions laid down by the Rome Statute.

Restriction 3: Public prosecutor holds monopoly on prosecutions

- **Measure contradicts French penal tradition as confirmed by the procedural reform of March 2007**
- **Upheaval of procedural balances, undermining victims’ rights**
- **Inequality of citizens under the law**

The bill adopted by the Senate includes, in the new article 689-11 paragraph 2, the rule that the public prosecutor be given a monopoly on prosecutions, thus denying the opportunity for any civil claimant, individual or corporate body, to instigate prosecution of crimes against humanity, war crimes and genocide.

1) A measure that contradicts French penal tradition.

The monopoly on prosecutions granted to the public prosecutor is a radical break with French penal tradition which, since the Laurent-Atthalin ruling in 1906, allows all victims of crimes

⁴ Crim. 23 October 2002.

or misdemeanours to instigate criminal proceedings, even though the public prosecutor refuses to do so. In France, here at the beginning of the 21st Century, the intense debates and deliberations rightfully generated by the abuse of the system of charges being pressed by civil claimants⁵ have only confirmed the willingness to maintain this right, while modifying it to prevent misuse.

The legislative, with the law of 5 March 2007, thus maintained the mechanism by which a private claimant can instigate prosecution in front of an instructing magistrate. It settled for the institution of a waiting period, the private claimant wishing to press charges having to wait three months for the opinion of the prosecution as to the possibility of carrying out a prosecution, before being able to do so directly in front of the instructing magistrate in line with established procedural rules.

It is also useful to note that this filter has only been established for misdemeanours, that is, for the least serious crimes. It is therefore illogical that the law incorporating the Rome Statute into French law removes the possibility for victims of more serious crimes (or human rights defence organisations) to initiate prosecution directly, by according a monopoly on prosecutions to the public prosecutor.

2) A serious abuse of victims' rights

The monopoly on prosecutions accorded to the public prosecutor constitutes “*a violation of victims' rights to effective remedy*”, declared the National Consultative Commission of Human Rights (CNCDH) in its opinion of 6 November 2008 regarding the law implementing the Statute of the International Criminal Court into French criminal law. The CNCDH added that such a measure would be all the more unacceptable since “*France actively committed itself to recognise victims' rights during the entire negotiation period involved in setting up the ICC*”.

In support of this assertion, it should be remembered that the only criminal trials of importance undertaken against those accused of international crimes have been, in France, as a result of charges initially being pressed by private claimants. One cannot fail to notice that French public prosecutors have not played, in this respect, their role as defenders of public interest, notably in refusing to initiate prosecution for crimes of which the seriousness affects the core of humanity itself.

3) A violation of the principle of the equality of citizens before the law

The monopoly on prosecutions accorded to the public prosecutor for the most serious crimes committed outside the Republic's territory asks questions of the constitutionality of such a measure.

In effect, the equality of citizens before the law is a constitutional rule confirmed by the 1789 Declaration of the Rights of Man and of the Citizen, and by article 1 of the 1958 Constitution. Our procedural system has several limitations as regards the potential for private claimants to initiate the pressing of charges. These exceptions however remain limited and justifiable with regards to the jurisprudence requiring that they be established “*in the public interest*”, the

⁵ Cf notably the report of the working group chaired by J-C Magendie on “Promptness and quality of justice: time management in trials”, Ministry of Justice, Paris, La Documentation française, 2004.

resulting difference in treatment also being in line with the purpose of the establishing law and based on “*objective and rational criteria*”. For example, the victim of a car theft can initiate prosecution by pressing charges as a victim, as can the victim of acts of torture committed abroad. However such a prerogative will no longer benefit victims of war crimes, crimes against humanity or genocide committed abroad.

What could be the “*public interest*”, as accepted by constitutional jurisprudence, to justify that the victims of war crimes, crimes against humanity or genocide cannot have the same access to a criminal judge than, for example, victims of acts of torture?

Restriction 4: Overturning the rule of complementarity

- **The overturning of the rule of complementarity takes away from the domestic courts the responsibility accorded to them by the Rome Statute to take precedence and judge international crimes themselves.**

The text adopted by the Senate makes provision that a case cannot be brought before a court in France without the International Criminal Court having previously been asked to expressly defer its competence, thus giving priority to this Court to prosecute those responsible for crimes against humanity, genocide and war crimes.

However, in the international criminal justice system resulting from the Rome Statute, the usual judge for international crimes should be the national judge⁶.

This measure is contrary to Statute articles 17 and 18 which give the courts of the States Parties the priority and responsibility to prosecute those accused of international crimes, the ICC only having competence where the national courts have failed⁷.

In order that the ICC may decide to proceed with a case, the Court must decide that the State is unwilling or genuinely unable to carry out the investigation or prosecution. It is therefore only in this eventuality, and after it has been seised by a State Party, by the UN Security Council or by the Prosecutor himself (*proprio motu*), that the ICC becomes competent.

To call upon the ICC to “*expressly defer its competence*” in order to bring proceedings against an individual suspected of international crimes and present on French territory therefore goes against the Rome Statute.

⁶ See Antonio Cassese and Mireille Delmas-Marty, *Juridictions Nationales et Crimes Internationaux* [*National Jurisdictions and International Crimes*], Paris, PUF, 2002.

⁷ It should be noted that the International Criminal Court differs on this point from the ad hoc International Criminal Tribunals for the former Yugoslavia and for Rwanda, which, created by a UN Security Council resolution in accordance with Chapter VII of the UN Charter, have primacy over the national criminal courts as regards investigating and prosecuting those responsible for crimes within their competence.