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**THE ROLE OF PARLIAMENTS IN THE ESTABLISHMENT AND FUNCTIONING OF  
MECHANISMS TO PROVIDE FOR THE JUDGEMENT AND SENTENCING OF  
WAR CRIMES, CRIMES AGAINST HUMANITY, GENOCIDE AND  
TERRORISM, WITH A VIEW TO AVOIDING IMPUNITY**

***Preliminary draft report prepared by the co-Rapporteurs***  
***Ms. Houria Bouhired (Algeria)***  
***Mr. Jorge Argüello (Argentina)***

**I. The need for justice and the challenge of ensuring it in response to atrocities**

1. Justice is an ideal that involves responsibility and fairness in the protection and preservation of rights and in the prevention and punishment of crimes. Justice is a concept rooted in all national cultures, which requires that the rights of the accused, the interests of the victims and the welfare of society as a whole be taken into account through the existence of judicial mechanisms. Such mechanisms may be official and/or traditional in nature.
2. Justice and peace are not opposing forces, but are complementary. The experience gained during the past decade has clearly shown that it is not possible to consolidate peace in the aftermath of conflict unless the population believes that the abuses to which it has been subjected will be addressed. Therefore, the question is not so much whether justice and accountability should be promoted, but rather how and when. Clearly, addressing past events, re-establishing the rule of law and promoting democracy are processes that require time in countries with devastated institutions, depleted resources, a weak security environment and a divided and deeply affected population. Nevertheless, such tasks are both imperative and achievable.
3. In order to ensure justice, it is necessary to focus on the multiple obstacles to justice, which often include a lack of political will to introduce reforms, the absence of an independent judiciary, a shortage of technical expertise, a paucity of material and financial resources, citizens' distrust of the government, a failure to respect human rights and other issues linked to peace and security.

## **II. Significant strides in the international pursuit of justice: The development of a solid legal framework**

### Creation of an international body of law

4. Over a period spanning more than fifty years, the international community has created a substantive and solid set of rules in the pursuit of justice, which includes provisions on human rights and criminal justice. It also includes international humanitarian standards which set out detailed rules aimed at protecting victims of armed conflict and restricting the means and methods of warfare. The international community has also established mechanisms to ensure that these rules are respected. In particular, humanitarian law holds individuals responsible for violations which they commit or order others to commit. War crimes are one of the most serious violations of humanitarian law. Specific acts constituting such crimes are listed in the Geneva Conventions of 1949 and their Additional Protocol I of 1977.
5. While war crimes are addressed by humanitarian law and are covered inter alia, together with crimes against humanity and genocide, by the Rome Statute of the International Criminal Court (hereunder referred to as the Rome Statute), the provisions of international law on terrorism stem from a different set of rules. However, they too establish obligations which derive from general international law. The sources of these provisions are the 12 international conventions and protocols relating to terrorism. This body of law was recently strengthened, when in 2002 the Organization of American States adopted the Inter-American Convention on Terrorism.

### The emergence of ad hoc international courts and of the International Criminal Court

6. In the 1990s, a series of international initiatives spearheaded the effort to try the most serious international crimes committed in societies devastated by war. Undoubtedly, the subsequent establishment of the International Criminal Court (ICC) has been the most striking milestone in the struggle for justice. It epitomises the principle that the most serious crimes which affect the whole international community must not be left unpunished.
7. The ICC will:
  - bring to justice those persons who have seriously violated human rights or humanitarian law;
  - bring such violations to an end and prevent their recurrence;
  - ensure justice and dignity for the victims and establish a record of past events;
  - deter potential perpetrators of such crimes by demonstrating that there is no safe haven;
  - foster long-lasting national reconciliation and peace;
  - re-establish the rule of law.

8. In addition to conventional types of crime, other types of crime (such as money-laundering, drug trafficking, corruption and cyber-crime) have emerged which provide financial, moral, material and strategic support for the perpetrators of war crimes, crimes against humanity, genocide and terrorism. The international community is increasingly concerned about these new crimes. Some progress has been made in controlling them, with the elimination of bank secrecy in the European Union, the adoption of the Convention on cyber-crime and the establishment of an international framework for cooperation in the fight against terrorism.

### **III. Primary focus on justice at the national level**

9. While some international courts have been established to try crimes committed in societies devastated by war, their contribution towards the creation of a lasting national capacity for the administration of justice has been rather limited.
10. Clearly, the aim should not be to create international mechanisms to replace national structures. The ICC itself emphasises that the fight against impunity starts first and foremost at the national level. The Rome Statute recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. More particularly, the Rome Statute establishes, by virtue of the principle of complementarity, that States have the primary responsibility for judging war crimes, crimes against humanity and genocide and that the ICC shall only assume this responsibility if the State party is unwilling or unable to do so.
11. No initiative to strengthen the rule of law can be successful if it is imposed from abroad. Both the competent international agencies and the international community must therefore adopt an attitude of solidarity, and should enter into a real dialogue with national institutions, including national parliaments, so as to analyse the national needs and capacity, in particular by drawing on the expertise available within the State concerned. In this regard, the United Nations is increasingly using the assessment strategies of the States concerned, as well as consultations in which the national interested parties - including justice officials, civil society, professional associations, traditional leaders and important groups such as women, minorities, marginalised people and refugees - take part in an active and significant way.

### **IV. Specific role and responsibilities of Parliament**

#### Ratification of the Rome Statute

12. Ninety-eight States have already ratified the Rome Statute. It is essential that all the States with membership in the IPU which have not yet ratified the Statute do so as soon as possible. Obviously, the role of parliament is crucial here, as legislative approval is essential for the executive branch to accept obligations by means of a treaty and for the Judicial branch to enforce it.

13. The Council of the European Union (EU) on 13 June 2003 adopted a Common Position that strengthens the European Union's support of the ICC. In article 1, the Common Position states that "The International Criminal Court, for the purpose of preventing and curbing the commission of the serious crimes falling within its jurisdiction, is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law as well as contributing to the preservation of peace and the strengthening of international security, in accordance with the purposes and principles of the Charter of the United Nations." Likewise, the Members of the EU undertook in their negotiations and political dialogues with other States to make every effort to ensure the widest participation in the Rome Statute and to give technical and financial assistance to the legislative work needed for such participation by other States.

Incorporation into law of obligations arising from the Rome Statute and other relevant treaties, in particular with respect to definitions of crimes and criminal procedures

14. The provision of treaties which define war crimes and crimes against humanity generally cannot be directly enforced. They need to be incorporated into the domestic legal system of the State before they can be applied by the judiciary.
15. Humanitarian law requires States to enact national legislation which prohibits and punishes war crimes, either by adopting a separate law or by amending existing laws. Such legislation must cover all persons, regardless of nationality, who commit war crimes or order them to be committed, and should cover situations where violations result from a failure to act when there is a legal duty to do so. It must also cover acts committed both within and outside the territory of the State.
16. Similarly, under the Rome Statute, States have the responsibility to put in place the necessary substantive criminal law provisions, inter alia through the definition of crimes which fall within the purview of the ICC.

International cooperation in ensuring justice

17. Under the Rome Statute, States are bound to cooperate with the ICC and thus to introduce the necessary procedures to ensure such cooperation at the national level. Parliaments should be encouraged to do everything within their powers to ensure that the ICC has the necessary funds, capacity, information and support for the investigation, prosecution and judgement of the persons with the greatest responsibility for war crimes, crimes against humanity and genocide.
18. Moreover, several treaties (for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) compel States parties to introduce rules to enforce the *aut dedere, aut judicare* principle, according to which the State which does not order extradition is obliged to prosecute. Similarly, under international humanitarian law, States have the obligation to look for and prosecute those alleged to be responsible for grave breaches of the Geneva Conventions of

1949 and their Additional Protocol I of 1977 or otherwise responsible for war crimes, and to prosecute such persons or extradite them for trial in another State. States will therefore have to set up appropriate mechanisms to ensure the effective enforcement of this principle, as well as to ensure more generally an effective framework for judicial cooperation with other States in these matters.

#### The fight against terrorism

19. Parliaments which have not done so should ratify the 12 international treaties on terrorism and incorporate them into domestic legislation, in particular in respect of the definition of crimes and the issuance of procedures for the enforcement of the principle of *aut dedere, aut judicare*.
20. In addition, resolution 1373 (2001) of the United Nations Security Council established additional tasks that States must carry out as part of the campaign against terrorism.
21. Clearly, prevention is the first imperative of justice, and it is thus essential to establish and implement mechanisms to punish terrorist activities. Here too, parliaments have an essential role to play.

#### The need for effective partnerships between parliaments and other national institutions and international actors

22. An exclusive focus on a particular national institution or a disregard of civil society will undermine the pursuit of justice. Parliamentary strategies to implement mechanisms for the prosecution and judgement of war crimes, crimes against humanity, genocide and terrorism should take into account that if they are to be effective, they must have a broad scope. They must ensure the participation - in their development and enforcement - of all institutions dealing with justice, both of an official and non-official nature.
23. Parliaments should support all groups which are interested in judicial reform, which help in strengthening the judiciary's capacity, which enhance national consultations about judicial reform and which fill in the gaps that may appear in the rule of law. Such gaps frequently lead to impunity, and are particularly evident in those societies that have gone through conflicts.