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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**

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I. The need and challenge of ensuring justice in response to atrocities

1. Justice is an ideal that involves responsibility and fairness in the protection and preservation of rights and 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; they are supportive of one another. 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 long-term 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, such as racism, xenophobia and other forms of intolerance that result in gross violations of international law.

4. In this regard, *transitional justice* should be considered as an appropriate mechanism to fulfill this objective, considering that its implementation involves legal processes intended to help a country undergoing political transition to confront its legacy of human rights abuse, violence or other forms of oppression. Transitional justice projects are intended to promote justice, peace, and reconciliation, and may take many forms. They may, for instance, involve prosecuting individual perpetrators of human rights violations, offering reparations to victims, establishing truth-seeking initiatives, reforming government institutions, or removing human rights abusers from positions of power.

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

Creation of an international body of law

5. 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 for the protection of victims of war of 12 August 1949 and their Additional Protocol I of 1977.
6. International law provisions on terrorism, which are a set of rules different from those governing the crimes defined in the Rome Statute of the International Criminal Court (hereunder referred to as the Rome Statute), also establish obligations derived from general international law. The conventional source of these provisions are the 12 international agreements against terrorism which have been reinforced at regional level by the Inter-American Convention against Terrorism of 2002, the European Convention on the Suppression of Terrorism concluded under the auspices of the Council of Europe and the Shanghai Convention on Combating Terrorism, Separatism and Extremism.
7. Customary international law must be seriously considered as well, as it is binding on all nations regardless of their explicit agreement with international treaties or practices. Customary international law results when States follow certain practices generally and consistently out of a sense of legal obligation. Principles of customary law have been codified in the Vienna Convention on the Law of Treaties, which provides inter alia that rules set forth in a treaty can become binding upon a non-state party as a customary rule of international law.

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

8. In the 1990's, 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) was the most striking milestone in the struggle for justice. The ICC epitomises the principle that the most serious crimes which affect the whole international community must not be left unpunished.
9. The ICC aims:
 - to bring to justice those persons who have seriously violated human rights or humanitarian law;
 - to bring such violations to an end and to prevent their recurrence;
 - to ensure justice and dignity for the victims; to establish a record of past events;
 - to warn potential violators that there is no safe haven;
 - to foster long-lasting national reconciliation and peace;
 - to clear the way for solutions that do not rely on military strength by re-establishing the rule of law;
 - to make it possible for victims and their families to have an opportunity to see justice done and to know the truth, and to initiate the process toward reconciliation;
 - to be guaranteed independence and objectivity as an international institution based on multilateral conventions.
10. In addition to the crimes, addressed by the Court, other types of crime (such as money-laundering, drug trafficking, corruption and cybercrime) have emerged which help the perpetrators of war crimes, crimes against humanity, genocide and terrorism in a financial, moral, material or strategic sense. The international community is increasingly concerned about these crimes. Some progress has been made, with the elimination of bank secrecy in the European Union, the adoption of a European Convention on Cybercrime and the establishment of an international framework for cooperation in the fight against terrorism.
11. The Rome Statute is the first international convention to provide a definition of crimes against humanity. It defined 11 types of acts as crimes against humanity. One of the most significant achievements of the Rome Statute is its handling of the issue of gender. The Rome Statute recognises sex crimes against women as a violation of the sanctity of a woman's body. It is of great significance that "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity" is clearly stipulated in the definition of "crimes against humanity" and "war crimes".

III. Primary focus on justice at the national level

12. While international courts have been established to deal with 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.

13. Clearly, the aim should not be to create international mechanisms to replace national structures. In this regard, the ICC underlines that the fight against impunity starts first and foremost at the national level. The Rome Statute recalls that any State party has the obligation to exercise criminal jurisdiction over a perpetrator of international crimes. More specifically, the Rome Statute establishes, by virtue of the principle of complementarity, that States parties have the primary responsibility for prosecuting 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. In this context, mention should also be made of the unprecedented number of cases brought in the national courts of third-party States in recent years under the principle of universality, a concept which is rooted in international law and codified in United Nations instruments. According to this principle, some crimes are so grave that all countries have an interest in prosecuting them and may act accordingly, even though there may not be a direct link between the crime and the country in which the prosecution takes place. As is the case with the ICC, this exceptional form of jurisdiction is also rightly reserved for those cases where the justice system of the country where the violations take place is unable or unwilling to prosecute.
14. Moreover, 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 assessment strategies from the States concerned as well as consultations in which national interested parties - including justice officials, civil society, professional associations, traditional leaders and important groups such as women, children, minorities, marginalised people and refugees - take part in an active and significant way. This evaluation is particularly important in cases where governments which accede to power in the wake of armed conflict have themselves committed serious crimes. Such governments, under the pretext of promoting peace, often take measures in favour of amnesties for the perpetrators of crimes to which statutory limitations do not apply.
15. Although justice at the national level is generally recognised as the best long-term mechanism to enhance the rule of law, many nations (if not most) simply lack the resources to address widespread violations of human rights. Not only do they face financial limitations, but it is often the case that the perpetrators of such crimes are politically powerful; often they are government or judicial officials. Accordingly, when the suggestion is made that the international community should show solidarity with national institutions, caution must be taken to ensure that building a national capacity for the administration of justice does not take precedence over identifying and removing from power those who are responsible for war crimes, crimes against humanity, genocide and terrorism.

IV. Specific role and responsibilities of parliament

Ratification of the Rome Statute

16. Ninety-seven States have already ratified the Rome Statute. It is essential that all States whose parliaments are Members of the Inter-Parliamentary Union and which have not yet ratified the Statute do so as soon as possible. Obviously, the role of parliament is crucial here, as in many countries legislative approval is essential for the executive branch to accept obligations by means of a treaty and for the judiciary to enforce it.
17. In this regard, it should be noted that the Council of the European Union adopted on 16 June 2003 a Common Position that strengthens the European Union's support for the ICC. Article 1 of 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." The members of the European Union also undertake in their political negotiations and dialogues to encourage the widest possible ratification or adherence to the Statute of Rome and to give technical and financial assistance to legislative works in other States.

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

18. Treaties which define war crimes and crimes against humanity generally contain provisions that cannot be directly enforced but need to be incorporated into the domestic legal system of the State before they can be applied by the judiciary.
19. In this regard, 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.
20. Similarly, States party to the Rome Statute 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

21. Under the Rome Statute, States parties are bound to cooperate with the ICC and thus to introduce the necessary procedures to this effect 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.
22. 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 a State which does not order the extradition of a person accused of these crimes is obliged to prosecute that person. 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 on the protection of victims of war of 12 August 1949, their 1977 Additional Protocol I, or otherwise responsible for war crimes, and to prosecute such persons or extradite them for trial in another State. States therefore have to set up appropriate mechanisms which ensure the effective enforcement of this principle, and also must ensure more generally an effective framework for judicial cooperation with other States in these matters.

The fight against terrorism

23. Parliaments which have not done so, should be encouraged to ratify the 12 international treaties on terrorism and to incorporate their provisions into domestic legislation, in particular where they address the definition of crimes and the issuance of procedures for the enforcement of the principle of *aut dedere, aut judicare*.
24. Moreover, United Nations Security Council resolution 1373 (2001) established additional tasks to be implemented by States in order to deal with terrorist actions.
25. Clearly, prevention is the first imperative of justice. For this purpose it is essential to establish and implement mechanisms to punish such criminal activities. Here again, parliaments have an essential role to play.

The need for effective partnerships between parliaments and other national and international bodies

26. An exclusive focus on a particular national institution or a disregard of civil society will undermine the pursuit of justice. Parliamentary strategies for the implementation of mechanisms for the prosecution and judgement of war crimes, crimes against humanity, genocide and terrorism should take into account that, to be efficient, they should have a wide scope and ensure the participation – in their development and enforcement - of all the institutions dealing with justice, both of an official and non-official nature.

27. In that light, parliaments should support all those groups which are interested in judicial reform, help in strengthening judicial capacity, enhance national consultations about judicial reform and fill in the gaps that may appear in the rule of law - frequently leading to impunity - which are particularly evident in those societies that have gone through conflicts.

The need to inquire into the origin of human rights violations

28. Apart from turning their attention to establishing mechanisms to prosecute serious international crimes, parliamentarians should also examine and address the root causes of such grave human rights violations. While an end to impunity may have a general deterrent effect, it is clear from national models that an effective enforcement system does not rid a society of crime. The fight against terrorism and other human rights violations requires a preventive approach that looks at the underlying causes of conflict, such as economic disparity, discrimination and social injustice.