

The Treaty of Rome and Possible Obligations Following Accession by Nepal

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1. Introduction

Almost immediately after the Treaty of Rome established the International Criminal Court the civil society in Nepal led by INSEC began lobbying with the government for acceding to this treaty. But the government not only took a lukewarm approach to the issue, instead went to the other extreme by signing an agreement with the US government which stands against the Treaty. Now since the newly reinstated Parliament has issued directive to the government to accede to the treaty it therefore becomes pertinent to examine what obligations would Nepal have to shoulder following her accession to the Treaty of Rome. In this short note, I will introduce the ICC by visiting major provisions of the Treaty. Following this, I will examine possible obligations that Nepal would have to shoulder after accession. Some of these obligations directly spring from the Treaty but others are either inferential or are necessary for strengthening the domestic legal system. Given that international criminal law proscribing system crimes takes a complementary approach, I argue that there will be less reason for states to worry about external interference after accession to the Treaty of Rome if the domestic legal system is strengthened internalizing values of criminal law proscribing gross violation of human rights, checking impunity and ensuring fair trial.

2. Background

The adoption of the Treaty establishing a permanent International Criminal Court (ICC) in 1998 was the fruition of the desire long held by the international community to create a permanent adjudicating body with wider jurisdiction than the International Court of Justice (ICJ). In fact, shortly after the United Nations was founded, the newly formed International Law Commission (ILC) was mandated to prepare a draft statute to create the International Criminal Court and a kind of a draft statute was prepared by the ILC in the 1950s¹. The ILC then formulated crimes against peace, war crimes; and crimes against humanity as crimes against international law.² However, owing to multitude of factors tangible progress could not be made in this regard for a long time. The international community dealt with international crimes on an ad-hoc basis. The ad-hoc tribunals created by the resolution of the UN Security Council dealt with war crimes, ethnic cleansings, and other atrocities in the 1990s. The Rwanda and former Yugoslavia tribunals are the two cases in point. The changing international relations also helped the world community come closer to deliberate on the possibility of creating ICC. The proposal put by a coalition of 16 Latin American and Caribbean countries led by Trinidad and Tobago at the UN got a nod by many countries. As a result, the draft prepared by the ILC was brought into discussion for a few years at the preparatory committee and other fora. The Treaty of Rome was adopted on 17 July 1998 which created the International Criminal Court.³ This Treaty came into force on July 1, 2002.

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1 Forum Asia, *International Criminal Court*, Bangkok, Thailand 200 p 1 ; See also Michael P. Scharf, *The Politics Behind the US Opposition to the International Criminal Court*, 15 NEW ENGLAND INTERNATIONAL AND COMPARATIVE LAW ANNUAL 2000, browsed at http://www.nesl.edu/Annual/vol15/#N_1 on May 10, 2002

2 In 1996 the ILC adopted twenty articles constituting a code of crimes against the peace and security of mankind. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (Sixth ed, Oxford, 2003) at p 560

3 Those doubting the success of the ICC term it as a treaty created at the conference dominated by weak and middle powers and non-governmental organizations. See Jack Goldsmith, *The Self-Defeating International Criminal Court* 70 U.CHLAW.REV. 89, 90 (2003)

3. The International Criminal Court

The ICC is the first ever permanent international criminal court, independent and impartial and able to hold individuals personally accountable for the commission of the most serious international crimes. The treaty envisages the court to be independent of the UN though it works in coordination with the UN.

The court comprises 18 judges of high moral character, impartiality and integrity, elected by the member states for a non-renewable 9 year term.⁴ The Court is a mixture of both academics and persons with practical experience in criminal law and international law, especially the international humanitarian law.

The Courts consists of the Presidency, the Appeal Division, Trial and Pre-Trial Divisions. The President and the First and the Second Vice-Presidents are elected by an absolute majority of the judges for a maximum period of three years.⁵ The Appeals Division is composed of the President and four other judges. Similarly, the Trial Division and the Pre-Trial Divisions are composed of not less than six judges each. The judicial function of the Court is carried out in each Division by Chambers. The Appeal Chamber is composed of all the judges while the Trial Chamber is run by three judges of the Trial Division. The function of the Pre-Trial Chamber is carried out either by three judges of the same Division or by a single judge depending on the situation.⁶

The Office of the Prosecutor is another very important office envisaged by the Statute. The Prosecutor acts independently as a separate organ of the court. The Prosecutor and his deputies are supposed to be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. The Prosecutor is elected by absolute majority of the State parties. The Deputy Prosecutor is elected by the same process from the list of candidate provided by the Prosecutor.⁷

The office of the Registrar is responsible for non-judicial aspects of the administration and for servicing the Court. The Registrar, who is the principal administrator, is elected by judges by absolute majority. He exercises his/ her function under the authority of the President.⁸

A judge, Prosecutor and his/her deputy can be removed from his/her office if found to have committed serious misconduct or a serious breach of duty by the assembly of the state parties.⁹ The Registrar can be removed from office by an absolute majority of judges.

3.1 Crimes within the Jurisdiction of the Court

The Court is empowered to hear the most serious crimes of concern to the international community as a whole. The Court is empowered to exercise its jurisdiction on the following crimes:¹⁰

- The crime of genocide¹¹;
- Crimes against humanity¹²;

4 See ICC Statute Art 36

5 *Id* Art 38

6 *Id* Art 39

7 *Id* Art 42

8 *Id* Art 43

9 *Id* Art 46

10 *Id* Art 5

11 Genocide involves any of a number of acts, including killing, causing serious bodily or mental harm, imposing measures intended to prevent births, and forcible transfer of children to another group "committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group. See *id* 6. See also Art 130 which provides that parties to the Genocide Convention already have the obligation to prosecute the crime of genocide.

- War crimes¹³;
- The crime of aggression.

The Statute defines and explains as to what the crimes of genocide, crimes against humanity, war crimes are.¹⁴ However, with regard to the crime of aggression it leaves to the states to define and sets out conditions for the exercise of jurisdiction.¹⁵

3.2 Exercise of Jurisdiction

Under the Statute the Court may exercise its jurisdiction only prospectively. That means that the court can take note of the crimes occurring only after the Statute comes into operation.¹⁶ The jurisdiction of the Court extends to all persons, regardless of their official capacity.¹⁷ The ICC gives access to individuals to bring up cases. It is competent to deliver justice in cases not only between the States but also between individuals and the States. Thus, the Statute has very pervasive provisions which bring head of the states or governments, military leaders and local war lords under the jurisdiction of the court. However, the Statute excludes a person below the age of 18 years (when committing the crime) from the jurisdiction of the Court.¹⁸

3.3 Pre-conditions for the Exercise of Jurisdiction

The Statute sets out preconditions for the exercise of jurisdiction. In the first place, those states which ratify the Statute automatically accept the jurisdiction of the ICC with respect to the crimes mentioned above.

Secondly, the ICC can also exercise its jurisdiction if one or more of the States are parties to the Statute a) on whose territory the conduct in question occurred, or b) of which the accused of the crime is a national. This creates two kinds of possibilities. In the first place the court can exercise jurisdiction even against the non-state party nationals. Where these conditions meet, The ICC Statute empowers it to exercise jurisdiction even when one of the state parties which is not a member of the ICC did not consent to the jurisdiction.¹⁹ Secondly, the citizens can file a report to the Prosecutor against their own state.

12 Crimes against humanity are defined as certain acts "when committed as part of a widespread or systematic attack directed against any civilian population". Art 7 defines the following acts as crimes against humanity: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other grave forms of sexual violence, persecution, enforced disappearance, apartheid and other forms of inhuman acts.

13 War Crimes for the purpose of the Rome Statute cover acts committed during international and non-international (internal) armed conflicts. The definition includes acts such as grave breaches of the 1949 Geneva Conventions, including willful killing or torture of protected persons or extensive destruction of protected property; other serious violations of the laws and customs applicable in international armed conflict; serious violations of common article 3 of the 1949 Geneva Conventions, including intentional attacks on or violence against civilians and other serious violations of the laws and customs applicable to non-international armed conflicts. *See id* Art 8

14 *See id* Art 6,7, and 8

15 *See Id* Art 6(2)

16 *Id* Art 11

17 *Id* Art 25 and 28

18 *Id* Art 26

19 States often prosecute foreign nationals for matters that occur within their state territories (principle of territoriality), or affect their citizens as victims (the principle of passive personality) or merely affect the state interests (the principle of protective jurisdiction). the consent of the foreign national's state is not required. Now the ICC has gone a step ahead prosecutes a defendant even if his/her state is not a party to the treaty and did not consent to the jurisdiction if the crime has occurred in a state of a party to the ICC or a country which has consented to the jurisdiction of the ICC without being a party which might pose a tension with the Westphalian system of territorial integrity, political independence, argues Prof Wedgwood. *See* Wedgwood. *Europ. Journ* 10(1999) cited in IAN BRIWNLIE *supra* note 2 at p 573. *See also* Madeline Morris, *Democracy and Punishment, The Democratic Dilemma of International Criminal Court*, 5 *BUFF.CRIM.L.R.* 591, 593 (2002); *See also* Vienna Convention on Law of the Treaties, Art 34 which states; "A treaty does not create either obligations or rights of a third state without its consent." Two exceptions to this rule are: a) when a treaty becomes part of international custom; and b) if a Treaty creates benefit to the third party and the find party accepts it.

And finally, the Court may also exercise its jurisdiction if one or more of the States of the nationality of the accused or the territory in which the crime was committed have accepted the jurisdiction of the Court.²⁰

3.4 Triggering of Jurisdiction

The court moves to assume its jurisdiction with respect to a crime if²¹:

- The matter is referred to the Prosecutor by a State Party; or
- The matter is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- The Prosecutor himself initiates an investigation in respect of such a crime.

In effect the Statute adopts a two-track system of jurisdiction. Track one would constitute situations referred to the Court by the Security Council.²² The second track would constitute situations referred to the Court by individual countries or the ICC Prosecutor.²³ Upon a cursory look of the Statute, the first track appears to be more powerful than the second track. The second track is a novel idea to do away with impunity not applied so far in international adjudicating process. A balanced approach seems to have been taken in the second track system to prevent frivolous cases from being brought to the court, by allowing accused to challenge the jurisdiction at pre-trial level and also during the trial.

Under the second track, the Court's jurisdiction would be based on a concept known as "**complementarity**". This means that the Court would be the last resort and would come into play only when domestic authorities are unable or unwilling to prosecute. The jurisdiction of the court becomes operational only if:

- The case has not been prosecuted or is not being investigated or prosecuted by a State which has jurisdiction over it,
- The State is unwilling or unable genuinely to carry out the investigation or prosecution;
- The person concerned has not already been tried;
- The case is of sufficient gravity to justify further action by the Court.

However, in order to prevent the ICC from initiating investigation of the Prosecutor the concerned state should show that²⁴:

- The proceedings were or are not being undertaken or the national decision was not made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.
- There has not been an unjustified delay in the proceedings;
- The proceedings were or are being conducted independently or impartially.

In order not to exercise jurisdiction the ICC should be satisfied that it is not a case of total or substantial collapse of the state or unavailability of its national judicial system to obtain the accused or the necessary evidence and testimony. It should also be convinced that the concerned state is able to carry out proceedings.

²⁰ See ICC Statute, Art 12

²¹ *Id* Art 13

²² This track would create binding obligations on all states to comply with orders for evidence or the surrender of indicted persons under Chapter VII of the U.N. Charter. This track would be enforced by Security Council imposed embargoes, the freezing of assets of leaders and their supporters, and/or by authorizing the use of force. It is this track that the United States favored, and would be likely to utilize in the event of a future Bosnia or Rwanda.

²³ This track would have no built in process for enforcement, but rather would rely on the good-faith cooperation of the Parties to the Court's statute.

²⁴ See ICC Statute Art 17

Before commencing investigation under the second track the Prosecutor needs to notify the State with a protective interest in a case of his/her intention.²⁵ If, within one month of notification, such a state informs the Court that it is investigating the matter, the Prosecutor must defer to the State's investigation, unless it can convince the Pre-Trial Chamber that the investigation is a sham. The decision of the Pre-Trial Chamber is subject to interlocutory appeal to the Appeals Chamber.

Thirdly, in case of war crimes Article 8(1) of the Statute specifies that the Court would have jurisdiction only over "serious war crimes" that represent a "policy or plan or as part of a large-scale commission of such crimes". Similarly, in case of crimes against humanity under Art 7(1), a widespread or systematic attack" would trigger the jurisdiction. Thus, random acts would not be subject to the Court's jurisdiction. Neither would one-time incidents be so easily brought to the court.

Fourthly, Article 15 of the Court's Statute guards against spurious complaints by the ICC prosecutor by requiring the approval of the Pre-trial Chamber before the prosecution can launch an investigation. Further, the decision of the chamber is subject to interlocutory appeal to the Appeals Chamber.

And finally, Article 16 of the Statute allows the Security Council to affirmatively vote to postpone an investigation or case for up to twelve months, on a renewable basis. While this does not allow individual countries to veto against the initiatives made at the Hague, this does give members of the Security Council a collective veto over the Court.

3.5 The Progression of the Case

3.5.1 Reference and Preliminary Investigation

Once a reference is made to the Prosecutor of a situation in which one or more crimes within the jurisdiction of the court appear to have been committed either by the state party or the security council the Prosecutor begins preliminary investigation to determine whether such incident has occurred or whether one or more specific person should be charged with the commission of the crimes.²⁶ The Statute also empowers the Prosecutor to initiate *proprio motu* investigation.²⁷ He/she may seek additional information from states, the UN, the INGOs or NGOs or other reliable sources that he/she deems appropriate.²⁸ If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation he/she submits to the Pre-Trial Chamber a request for authorization of an investigation. At this stage the victims of the crime may also make representation to the Pre-Trial Chamber. Upon examination of the request and the supporting material if the Pre-Trial Chamber considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it authorizes the commencement of the investigation. But if the Prosecutor himself concludes that the information provided does not constitute a reasonable basis for an investigation he drops the matter and informs the party who provided the information.²⁹

3.5.2 Deferral of Investigation

When the Prosecutor concludes that there would be a reasonable basis to commence the investigation, he/she is required to notify the State Parties of his/her finding. Within one month of such receipt of the notification the concerned State may inform the Court that it is

²⁵ *Id* Art 18

²⁶ *Id* Art 14

²⁷ *Id* Art 15

²⁸ *Id* Art 15(2)

²⁹ *Id* Art 15(6)

investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts under this Statute and which relate to the information provided. Then the Prosecutor is required to defer the matter for a maximum period of six months and after that he/she can open the matter for review. During such deferred period the concerned State is required to periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions, without undue delay.³⁰

As stated earlier the investigation or prosecution of the crime can also be deferred for 12 months if the Security Council in a resolution adopted under Chapter VII of the Charter of the UN requests the Court to that effect. The Council may renew the request under the same conditions.³¹

3.5.3 Conclusion of Investigation

After the conclusion of the investigation if Prosecutor concludes that there is no basis for prosecution he/she informs the Pre-Trial Chamber and the State or the Security Council who made a referral of his/her basis of conclusion and the reasons for the conclusion. The State or the Council may request the Prosecutor to reconsider the decision. In addition, the Pre-Trial Chamber may also review the decision of the Prosecutor not to proceed. The decision of the Prosecutor becomes effective only if confirmed by the Pre-Trial Chamber.

3.5.4 Confirmation of the Charge by the Pre-Trial Chamber

Under the Statute the Pre-Trial Chamber, upon the request of the Prosecutor issues warrant to the person if, upon examination of the request, it finds that there exists a reasonable ground to believe that the person has committed the crime.³² The trial on the case begins only after the confirmation of the charge on which the Prosecutor intends to seek trial.³³

3.6 Rights of Persons During Investigation and Trial

The Statute appears to be an amalgam of the both civil and common law system. Though critics take the view that ICC creates a court which is a police, investigator, jury, judge, and jailor in one, it does not bury the core values of the criminal justice system³⁴. For instance it guarantees a few rights to persons during an investigation such as:³⁵

- the right against self incrimination;
- the right against any form of coercion, duress or threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;
- the right to be questioned in a language that one fully understands and speaks, along with the concomitant right to the assistance of a competent interpreter and the right to have translations as are necessary to meet the requirements of fairness;
- the right against arbitrary arrest or detention,
- the right to be informed of the allegation prior to being questioned; the right to be informed of the charges before trial;
- the right to have adequate time and facility to prepare defense;
- the right to have legal assistance of the person's choosing along with the right to have a free legal aid in case one cannot hire the service of the counsel;

³⁰ *Id* Art 18

³¹ *Id* Art 16

³² *Id* Art 57

³³ *Id* Art 61

³⁴ *See for e.g.* Art 56(3) where a judge is indirectly involved in the collection of evidence even before the filing of the report of by he Prosecutor some time at its own initiatives.

³⁵ *Id* Art 55, 68

- the right to be questioned in the presence of counsel unless such right has been voluntarily waived;
- the right to be tried without undue delay;
- The right to be presumed innocent until proved guilty³⁶
- The right to a public hearing in full equality,³⁷
- The right to be present during the hearing.

3.7 Protection of Victim and Witnesses

Protection of victim and witnesses is another unique feature of the Statute. It contains several provisions regarding this. For instance the Trial Chamber may where necessary, provide for the protection and privacy of victims and witnesses without prejudicing the fair trial.³⁸ The Statute also provides for the creation of a **Trust Fund** for the restitution of the victim and for reparation, compensation and rehabilitation.³⁹ Even the arrested and convicted person may be entitled to get compensation if he or she is found to be unlawfully arrested or where a miscarriage of justice has occurred.⁴⁰

3.8 Sentencing, Appeals and Enforcement of the Sentence

In the event of conviction, the Trial Chamber considers the appropriate sentence to be imposed. For this, it takes into account the evidence presented and submission made during the trial that are relevant to the sentence. Except in case where the accused has accepted the guilt, the Trial Chamber, on its own motion or at the request of the Prosecutor or the accused, may hold a further hearing to evaluate any additional evidence or submissions relevant to the sentence.⁴¹ The Court may impose one of the following penalties on a person convicted of a crime referred to in the Statute⁴²:

- Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.⁴³

In addition to imprisonment, the Court may order a fine under the criteria provided for in the Rules of Procedure and Evidence or a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties. The State Parties are required to cooperate with the Court in its effort to impart justice.

The Statute accords the right to appeal to both the Prosecutor and the Party. The decision of the Trial Chamber may be appealed in accordance with the Rule of Evidence and the Rule of Procedure to the Appeal Chamber on the following grounds:

- Procedural error,
- Error of Fact,

³⁶ *Id* Art 66

³⁷ *Id* Art 67

³⁸ *Id* Art 58 and 68

³⁹ *Id* Art 75 and 79

⁴⁰ *Id* Art 85

⁴¹ *Id* Art 76

⁴² *Id* Art 77

⁴³ It is argued that this provision may be incompatible with the constitutional guarantee that many new democracies have given against life imprisonment which means a perpetual imprisonment.. For instance Portuguese constitution provides that no one may be subjected to a sentence or security measures that involves deprivation or restriction of liberty for life or for an unlimited or indefinite duration. Similarly, Brazilian constitution provides that there shall be no penalties of perpetual character. A couple of other Latin American countries also have provisions that broadly prohibit "*penas perpetuas*". See Helen Duffy, National Constitutional Compatibility and the International Criminal Court, 11DUKE J. OF COMP. & INT'L L. 5, 33 (no date)

- Error of Law,
- Any other ground that affects the fairness or reliability of proceedings or decision.

The sentence of imprisonment is binding upon the State Parties. They can in no case modify the sentence. The Court designates the state in which a sentence of imprisonment will be served. For this, it takes into consideration the willingness of the state to accept the sentenced person. While designating the state, the Court also need to take the views of the sentenced prisoners and the state of nationality of the sentenced person.⁴⁴ A sentenced person may also at any time apply to the Court to be transferred from the State of Enforcement. The Court also can supervise the sentence of imprisonment.

3.9 No Limitation

As the crimes under the jurisdiction of the ICC are of international concern, the investigation or institution of the case is subject to no statute of limitation.⁴⁵

3.10 No Reservation

The treaty of Rome is one of the few hard law instruments of recent times which does not allow the Member State to make reservation of any kind.

4. Possible Obligations upon the State Parties

Being a party to the Treaty of Rome mean several express and implied obligations upon the states. Since the House of Representative has issued directives to the government of Nepal to be a party to the ICC, it is high time that we examine what obligations Nepal needs to undertake after accession to the Treaty of Rome. These obligations can be categorized as direct and indirect or inferential-spring from the Treaty and the second type are necessary in order to meet international obligations by the State and more particularly to prevent the ICC from assuming jurisdiction. Without being exhaustive I would like to pick up a few here.

4.1 Direct Obligations

4.1.1 State Parties must comply with requests from ICC for cooperation or assistance with its investigations and prosecution. These may include arresting and surrendering suspects, enforcing the orders and judgments of the ICC, including seizing and forfeiting proceeds of crime, protecting victims and witnesses and allowing the prosecutor of the ICC to conduct investigation on the territory of the state.⁴⁶ The ICC Statute requires the States parties to put in place under their national laws procedures for all forms of cooperation and its international obligation to ensure justice.⁴⁷

a) State Parties must arrest and surrender a person when requested by the ICC. Once the states party receives a request for the arrest and surrender or provisional arrest of a person it must take immediate steps to arrest that person. After that a series of steps follow. The state party should bring such person before a competent judicial authority to determine the identity of the person, and also to determine that the arrest was lawful, and that a person's rights have been respected. The arrestee also has a right to apply for interim release or bail pending surrender to the ICC. But before making any decision on the bail application National authorities are required to consult the ICC. As the term 'surrender" is used it is assumed that ICC enjoys a superior

⁴⁴ *Id* Art 103

⁴⁵ *Id* Art 29

⁴⁶ *See id* Art, 9, 86

⁴⁷ *Id* Art 88(7)

authority over the national authorities and the state laws.⁴⁸ Besides, the Statute clearly accords precedence to the request of ICC over the competing request of extradition by another state party.⁴⁹

b) States must comply with request for assistance and cooperation with the ICC's investigations and prosecutions. State parties as well as the non-state parties may be asked to comply with the request of the ICC in varied forms such as production of required information, documents and evidence,⁵⁰ transfer of person to the ICC, protection of victims and witness. They are required to extend cooperation in voluntary appearance of persons as witness or experts before the ICC⁵¹, serving of summonses, execution of search and seizures, identification, tracing and freezing of proceeds and property etc⁵² and enforcement of orders and judgments of ICC.

4.1.2 States must allow the Prosecutor of the ICC to conduct investigations on their territory.⁵³ The State is under a duty to extend cooperation in the investigation. Where the cooperation is wanting due to unavailability of any authority or any component of its judicial system to execute the request for cooperation, the Pre-Trial Chamber may determine that the concerned State is clearly unable to execute a request for cooperation. It may then authorize the Prosecutor to take specific investigative steps.

4.1.3 States must prosecute offences against the administration of justice by the ICC. The Statute requires the state party to extend its criminal laws penalizing offences against the administration of justice such as giving false testimony, knowingly presenting false or forged evidence, corruptly influencing witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony, destroying, tempering or interfering with the collection of evidences, impeding, intimidating or corruptly influencing an ICC official, or retaliating against him for performance of his or her duties, or bribing him.⁵⁴

4.2 Implied Obligations

Besides the above, a couple of implied obligations cast upon the State when it accedes to the ICC. They are briefly discussed as follows:

4.2.1 Making the Constitution Compatible to the ICC:

With regard to the constitutional compatibility two issues come to the fore, which are more or less related. The first is the surrender (contrast with extradition) of the citizen to the ICC and the second is the issue of immunity of the head of the state or the government. Even though the Nepali Constitution does not explicitly guarantee the right against extradition, it does provide for the right against exile or banishment.⁵⁵ Further, the Extradition Act 1988 recognizes the power of the State to deny extradition of its citizens provided the state prosecutes them within the country which is in consonance with the principle of international law.⁵⁶ Now, that the ICC Statute creates a supra-national institution and requires that the state “**surrender**” its citizen, the State needs to make its law compatible to the provisions of the ICC. Even though the jurisdiction

48 *Id* Art 59 the term "surrender" is deliberately chosen here to distinguish it from extradition.

49 *See id* Art 90

50 *Id* Art 15, 18, 54, 57, 93, 99

51 *Id* Art 54, 55, 93, 99

52 *Id* Art 77, 88, 93, 94, 99

53 *Id* Art 54 and 57,

54 *Id* Art 70

55 NEP. CONST. 1990 ART 21. Many constitutions such as Art 47 of Slovenian Constitution, art 69 of Venezuela Constitution and Art 5 of Brazilian Constitution ban extradition of its citizen. A constitution which uses language very close to Nepal is the Constitution of Costa Rica which provides that no citizen shall be compelled to abandon national territory. *See also* Helen Duffy, *supra* note 43 at p 20-23

56 *See* Extradition Act 1988 S. 9 and S.15

is complementary to the domestic jurisdiction of the State there is a need to harmonize national law either through constructive interpretation or through constitutional amendment.

Second, relates to the immunity given to the head of the states and government. This is a protection given to them against prosecution for the works performed in official capacity to ensure that such people are not subjected to politically motivated frivolous criminal actions. Many constitutions guarantee varying degrees of immunities such as absolute immunity⁵⁷ and official immunity⁵⁸. The recent constitutional practice in this area is that immunity does not preclude State from taking action in cases where the offence invites prison sentence.⁵⁹ Even though Nepali Constitution is not explicit on the point a literal interpretation of the words used in the Constitution leads one to argue that the Constitution accords only an “official immunity” to the Monarch.⁶⁰ Now, that the Parliamentary Declaration of May 18, 2006 has provided that the acts performed by the King can be called into question in the Parliament as well as in the Court, the shield of immunity virtually does not exist.

Therefore, both the issue of compatibility of constitution and laws regarding of extradition and immunity can be solved through harmonious interpretation. However, as our current movement is towards entrenchment of democracy and the rule of law and since we are in the process of drafting an interim Constitution it is desirable that rather than sticking to the interpretive approach, we insert a provision in the Constitution to the effect that Nepal may recognize the jurisdiction of the ICC under the conditions specified by the Treaty of Rome.⁶¹ As there is also a need to take S 9 of the Treaty Act to the Constitution both can be done at the same time.⁶²

4.2.2 Standardization of the National Legal System

The primary objectives of the ICC is to put an end to impunity for the perpetrators of the most serious crimes such as genocide, war crimes and the crimes against humanity. It also carries with it other important values such as the establishment of peace, security and well-being in the world, justice, the rule of law, protection of human rights and humanistic values, prevention of crimes and preservation, restoration and maintenance of peace. In view of the growing complementarity of the international and domestic legal regime, it is desirable that Nepalese system also internalizes these values. For this purpose while it is necessary to make the Nepali legal system comprehensive enough to cover every crime under the jurisdiction of the ICC, it is also necessary that our legal system embraces and internalizes universal values of justice.

Presently, many crimes which fall under one of the three crimes under the ICC Statute find no place in the statute books in Nepal. For instance, Nepalese law is yet to define and criminalize genocide or the crimes against humanity even though the existing law covers quite a few crimes that fall under these two heads. There is a need to criminalize each and every crime mentioned in the ICC Statute with regard to the crime of genocide, the crime against humanity and war crimes. This being the general obligation that Nepal needs to shoulder, at the moment she has the following situation:

- There is no comprehensive law on enslavement, deportation or forcible transfer of population.
- Torture is not criminalized.

57 For instance, the Constitution of Norway accords absolute immunity to the King.

58 For instance, Spain, Belgium.

59 Argentina and Slovenia are the countries preclude immunity for crimes that carry prison penalties. See Helen Duffy, *supra* note 43at p 28-29

60 NEP. CONST Art 31 provides: “No question shall be raised in any court about any act performed by His Majesty” This means that immunity is available only for actions undertaken in the capacity of “His Majesty”

61 Quite a few countries such as France, Brazil, Belgium have inserted provisions in their constitution recognizing the jurisdiction of the ICC.

62 Of course , a caution needs to be taken in this regard to ensure that the provision does not provide a blanket permit or access to treaty parties to take benefits in Nepal without reciprocal guarantee of the same in other countries,.

- There is no law on sexual slavery and the canvas of law on sexual offences is also narrow. Crimes such as forced pregnancy, enforced sterilization, and many other forms of violence are not criminalized.
- There is no law to criminalize persecution on political, racial, ethnic, cultural and gender.
- There is no law on enforced disappearance of person, abduction, taking hostage of persons, destruction of property, and wanton attack on civilian population.

These are just a few examples that illustrate the narrow canvas of our law. Even in areas where there is law, in many instances it is deficient either in terms of its coverage or in terms of providing appropriate sanction. Similarly, there is a lack of firm and uniform policy on criminal responsibility, especially in the following areas:

- Commission of crime through other person either through inducement or by illegally using the position of power or exploiting superior subordinate relation;⁶³
- Providing means, assisting, or abating in the commission of crimes;
- Liability of those working with common purpose with one another;
- Incitement to commit crimes;
- Crimes of omission- criminal failure on the part of the person in authority who has a duty to prevent crime, has knowledge that the crime is being committed but fails to take action to prevent or repress the matter or report to the superior.

Under Nepali law intention is a material factor for culpability but knowledge is not. This goes against the spirit of the ICC statute.⁶⁴ Besides, there are issues of due process which need to be standardized so that prompt justice to every one is ensured.

In order to internalize the value of ICC the justice system should display impartiality and genuineness of purpose. It should not be seen as shielding certain interest group or power holders from criminal responsibility. Reckless blanket withdrawal of cases, amnesties in political interest make this commitment hollow. General amnesties in cases involving gross violation of human rights and humanitarian law goes against the very concept of the rule of law and the commitment made by the State to protect human rights of its people. Such activities ultimately jeopardize the very foundation of a civilized and humane legal order. Fair trial, impartiality and effectiveness are the cardinal features of an independent system of justice. There is therefore a need to shun parochialism and move towards adopting the global format without losing sight to the specific circumstances and the need of the country.

As mentioned already, the ICC jurisdiction is triggered only when the State is unable or unwilling to investigate the crime and punish the perpetrator. It is incumbent upon the State to promulgate laws so that no serious criminal offence goes unaddressed under the domestic legal system. A State that does not prosecute and punish crimes mentioned in the ICC Statute is virtually considered a failed state. Therefore, it is in national interest of the State to create a legal framework that proscribes crimes and imposes punishment when such crimes occur.

5. Ratification of the Treaty

When the Plenipotentiaries met in Rome on 17th July 1998 to vote for the adoption of the Treaty there were 120 votes in favor 21 abstentions and 7 oppositions. Among the countries, US and China were the major powers that opposed the treaty. The opposition of these super powers gave rise a fear that the Treaty would have a convulsive growth. However, to the astonishment of the

63 Order of the superior is not a defense under international law but where the person has a legal obligation to abide, did not know that the order was illegal and where the order was not manifestly illegal, the person following the order of the superior may be exempted from criminal responsibility. See ICC Statute Art 33

64 See ICC Statute Art 30

skeptics, the number of countries signing the Treaty has now reached over 130.⁶⁵ In view of the growing interest of international community to the ICC Treaty, it is very likely the treaty regime will form the basis of state obligation to international crimes.

6. Why Should Nepal Ratify the Treaty of Rome?

Even though international community for the first time made an attempt at Nuremberg and Tokyo to bring to book and punish perpetrators of international crimes, for a long time many atrocities committed against innocent people remained unchecked and unpunished.⁶⁶ After nearly forty years of Nuremberg and Tokyo, the UN could establish Tribunal for Rwanda and former Yugoslavia. It became possible due to the changed international scenario after the collapse of the Soviet Union. However, given the range and scale of atrocities, these ad-hoc tribunals, with their limited territorial and temporal mandate, could hardly be considered as appropriate antidote. Now, with the establishment of ICC as a permanent supra-national body, an opportunity has been created to save the present and succeeding generations from atrocities of wars and serious international crimes and wipe out safe heaven for perpetrators whether they be the head of the government, or military leaders or local war lords, or indoctrinated dictators.

The crimes brought under the jurisdiction of the ICC are not any new crimes. Right from Nuremberg days crimes such as genocide, war crimes, crimes against humanity and aggressive war (or crime against peace) were brought under the mandate of the international tribunals. By being a party to the Geneva Conventions Nepal has already recognized war crimes as crimes of international concern. She is also a party to CAT and the Genocide Convention. The core crimes of the ICC treaty are crimes of universal jurisdiction. These crimes are so universally condemned that those who commit them are considered *hostis humani generis* (an enemy of all mankind), and any nation in the world has the authority to exercise jurisdiction over such persons without the consent of the individual's state of nationality. With so much of respect and commitment that Nepal has shown to international human rights instruments there is no reason why should Nepal hesitate to join the comity of nations in its effort to further institutionalize international law.

By being a party to the Treaty, Nepal would not lose her sovereignty nor does the treaty usurp the local jurisdiction of her courts. The jurisdiction of the ICC is only **complementary**. Therefore, so long as local courts function independently, fairly and expeditiously, there is no reason why should the ICC usurp her jurisdiction. In fact none of the countries who have signed or ratified the Treaty believe on distorted notion which has been raised by those who oppose it.

The Treaty adopts the principles of both territoriality and nationality. The principle of territoriality is a traditional principle recognized in municipal criminal law. Over time countries are also slowly adopting the principle of nationality in prosecuting accused when it comes to serious crimes like abduction, hijacking or killing of dignitaries etc. For countries that believe in the use of force in international relation without the mandate of the UN there may be some ground for being skeptic, but in case of Nepal, since her military has been involved only under the banner of the UN, and as country does not believe in military adventurism there remains sufficient leverage in her favor to check frivolous prosecution. The Security Council can veto against such investigations if malicious moves are made to prosecute peace keepers.

As a matter of fact, whether or not we become party to the Treaty we are already the member of the UN. Since the Security Council is empowered to make a reference to the Prosecutor for

65 From south Asia only Bangladesh has signed but other countries are yet to accede to the treaty.

66 For instance, the international community could not take action against Polpot in Cambodia who killed over two million innocent people. Similar atrocities were committed in other parts of the world. Around 30,000 disappeared in Argentina's dirty war, 200,000 were massacred in East Timor. Around 750,000 were exterminated in Uganda and 100,000 Kurds were gassed in Iraq. Similarly, around 75,000 peasants are reported to have been slaughtered by death squads in El Salvador.

initiating investigation for any commission of the crime under the Statute, there is less likelihood that we will be able to do much to save our national interest against the will of the Security Council.

With regard to the fear that the ongoing insurgency in the country may turn into a great headache if we accede and ratify the treaty, the submission is as follows:

- The ICC does not operate retroactively;
- Even though a few cases have a chance of meeting the criteria required for triggering the jurisdiction of the ICC, for the same reason mentioned above they can not be taken up by the Prosecutor of the ICC.
- Many offences that occur at the domestic level do not meet the criteria of "most serious crimes of concern to the international community as a whole" as envisaged in the Treaty.⁶⁷
- Nepal can very much make a reservation under the transitional measure that it will opt out of the court's jurisdiction over war crimes committed on its territory or by its nationals for a period of seven years upon ratification of the statute.⁶⁸

If the signing of the treaty imposes restraints on those bent on pursuing mindless killings it is always better for the country. Now, that international human rights law stands against general amnesty to serious international crimes, the State will be bound to use reason and sense of justice when proclaiming general amnesty. Therefore, a resolve to join the international community by being a party to the Treaty would also expedite the reform initiatives in the country also.

Finally, the respect to the rule of law (international law?) serves the interest of weaker nations than the stronger ones. The stronger countries are always able to protect their interests even without international law. It is therefore submitted that Nepal stands to gain more by joining the international community in its resolve to stamp out serious crimes of international concern than by remaining isolated and aloof.



⁶⁷ *Id* Art 5(1)

⁶⁸ *Id* Art 124