

Human rights building in post-conflict society:

Universality of Human Rights, Global judicial forum and building human rights culture in Nepal

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We are living in the most exciting time in human history. This is the era of globalization of human rights, and human rights have become the global aspiration. People across the world fighting for their rights, freedom and justice. There is a massive codification of international human rights law after the Second World War.¹ On the one hand human rights are the subject of national laws and constitutions but on the other hand there is a continuous and tremendous growth of international human rights laws under the aegis of United Nations. There is an emergence of international human rights regime. The basic purposes and principle of United Nations is to 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'² The central notion of human rights is the notion of its universality. The human rights are not only the prerogatives of the rich and industrialized nations, but it is the universal notion and it is the rights of the humanities. UN system has played a proactive role to universalization of human rights notion. The creation of United Nations is a great leap forward in the history of mankind. It envisage a 'common standard of mankind' regarding with human rights.³ The era of 'cultural relativity' regarding human rights has gone. Now the notion of the human rights is truly universalized and people are asserting their rights against their national government across the world. This is a big paradigm shift. The global movement is going on to realized freedom and liberty. The massive violations of human rights are no longer a matter of domestic jurisdictions of the state, now it became a legitimate interest of mankind. Thus human rights have become a

¹ See, International Bill of Human Rights.

² Art. 1(3) UN Charter.

³ Preamble, Universal Declaration on Human Rights 1948

transborder and transnational issue. It does not confine within the boundary of nation states. The birth of United Nation had revolutionalized this process.

The state is no longer free to deal with its own citizens. Now state needs to be accountable toward international community regarding their human rights record. Now there is international auditing of national human rights situation, it is no more an internal matter of the state. This is the momentous development of international laws. UN charter is the landmark document of international law under which member states took the 'pledge to take a joint and separate action in cooperation with the organization for the universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.'⁴ Traditionally only the state could be the subject of international laws, but the massive growth and development of international law made the individual also the equally a subject matter of international law. This is a most revolutionary development in the field of international law.

The adoption of international bill of rights is the high watermark of the globalization of human rights.⁵ There is the continuous growth of international human rights law and international humanitarian law after the Second World War. Second World War shook the conscience of humanity and there was the birth of UN system to 'save the succeeding generation from the scourge of the war'.⁶ UN symbolizes the new global order. The founding father of UN system envisions a new world order based on international rule of law, sovereign equality, human rights and international justice. UN charter heralded a new era of international rule of law despite of its several shortcomings.

International Criminal Court

The International Criminal Court is the global forum to enforce rule of law and secure justice and accountability. It is a major breakthrough in the field of international human rights and international humanitarian law. It is the internationalization of criminal justice system and added a new dimension in the field of criminal adjudication. Since the notion of human rights is increasingly globalizing one, so it is imperative that there need

⁴ Art. 55-56 United Nation Charter.

⁵ See the International Covenant on civil and political rights and International Covenant on Economic, Social and Cultural Rights.

⁶ Preamble, UN Charter

to be some kind of system of global justice in the place. The principle of international human rights and humanitarian laws are not the abstract principles but need to be enforced by adequate and competent institution free from political clout, pressure and consideration. The perpetrator or person who committed a crime against humanity need to be brought to the justice and must be hold accountable for their crimes. The supremacy of the laws needs to be maintained. The culture of impunity is antithetical to the rule of law. The law must allow to take its course under any circumstances and without any interfere. There must be a zero tolerance to impunity. The council of European Union is rightly pointed out- "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 rule of law as well as contributing for the preservation of peace and the strengthening of international security, in accordance with the purpose and principles of the Charter of the United Nations."⁷

The horrendous crimes were committed against humanity during the Second World War at the large scale. It shook the conscience of the humanity. The Second World War was followed by Tokyo and Nuremberg trial. The international tribunal was set up to brought perpetrator to the justice. It was an innovative step in the field of international law. It established the notion of individual accountability under international law, but it was heavily criticized as a 'victor's justice'. It was not a permanent institution and done only a selective justice.

In 1948, the United Nations General Assembly adopted the Genocide convention. The Genocide convention mention that criminals to be tried "by such international penal tribunals as may have jurisdiction" and requested the International Law Commission "to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide." the International Law Commission drafted such a statute in the early 1950s, but the global situation was not ripe or for such kind of global mechanism. The nature of prevailing international power politics shadowed the development of judicial institution at the global level in that era.

In June 1989, Trinidad and Tobago proposed in order to fight with drug trafficking

⁷ EU Council common position on the International Criminal Court 2003/444/CFSP.

for the establishment of an ICC. The UN General assembly asked that the International Law Commission resume its work on drafting a statute. There was a mass commission of crimes against humanity, war crimes, and genocide in Bosnia-Herzegovina and Croatia as well as in Rwanda in the early 1990s. In response to that UN Security Council established two separate temporary Ad Hoc tribunals to hold individuals accountable for these atrocities. The two ad hoc tribunals for the former Yugoslavia and Rwanda have made important contributions to the progressive development of international criminal law and the establishment of ICC would have been extremely difficult, if not impossible, without them.⁸ In 1994 the International Law Commission presented its final draft statute for an ICC. International law commission recommended that a conference of plenipotentiaries be convened to negotiate a treaty and enact the Statute. To consider major substantive issues in the draft statute, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal court.

The Preparatory Committee prepared a consolidated draft text. NGO's are also the parts of the process. They provided input into the discussions and attended the several meetings and gave an extensive input in the drafting process. The United Nations called the, United Nations Conference of Plenipotentiaries on the Establishment of an ICC at its fifty-second session to “finalize and adopt a convention on the establishment” of an ICC. The “Rome Conference” took place from 15 June to 17 July 1998 in Rome. The Rome conference was attended by 160 countries. After the five weeks negotiation the ICC statute was adopted by 120 countries. International Criminal court is the permanent judicial institution to deal with gravest crime. The diplomatic conference adopted the Rome Statute, which created permanent court. The Rome Statute has a detail provision about the working procedure of the court, definition of the crime and obligation of the state parties. The Court now started its function from 1 July 2002. In 11 April 2002 it received a requisite number of ratification from state parties. Now the huge number of state parties had already ratified the statue, till the January 2008, 105 nations has already

⁸ See, Dieng, A., 'International Criminal Justice: from paper to practice- A contribution from the International Criminal Tribunal for Rwanda to the establishment of the international Criminal Court', *Fordham International Law Journal* vol. 25, no. (March2002), p. 688-707; Hulthuis, H., Operational Aspect of Setting Up the International Criminal Court: Building on the Experience of the International Criminal Tribunal for the Former Yugoslavia' , *Fordham International Law Journal* vol. 25 no. 3 (March 2002), pp. 708-716.

ratified the Rome Statute and 41 nations already signed but not yet ratified yet. The ICC already acting in a several situations such as - Uganda, Democratic republic of Congo, Central Africa and Dafur. The Court had issued several warrants and some peoples are in custody also.

The ICC has a limited jurisdiction, which has been carefully defined under the statute. The Court is designed to prosecute only crime of grave nature. The Court does not have a universal jurisdiction; there is a misconception among the some countries that the Court constitutes a threat to their sovereignty. But the notion of complimentary need to be understood clearly and correctly, the Court does not have an automatic jurisdiction. The Court take the matter only when the state party or fail or unwilling to take concrete judicial step under such circumstances. It is an international institution so that international jurisdiction is carefully balanced with domestic jurisdiction; the states are still the prime actor under international law. The court can have jurisdiction when crimes have been committed in the territory of the state which has ratified the Rome statute, crimes have been committed by a citizen of a state which has ratified the Rome Statute, A state which has not ratified the Rome Statute has made a declaration accepting the court's jurisdiction over the crime, Crimes have been committed in a situation which threatens or breaches international peace and security and the UN security Council has referred the situation to the Court. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: The crime of genocide, crimes against humanity, War crimes and the crime of aggression.⁹

The Statute provides very careful definition of the crime of "genocide". Under the statute genocide is 'destroy all or part of a group'. Under the statute anyone who solicits or induces someone to commit genocide is also a guilty of genocide. For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Killing members of the group, Causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births

⁹ Art. 5.

within the group, forcibly transferring children of the group to another group¹⁰
The statute clearly mentions that following a superior's orders is not a legitimate defense to genocide.

The statute also defines "the crime against humanity." The it covers murder, extermination, enslavement, deportation to forcible transfer of population, imprisonment or other severe deprivation of physical liberty in a violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, enforced disappearances, the crime of apartheid, other inhuman acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹¹ For the purpose of this Statute, "crime against humanity" means any of the abovementioned acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack¹²

Likewise statute also define the war crime as 'violations of the common article 3 of the Geneva convention against civilian, wounded and detainees, including violence to life and person in particular murder of all kinds, mutilating, cruel treatment and torture, committing outrages upon personal dignity, in particular humiliating and degrading treatment, taking of a hostages, and passing of a sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.¹³

ICC is the international judicial institution, it operate according to recognize or established principle of justice. It does not act in an arbitrary fashion or manner. The fairness and impartiality is the key component of the strength of this kind of institutions. An accused have also a right to fair and speedy trial, and justice not only to be done but it also seems to be done on the face of records. The rights of the accused get a due place in

¹⁰ Art. 6.

¹¹ Art. 7.

¹² *Id*

¹³ Art. 8.

the justice delivery process in the scheme of the Rome Statute. The 'presumption of innocence until prove guilty is recognized by the Rome Statute.¹⁴ The accused have an every rights to self defense. It is up to the prosecution who has to prove the guilt beyond the reasonable doubt. The accused have right to have a fair trial.¹⁵ Under which, right to know, right to a legal council, speedy trial, cross examination are also recognized by statute.

The victims have a special place in the Rome statute. Under statute it may order a convicted person to provide reparations to victim, including reparation, and any other reparations to victim it deems appropriate in the particular case.¹⁶ The state parties have also an obligation under international and national law ensure that they themselves provide reparation to the victims, either when the convicted person is unable to make reparations or when the state itself is also responsible for the crime. Likewise Statute also envisage a establishment of a victims and witness unit in the ICC .Registry under which it will provide the protective measures, security arrangements, counseling and other appropriate assistance to victims, witness who appears before the ICC and others.¹⁷

In order to protect the functional autonomy of the institution, it is an essential to have some immunity of its officials. In 2002 the multilateral arrangement 'Agreement on the Privileges and Immunities' of the International Criminal Court was already made. ICC is international and independent judicial institution immune from political interference. It is not a specialized agency of United nations, even though UN had played a crucial role for its establishment or creation. On 4 October 2004 there was a 'Negotiated Relationship Agreement between the International Criminal Court and the United Nation'. In many countries in the world there is a total breakdown of the rule of law, national Court system has fail or unwilling to take action against gravest crime, that's why the International Criminal Court deals with the gravest crimes such as genocide, crime against humanity, war crime and aggression. The Court has no retroactive jurisdiction. It does not substitute the national judicial institution but it is based on the principle of complimentarity. The primary responsibility goes to the national courts to end impunity

¹⁴ Art. 66.

¹⁵ Art. 67.

¹⁶ Art. 75(1).

¹⁷ Art. 43(2).

and brought them to the justice. The International Criminal Court is the supra national institution, designed to promote international rule of law and to end impunity.

Future and Effectiveness of ICC

The emergence of ICC is the watershed development in the field of international justice. The mankind's aspiration of justice and human rights is the universal one. The explosion of technology turns the entire globe into a village. We live in the world which is increasingly interconnected and globalized. The absolute and unlimited sovereignty of nation state is not possible and feasible in this internationalized world. There must be zero tolerance for the crime of genocide, crime against humanity, war crimes and aggression. There is a popular saying that threat for the justice in one place is threat for justice everywhere. Now the ICC is the reality, it is a functioning judicial institution now. It is one of the exciting developments of our time. It is currently enjoying an overwhelming support from the international civil society, media and justice loving people from all over the world. The overwhelming majority of nation states are ratifying it. The universal ratification of the Rome Statute is the need of the hour, which is a core element of the effectiveness of this institution. The nation states are compelled to ratify it because of overwhelming support of civil society organization and media. It is heading towards a universal ratification. But ratification by USA, China, India and Japan is the critically important for its success and effectiveness. The USA is quite skeptical about it; initially it took some initiation of the creation of the Court, but changes its strategy toward it and it took no stone unturned to undermine Court's authority and integrity. In The 31 December 2000 Clinton administration signed the Rome Statute but it was 'unsigned' by Bush administration in the 6 may 2002. In addition to that United States has been approaching countries around the world seeking to conclude bilateral non-surrender agreements excluding US citizens and military personnel from the jurisdiction of the Court. These agreements prohibit the surrender to the ICC of a broad scope of a person including current or former government officials, military personnel, and US employees and nationals. This kind of agreement is a threat for the effectiveness and independent functioning of the Court. This kind of bilateral non-surrender agreement

with member state do not confirm with the Rome Statute and a clear violation of the Statute. This kind of behavior is not acceptable and integrity and authority of the Court needs to be safeguarded.

The International Criminal Court is making some slow and steady progress. The ICC prosecutor is investigating situation in Uganda and democratic Republic of Congo and Daafur, Sudan, which was referred to the Court by the Security Council. The ICC prosecutor's office is also analyzing five other situations, including the Central African Republic Cote d'Ivoire. In October 2005, the Court issued its first warrants of arrest against five members of the Lord's Resistance Army in the situation in Uganda.

The ICC lacks a police power of its own so backing and strong support of member states would be critically important. The states are under the legal obligation to cooperate it, but some member states are reluctant to cooperate it. The active cooperation on the part of member states is critically important for its success. The universal ratification and participation by nation state would dramatically enhance its effectiveness. The Europe has done a wonderful job; each and every country of Europe had ratified the Rome statute. But the Asia is lagging behind in this process. The low level of ratification from Asia is the matter of concern since many Asian countries are facing a problem of state lawlessness and situation of grave crime including crime against humanity and war crimes.

Culture of impunity and breakdown of rule of law in Nepal

Nepal is trying to recover from years of conflict which weakened the rule of law institutions and seriously undermined the capacity of the state to implement its own laws. The state institutions became weak and fragile. Nepal is currently suffering from a culture of impunity, which became a rule rather than exception. The rule of law is grossly undermined due to the culture impunity and lawlessness. There is a gross violation of human rights and breakdown of rule of law in Nepal. The culture of impunity and breakdown of the legal regime might jeopardize the peace building process in Nepal. The peace process doesn't mean a blanket amnesty to the perpetrator. The justice, accountability and rule of laws are the essential component of peace building process. In the name of peace process no one is allow to break the law. The genuine peace building

process requires a culture of accountability and rule of law. There is popular misconception in Nepal that emphasis on justice and accountability would jeopardize a peace process and peace can be traded with rule of law, but it should not be forgotten that if the rule of law is allowed to be undermined there could neither peace nor justice. Any genuine peace building process must generate people's support and ownership in the process. The people's faith and support is the critically important component for the lasting and sustainable peace. The gross violation of the human rights in Nepal is being committed by the state as well as non- state actor. The grave crimes including crimes against humanity are going unpunished in Nepal.

Nepal's judicial and law enforcement institutions lost their credibility and failed to deal with the serious issue of impunity which is the biggest threat for the peace building endeavor in Nepal. The judicial institution and law enforcement agencies lack the credibility, integrity and professionalism. The law enforcement machinery's in Nepal are the largely weak and inefficient institutions. These institutions are also highly politicized and lack the will and motivation to enforce the laws. There is gross violation of international human rights and humanitarian law but one is brought to the justice till date in Nepal. There is a massive violation of comprehensive peace agreement which is the major roadmap for post conflict rebuilding process. Nepal needs a credible peace process which requires justice and accountability. Under the basis of state lawlessness and widespread or systemic violation of rule of law it would be extremely difficult and challenging to make a new Constitutional order based on human rights and rule of law.

The peace building process means a rebuilding and strengthening a human rights and rule of law institutions. The human rights need to be the central theme of peace building in any post conflict society. Nepal has to deal with the past effectively and need to create a basis for justice and human rights.

Nepal needs to ratify Rome Statute

Nepal needs to ratify the Rome statute of international criminal court in order to end the culture of impunity, since Nepal's judicial institutions and law enforcement agencies fail and unwilling to deal with this issue. The culture of impunity creates a vicious cycle. The punishment of the present crime is work as strong deterrents against

future crimes. 'The prosecution of perpetrators who have committed gross violation of human rights is a critically important component of any efforts to deal with a legacy of past abuse. Prosecution can serve to deter future crimes, be a source of comfort to victims, reflect a new set of social norms, and begin the process of reforming and building trust in government institutions.'¹⁸

Nepal did not sign the Rome Statute and it has not signed the agreement on privilege and immunities of the court. On 31 December 2002 Nepal signed a bilateral non-surrendered agreement with United States which is against the integrity and effectiveness of the Rome Statute. It undermines the notion of international justice and international rule of law, because anyone who committed a crime under the Rome Statute must be the subject of the Court's jurisdiction. No perpetrator can claim a privilege and immunities under the Rome Statute. It also undermines the universality of the Court. Nepal's signing a non-surrender agreement with United States is also a big obstacle toward Nepal's accession to Rome Statute of International Criminal Court. Nepal's major donor EU did not like this step; it sent a letter to the government Nepal. The letter expressly mentions that 'the EU cannot support bilateral non-surrender agreements that do not conform with the Rome Statute. The letter also mentions that 'EU is willing to provide technical assistance on implementing legislation.'¹⁹ The National Human Rights commission also expressed its concern on the issue of non-ratification of the Rome statute, despite of the legislative directives.²⁰

The crime of disappearance constitutes a 'crime against humanity'. Nepal has an extremely bad reputation regarding the incidence and crime of disappearance, the highest number of cases of disappearances was recorded in the UN sub-committee on disappearances. The high number of incidence is the result of state lawlessness and culture of non- accountability. The crime of disappearance is still continuing despite of signing of comprehensive peace agreement. The OHCHR in 'September, submitted some 330 past cases of disappearances to the relevant security forces and to the United Nations working group on Enforced and involuntary Disappearances. The Nepalese army

¹⁸ See, for instance, Roht-Arriaza, N. (Ed.). *Impunity and Human Rights in International Law and Practice*, (Oxford University Press: Oxford, 1995).

¹⁹ EU letter to Nepal dated December 4, 2006

²⁰ NHRC Report Number 33/3/64

provided a response on 42 out of 315 cases which it said were clarified. In all but one of the cases followed up subsequently, OHCHR found no evidence to support the army's version that they had either been killed in security forces operation with CPN (M) or released. OHCHR does not consider the Nepalese Army's investigations is transparent or impartial.²¹ The Supreme Court of Nepal directed to government to enact a comprehensive law which criminalize the crime of disappearance. The Court held that 'while enacting the law the state should take note of its commitments concerning disappeared persons expressed in the constitution, the fundamental rights and freedom of its citizens, international instruments ratified by state concerning human rights and humanitarian law. The state should also take note of the standards established in the international instruments accepted by the international community.'²² This is a one of the landmark judgment in the judicial history of Nepal but despite of the Court rulings no concrete initiation was taken from the government to implement the judgment of the Supreme Court. In 25 July 2006 the parliamentary committee on foreign affairs and Human Rights gave directive to the government to form an "all powerful commission to solve the issue of disappearances once and for all," but this directive has also been put into a cold storage by the executive branch of the state.

Again, on 24 July 2006, the legislative parliament of Nepal unanimously endorsed a proposal to accede to the Rome Statute but the will of the legislature still not carried out yet. The will of the parliament reflect and represent the will of the people, and executive department of the state is under the Constitutional and legal obligation to implement or carried out the will of the legislature. It is antithetical from the standpoint of the constitutional governance that will of the legislature has not been carried out by the concerning authority.

Nepal also needs to enact an implementing legislation immediately, since ICC work on the principle of complementary and primarily it is a state's obligation to take prompt action and brought the perpetrator to the justice. Nepal need to show its genuine commitment to human rights and justice, only cosmetic commitment and lip service doesn't work. Trials can also help to reestablish trust between citizens and the state by

²¹ Reports of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of her Office. Pg. 70. Dated 17, January 2007.

²² *Rabindra Prasad Dhakal v. Nepal Government, Ministry of Home Affairs and others.*

demonstrating to those whose rights have been violated that state institutions will seek to protect rather than violate their rights. This may help to restore the dignity of victims and reduce their sense of anger; marginalization and grievances.²³ Nepal already signed a several human rights convention. Nepal is the party of all four Geneva Conventions; the Geneva Convention also applies to non-international armed conflict.²⁴ Nepal is also the member of United Nations, under the UN charter member states are also obligated to abide by principle of human rights. Nepal's accession to Rome Statute would give credibility to peace process and deepen its commitment to justice and rule of law. Only paying a lip service by all the actors to justice and accountability does not improve the situation. The ratification of the Statute would send a strong message to all the perpetrators. The vicious cycle of human rights violation needs to be stop immediately. Nepal badly needs a culture of justice and accountability and in order to break the vicious cycle of human rights violation the participation into the Rome Statute is critically important. It would work as a strong deterrent against those who are continuously engaged in the crime against humanity in Nepal, despite the signing of comprehensive peace agreement there is not a much improvement of the situation in Nepal. The nation miserably failed to address the problem of impunity. There is growing culture of impunity, non-accountability and state lawlessness in Nepal. The ending a culture of impunity is critically important component for genuine peace process.

Nepal's participation to the Rome Statute would enhance its international prestige and inspire other fellow Asian nation. It would be a significant contribution toward the promotion of global justice, by the ratification of the treaty Nepal also gets an opportunity to participate in the working of the Court.

Conclusion

The establishment of International Criminal Court is one of the most important breakthroughs in the field of contemporary international law; it was a longstanding aspiration of human kind to have some sort of concrete machinery for international

²³ Alan Bryden, heiner. *Security Governance in Post-Conflict peace building*. Geneva Center for the democratic control of armed forces. 2005.

²⁴ Common Art. 3 of all the Four Geneva Convention 1949.

justice. Now, the International Criminal Court is the functioning reality. It needs active and unflinching support from the world community. Its integrity and effectiveness needs to be constantly enhanced and safeguarded by international community. The international power politics would have a huge bearing on its success and future. It should not allowed to be the victim of international power politics, The Court must be allow to function as a impartial and effective international judicial institution, free from fear and favor. The universal participation and ratification is the key element of its success and effectiveness, international community must show its commitment toward international justice and rule of law. In this era of massive explosion of technology, the effective system of global justice is the need of the hour.

Nepal also should not stay away from this process of international justice and rule of law and participate in the universal ratification endeavor of International Criminal Court. Nepal's ratification of ICC is critically important to its peace building effort, without effectively addressing the issue of impunity it would be hard to move Nepal's peace process ahead and also difficult to write a new democratic constitutional order based on human rights, rule of law and socio-economic justice.

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