

Effectiveness of Rome Statue of ICC in Transitional Period

By Dipendra Jha

Almost all the countries passed through transition are less concerned for providing justice to the victims and their survivals. There has been no trail for human rights abuses. Post-conflict reconciliation efforts have begun to put aside many issues of justice in the so-called interests of peace. Surrender of justice in the name of 'peace process' is the latest example that needs to be timely addressed in Nepal.

There are few examples in which the perpetrators have been punished to some extent due to the effective efforts of International Criminal Court (ICC) through *ad hoc* tribunals like in ICTY and the ICTR.

It is the reason most of the head of government and chief of security agencies are not willing to sign and ratify the ICC statute. In the past, Nepalese governments also scared to sign and ratify the ICC, due to the specific elements of genocide, crimes against humanity and war crimes, though it includes *non-international armed conflict*. Another important factor is the *individual responsibility* for the crime committed which is mentioned in the Rome Statute.

The armed conflict has come to a certain resort in April 2006 with the re-instatement of the parliament and announcement of bilateral cease-fire by the government and CPN-Maoist. During the ten-year armed conflict, thousands people were victimized in arrests and torture, extrajudicial killings, enforced disappearances, brutal dispersal of protests and general violence.

An investigation committee was formed to look at the atrocities committed by the government during the king's direct rule. The government tries to exempt military personnel and the Maoists from the coverage of its investigations, saying that "the procedure would demoralize the country's armed forces and weaken the law enforcement function of the transitional government." It is noteworthy that if the judicial system of the country seems ineffective or face serious hindrances in carrying out their work, the provisions of Rome Statute can be applied in the future if the government ratifies it.

The ICC can exercise its jurisdiction if the state is unable or unwilling to fulfill its legal duty to take reasonable steps to carry out serious investigation of human rights abuses like genocide, crime against humanity and war crimes. As the present judicial system of the country has been weak, the victims of aforementioned crimes covered by the ICC can not be assured justice. On the other hand, still the Maoists are out of grip of national legal jurisdiction as they are vowing that they have waged armed conflict against the state and cannot come under such condition. On the other hand, they have been running 'People's Courts' which has also been another factor for the contradiction with their accountability.

In these types of critical situations in future, the ICC will be helpful to make independent investigations, impose appropriate punishment and ensure the victim with adequate compensations. Article 17 of the Rome Statute clearly mentions that it will only have jurisdiction over the suspects where the relevant state is 'unwilling or unable' to exercise its own jurisdiction.

ICC does not investigate past human rights abuses, but it prevents from future atrocities. In accordance with Article 12 of the Rome Statute, a non-state party may accept the jurisdiction of the ICC. This leaves to the country's government the choice to accept the court's jurisdiction. Therefore, the jurisdiction of the ICC under Rome Statute is based on voluntary acceptance by state or non-state parties. The purpose of the ICC is not to undermine or detract from national criminal jurisdiction, but to exercise its own jurisdiction when a country is unable or unwilling to exercise it. Therefore, it is the first responsibility of the state to make independent and accurate investigation of all the cases related to the crimes.

It is generally accepted principle that those who have perpetrated serious violation should not remain unpunished. Crime deserves punishment whatever the nature of offense is. Justice encourages applying the principle of prosecution. But the question arises here is to what extent the actual perpetrators need to be directly responsible? Is it possible to prosecute the vast majority of the people who are directly responsible for serious crimes like genocide in Rwanda, where large numbers of people are responsible for genocide? This is one of the challenges ahead of ICC.

The Rome Statute is the product of political compromise among nation states. But, the influence of big countries like US, which has weakened its mandate, affects the prosecution; it can be effective in small and weak countries like Nepal. It is beyond the grip of the ICC to prosecute US soldiers for committing genocide in Iraq, Afghanistan, and Israeli armies for war crime in Lebanon. But still, it can be effective for the countries, which are weaker in terms of political influences in the world.

We can look at the three major aspects of ICC. These are: (i) it focuses on serious crimes like genocide, war crimes and crime against humanity: repairing the harm done to victims and reducing future harm by preventing crime; (ii) requires offenders to take individual as well as group responsibility for their actions and for the harm they have caused; and (iii) seeks redress for victims, recompense by offenders and reintegration.

The ICC discourages individuals to commit such crimes in the future. Like the present situation of impunity, where there is no system or policy to bring to justice the individuals and groups who have committed heinous crimes like killings, disappearances, abduction, torture, and arbitrary arrest, it can further the role of national judicial system to be more effective in protecting rights of the victims.

In this context, there is a vital need for immediate ratification of the Rome Statute of the ICC by Nepal Government, which can ensure that the crimes under the Rome Statute can be taken up by the international mechanism at the situation when national mechanism are failed. Until the government ratifies the Rome Statute, there will be high-risk of continuation of culture of impunity in the country.

Directive proposal of the House of Representatives (HoR) to the government on 25 July 2006 to ratify Rome Statute has signaled a positive response to the ICC. But the way ahead has to be ensured that the agenda for immediate ratification and effective implementation under the state obligations are put in place. [ENDS]