International Criminal Court, Article 98(2) and Bilateral Immunity Agreement

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Overview

The establishment of International Criminal Court is a landmark development. It is an innovative step in the field of international law. Under the Rome Statute, individuals can also be held accountable for serious crimes. 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. UN system has played a proactive role to universalize human rights. The creation of United Nations is a great leap forward in the history of mankind. It envisages a 'common standard of mankind' regarding with human rights.[3] The era of 'cultural relativity' regarding human rights has gone. Now the notion of 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 transborder and transnational issue. It does not confine within the boundary of nation states. The birth of United Nations has revolutionized 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 in the field of international law. 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.

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[1] See, International Bill of Human Rights.
[2] Art. 1(3) UN Charter.
[3] Preamble, Universal Declaration on Human Rights 1948
[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

International Criminal Court

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 to be some kind of system of global justice in the place. The principles 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 taking its course under any circumstances and without any interference. 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 bring perpetrators 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 only took a selective case.

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 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 time.

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

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

[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.

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.

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 takes the matter only when the state party fails or is 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 within the group, forcibly transferring children of the group to another group[10] 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." This 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

[9] Art. 5.
[10] Art. 6.
[11] Art. 7.

widespread or systematic attack directed against any civilian population, with knowledge of the attack[12]

Likewise statute also defines 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 ate generally recognized as indispensable.[13]

ICC is the international judicial institution, it operate according to recognized or established principles 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 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 the Statute.

The victims have a special place in the Rome Statute. Under the 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 to 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, the Statute also envisages establishment of a victims and witness unit in the ICC. Registry under which provides 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 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 made. ICC is international and independent judicial institution immune from political interference. It is not a specialized agency of the 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 failed 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 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.

Jurisdiction of ICC and US Bilateral Immunity Agreement

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

[12] *Id*
[13] Art. 8.
[14] Art. 66.
[15] Art. 67.
[16] Art. 75(1).
[17] Art. 43(2).

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. 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. It took some initiation in the creation of the Court, but changes its strategy toward it and it took no stone unturned to undermine Court's authority and integrity. On 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 U.S. administration is not only staunchly opposed to the ICC, but has also taken significant steps to isolate and undermine the Court. The Bush administration incorrectly claimed that the ICC is a politicized court that will target US service members and nationals abroad. President Bush un-signed the Rome Statute—a hitherto unprecedented act. He also pushed for blanket immunity from the ICC, to be enforced by the Court's member states. This push resulted in Congress's passage of legislation over a period of five fiscal years that conditioned military and economic aid to recipient countries on the execution of agreements providing *all* US nationals, including soldiers, blanket immunity from the ICC's jurisdiction.

The administration calls these arguments "Article 98 Agreements," referring to Article 98 of the Rome Statute. Yet neither the text nor the object and purpose of Article 98 allow for these bilateral immunity agreements. In fact, the European Union, nearly all of whose members are party to the ICC, has concluded that "entering into US bilateral immunity agreements – as presently drafted – would be inconsistent with ICC States Parties' obligations with regard to the ICC Statute and may be inconsistent with other international agreements." The so-called "article 98" agreements the US currently seeks are constituted solely for the purpose of providing individuals or groups of individuals with immunity from the ICC. As such, these agreements are contrary to the purpose of article 98(2) and do not legitimately fall within its scope, because their effect is to prevent States Parties from meeting their obligations under the Rome Statute, they constitute a breach of articles 27, 86, 87, 89 and 90 of the Rome Statute. They also constitute a breach of article 18 of the Vienna Convention on the Law of Treaties, which applies to Rome Statute States Parties and signatories alike, and are likely to create conflicts for States between their obligations under the Geneva and Genocide Conventions and under the Rome Statute, as well as their obligations under their own extradition regimes.

Further, the delegates negotiating article 98 never intended to allow the conclusion of *new* agreements based on article 98. Rather, delegates sought to address potential conflicts between the Rome Statute and *existing* international obligations or new international obligations based on existing application of the negotiating history of the treaty is relevant where a particular interpretation of a treaty would a result which is manifestly absurd or unreasonable. Clearly, agreements concluded in line with the US interpretation of article 98(2) would lead to such an absurd or unreasonable result, by allowing non-State parties to subvert the fundamental principle of the Rome Statute that anyone--regardless of nationality--committing genocide, crimes against humanity, or war crimes on the territory of a State Party is subject to the jurisdiction of the International Criminal Court. The overall object and purpose of the Rome Statute is to ensure that those responsible for the worst possible crimes are brought to justice in all cases, primarily

by States, but as a last resort, by the International Criminal Court. Thus, any agreement that precludes the ICC from exercising its complementary function of acting when a State is unable or unwilling to do so, defeats the object and purpose of the Statute. The Vienna Convention on the Law of Treaties reinforces the conclusion that the US approach to article 98 is unreasonable, noting that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and ***in the light of its object and purpose***.

The definition of person used in the US draft agreement is so broad it would include a number of categories of persons that are not covered by the types of agreements under the purview of article 98(2). The agreements the US seeks cover **former** government officials, employees and military personnel. In particular it should be noted that these agreements could also include non-American defense contractors manufacturing anything for the US armed forces. In this case, governments could find themselves in the unimaginable situation of being unable to surrender their own nationals to the ICC. In addition, any non-American nationals serving as members of the US armed forces would receive immunity under these agreements. The US armed forces have members from many different countries, so this is a wider concern than it might otherwise seem. These agreements would essentially include any such persons, regardless of their reason for being on the territory of the State concerned

Although the US said that it did not apply pressure on states to sign non-surrender agreements, some US government officials indicated that a state's unwillingness to sign had affected US support for its entry into NATO and lead to the cutoff of US military aid. While some officials have argued that the administration was obligated by the **American Service members' Protection Act (ASPA)** to withhold military aid from states parties that do not conclude such agreements. Human Rights Watch noted many examples of American diplomats going far beyond the provisions of the American Service members' Protection Act (ASPA) to pressure small countries.

- **Croatia**: US Ambassador Lawrence Rossin published an article in Croatia (also on the US Embassy website) raising questions about the viability of Croatia's accession to NATO if Zagreb does not sign a bilateral immunity agreement.
- **Bahamas**: US Ambassador Richard Blankenship publicly warned that if the Bahamas did not support the US position on the ICC, a significant amount of US aid would be withheld, including aid for paving and lighting an airport runway.
- **The Caribbean Community (CARICOM)**: On May 23, it was reported that US Assistant Secretary of State Stephen Rademaker told foreign ministers of the CARICOM that they would lose the benefits of the New Horizons program if they did not sign agreements. The program, originally conceived to provide hurricane relief to countries at risk from tropical storms, now includes rural dentistry and veterinary programs.
- **Comoros**: According to a Comorese diplomat, the United States informed his country that a previously promised USAID project has been relocated to Djibouti following the latter's signing of a bilateral agreement.
- **Niger**: According to a senior Ministry of Foreign Affairs official, the United States threatened to suspend cooperative development projects if Niger does not sign a bilateral agreement.
- **Honduras**: Government officials and legislatures stated that the United States threatened important non-military assistance to Honduras if an agreement was not ratified by July 1.
- **Bosnia**: Before Bosnia's signature and subsequent ratification of an agreement, Bosnian Foreign Minister Mladen Ivanic said that the US message was that it would be "very difficult to continue military and other assistance" if Bosnia did not sign. Bosnia was reported to have been told that the Department of State would review "dispensable programs," including economic aid.

American Service members Protection Act (ASPA)

The American Service members Protection Act, originally signed into law in August 2002, prohibits the United States from providing military aid under Congress's annual Defense Authorization Bill to countries that have ratified the Rome Statute of the International Criminal Court (ICC) and do not have a BIA with the U.S. in place. Furthermore, ASPA effectively limits U.S. cooperation with the International Criminal Court, restricts U.S. participation in U.N. peacekeeping, and authorizes the President to use "all means necessary and appropriate" to

free any U.S. or allied personnel held by or on behalf of the ICC—a provision that has led frustrated European leaders to refer to ASPA as the "Hague Invasion Act."

Military aid, and its sanctioning under ASPA, has served as carrots and sticks for ICC member states in Latin America. Under ASPA, if a military aid recipient country does not fall under the statutory exemption or refuses to enter into a BIA, it will risk losing two types of military aid. The two types of aid sanctioned under ASPA are International Military Education and Training (IMET) and Foreign Military Financing (FMF). According to the State Department, IMET is primarily used for providing professional military education, improving civil-military relations, resource management and democratic institution-building. The State Department characterizes FMF as aid intended to provide equipment, training assistance and sustaining operations. The U.S. government utilizes both types of military aid for what it characterizes as "counter-terrorism efforts."

Despite the provision banning military aid to ICC countries, ASPA does provide exemptions if the President waives the requirement in the "national interest"; countries have concluded a BIA with the U.S.; or the country is one of the statutorily exempt countries under ASPA, namely all NATO countries,

Article 98(2) of Rome Statute

The nations that negotiated the drafting of the Statute did so with extensive reference to international law and with care to address potential conflicts between the Rome Statute and existing international obligations. The drafters recognized that some nations had previously existing agreements, such as Status of Forces Agreements (SOFAs), which obliged them to return home the nationals of another country (the "sending state") when a crime had allegedly been committed. Thus Article 98 was designed to address any potential discrepancies that may arise as a result of these existing agreements and to permit cooperation with the ICC. The article also gives the "sending state" priority to pursue an investigation of crimes allegedly committed by its nationals. This provision is consistent with the Statute's complementarity principle, which allows the country of the nationality of the accused the first opportunity to investigate and, if necessary, try an alleged case of genocide, war crimes, or crimes against humanity. The proposed agreements seek to amend the terms of the treaty by effectively deleting the concept of the sending state from Article 98; this term indicates that the language of Article 98 is intended to cover only SOFAs, Status of Mission Agreements (SOMAs) and other similar agreements. SOFAs and SOMAs reflect a division of responsibility for a limited class of persons deliberately sent from one country to another and carefully addresses how any crimes they may commit should be addressed.

By contrast, the US-proposed bilateral immunity agreements seek immunity for a wide-ranging class of persons, without any reference to the traditional sending state-receiving state relationship of SOFA and SOMA agreements. This wide class of persons would include anyone found on the territory of the state concluding the agreement with the U.S. who works or has worked for the U.S. government. Government legal experts have stated that this could easily include non-Americans and could include citizens of the state in which they are found, effectively preventing that state from taking responsibility for its own citizens.

Nepal and Bilateral Immunity Agreement

Nepal needs to ratify the Rome statute of International Criminal Court in order to end the culture of impunity. Impunity creates a vicious cycle. The punishment of the present crime works as strong deterrents against future crimes. 'The prosecution of perpetrators, who have committed serious crimes, 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 singed a bilateral non-surrender

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

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 confirm 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 legislature 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.

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 bring the perpetrator to the justice. Nepal needs 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 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.[21] 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.[22] 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 stopping 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 nations. It would be a significant contribution toward 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 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

[19] EU letter to Nepal dated December 4, 2006

[20] NHRC Report Number 33/3/64

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

[22] Common Art. 3 of all the Four Geneva Convention 1949.

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.

The US Bilateral immunity agreement is the violation of Rome Statute. It defeats the very purpose and principles of ICC. It is the major roadblock for the effective functioning of ICC. Nepal 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.

Statement by Mr. William R. Pace, Convener of the Coalition for the International Criminal Court (CICC) for the meeting on "Article 98(2) of the Rome Statute and Jurisdiction of the ICC" organized by Citizens' Task Force to Combat Impunity (CTCI),29 November 2010, Kathmandu, Nepal

The Coalition understands that the BIA campaign pursued under the Bush administration had a strong negative effect which impacted prospects for ratification.

In that context we believe it is important to highlight that under the Obama administration the US has begun to actively participate in ICC affairs. In 2009 it attended the Assembly of States Parties Meeting and in 2010 it also participated with a robust delegation at the Review Conference held in Kampala. These actions clearly indicate that the US has now entered into a phase of constructive engagement with the ICC, and all signs indicate that this relationship will continue.

It must be recalled as well that the campaign to enter into Bilateral Immunity Agreements (BIAs) is no longer operative. The Obama administration is no longer pursuing ratification of BIAs negotiated during the Bush. Under the Bush administration, specific prohibitions stipulated under the American Service Members Protection Act (ASPA) to provide US military assistance to parties to the International Criminal Court were repealed in January 2008. In addition, in March 2009, President Obama signed into law the Fiscal Year 2009 omnibus appropriation bill, Public Law No. 111-8, which did not include the so-called "Nethercutt Amendment" which had previously allowed for cuts in Economic Support Funding (ESF). Therefore, with the repeal of the ASPA prohibition and the non-renewal of the Nethercutt provision, no anti-ICC sanctions are still in effect.

Such agreements, which attempt to invoke Article 98 of the Rome Statute as their basis, only deal with how ICC suspects should be dealt with by the parties to the agreement and do not bind the Court or affect the validity of a nation's commitment to the ICC.

Annex 3 : Agreement Between His Majesty's Government of Nepal and the Government of the United States of America Regarding the Surrender of Persons to the International Criminal Court

His Majesty's Government of Nepal and the Government of the United States of America, hereinafter 'the parties', Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes.

Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction, Considering that both the Governments have expressed their intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by their officials employees, military personnel or other nationals,

Bearing in mind Article 98 of the Rome Statute,

1. For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.
2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party,

a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or

b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.

3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of His Majesty's Government of Nepal.
4. When His Majesty's Government of Nepal extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, His Majesty's Government of Nepal will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States.
5. Each party agrees, subject to its international legal obligations, no to knowingly facilitate, consent to, or cooperate with efforts by any third party or country to effect the extradition, surrender, or transfer of a person of the other Party to the International Criminal court.
6. This agreement shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic legal requirements to bring the Agreement into force. It will remain in force until one year after the date on which one Party notifies the other of its intent to terminate this agreement. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

Done in duplicate in Kathmandu on 31st of December 2002 in English Language.

sd.	sd.
Mr. Madhu Raman Acharya	Mr. Michael E. Malinowski
Foreign Secretary	Ambassador
For His Majesty's Government of Nepal	For the Government of the United States of America

अन्तर्राष्ट्रिय फौजदारी अदालतमा व्यक्तिको आत्मसमर्पण सम्बन्धी नेपाल सरकार तथा संयुक्त राज्य अमेरिका सरकारका बीच भएको सम्झौता

नेपाल सरकार तथा संयुक्त राज्य अमेरिका सरकार यसपछि "पक्षहरू" भनिने जनसंहार, मानवता विरुद्धको अपराध तथा युद्ध अपराध गर्नेलाई न्यायको दायरामा ल्याउनु पर्ने महत्वलाई पुनर्पुष्टि गर्दै ।

अन्तर्राष्ट्रिय फौजदारी अदालतको स्थापना गर्न संयुक्त राष्ट्रसंघको आधिकारिक व्यक्तिहरूको कुटनैतिक सम्मेलनद्वारा सन् १९९८ को जुलाई १७ मा ल्याइएको अन्तर्राष्ट्रिय फौजदारी अदालतको रोम विधान राष्ट्रिय फौजदारी क्षेत्राधिकारलाई विस्थापित गर्न नभई पुरकका रूपमा ल्याइएको हो भन्ने पुनस्मरण गर्दै,

दुवै सरकारहरूले आफ्ना कर्मचारी, सैनिक तथा अरु नागरिकद्वारा अन्तर्राष्ट्रिय फौजदारी अदालतको क्षेत्राधिकारमा पर्ने भनी आरोप लागेका काम गरेको खण्डमा अनुसन्धान तथा अभियोजन गर्ने चाहना व्यक्त गरेको मनन गर्दै,

रोम विधानको धारा ९८ लाई मध्यनजर गर्दै,

१. यस सम्झौताका हकमा "व्यक्तिहरू" भन्नाले कुनै पक्षका वर्तमान वा पूर्व कर्मचारीहरू, कामदारहरू (ठेकेदार समेत), वा सैनिक कर्मचारी वा नागरिकहरू भन्ने जनाउछ ।

२. पहिलो पक्षको स्पष्ट सहमति भएकोमा बाहेक दोस्रो पक्षको भूभागमा रहेका पहिलो पक्षका व्यक्तिहरूलाई,
   (क) कुनै पनि उद्देश्यका लागि कुनै पनि माध्यमबाट अन्तर्राष्ट्रिय फौजदारी अदालतमा समर्पण वा हस्तान्तरण गरिने छैन, वा
   (ख) अन्तर्राष्ट्रिय फौजदारी अदालत समक्ष समर्पण वा हस्तान्तरण गर्ने उद्देश्यले कुनै पनि माध्यमबाट कुनै अर्को निकाय वा तेस्रो मुलुकमा समर्पण गर्ने वा हस्तान्तरण गर्ने वा तेस्रो मुलुकतर्फ निकाला गरिने छैन ।

३. नेपाल सरकारको स्पष्ट सहमति व्यक्त भएकोमा बाहेक संयुक्त राज्य अमेरिकाले अर्को पक्षका व्यक्तिहरूलाई तेस्रो मुलुकमा सुपुर्दगी, समर्पण वा हस्तान्तरण गरेकोमा उक्त तेस्रो राष्ट्रले उक्त व्यक्तिलाई अन्तर्राष्ट्रिय फौजदारी अदालतमा समर्पण वा हस्तान्तरण गरेमा संयुक्त राज्य त्यसप्रति सहमत हुने छैन ।

४. संयुक्त राज्यको स्पष्ट सहमति व्यक्त भएकोमा बाहेक संयुक्त राज्य अमेरिकाले अर्को पक्षका व्यक्तिहरूलाई तेस्रो मुलुकमा सुपुर्दगी, समर्पण वा हस्तान्तरण गरेकोमा उक्त तेस्रो राष्ट्रले उक्त व्यक्तिलाई अन्तर्राष्ट्रिय फौजदारी अदालतमा समर्पण वा हस्तान्तरण गरेमा संयुक्त राज्य त्यसप्रति सहमत हुने छैन ।

५. अन्तर्राष्ट्रिय कानुनअन्तर्गतको दायित्वहरूको अधिनमा रही प्रत्येक पक्ष अर्को पक्षको व्यक्तिलाई अन्तर्राष्ट्रिय फौजदारी अदालतमा सुपुर्दगी, समर्पण वा हस्तान्तरण गर्ने तेस्रो मुलुकको प्रयासलाई जानीजानी सहजीकरण, सहमति वा सहयोग गर्ने छैन भन्नेमा सहमति जनाउादछ ।

६. प्रत्येक पक्षले यस सहमतिलाई लागू गर्न आवश्यक पर्ने घरेलु कानुनी आवश्यकता पूरा गरिसकेको निश्चित गर्दै लिखित आदानप्रदान गरेपछि यो सहमति लागू हुनेछ । यो सम्झौतालाई भङ्ग गर्ने मनसायको सूचना एक पक्षले अर्को पक्षलाई दिएको एक वर्ष नपुगेसम्म यो सम्झौता लागू हुनेछ । भङ्ग हुने मिति अगाडि घट्ने कुनै पनि कार्य वा उठ्ने कुनै पनि आरोपका सम्बन्धमा यस सम्झौताका प्रावधानहरू लागू रहनेछन् ।

सन् २००२ को डिसेम्बर ३१ तारिखमा अंग्रेजी भाषाका दुई प्रतिमा काठमाडौंमा हस्ताक्षर गरियो ।

श्री मधुरमण आचार्य
पररा्ष्ट्र सचिव
नेपाल सरकारका निमित्त

श्री माइकल इ. मेलिनोस्की
राजदुत
संयुक्त राज्य अमेरिका सरकारका निमित्त