

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: STATE OBLIGATIONS TO RATIFICATION AND IMPLEMENTATION¹

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It is a great honor and pride to be here and to contribute in our small way to your efforts to consolidate the gains of your new democracy. Indeed we congratulate the people of Nepal for struggling so hard to survive and to prevail and we share your joy in your success.

We hope this workshop can help us in our reflections on the future of Nepal in its search for justice and lasting peace.

As in other international treaties, states which become parties to them have certain obligations to fulfill. Under the Rome treaty, states party to it have two fundamental obligations: the first is complementarity and the second is full cooperation.

The Rome Statute's preamble and Articles 1 and 17 provide that states, not the Court have the primary responsibility for bringing those responsible for genocide, crimes against humanity and war crimes to justice. In the preamble, they affirm that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by international cooperation'. Determine 'to put an end to impunity for the perpetrators of these crimes' and recall that 'it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes'. Paragraph 10 in the Preamble emphasize that the Court 'shall be complementary to national criminal jurisdictions'. Article 1 repeats this statement and Article 17 provides that a case is inadmissible when it is being, or has been investigated or prosecuted by state, unless that state is or was unwilling or unable genuinely to carry out the investigation or prosecution.

Therefore not only do states have the primary duty to bring to justice those responsible for crimes under international law but the Court will be able to act when states are unable or unwilling to do so. This means that for the Court to be able to be an effective complement to states in carrying out justice for the crimes under its jurisdiction, states need to fulfill their responsibilities. They must enact, then enforce national legislation which provides that these crimes under international law are also crimes under national law wherever they have been committed, no matter who has committed them or who is the victim. An effective implementing legislation will demonstrate that the state is aware of its primary responsibility under international law to ensure accountability for the crimes and will make certain that national courts will undertake the tasks. This is why the Court is referred to as the 'Court of last resort' because it is only when all remedies have been exhausted at the national level that the Court may intervene.

Once the Court has determined that it may exercise jurisdiction in accordance with the principle of complementarity, under Article 86, states parties agree to 'cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court'. This obligation means that states parties must ensure that the Prosecutor and the defence can conduct effective investigation in their jurisdiction, that their courts and other authorities provide full cooperation in obtaining documents, locating and seizing assets of the accused, conducting searches and seizures of evidence, locating and protecting witnesses and arresting and surrendering persons accused of crimes by the Court. In addition to these statutory obligations, states also should cooperate with the Court in the enforcement of sentences by making detention facilities available for convicted persons.

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For the state cooperation to be truly effective, it will be necessary for the states to educate the public and to train judges, prosecutors, law enforcement and lawyers on the scope of state obligations.

The state has also to sign and ratify the Agreement on Privileges and Immunities of the Court (APIC) which allows the Prosecutor and other Court personnel to do their work within the territory of the state. Article 48 (1) of the Rome Statute provides that 'the Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purposes.' Because the Court is independent of the United Nations, it has to undertake separate agreement with states just like what is provided for in the UN Charter which gives UN personnel the privilege and immunity when they conduct their work in member state territories.

With regard state obligation to implementation, the state has to enact and enforce laws to enable it to effectively exercise its duty to fully cooperate with the Court. In the experience of many States parties that have gone through this process, it is not enough to declare that all the provisions of the ICC treaty shall apply to national law or will form part of the national law. They found it necessary to adopt specific laws that provide concrete ways and procedures to implement cooperation with the Court.

However, there are basic elements that have to be incorporated in national laws to enable states to exercise their obligations and to ensure that the national laws are consistent with international law, particularly with the provisions of the Rome Statute. For example, defining crimes, principles of criminal responsibility and defences. The legislation should provide that the crimes in the Rome Statute and other crimes under international law are also crimes under national law.

Also, there should be provisions that would ensure elimination of bars to prosecution. For example, no amnesties, pardons or similar measures of impunity by any state should be recognized. There should be no immunity for any officials, including heads of states from prosecution. Fair trials should be ensured, without death penalty.

The process of drafting the implementing legislation requires the participation not only of the ministries tasked to work on the draft for adoption by the parliament but the broadest section of the people: the lawyers, the women, the children, the indigenous peoples, especially the victims and their families. This process will guarantee that all obligations are included in the legislation and in the actual implementation, will ensure support for the state's commitment to international justice.

Also as a state party, Nepal has the right to nominate a judge and other officials and personnel of the Court and given its long experience in the area of human rights and struggle for justice, it is on high moral ground to be heard and to be recognized in the international community.

It will also sit as a state party in the Assembly of States Parties that make decisions with regards the Court. As the newest mechanism for international justice, Nepal would be in the best position, given its experience, to participate in shaping the Court towards the role it was designed and intended to play in humanity's search for justice.

The establishment of the ICC is considered a milestone in the long history of humanity's search for international justice and peace. We in Asia look forward to Nepal, as we work hard to make our own governments to ratify, to be part of this movement for international justice. We owe it to our people – to ourselves - the dignity we all deserve.

Thank you and we wish to express our solidarity with the people of Nepal.

MABUHAY!
