the state of Incorporation Jurisprudence has given to Judges in the Philippines. It is hoped that the framework presented in Chapter 5 bridges these competing and equally valid views with circumspection. Certainly, the Incorporation Clause should not be laden with procedural barriers that would make its application almost impossible; neither should the near-absence of light as to the scope, meaning, and application of the Incorporation Clause from the Framers detract Courts from applying the Clause to serve the needs of modern society. This should not mean, however, that the opposite is permissible — Courts cannot, under the guise of Interpreting the Incorporation Clause, allow for principles of International Law to have the force and effect of Philippine law, based on advocacies or whim. To do so would amount to an assumption of a function it was not granted under the Constitution — the power to make law.

The analysis of the existence of principles of International law must therefore be given an objectively rigorous approach to ascertain their true status. They should not be made susceptible to the whims of individual judges seeking to achieve 'just results.' As the decisions now stand, hardly any limit but the sky exist in the use of the Incorporation Clause, should the majority of the Supreme Court decide that the incorporation of a principle is for any reason desirable. The Incorporation Clause could not have been meant to give the Court *carte blanche* to embody the economic or moral beliefs in its prohibitions or authorizations, with no guide but its own discretion.[541] As ultimately an issue of *judicial self-restraint*, therefore, the placement of appropriate structural safeguards is the order of the day in the application of the Incorporation Clause.

Indeed, perhaps in the final analysis, it is better to describe the endeavor as one of interaction and cooperation, rather than making veiled references to formal hierarchies, [542] as international law needs the cooperation of States to fulfill its promise, and reciprocal collaboration from municipal courts, to ground it in reality.

541. These thoughts bring to mind a similar, but more famous, struggle Courts have faced — the limits to the exercise of judicial review over statutes. *See*, e.g., Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting) ("I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be constitutional rights of the States. As the decision now stands, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions.").

542. *See generally* Myres S. McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S. DAK. L. REV. 25, 37-38 (1959), *reprinted in* MCDOUGAL AND ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 157, 171-72 (1960).

Taking *The Most Serious Crimes of International Concern* Seriously

*Pedro Roman M. Ariston**

ABSTRACT

On 28 December 2000, the Republic of the Philippines became the 124th State Signatory to the Rome Statute of an International Criminal Court (ICC). Consistent with the country's treaty-ratification process, Senate concurrence would secure "State Party-hood." Accordingly, the Executive Department is thoroughly assessing the Statute. The emerging general consensus favors ratification, albeit aware of complex and difficult constitutional and legal concerns. One key concern queries whether the core crimes of genocide, crimes against humanity and war crimes can be construed as criminalized under Philippine domestic law sans statutory criminalization and yet compliant with the principle of complementarity and principle of legality, nullum crimen, nulla poena sine lege. This thesis tackles this issue.

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περί τῆς ἀγαπητῆς Ἀγγελικῆς μου, βόσκεις μέ.

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The Rome Statute aims to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, thereby effecting deterrence. Three pillar-principles support the Statute: first, the principle of complementarity; second, it exclusively deals with the most serious crimes of international concern; third, it remains, as far as possible, within the realm of customary international law especially in criminalizing the said crimes. Complementarity lays on the shoulders of national justice systems the primary responsibility of investigating, prosecuting and punishing perpetrators of the core crimes, consistent with their national laws. The ICC would exercise its jurisdiction when the national criminal jurisdiction concerned proves unwilling or unable to genuinely carry out its responsibility. As such, the Statute is catalytic: it spurs the domestic justice system of states to internalize aversion to impunity. In epitomizing jus scriptum, the Statute's criminalization of the core crimes transcends mere codification of pertinent customary international law by likewise embodying progressive development of international law. In a nutshell, the innovations introduced involve defining crimes against humanity and war crimes, and entrusting the punishment of core crimes perpetrators to a multilateral treaty-created permanent international criminal court empowered to impose a penalty of imprisonment, coupled with a fine or forfeiture.

Under the 1987 Philippine Constitution, international law becomes law of the land through the Incorporation and Treaty Clauses. Analyzing how these two provisions respectively incorporate and transform international law into Philippine domestic law reveals that neither the Incorporation Clause nor the Treaty Clause can criminalize the core crimes without undermining the principles of complementarity and legality. Thus, this thesis submits that any legislative implementation of the Rome Statute should necessarily criminalize genocide, crimes against humanity and war crimes. For fidelity to the Philippines' avowed commitment of taking the establishment of the ICC seriously inevitably entails taking the most serious crimes of international concern seriously.

I. INTRODUCTION

Nippy New York winter waltzed down First Avenue as Charge d'Affaires Enrique Manalo of the Philippine Permanent Mission to the United Nations, armed with presidential imprimatur, signed the Rome Statute of the International Criminal Court.[1] On that 28th day of December 2000, circa

1. Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc. A/CONF.183/9*, *corrected through May 8, 2000, at* <http://www.un.org/law/icc/statute/romefra.htm>, *reprinted in* 37 ILM 999 (1998) (uncorrected version) [hereinafter Rome Statute]. *See infra* note 150 explaining the rationale of the corrected text. Others refer to the document as "ICC Statute." Henceforth, verbatim reference to specific Statute provisions will be cited in parenthetical form appearing in the body: thus, "(Article 8(2)(b)(xii))" refers to Article 8, paragraph 1, subparagraph b, item xii.

10:45 A.M., the Republic of the Philippines thus became the Statute's 124th State Signatory; barely beating the deadline set on "New Millennium's Eve."[2]

The government press releases extolling the event waxed panegyrical, ennobling it with enviable pedigree:

> The Philippines and its people deeply value the dignity of human beings and protection of all human rights. With unwavering commitment to democracy, good governance and the rule of law, the Filipino people have contributed their [fair] share to eradicate despotism and tyranny in the world. The Philippines is gratified that the [I]CC Statute reflects its core national values and is proud to be associated in the noble effort to establish the court.[3]

> Philippine signing of the Rome Statute will bolster the Philippine image of being a consistent supporter of human rights and justice for victims of aggression, including genocide. Philippine support for the ICC by signing the statute will be consistent with the country's obligations as a state party to the 1949 Geneva Conventions and their 1977 Protocols, the 1948 Genocide Convention, the 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and the 1984 Convention Against Torture and its 1992 Amendment.[4]

However, these official pronouncements were quick to add a constitutionally mandated "suspensive condition" to the signing:

> To be fully bound by the ICC Statute, the ratification process under the Philippine Constitution requires that the Philippine Senate express its concurrence to the signature by the Philippine Government. The Philippine Government will submit the ICC Statute for the consideration of the Philippine Senate after a thorough assessment of whether the court would reflect the true aspirations of the international community for a balanced, fair, and effective pursuit of justice without fear or [favor].[5]

Back home, a subdued reception of the event filtered through the local press: "But while the Philippines signed the ICC Statute, the [D]epartment

2. Department of Foreign Affairs of the Philippines, DFA Press Release No. 171-00, Dec. 29, 2000 [hereinafter DFA P.R. No. 171-00]; Maria Talosig *"RP signs treaty for intl court's creation,"* TODAY, Jan. 4, 2001, at 1 & 10. [hereinafter Talosig] The Statute had "remain[ed] open for signature in New York, at United Nations Headquarters, until 31 December 2000." Rome Statute, *supra* note 1, art. 125(1).

3. Department of Foreign Affairs of the Philippines, DFA Press Release No. 170-00, Dec. 28, 2000. [hereinafter DFA P.R. No. 170-00.]

4. DFA P.R. No. 171-00, *supra* note 2.

5. DFA P.R. No. 170-00, *supra* note 3; DFA P.R. No. 171-00, *supra* note 2. The choice of words is inaccurate — the Senate concurs with the *ratification* of the treaty, not its signing. *See infra* note 342.

[of Foreign Affairs] somehow admitted that the Philippines has not made a 'thorough assessment' on whether the international [criminal] court would benefit the Philippines."[6] This paper makes a modest contribution to the "thorough assessment" of the Rome Statute.

II. Taking the ICC Seriously: The Quest Retraced

Over five centuries span the evolution of the ICC from an abstract legal concept to its envisioned constitution as a permanent juridical body. Milestones mark the international community's quest for a permanent international criminal court.

In retracing this unfinished quest, this chapter pinpoints such milestones under two principal phases: the historical antecedents of the ICC and its establishment as envisaged in the Rome Statute. It further highlights how the Philippines has embarked on this quest. It ends with a selection of the most significant efforts that the Philippine Government has thus far undertaken in view of its avowed task of thoroughly assessing the Rome Statute.

A. The ICC's Historical Antecedents

1. Birth Pangs

The idea of an international criminal court was conceived in 15th century Breisach, Germany, where the first criminal trial stamped with an international character was held under the auspices of the Holy Roman Empire. In 1474, a tribunal presided over by twenty-seven judges, "each representing a member state or unit of the Empire," convicted and sentenced to death Peter von Hagenbach for "crimes against the law of God and the laws of man," in allowing his troops to "rape and kill innocent civilians and pillage their property."[7] Von Hagenbach's death knell unfortunately lulled the concept to slumber.

Almost four centuries later, in 1870, International Committee of the Red Cross co-founder Gustav Moynier awakened the concept when he initially considered whether an international criminal court should be created to enforce the Geneva Convention of 1864 concerning the treatment of wounded soldiers. He later abandoned the idea, thinking that the onus of public opinion would suffice as deterrence. The Franco-Prussian War that broke out several months later proved him wrong. Appalled by the atrocities

6. Talosig, *supra* note 2, at 1.

7. M. Cherif Bassiouni, *The International Criminal Court in Historical Context*, 1999 St. Louis-Warsaw Transnat'l L. J. 55, 56 & n.5 [hereinafter Bassiouni, *Historical Context*] (citation omitted).

committed by both sides, Moynier on 28 January 1872 proposed a treaty-created court "to be activated automatically in the case of any conflict between the parties" — a proposal that fell on deaf ears for it was "almost unanimously rejected by the leading international lawyers of the day, and, therefore, only one government was prepared to support it."[8]

2. Initiatives After the "Great War"

Four decades later, Germany was at war and the idea of an international criminal court were again familiar bedfellows. World War I ended with the signing of the Treaty of Versailles in 1919. The Treaty clamored for the prosecution of German Kaiser Wilhelm II of Hohenzollern for "what is today the crime of aggression."[9] It also set up a Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties, composed of all the Allied Powers, "to investigate the possibility of charges."[10]

By 1920, the Commission had compiled a list of 20,000 Germans to be tried for war crimes and, thus, "proposed the constitution of an international 'high tribunal' for the trial of 'all enemy persons alleged to have been guilty of offenses against the laws and customs of war and laws of humanity.'"[11] The Commission's American members found the proposal objectionable due to positive law's silence in criminalizing such offenses and the principle of sovereignty's eloquence in fortifying the immunity of Heads of State.[12] Compromises were thus inevitable. The alternative solution to the proposed international tribunal saw an agreement to allow the German Supreme

8. Christopher Keith Hall, *Origins of the ICC Concept (1872-1945)*, 6 International Criminal Court Monitor 6 (Nov. 1997).

9. Bassiouni, *Historical Context*, *supra* note 7, at 56.

10. *Id.* & n.10. The Allied Powers include Japan, the United States, France, Italy, Great Britain, Belgium, Greece, Poland, Portugal, Romania, Serbia, and Czechoslovakia.

11. Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 Cornell Int'l L.J. 665, 669 (1996) [hereinafter Sadat Wexler, *An Appraisal*] (citation omitted). The text of the Commission's Report with four Annexes is reprinted in 42 Am. J. Int'l L. 95-154 (1920).

12. Specifically, they argued that: first, there is "*no international statute or convention making a violation of the laws and customs of war* — not to speak of the laws or principles of humanity — *an international crime, affixing a punishment to it*, and *declaring the court which has jurisdiction over the offense*;" and, second, "the proposed trials would violate the principle of sovereignty, particularly as to the attempt to impose international criminal liability on a Head of State." Sadat Wexler, *An Appraisal*, *supra* note 11, at 670-71 (citation omitted) (emphasis supplied). The first argument approximates the core concerns inherent in the issue of criminalization.

Court at Leipzig to try the cases. The so-called Leipzig trials ended in 1923 as a farce — the original list of 20,000 was trimmed to 43; out of these 43, 23 were indicted; out of those indicted, only 12 were convicted and sentenced to 3 years imprisonment, of which only 6 months were served.[13] As for the Kaiser, the compromises were enshrined in Articles 227-229 of the Treaty of Versailles calling his trial before a "special tribunal" — composed of five judges each representing the United States, Great Britain, France, Italy and Japan — for the "supreme offence against international morality and the sanctity of treaties."[14] Consanguinity nipped Wilhelm II's trial in the bud: the Netherlands, his cousin's kingdom, conveniently offered him sanctuary in Door Castle.[15]

The fiasco that was the Leipzig trials and the Wilhelm II affair did not dampen nor deter the zeal of the proponents of a permanent international criminal court. The Advisory Committee of Jurists of the League of Nations, in a resolution, pushed for the establishment of a High Court of International Justice, which would "'try crimes constituting breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations.'"[16] In 1925, the Washington Conference of the Interparliamentary Union, in an annex to a resolution, likewise "suggested that a criminal chamber should be created within the Permanent Court of International Justice for the trial of individuals accused of international crimes and offenses" and further advocated "that international offenses, and the sanctions therefor, should be defined in advance in precise texts."[17] The International Law Association, in 1926, and the International Association of Penal Law, in 1928, took this suggestion to heart when both adopted similar draft statutes establishing an international criminal court that would be "a division of the Permanent

13. Bassiouni, *Historical Context*, *supra* note 7, at 58-59. Parenthetically, in the *Dover Castle* and *Llandovery Castle* cases, the German Supreme Court accepted the accused officers' defense based on superior orders as an absolute defense. *But see* Vespasian V. Pella, *Towards an International Criminal Court*, 44 AMER. J. INT'L L. 37, 38 & n.4 (1949) (offering a different tally, *i.e.*, "[o]ut of 896 persons figuring on the first list of the Allies, the German Court of Leipzig condemned only 6").

14. Sadat Wexler, *An Appraisal*, *supra* note 11, at 670 & n.25 (citation omitted). *See also* Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 207 (1999) [hereinafter Ferencz].

15. *See* Bassiouni, *Historical Context*, *supra* note 7, at 58 (claiming that there is no true record whether a formal request was made to the Netherlands for the Kaiser's extradition). *But see* Sadat Wexler, *An Appraisal*, *supra* note 11, at 670 (asserting that the Netherlands refused to extradite Wilhelm).

16. Sadat Wexler, *An Appraisal*, *supra* note 11, at 670 (citation omitted).

17. Vespasian V. Pella, *Towards an International Criminal Court*, 44 AMER. J. INT'L L. 38 (1949) [hereinafter Pella].

Court of International Justice" and proposing the trial therein of both States and individuals.[18] Unfortunately, such efforts, especially those of the non-governmental organizations (NGOs), proved futile — both the resolutions and draft statutes were officially ignored for "the governments did almost nothing between the two [world] wars to bring about an international system of criminal justice."[19] Such cold reception is attributed to three factors. First, the omnipresence of the question of State sovereignty, particularly, the proposed court's capability to arraign individuals is deemed an affront to the sovereignty of the State of said individuals, and violates the latter's 'right' to be judged according to domestic law and by one's countrymen. Second, there is the absence of positive law, or as eloquently passed in the 1927 34th Conference of the International Law Association, "*Faut-il avoir la Cour avant la Loi, ou la Loi avant la Cour?*" [Must one have the Court before the law, or the law before the Court?]. Third, the absence of a unanimous agreement that an international criminal court could be an effective deterrent of war, with some quarters arguing that such a court could actually worsen international relations in that "[w]hen the soldiers and sailors had finished fighting,...the lawyers would begin a war of accusation and counter accusation and recrimination."[20] The whispered consensus, within diplomatic circles, was that the time for an international criminal court "is not yet ripe."[21]

The 9 October 1934 murder of King Alexander of Yugoslavia and the French Foreign Affairs Minister Louis Barthou broke this indifference-induced impasse, being the impetus behind the Convention on the International Criminal Court for the Repression of Terrorism. Prompted by the French Government, the Council of the League of Nations convened a diplomatic conference in Geneva on 16 November 1937 for the purpose of preparing "'an international convention for the prevention and the punishment of acts of political terrorism.'"[22] Two conventions were opened for signature at the conference. The first provided that "the contracting parties undertook to treat as criminal offenses, acts of terrorism, including conspiracy, incitement and, participation in such acts, and, in some cases, to grant extradition for such crimes." The second "called for 'the creation of an international court to try individuals accused of an offense punished by the

18. Sadat Wexler, *An Appraisal*, *supra* note 11, at 670-71 (citation omitted).

19. Pella, *supra* note 17, at 38.

20. Sadat Wexler, *An Appraisal*, *supra* note 19, at 671-72 & n.37 (citation omitted).

21. Ferencz, supra note 14, at 208.

22. J. Y. Dautricourt, *The International Criminal Court: The Concept of International Criminal Jurisdiction — Definition and Limitation of the Subject*, *in* I A TREATISE ON INTERNATIONAL CRIMINAL LAW 636, 643 (M. Cherif Bassiouni & Ved P. Nanda, eds., 1973) (citation omitted) [hereinafter Dautricourt]. *See also* Pella, *supra* note 13, at 38-39.

first Convention.'"[23] Although the scholars who sponsored it called the convention "a step towards international justice and even an 'historical event',"[24] only 13 states signed the convention.[25] In fact, it never entered into force due to the events that precipitated the outbreak of World War II. Yet, the effort deserves praise: the Convention "inspired the two committees on international criminal jurisdiction of 1951 and 1953;"[26] and "[f]or the first time the regular rendition of international judgments in criminal cases was contemplated, and that corollary of the dogma of sovereignty, the doctrine that such cases belong exclusively to national courts, abandoned."[27]

1. The International Military Tribunals of Nuremberg and Tokyo

Unfortunately for the skeptical diplomats, the lawyers did not wage their war for the fighting has yet to cease. The perceived inopportuneness proved to be the world's undoing. Adolf Hitler seized the shortsightedness of the decision-makers as he prefaced the Nazi solution to *Der Judenfrage* ("The Jewish Problem") with the comment that "[w]ho after all is today speaking about the destruction of the Armenians?"[28] That "the time is not yet ripe" gave Hitler "the comfort of an amber light, or, at least, comfort of knowing that he might get away with this policy, as others had in the past."[29] That policy was "eliminationist antisemitism" — "a virulent and violent 'eliminationist' variant of antisemitism [i.e., "negative beliefs and emotions about Jews *qua* Jews"], which called for the elimination of Jewish influence

23. *Id.* (citation omitted). The envisioned court's *modus procedendi* had the following main features: first, any contracting party may opt to place before its domestic courts or to extradite to another country or to defer to the international court any person accused of perpetrating one of the crimes mentioned in the Convention; second, the court "would be permanently organized, but would meet and sit only if an offender were put on trial before it"; and, finally, the court would enforce the criminal law that is "the least severe of the domestic laws of both involved countries, the one on whose territory the breach was committed and the other which had deferred the accused to the court."

24. *Id.* (citation omitted).

25. Pella, *supra* note 17, at 38-39.

26. Dautricourt, *supra* note 22, at 644.

27. Pella, *supra* note 17, at 38-39.

28. M. Cherif Bassiouni and Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 154 (1992) (citation omitted). Hitler was referring to "the killing of an estimated one million Armenian by Turkish authorities, as well as by the Turkish populace supported by or abetted by the state's public policy" that became the impetus for the coining of the term "crime against 'the laws of humanity.'" *Id.* at 152. *See also* Bassiouni, *Historical Context*, *supra* note 7, at 57.

29. *Id.*

or of Jews themselves from German society."[30] Given the international considerations of the 1930s, the international community bid their time in creating an international criminal court, so did Hitler and the Nazis with their Final Solution. Killing the German Jews "even it if had been possible, would...have been premature and ultimately self-defeating."[31] The time was ripe by the summer of 1941 when the program of systematic extermination had begun when it had subsided, the body count yielded six million Jews.

The unprecedented horrors of the Holocaust gnawed at the collective consciences of the victorious Allies. Resolute action was their response: "they proceeded immediately to establish a system of accountability" in the St. James Declaration of 1942 and in the Moscow Declaration of 1943.[32] In 1943, they also set up a fourteen-member War Crimes Commission tasked to collect evidence to be used at subsequent trials.[33] After V-E Day, the victorious Allies "decided to try the Axis leaders rather than shoot them."[34] Eminent jurists, representing the Allies, assembled in London and, after six weeks of negotiations, hammered out a Protocol for establishing the International Military Tribunal ("IMT" or "Nuremberg Tribunal").[35]

On 8 August 1945, the United States, the Provisional Government of the French Republic, the United Kingdom and the Union of Soviet Socialist Republics signed the London Accord, stating therein their intention to establish an IMT "for the trial of war criminals whose offenses have no particular geographical location, whether they be accused individually or in their capacity as members of organizations or groups or in both capacities."[36] Annexed to the agreement was the Charter of the International Military Tribunal ("IMT Charter" or "Nuremberg Charter"), which sets out in Article 6 the IMT's subject-matter jurisdiction: crimes against peace, war

30. DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 23 & 34 (1996).

31. *Id.* at 139-40 (citation omitted) (emphasis supplied).

32. Bassiouni, *Historical Context*, *supra* note 7, at 60 (citation omitted).

33. Peggy E. Rancilio, *From Nuremberg to Rome: Establishing an International Criminal Court and the Need for U.S. Participation*, 77 U. DET. MERCY L. R. 155, 158 (1999) [hereinafter Rancilio] (citation omitted).

34. Sadat Wexler, *An Appraisal*, *supra* note 11, at 673.

35. Ferencz, *supra* note 14, at 211.

36. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 8 U.N.T.S. 279, *reprinted in* 39 AM. J. INT'L L. 257-58 (Supp. 1945), art. 1. *See also* Sadat Wexler, *An Appraisal*, *supra* note 11, at 674 & n.48.

crimes and crimes against humanity.[37] The IMT Charter also excluded the act of State defense and the superior order defense.[38]

The IMT indicted twenty-four individuals, twenty-two of whom actually faced trial. The trial ended after 284 days with 19 convictions and 3

37. Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 8 U.N.T.S. 279, *as amended*, Protocol to Agreement and Charter, Oct. 6, 1945, *reprinted in* 39 AM. J. INT'L L. 258-64 (Supp. 1945) [hereinafter IMT Charter]. This provision reads *in toto* thus:

Article 6. The Tribunal established by the agreement referred to in article 1 hereof for the trial and punishment of the major war criminals of the European Axis shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organization committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace. Namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War crimes. Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or internees or persons on the seas or elsewhere; improper treatment of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; or devastation not justified by military necessity.

(c) Crimes against humanity. Namely, Murder, extermination, enslavement, deportation and other inhuman acts committed against civilian populations before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

38. Sadat Wexler, *An Appraisal*, *supra* note 11, at 674 (citation omitted). These defenses say that "the defendants were individually responsible for the commission of such crimes, notwithstanding their positions as heads of state or the fact that a defendant may have acted pursuant to an order of his Government or of a superior."

acquittals. Twelve of the convicts were sentenced to death.[39] Critics of the Nuremberg Trials argue that the "IMT Charter and Judgment were but a (retroactive) *droit ad hoc*, in which only the vanquished were tried by judges representing the nationalities of the victors."[40] Nevertheless, its legal and moral legacy is more or less secure: first, the IMT Charter "seemed to lay to rest, at least as a practical matter, the theory that the constitution of an international criminal tribunal contravenes the sovereignty of states per se;" second, the IMT, in having its judgment embodied in a legal precedent, "arguably created the positive law thought to be lacking prior to its existence;" and, lastly, "the Nuremberg judgment affirms the idea that war as a means of solving interstate conflict is morally, legally, and politically wrong."[41]

The Nuremberg precedent immediately bore fruit in East Asia. While the trials were ongoing, General Douglas MacArthur issued a military proclamation that included a charter that was almost a verbatim copy of the IMT Charter,[42] thereby creating the International Military Tribunal for the Far East ("IMTFE" or "Tokyo Tribunal") to try "Japanese Ministers, Ambassadors, Admirals and Generals."[43] Playing to a tee his role as Supreme Commander for the Allied Powers in the Far East, MacArthur appointed military tribunals, composed of judges from [nineteen] countries erstwhile at war with Japan, "to try Japanese leaders accused of aggression, war crimes

39. Rancilio, *supra* note 33, at 160. *See also* Sadat Wexler, *An Appraisal*, *supra* note 11, at 675.

40. Sadat Wexler, *An Appraisal*, *supra* note 11, at 675 (citation omitted).

41. *Id.* at 676 (citation omitted).

42. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946 (General Orders No.1), *as amended*, General Orders No. 20, Apr. 26, 1946, T.I.A.S. No. 1589, 4 BEVANS 20 [hereinafter IMTFE Charter]; Bassiouni, *Historical Context*, *supra* note 15, at 61. The distinction in the creation of the tribunals is noteworthy:

Although both Tribunals were to try only major war criminals, the IMT was established pursuant to an international treaty while the IMTFE was proclaimed in a military order issued by General Douglas MacArthur, supreme commander of Allied Forces in the Pacific. The disparity between the two types of instruments which established these parallel tribunals for the prosecution of major war criminals was never validly explained, except for the fact that the violations giving rise to the prosecutions occurred in different military theaters.

M. Cherif Bassiouni, *"Crimes Against Humanity": The Need for a Specialized Convention*, 31 COLUM. J. TRANS'L L. 457, 460 & n.9 (1994) [hereinafter Bassiouni, *"Crimes Against Humanity"*].

43. Ferencz, *supra* note 14, at 216.

and crimes against humanity."[44] The tribunal sat for two years and convicted all the accused, sentencing seven to hang.[45]

2. U.N. Initiatives After World War II

The nascent United Nations (U.N.) proceeded where the Allies left off. After a meeting from 12 May to 17 June 1947, the U.N. Committees on the Progressive Development of International Law and its Codification stated in its report that "the implementation of the principles of the [Nuremberg] Tribunal and its judgment, as well as the punishment of other international crimes which may be recognized as such by international multipartite conventions, may render desirable the existence of an international judicial authority to exercise jurisdiction over such crimes."[46] Subsequently, the General Assembly adopted Resolution 177 (II) of 21 November 1947 "with a view to the achievement of a more precise formulation of the principles of international law recognized in the Charter and Judgment of the [Nuremberg] Tribunal," charging the International Law Commission (ILC) with the task of such formulation.[47]

In 1948, the U.N. General Assembly referred the draft of the Genocide Convention to its Sixth Committee. A principal bone of contention then was article VII of the draft which provided that persons accused under the Convention "shall be tried by a competent tribunal of the State in the territory of which the act was committed or *by a competent international tribunal.*"[48] Speaking in favor of providing for a recourse to international jurisdiction, the Philippine representative expressed the belief "that genocide was a collective crime of such proportions that it could rarely be committed except with the participation or tolerance of the state and hence 'it would be paradoxical to leave that same state the punishment of the guilty.'"[49] Eventually, on 9 December 1948, the General Assembly unanimously approved the Convention on the Prevention and Punishment of the Crime

44. *Id.* Ferencz pegs the number at eleven. *But see* Bassiouni, *Historical Context*, *supra* note 7, at 61 (pegging the number at nineteen).

45. *Id.*

46. Pella, *supra* note 17, at 44 (citation omitted). Pella uses "Nürnberg."

47. *Id.* at 42. *See also* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES para. 119 n.121 (1985) [hereinafter VILLIGER].

48. Yuen-li Liang, *The Question of the Establishment of an International Criminal Jurisdiction*, 43 AM. J. INT'L L. 478, 484 (1949) [hereinafter Liang, *Question*] (emphasis supplied).

49. *Id.* at 480 (citing U.N. Doc. A/C.6/SR.98, at 7).

of Genocide ("Genocide Convention").[50] The contentious article VII became article VI, the adopted version of which provides that:

> Persons charged with genocide of any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, *or by such international penal tribunal* as may have jurisdiction with respect to these Contracting Parties which shall have accepted its jurisdiction.[51]

Corollary to the Genocide Convention and echoing Resolution 177 (II), the General Assembly also adopted Resolution 260B (III) which invited the ILC "'to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions'" and requested it "'to pay attention to the possibility of establishing a Criminal Chamber of the International Criminal Justice.'"[52]

The ILC hunkered down to work. By the end of its second session in 1950, the ILC, after considering two contrasting reports on the matter, voted "to support the desirability and feasibility of creating an international criminal court."[53] The General Assembly then took the cudgels from the ILC. In Resolution 489 (V) of 12 December 1950, it appointed the Committee on International Criminal Jurisdiction (1951 Committee), composed of seventeen Member States, with the task of "preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court."[54]

50. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, I-4 D.F.A.T.S. 1, II P.T.S. 83, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (Signed for the Philippines Dec. 11, 1948 with declaration and reservation. Entry into force for the Philippines Jan. 12, 1951).

51. Liang, *Question*, *supra* note 48, at 479.

52. *Id.* at 478-79. *See also* VILLIGER, *supra* note 47, para. 119 n.123.

53. Sadat Wexler, *An Appraisal*, *supra* note 11, at 677 (citation omitted). Ricardo Alfaro's report "concluded that such a jurisdiction was both 'desirable' and 'possible'" while Eric Sanström's "concluded that although the creation of an International Criminal Court was possible, it was not desirable" because it "would 'do more harm than good.'" *Id.* at 677-78.

54. Bienvenido C. Ambion, *Organization of A Court of International Criminal Jurisdiction*, 29 PHIL. L.J. 345, 352 (1954) (citing U.N. Doc. No. A/AC.48/4) [hereinafter Ambion, *Organization*]. The seventeen Member States of the 1951 Committee: Australia, Brazil, China, Cuba, Denmark, Egypt, France, India, Iran, Israel, Netherlands, Pakistan, Peru, Syria, United Kingdom, United States, and Uruguay. India and Peru did not send representatives to the Committee. *Id.* n.34. This particular move raised not a few eyebrows for it "involved a reversal of roles that was curious, to say the least: [the General Assembly] had asked a body of jurists a political question (whether the creation of the court was

Accordingly, the 1951 Committee convened at Geneva for the entire month of August 1951. The result was a report accompanied by two annexes: Annex I "which is the Draft Statute for the International Criminal Court ["1951 Draft Statute" or "Geneva Draft"]" and Annex II "which expresses the *voeu* that together with the instrument creating the International Criminal Court, a protocol be drawn up conferring jurisdiction upon said Court with respect to the particular crime of genocide."[55] The 1951 Committee specifically decided that a "multilateral convention would be the most appropriate mechanism for the creation of the court" rather than establishing it as an organ of the U.N. via an amendment of its Charter or a General Assembly Resolution, and envisaged the Court "as a 'semi-permanent' institution that would hold sessions only when matters before it required consideration."[56]

The General Assembly, in its 7th session, considered the 1951 Committee's report and the comments thereon of twelve Member States. Acknowledging the "need for further study," the General Assembly eventually adopted Resolution 687 (VII) of 5 December 1952 "establishing a new committee to examine certain aspects of the question of international criminal jurisdiction and to review the draft statute prepared by the 1951 committee."[57] Convening in New York from 27 July to 20 August 1953, the seventeen-member 1953 Committee on International Criminal Jurisdiction ("1953 Committee") culminated its deliberations with "the adoption of a report with a Revised Draft Statute for an International Criminal Court annexed to it."[58] As regards the method of establishing the Court, the 1953 Committee had four options, *viz.*: (1) "by amendment of the Charter of the United Nations"; (2) "by multilateral convention"; (3) "by resolution of the General Assembly of the United Nations"; and, (4) "by resolution of the General Assembly followed by conventions."[59] The Philippine representative favored the first option, advocating for the creation of a criminal chamber in

desirable) and had subsequently entrusted a political body with the technical task of elaborating a draft statute." Sadat Wexler, *An Appraisal*, *supra* note 11, at 678.

55. *Id.* at 352. For the full text of the Geneva Draft see 46 AMER. J. INT'L L. 1 (Supp. 1952).

56. Sadat Wexler, *An Appraisal*, *supra* note 11, at 679 (citation omitted).

57. Yuen-li Liang, *The Establishment of an International Criminal Jurisdiction: The Second Phase*, 47 AMER. J. INT'L L. 638 & n.4 (1953) [hereinafter Liang, *Second Phase*].

58. *Id.* at 639. The seventeen Member States of the 1953 Committee: Argentina, Australia, Belgium, China, Denmark, Egypt, France, Israel, Netherlands, Pakistan, Panama, Peru, *Philippines*, United Kingdom, United States, Venezuela, and Yugoslavia. Pakistan did not send a representative. *Id.* n.4 (emphasis supplied). *See also* Ambion, *Organization*, *supra* note 54, at 353 & n.40.

59. *Id.*

the existing International Court of Justice in pointing out the following advantages:

> First, the administration of international criminal justice would be vested in the principal judicial organ of the United Nations, thus obviating the serious difficulty of having a criminal court subsidiary and subservient to a political body such as the General Assembly. Secondly, the judicial powers of the United Nations would be integrated rather than dispersed. Thirdly, international criminal jurisdiction would be permanent. Fourthly, it would be less expensive than if a new and separate court were to be established.[60]

The 1953 Committee, in eventually adopting the Israeli proposal, considered "the best method of establishing an international criminal court would be by means of a convention prepared by an international diplomatic conference convened under the auspices of the United Nations" and further recommended to the General Assembly that the court would only come to exist when a still to be determined number of states had conferred jurisdiction upon it and had ratified the court's statute as drawn up by the international diplomatic conference.[61] It also agreed that the Court "shall be a permanent body and not an *ad hoc* organ," *i.e.*, permanent in the organic, not functional, sense "so that the court would convene only when cases are submitted to it."[62]

Both the lack of political consensus and the onset of the Cold War put up a roadblock to the inroads paved by the 1951 and 1953 Committees, thereby shelving anew the idea of an international criminal court for the next thirty-five years.[63] The impasse was reminiscent of the indecision that prevailed after the Great War, and the consequences of such would prove to be as harrowing as the Holocaust.

60. *Id.* at 640. The Philippine voice was also heard, when it concurred with France, on Peru's opinion that the court should acquit the accused when it would dismiss a case on the ground that a fair trial was impossible. *Id.* at 653-54. And yet again, when the Philippine representative, opposing the proposal of the United States, warned against the complications that would arise when the jury system is introduced. *Id.* at 654.

61. *Id.* at 645-46. As to the substantial amendments to the Geneva Draft, *viz.*, competence of the court and its organization and procedure see *id.* at 646-57. *See also* Bienvenido C. Ambion, *Establishment of the Proposed International Criminal Court*, 30 PHIL. L.J. 370 (1955) [hereinafter Ambion, *Establishment*].

62. Ambion, *Establishment*, *supra* note 61, at 371.

63. Sadat Wexler, *An Appraisal*, *supra* note 11, at 683 (citation omitted). *See also* Rancilio, *supra* note 33, at 178.

3. The Ad Hoc International Criminal Tribunals of Yugoslavia and Rwanda

In 1989, a coalition of sixteen Caribbean and Latin American nations, led by Trinidad and Tobago, introduced a resolution before the U.N. General Assembly that resuscitated the idea of an international criminal court. The coalition's concern centered on "the problem of extraditing and prosecuting international narco-terrorists," thus the resolution specified that the ILC "should specifically address the crime of illicit trafficking in narcotic drugs across national frontiers, and presumably discuss the international criminal court (or other trial mechanism) in that context."[64] The ILC itself had also repeatedly requested the General Assembly "as to what judicial authority would implement the Draft Code of Crimes [Against the Peace and Security of Mankind]" that the ILC had been asked to draft.[65] Thus prompted, the General Assembly in turn requested the ILC "to address 'the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes covered under [the Draft Code of Crimes].'"[66] By 1991, the ILC provisionally adopted a Draft Code of Crimes and, in 1992, created a working group on an international criminal court.[67]

The collapse of Yugoslavia in 1991 and the internal conflict that ensued thereafter — resulting into the death of approximately 200,000 people, and rendering 2,000,000 more as refugees by February 1994[68] — unwittingly fueled the momentum for the ILC project. Spurred by international outcry, the U.N. Security Council, in a flurry of Resolutions that culminated with the adoption of Resolution 808 on 22 February 1993, "established an international tribunal for the purpose of prosecuting 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.'"[69] On 25 May 1993, the Security Council unanimously adopted Resolution 827 which included a draft of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute).[70] The creation of the ICTY by the Security Council "suggested that the need for a permanent court was not merely theoretical, and that governments, including the United States, would be

64. *Id.* at 683 & n.112.

65. *Id.*

66. *Id.* at 683 (citation omitted).

67. *Id.* at 683-84.

68. Rancilio, *supra* note 33, at 165. This article gives a concise historical background of the conflict.

69. *Id.*at 166-67 (citing S.C. Res. 808, U.N. SCOR, 48TH Sess., 3175TH mtg,, U.N. Doc. S/RES/730 (1993)).

70. *Id.* at 167. For brevity, the Tribunal shall henceforth be referred to as ICTY.

willing to support the creation of an international criminal tribunal, at least under some circumstances."[71]

On 6 April 1994, inter-ethnic conflict erupted in Rwanda which ended that July with an estimated 500,000 to 1,000,000 deaths due to the wanton Hutu massacre of the Tutsis.[72] Acting under the ICTY precedent, the Security Council adopted Resolution 955 on 16 October 1994 establishing the International Criminal Tribunal for Rwanda (ICTR).[73]

The Security Council's establishment of the ICTY and ICTR marked an important turning point in the effort to establish a permanent international criminal court for "[t]hese Security Council actions constituted a psychological, political and legal breakthrough for the international criminal court proposal and for the concept of the international accountability of individuals for gross and massive crimes. ...[T]he ad hoc tribunals were concrete proof that international criminal court could exist and function."[74]

These developments accelerated the pace of the ILC endeavor. In 1993, it considered two draft statutes. In 1994, during its forty-sixth session, the ILC adopted a final version of the draft statute and recommended "that an international conference of plenipotentiaries be convened to study the draft statute and to conclude a convention on the establishment of an international criminal court."[75] After incorporating the comments of governments, this final version became the basis for the 1994 ILC Draft Statute for a permanent international criminal court.[76]

71. Sadat Wexler, *An Appraisal*, *supra* note 11, at 686.

72. Rancilio, *supra* note 33, at 173-74.

73. *Id.* at 174.

74. Fanny Benedetti and John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome an Afterword on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE 1, 2-3 (1999) [hereinafter Benedetti & Washburn].

75. *Establishment of an international criminal court*, G.A. Res. 49/53, U.N. GAOR, 49th Sess., Supp. No. 49 at 292, U.N. Doc A/49738 (1994) [hereinafter G.A. Res. 49/53].

76. Sadat Wexler, *An Appraisal*, *supra* note 11, at 686. Part II of this article offers an analysis of the 1994 ILC Draft. *Id.* at 685-707. Part III is a critique or assessment of the same. *Id.* at 707-25. *See also* Benedetti & Washburn, *supra* note 74, at 3. For the complete text of the 1994 ILC Draft see Merlvin Rorie S. Urgello, Repercussions of the Formation of an International Criminal Court (1998) (unpublished J.D. thesis, Ateneo de Manila University, School of Law) (on file with the Ateneo Professional Schools Library).

B. The ICC Under the Aegis of the Rome Statute

1. Paving the Road to Rome

On 9 December 1994, the U.N. General Assembly, in a resolution, welcomed the ILC report containing the 1994 Draft Statute and, more importantly, took up the ILC recommendation in deciding

> to establish an ad hoc committee, open to all States Members of the United Nations or members of specialized agencies, to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries[.][77]

The General Assembly tasked this Ad Hoc Committee on the Establishment of an International Criminal Court (Ad Hoc Committee) to "meet from 3 to 13 April 1995 and, if it so decides, from 14 to 25 August 1995, and submit its report to the General Assembly at the beginning of its fiftieth session."[78] The Ad Hoc Committee discussed "major substantive and administrative issues, but did not engage in negotiations or drafting."[79] Thus, in its report, the Committee expressed "the opinion that issues can be addressed most effectively by combining further discussions with the drafting of texts, with a view to preparing a consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries."[80]

Acting on this opinion, the General Assembly resolved on 11 December 1995,

> *to establish a preparatory committee* open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, *to discuss further the major substantive and administrative issues arising out of the draft statute* prepared by the International Law Commission and, taking into account the different views expressed during the meetings, *to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries*, and also decides that the work of the Preparatory Committee should be based on the draft statute prepared by the International Law Commission and should take into account the report

77. G.A. Res. 49/53, *supra* note 75, para. 2.

78. *Id.*

79. M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443, 443-44 (1999) [Bassiouni, *Negotiating the Treaty*].

80. *Establishment of an international criminal court*, G.A. Res. 50/46, U.N. GAOR, para. 2, U.N. Doc. A/RES/50/46 (1995) (citation omitted).

> of the Ad Hoc Committee and the written comments submitted by States to the Secretary-General on the draft statute for an international criminal court pursuant to paragraph 4 of General Assembly resolution 49/53 and, as appropriate, contributions of relevant organizations[.][81]

The Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) was thus born.[82] Initially mandated to convene for two sessions, the PrepCom held an additional four sessions sanctioned by General Assembly Resolution No. 51/207, which reaffirmed the PrepCom's mandate "in order to complete the drafting of a widely acceptable consolidated text of a convention, to be submitted to the diplomatic conference of plenipotentiaries," and scheduled the conference for 1998.[83] Three "informal intersessional meetings" were also held, interspersed between the first and second, third and fourth, and fourth and fifth sessions of the PrepCom.[84] In the interregnum between the PrepCom's fifth and

81. *Id.* (emphasis supplied).

82. Organizationally, the Bureau — composed of the Chairman, three Vice-chairpersons and the Rapporteur — was the PrepCom's principal organ; the Chairman then appointed coordinators or "informal chairs of working groups" whose task was to draft text for the different parts of the statute. Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 444 & nn.8, 9, 15. *But see* Benedetti & Washburn, *supra* note 74, at 10 (excluding the Rapporteur from the enumeration).

83. G.A. Res. 51/207, U.N. GAOR (1996). *See also* Benedetti & Washburn, *supra* note 74, at 6 (providing in Table 1 a Selective Chronology of Events in Drafting the International Criminal Court Treaty, 1996-1998).

84. Benedetti & Washburn, *supra* note 74, at 6 tbl.1. In devoting itself to discussing the core issues of the court's relation to national courts, its subject matter jurisdiction, how a case would come before the court, and state cooperation with the court, the first session (23 March – 12 April 1996) of the PrepCom accomplished to develop "the draft definitions of the three core crimes: war crimes, crimes against humanity, and genocide." *Id.* at 5-6 (citation omitted). The second session (12 – 30 August 1996) tackled "general principles of criminal law, rules of procedure, state cooperation with the international criminal court, composition and organization of the court, and penalties." *Id.* at 7. The third session (11 – 21 February 1997) consolidated the substantial parts of the draft text pertaining to "the definition of genocide and crimes against humanity and a major part of the general principles of criminal law." *Id.* The issues of complementary jurisdiction and the trigger mechanisms of such jurisdiction preoccupied the fourth session (11 – 15 August 1997). The fifth session (1 – 12 December 1997) reviewed the definition of crimes and state cooperation and discussed procedural matters, penalties and general principles of international law. *Id.* at 7-8. An intersessional meeting of the Bureau and the coordinators convened at Zutphen, The Netherlands (Jan. 19-30, 1998) streamlined the so-called "telephone book" — an "unstructured and substantially unusable compilation of all governmental proposals" — that issued out of the fifth session. Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 444 & n.7. The sixth session

sixth sessions, the General Assembly adopted on 15 December 1998 Resolution 52/160 accepting the offer by the Italian Government to host in Rome the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which was "open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency," to be held "from 15 June to 17 July 1998, with a view to finalizing and adopting a convention on the establishment of an international criminal court."[85] After over two years of informal meetings and sessions *in plenum*, the PrepCom forged from the furnace of negotiation a 173-page long draft statute, consisting of 116 articles with 1300 brackets "for optional provisions and word choices."[86]

Anticipating organizational difficulties that could bedevil the Rome Conference, the PrepCom's Bureau and working group coordinators, albeit bereft of official capacity after 3 April 1998, met on 4 – 8 May 1998 at Couermayeur, Italy, under the auspices of the International Institute of Higher Studies in Criminal Sciences, the International Scientific and Advisory Professional Council, and the Italian Ministry of Foreign Affairs.[87] The Couermayeur meeting "discussed the organizational plan for the Conference's work, developed a strategy for the order in which the various parts of the Draft Statute would be discussed, and planned the work flow between the three official conference bodies — the Committee of the Whole, the Working Group, and the Drafting Committee."[88] Such work flow generally consisted in the following:

> The plenary dealt with the organization of work, the delivery of policy statements of a general nature...and the formal adoption of the statute at the end of the conference. The CW [i.e., Committee of the Whole] was responsible for the development of the statute, and the Drafting Committee was responsible for ensuring proper and consistent drafting throughout the statute in all languages. In general, issues once debated in the CW were referred to working groups or coordinators. The latter then reported the result of their work to the CW, and texts accepted by the CW were referred to the Drafting Committee. Texts refined by the [Drafting] [C]ommittee had again to be approved by the CW. The final report was sent from the CW to the plenary, with a complete text, on the final day of the conference.[89]

(Mar. 16-Apr 3, 1998) handled the leftover issues: "composition of the court, relations with the U.N., the financing of the court, the final clauses of the statute and the establishment of a preparatory commission." Benedetti & Washburn, *supra* note 74, at 8.

85. G.A. Res. 52/160, U.N. GAOR (1998).

86. Bassiouni, *Negotiating the Treaty*, *supra* note 74, at 445. *See also* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, "Report of The Preparatory Committee on The Establishment of An International Criminal Court," U.N. Doc. A/CONF.183/2/Add.1, Apr. 14, 1998 (containing the Draft Statute for an International Criminal Court with the brackets) [hereinafter Draft Statute].

87. *Id.* at 446-47.

88. *Id.* at 447.

2. Solving the Jigsaw Puzzle

When the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) convened on 15 June 1998 at the headquarters of the Food and Agriculture Organization of the United Nations (FAO Headquarters), the task laid before it for the next five weeks was, to say the least, daunting. The composition of the delegates who attended the Conference made the endeavor more difficult. Initially, about 5000 delegates attended the initial ceremonies, but after a week's time, the number dwindled to approximately 2000.[90] Part of these delegates represented 160 states; the rest, participating as observers, represented: 1 organization (Palestine), 16 inter-governmental organizations and other entities, 5 specialized agencies and other related organizations, 9 U.N. programmes and bodies, and 135 non-governmental organizations.[91]

Those who stayed behind may be classified into two groups: first, "those with some knowledge of the Draft Statute's text, either from their previous participation in the Ad Hoc Committee or the PrepCom or from their own study;" and, second, "those who had little or no knowledge of the text," who comprise about nine-tenths of the delegates.[92] The latter's lack of knowledge may partly be attributed to the fact that by the time the PrepCom had finished the Draft Statute by 3 April 1998 it had still to be translated into the different languages such that only six weeks were left for the text to make its way from New York to the Member States' respective concerned officials. The upshot of this short interregnum: "by the time the text reached those officials who later joined their governments' delegations in Rome, they had little time to study and assess the Draft Statute or to

89. Philippe Kirsch and John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 3 & n.5 (1999) [hereinafter Kirsch & Holmes].

90. Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 449.

91. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, "Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court," at paras. 14-16 & annexes I-III, U.N. Doc A/CONF.183/10 (1998) [hereinafter Final Act].

92. Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 449.

obtain specific instructions for the Conference from their superiors."[93] The net result is the necessity of a "learning curve period" for the delegates that inevitably slackened the pace of negotiations.[94] By the second week, pessimism had filtered through the Conference, speculations about a second Diplomatic Conference or Rome II started to float among the delegates.[95]

Philippe Kirsch, Chairman of the Committee of the Whole, remedied the situation by instituting smaller informal working groups. Although these informal working groups accelerated the pace of the negotiations, it also resulted into a piecemeal treatment of the Statute's articles.[96] Thus, formulating the Draft Statute "resembled the assembly of a large jigsaw puzzle: the [Drafting] Committee had to determine how all the pieces — the separate articles or paragraphs received in this manner — fit together."[97] By 15 July 1998, the Drafting Committee had completed all 111 articles of the draft text, which the Committee of the Whole approved, save for Part 2 (Articles 5-21) and certain Final Clauses.[98]

Part 2 of the Draft Statute, in dealing with Jurisdiction, Admissibility and Applicable Law including the lists and definition of crimes, largely contained the elements of the statute "that could make or break the conference."[99] Consequently, the Bureau of the Committee of the Whole (CW-Bureau) —

93. *Id.* at 445.

94. *Id.* at 446.

95. *Id.* at 449.

96. M. Cherif Bassiouni, Chairman of the Drafting Committee, describes the flow of texts, thus:

> The working groups submitted draft provisions directly to the Committee of the Whole for its *pro forma* approval. After the Committee of the Whole considered each new provision, it labeled the additions "rolling text" and placed them aside pending receipt of the remainder of articles in which they belonged. Once the Committee had received a given article in full, the Secretariat would prepare a separate document and assign it a conference symbol number; the text would then be translated and distributed to the Drafting Committee for review. Once the Drafting Committee had the opportunity to discuss the portions of each article, it labeled the article "text adopted on first reading." The Drafting Committee would then await the remaining parts of the Draft Statute to determine whether the language for an individual article was consistent with the rest of the parts. Once that was accomplished, the Drafting Committee would label the article "text adopted on second reading." The Drafting Committee reported to the Committee of the Whole when it completed an entire part of the Draft Statute.

Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 451 & n.33.

97. *Id.* at 451-52.

98. *Id.* at 453.

99. Kirsch & Holmes, *supra* note 89, at 3-4.

composed of representatives of Canada, Argentina, Romania, Lesotho and Japan — trained its negotiating energies towards resolving the contentious issues of Part 2.[100] The issues ensconced in Part 2 also constituted the rallying point of the various groups into which the participating States had coalesced. Foremost of these groups was the so-called "Like-Minded Group" (LMG), which had grown from its original forty-two states during the PrepCom to sixty states in the conference.[101] The LMG, which was the stalwart for the establishment of the court during the PrepCom, pushed for "a strong and independent court."[102] The permanent members of the Security Council (P-5) constituted a second group that rallied around the following points: "a strong role for the Council vis-à-vis the court"; "the exclusion of nuclear weapons from the weapons prohibited by the statute"; and, a careful circumscription of the court's jurisdiction and its exercise.[103] Finally, the Non-aligned Movement — composed of India and a group of Gulf States — initially pursued "the inclusion of nuclear weapons in the list of prohibited weapons and the absence of control by the Security Council," but later the group broke up coalescing regionally or joined the LMG.[104]

The passage of the text of Part 2 to that stage when the Conference had voted for the full text of the Statute contravened the procedure in drafting the final text outlined above. On the afternoon of 16 July 1998, the CW-Bureau forwarded Part 2 of the draft with the instruction that "the text could be read but not altered."[105] This "take-it-or-leave-it" package

100. *Id.* at 4.

101. Benedetti & Washburn, *supra* note 74, at 30. The LMG included, *inter alia*: "Australia, Austria, Argentina, Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, the Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad and Tobago (representing 12 Caricom states), Uruguay and Venezuela." Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 455 & n.51. The Philippines too was a member of the LMG. Interview with Dean Raul C. Pangalangan, Dean University of the Philippines College of Law and member of the Drafting Committee, at Malcolm Hall, U.P.-Diliman, Quezon City (Jul. 17, 2001) [hereinafter Pangalangan Interview]; <http://www.igc.org/icc/rome/html/ratify.html>.

102. Kirsch & Holmes, *supra* note 89, at 4.

103. *Id.* Just before the Rome Conference, the United Kingdom joined the LMG.

104. Benedetti & Washburn, *supra* note 74, at 31.

105. Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 453. *See also* Kirsch & Holmes, *supra* note 89, at 3 & n.5 [parenthetically describing the deviation, thus: "There were some variations on this procedure; for example, some parts of the draft statute was sent directly to working groups or to the Drafting Committee without preliminary CW discussion (e.g., some procedural provisions), and *part 2 of the statute did not go to the Drafting Committee except informally.*" (emphasis supplied)]

sprouted from the logjam that had grounded the negotiations on Part 2 to a standstill as the Conference entered its third week. The CW-Bureau prepared a discussion paper on Part 2 and presented the same in the 5 July 1998 meeting of twenty-eight delegations, organized by Kirsch, "to explore possibilities of compromise and to analyze the reactions of delegations."[106] The Bureau Discussion Paper was then subjected to a series of debates before the conference *in plenum* that lasted as late as the last week of the conference. With the key problems in Part 2 still unresolved, the Bureau, with two days remaining, had two alternatives: "to propose a final package for possible adoption by the conference, or to report to the plenary that an agreement was not possible and begin preparations for a second session."[107] The CW-Bureau chose the former.

The Drafting Committee's reaction to the take-it-or-leave-it instructions was vehement refusal, the members feeling that the instructions violated the Rules of the Conference.[108] Drafting Committee Chairman Bassiouni implored the members of the committee not to pose any objections and assert the Rules of Procedure, otherwise the adoption of the package could be prevented; the members acquiesced.[109]

3. Adoption of the Rome Statute

On the last day of the Conference, with the clock approaching midnight, the Committee of the Whole assembled in the Red Room of the FAO Headquarters. The American and Indian delegations each stood to introduce last minute amendments to the Part 2 proposal. After arguing with other delegations that any change in the package would signal its demise, Norway introduced a no-action motion to both proposed amendments. Kirsch, pursuant to Conference procedural rules, gave precedence to the Norwegian no-action motion; voting thereon proceeded forthwith.[110] The vote on the no-action motion for India's proposal was 114 in favor, 16 against and 20 abstentions; for the U.S. proposal, 113 in favor, 17 against and 25 abstentions.[111] Then, in "one of the most extraordinary emotional scenes ever to take place at a diplomatic conference," the delegates, for the next ten minutes, "burst into spontaneous standing ovation, which turned into

106. Kirsch & Holmes, *supra* note 89, at 5. The said paper is available as Bureau Discussion Paper, U.N. Doc.A/CONF.183/C.1/L.53 (1998).

107. *Id.* at 9-10.

108. Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 453.

109. Pangalangan Interview, *supra* note 101.

110. Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 458-59; Benedetti & Washburn, *supra* note 74, at 26.

111. Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 458.

rhythmic applause,"[112] coupled with "cheering, hugging, weeping."[113] At about 11:00 P.M., the Committee of the Whole adjourned. Thereafter, the Plenary convened in a long and narrow ceremonial meeting hall for its final session.

Just before the stroke of midnight, the U.S. delegation again asked for a vote on the statute as a whole. The electronic scoreboards installed at each end of the long hall displayed the final tally: 120 in favor, 7 against,[114] and 21 abstentions — the Rome Statute of the International Criminal Court and the Final Act of the Conference were adopted. Twenty minutes of exultation followed. Then, the delegations respectively explained their votes. The post-vote statements ended 2:00 A.M. of 18 July 1998, but the clock was "figuratively stopped" at 11:29 P.M. of 17 July 1998 "so that the Plenary could be said to have completed its work within the General Assembly's mandate."[115] Pursuant to the Final Act of the Rome Conference, the Rome Statute was "opened for signature on 17 July 1998, in accordance with its provisions, until 17 October 1998 at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York."[116]

4. Keeping the Afterglow Aflame

Annexed to the Final Act, are six resolutions adopted by the Conference, including Resolution F that established the Preparatory Commission for the International Criminal Court (Preparatory Commission).[117] Its membership

112. *Id.* at 459. *See also* Pangalangan Interview, *supra* note 101.

113. Benedetti & Washburn, *supra* note 74, at 26.

114. Because the voting was unrecorded, the identity of the dissenting delegations could not be absolutely ascertained; but, China, India, Israel and the United States "disclosed their negative votes in statements in the plenary session after the vote." The probable candidates for the other three "dissenters" are Iraq, Libya and Qatar. Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT'L L. REV. 1, 101 n.304. (2000) [hereinafter van der Vyver]. For an explanation of the negative votes of China, India, and Israel see *id.* at 99 nn.300-02. *But see* Benedetti & Washburn, *supra* note 74, at 27 (enumerating the following: United States, Israel, China, Iraq, Yemen, Libya and Qatar); Leila Nadya Sadat and S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 384 n.8 (2000) [hereinafter Sadat & Carden] (apart from the United States the most likely candidates: China, India, Iraq, Israel, Libya, Qatar, and Yemen).

115. Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 460.

116. Final Act, *supra* note 91, para. 24.

117. The other resolutions: A (tribute to the ILC); B (tribute to the participants and chairman of the PrepCom); C (tribute to the Conference President, the Committee of the Whole Chairman, and the Drafting Committee Chairman);

consists of "representatives of States which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other States which have been invited to participate in the Conference."[118] The Commission has a two-fold mandate. First, it "shall prepare proposals for practical arrangements for the establishment and coming into operation of the Court," including, *inter alia*, the draft texts of the Rules of Procedure and Evidence and Elements of Crimes due on 30 June 2000. Second, it "shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime."[119]

With this prioritized mandate and deadline in mind, the Commission's work plan focused its first five sessions to prepare a finalized draft text of the Rules of Procedure and Evidence and the Elements of Crimes. Consequently, the Commission's first (16 – 26 February 1999), second (26 July – 13 August 1999), third (29 November – 17 December 1999), and fourth (13 – 31 March 2000) sessions tackled the oral reports of the coordinators for the Rules and the Elements.[120] In its fifth session (12 – 30 June 2000), the Commission adopted the finalized draft texts of the Rules of Procedure and Evidence and the Elements of Crimes.[121] The sixth session (27 November – 8 December 2000) work plan considered the following topics: the relationship agreement between the U.N. and the ICC, the Court's financial rules and regulations, the agreement on the privileges and immunities of the Court, and the crime of aggression.[122] The seventh session

D (tribute the Italian government and people); E (on treaty crimes). Final Act, *supra* note 91, at 26.

118. Final Act, *supra* note 91, at 2.

119. *Id.* at 5-7. Other draft texts include: A relationship agreement between the Court and the United Nations; Basic principles governing a headquarters agreement to be negotiated between the Court and the host country; Financial regulations and rules; An agreement on the privileges and immunities of the Court; A budget for the first financial year; The rules of procedure of the Assembly of States Parties. *Id.* para. 5(c)-(h).

120. Preparatory Commission for the International Criminal Court, "Report of the Preparatory Commission for the International Criminal Court," U.N. Doc. PCNICC/2000/1, Nov. 2, 2000, at 3.

121. *Id. See also* Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court*, 94 AM. J. INT'L L. 773 (2000).

122. Preparatory Commission of the International Criminal Court, "Proceedings of the Preparatory Commission at its sixth session (Nov. 27-Dec. 8, 2000)," para. 9, U.N. Doc. PCNICC/2000/L.4/Rev.1, Dec. 14, 2000 [hereinafter Sixth Session Proceedings]. The Commission came up with the following draft documents: A draft relationship agreement between the Court and the United Nations (*see*

(26 February – 9 March 2001) considered, in addition to those items taken up in the sixth session, the Rules of Procedure of the Assembly of States Parties.[123] The work plan of the eighth session (24 September – 5 October 2001) augmented the work of the previous two sessions in considering two additional items: the basic principles of the headquarters agreement to be negotiated between the Court and the host country, and the Court's first-year budget.[124] Moreover, a Bureau-prepared road map was introduced; the purpose of which is "to identify the issues that remained to be addressed by the Preparatory Commission in order to facilitate the speedy and effective establishment of the Court."[125]

On 12 December 2001, the U.N. General Assembly requested the Secretary-General to reconvene the Commission "from 8 to 19 April and from 1 to 12 July 2002."[126]

5. Status of the Statute

To date, out of the 139 State Signatories to the Rome Statute, 55 are deemed States Parties by virtue of their ratification or accession.[127] Pursuant

U.N. Doc. PCNICC/L.4/Rev.1/Add.1.); Draft of financial regulations and rules (*see* U.N. Doc. PCNICC/L.4/Rev.1/Add.2.); Draft agreement on the privileges and immunities of the Court (*see* U.N. Doc. PCNICC/L.4/Rev.1/Add.3.); and Consolidated text of proposals on the crime of aggression (*see* Sixth Session Proceedings, *supra*, Annex V, at 13-20).

123. Preparatory Commission of the International Criminal Court, "Proceedings of the Preparatory Commission at its seventh session (Feb. 26-Mar. 9, 2001)," para. 9, U.N. Doc. PCNICC/2001/L.1/Rev.1, Mar. 9, 2001.

124. Preparatory Commission of the International Criminal Court, "Proceedings of the Preparatory Commission at its eighth session (24 September – 5 October 2001)," para. 10, U.N. Doc. PCNICC/2001/L.3/Rev.1, Oct. 11, 2001 [hereinafter Eighth Session Proceedings].

125. *Id.*, para. 16. This road map "outlines the documents and activities, including their sequence, needed for the smooth operation of the Assembly of States Parties and for the most efficient establishment of the Court, including its essential provisional internal rules." Preparatory Commission of the International Criminal Court, "Road map leading to the early establishment of the International Criminal Court," para. 2, U.N. Doc. PCNICC/2001/L.2, Sept. 26, 2001, *revised by* U.N. Doc. PCNICC/2001/L.2/Corr.1, Oct. 4, 2001. While in no may purporting "to set out a specific timetable for the completion of these tasks," the hope is that "this outline and the use of established mechanisms of the Preparatory Commission would enable it to complete the necessary tasks in a way that allows the Court to become functional as early as possible." *Id.*

126. G.A. Res. 56/85, U.N. GAOR, 56th Sess., Agenda Item 164, at para. 4, U.N. Doc. A/RES/56/85 (2001).

to Article 126(1), providing that the "Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations," the world eagerly awaits the next five States Parties.

C. *The Philippines Takes The ICC Seriously*

Consistent with its cooperative stance on the issue of creating a permanent international criminal court, the Philippines takes the establishment of the ICC as envisioned in the Rome Statute seriously. This attitude becomes apparent through the preparation that the Philippine government had undertaken for the Rome Conference, the participation of the Philippine delegation during the Conference, and the reception of the adopted Statute.

1. Preparing for Rome

When the renewed talk about an international criminal court reached its crescendo as the PrepCom was streamlining the Draft Statute and with the Rome Conference less than four months away, then Philippine President Fidel V. Ramos issued Administrative Order No. 387 on 24 March 1998, creating the ICC Task Force.[128] The Task Force is composed of duly-designated representatives of the following agencies and/or institutions: Department of Foreign Affairs (Chairman), Department of Justice (Co-Chairmen), Office of the Solicitor General, Office of the Executive Secretary/Office of the Chief Presidential Legal Counsel, Department of

127. The States Parties, enumerated chronologically according to the date of ratification or accession: Senegal, Trinidad and Tobago, San Marino, Italy, Fiji, Ghana, Norway, Belize, Tajikistan, Iceland, Venezuela, France, Belgium, Canada, Mali, Lesotho, New Zealand, Botswana, Luxembourg, Sierra Leone, Gabon, Spain, South Africa, Marshall Islands, Germany, Austria, Finland, Argentina, Dominica, Andorra, Paraguay, Croatia, Costa Rica, Antigua & Barbuda, Denmark, Sweden, Netherlands, Yugoslavia, Nigeria, Liechtenstein, Central African Republic, United Kingdom, Switzerland, Peru, Nauru, Poland, Hungary, Slovenia, Benin, Estonia, Portugal, Ecuador, Mauritius, Former Yugoslav Republic of Macedonia, and Cyprus. *See* <http://www.igc.org/icc/rome/html/ratify.html> (last modified Mar. 7, 2002) (unofficial list) (listing the 139 Signatory States, arranged alphabetically with the date of signing indicated); <http://www.icrc.org/eng/party_icc>. The official list is available in <http://untreaty.un.org/>.

128. Administrative Order No. 387, § 1 (1998).

Interior and Local Government and the University of the Philippines College of Law.[129] Its duties and functions include the following:

1. Undertake studies and researches pertaining to the proposed establishment of the International Criminal Court;
2. Formulate policy recommendations to serve as inputs in the review and consolidation of the Philippine Government's position in the Preparatory Committee meetings of the ICC and the United Nations General Assembly;
3. Identify and recommend legislative measures necessary in the furtherance of the foregoing;
4. Serve as a forum for the resolution of issues and concerns pertaining to the establishment of the ICC;
5. Pursue other related functions which may be deemed necessary by the President.[130]

2. The Philippine Position in Rome

A day after the Rome Conference commenced, Foreign Affairs Undersecretary Lauro L. Baja, Jr. delivered the Philippine statement before the plenary assembly. Baja began with the Philippines' wish of seeing the ICC's establishment "as the most effective means of achieving" that elusive "holy grail of most judicial systems," i.e., "the efficient and effective dispensation of justice;" then, he outlined the country's position thus:

> But, Mr. President, we do not believe that the ICC should be established only for the sake of being established. If it is to be set-up on a basis which renders it ineffective in addressing the problem of impunity of the perpetrators of the atrocious violations of the laws of humanity, then perhaps the world would be better off without it. For such a flawed institution will not serve justice and consequently cannot help maintain international peace and security.
>
> Accordingly[,] and to uphold the current evolution of international law particularly but not limited to human rights and humanitarian law, the Philippines[,] consistent with its constitutional and legal traditions, supports the following positions:
>
> 1. *National judicial systems should have primacy in trying crimes and punishing the guilty.* The ICC should *complement* national judicial systems and come into

129. *Id.* § 2. Presently, the members are: Undersecretary Franklin M. Ebdalin (DFA), Undersecretary Manuel A. J. Teehankee (DOJ), Undersecretary Anselmo S. Avenido, Jr. (DILG), Assistant Solicitor General Nestor J. Ballacillo, and Dean Raul C. Pangalangan (UP College of Law).

130. *Id.* § 5.

primacy *only when national institutions are non-existent, cannot function or are otherwise unavailable.*

2. The International Criminal Court should have *jurisdiction* over the *"core crimes"* of *genocide, war crimes, crimes against humanity*, and *aggression*. But in addition, there must be a provision allowing for the future inclusion in this jurisdiction of other crimes that affect the very fabric of the international system and the existence of human beings.

3. The Prosecutor should be independent who, while balanced by the supervisory Pre-Trial Chamber as a safeguard against political bias and overzealousness, can motu proprio investigate complaints pertaining to the commission of the "core crimes" under the court's jurisdiction.

4. The use of weapons of mass destruction, including nuclear weapons, must be considered a war crime.

5. The specification of *war crimes* and *crimes against humanity* should include *special consideration* for *the interests of minors* and for *gender sensitivity*.

a) The Statute should provide for an age below which there is exemption from criminal responsibility, we believe children nine years and below should be exempt from criminal responsibility; those between the ages of 9 and 18 should be entitled to a presumption of an absence of discernment[;]

b) Recruitment into armed forces should start from 18 years; minors, or those below 18 years of age, should not be allowed to participate in armed conflict;

c) Sexual abuse of women committed as an act of war or in a way that constitutes a crime against humanity should be deemed particularly reprehensible[;]

d) The crime of rape should be gender neutral and classified as a crime against persons and not just against chastity[.]

6. *A schedule of penalties should be prescribed for each core crime defined in the statute, following the principle that there is no crime if there is no penalty.* This would also meet the due process requirement that an accused individual should be fully appraised of the accusation against him or her as well as of the penalty or penalties attaching to the alleged crime.

∴

Finally, *we accept the reality that for the ICC to be established, well-guarded notions of sovereignty may have to be adjusted.* The establishment of the ICC *would require some rather far[-]reaching changes in our national laws. We are prepared to make those changes, realizing that we are in a defining moment in the establishment of an effective criminal court.*[131]

131. Lauro L. Baja, Jr., Towards an Effective International Criminal Court, Address at the United Nations Diplomatic Conference of Plenipotentiaries for the Establishment of an International Criminal Court (Jun. 16, 1998), in <http://www.un.org/icc/speeches/speeches.htm> [hereinafter Baja] (emphasis supplied). The author transformed the text from uppercase font to regular size font.

In terms of actual workload, the Philippines was a member of the Drafting Committee.[132] In the course of the discussion on the core crimes, the Philippines "strongly advocated the inclusion of such crimes as drug trafficking, terrorism, and crimes committed against UN personnel," and "pushed for the inclusion of aggression" submitting that "aggression exists as a crime under customary international law which must necessarily be addressed because it is in fact the root cause for the commission of other serious crimes, as it clearly triggers wars and conflicts."[133]

On the day of reckoning, the Philippines cast its lot with 119 other States, voting to adopt the Rome Statute. Afterwards, in explaining its vote, the Philippines made this terse statement: "The Statute contains the vital elements for establishing the International Criminal Court, including the fact that the Prosecutor will have *motu proprio* powers. For the victims, it has provisions for restitution, compensation and rehabilitation. The Philippines has voted in favour of the Statute."[134]

3. Reception Back Home

Armed with an adopted Statute, the ICC Task Force pursued its mandate to "serve as a forum for the resolution of issues and concerns pertaining to the establishment of the ICC." Four "voices" stand out in the forum: the initial dissenting PNP/AFP voice, the last-minute signing of the Statute, the pro-ratification consensus of the Round Table Discussion, and the Experts' Conference.

a. Erstwhile Dissent

The strongest opposition came from the ranks of the Philippine National Police (PNP). The PNP's reservation in endorsing the ratification of the Rome Statute was based on six grounds, *viz.*: first, the Statute "will create substantial amendment to our criminal procedure and rules on evidence

132. Final Act, *supra* note 91, at 4. Raul C. Pangalangan sat as Philippine representative in the committee. Pangalangan Interview, *supra* note 101. *But see* Bassiouni, *Negotiating the Treaty*, *supra* note 79, at 451& n.32 (mentioning instead Antonio Morales and Jose Tomas Syquia).

133. Franklin M. Ebdalin, *The International Criminal Court: An Overview*, 46 ATENEO L.J. 318, 327, 329 (2001) [hereinafter Ebdalin].

134. Press Release, Rome Conference, UN Diplomatic Conference concludes in Rome with decision to establish permanent International Criminal Court (Jul. 18, 1998) (*available in* http://www.un.org/icc/pressrel/pressrel.htm) [hereinafter Press Release L/ROM/22].

resulting in adopting separate rules on certain crimes and suspects;" second, the Statute "will be a derogation of our sovereign authority to suppress criminality within our territorial jurisdiction by allowing another entity to interfere with what is supposedly an internal affair"; third, the Statute "will give lawless elements an opportunity or leverage against law enforcers by filing [a] complaint against them to the ICC"; fourth, ratification of the Statute "will be an admission through adhesion (to the Statute) that our criminal justice system is ineffective"; fifth, the Statute "will disregard immunity from suit enjoyed by government official under our Constitution," specifically article VI, section 11; finally, the Statute "will hold criminally liable military and other persons due to command responsibility."[135] The conclusion reached was that the PNP "hold[s] in abeyance the ratification of the International Criminal Court Statute."[136]

This strong reservation by the PNP, shared by the Armed Forces of the Philippines, effectively stayed the Chief Executive's hands from signing the Statute, and withstood the strong NGO lobby pushing for signature and ratification. It thus came as a complete surprise to both pro- and anti-ICC ratification forces, when then President Joseph "Erap" Ejercito Estrada authorized the signing of the Rome Statute on 28 December 2000, barely three days before the New Year's Eve deadline.

b. Erap's Eleventh Hour Imprimatur

The story behind the Philippine signing of the Statute exemplifies "Erap statesmanship." The Philippine Coalition for the Establishment of the ICC (Coalition) was the driving force behind the clamor for Philippine signing of the Statute. For at least one year since the adoption of the Rome Statute, the Coalition had been meeting with various government officials concerned. Such meetings proved futile, at best. As late as 20 December 2000, the Coalition was in the heat of last-minute advocacy to persuade the Estrada Administration to sign the Statute. Then Executive-Secretary Ronaldo Zamora expressed interest in the Statute and had actually submitted the treaty to the President. Nothing came out of Zamora's intercession, presumably due to the onus of the President's workload, compounded by the heat emanating from the impeachment trial. Christmas Eve saw the Coalition's National Council assigning Neri Javier Colmenares to follow up

135. Position Paper, Philippine National Police, PNP Position on the Statute of the International Criminal Court 1, 4-6 (unpublished position paper, on file with the ICC Task Force and the author). As regards the first objection, the pertinent provisions of the Revised Rules of Court and the 1987 Philippine Constitution on the following matters will be affected: prosecution of offenses, preliminary investigation, warrant of arrest, temporary grant of liberty in lieu of bail, appeal procedure, and inadmissibility of video- or audio-recorded testimony.

136. *Id.* at 6.

things with Malacañang, since he would be staying in Metro Manila for the holidays.

When 27 December 2000 came, Colmenares was resigned that the deadline would lapse sans the Philippines signature. Hope unexpectedly sprung at the instance of a friend's assurance that he would bring the matter to then Department of Agrarian Reform Secretary Horacio "Boy" Morales during lunch that same day. By 2:00 P.M., Colmenares got word from the said friend that Morales requested for a concise memorandum describing the Statute and arguing for the expediency of a Philippine signing. Given a new lease in life, Colmenares finished the memo two hours later, submitting the same, with a copy of the Statute appended, to Morales' representative by 5:00 P.M., who, in turn, informed him that Morales will meet with the President late that evening. Later, Colmenares received a call from Malacañang asking for the whereabouts of the treaty. After a series of phone calls, Colmenares successfully relayed to Morales' secretary the document bar code of the Statute. At the break of dawn the next day, Colmenares received word from the Department of Foreign Affairs that the country had signed the Statute earlier that day.[137]

c. The October 5 Round Table Discussion

With presidential imprimatur affixed, the next phase in treaty-ratification Philippine-style involves winning over two-thirds of the Senate membership. To this end, the ICC Task Force co-sponsored with the Center for Restorative Justice in Asia ("CRJA") an Experts' Conference on the International Criminal Court held in Manila last 16 to 18 October 2001 ("Experts' Conference").

Barely a fortnight before the Conference, on 5 October 2001, a round table discussion ("October 5 Round Table Discussion") on the ICC was held at the University of the Philippines. In attendance were senior officials of the Department of Foreign Affairs, Department of Justice, Department of Interior and Local Government, Commission on Human Rights, University of the Philippines and Office of the Solicitor General. Convened in view of the upcoming Experts' Conference, the discussion saw the participants reaching a general consensus that the Philippines should ratify the Rome Statute, with full awareness "of the complex and difficult constitutional and legal concerns that have to be resolved in [Philippine] jurisdiction."[138]

137. E-mail letter from Atty. Neri Javier Colmenares (copy on file with author).

138. Nestor J. Ballacillo, Challenges of International Criminal Court Ratification and Implementation in Southeast Asia and the Pacific States: The Philippines, (Oct. 2, 2001) (unpublished paper, on file with author) [hereinafter Ballacillo, Challenges]. Ballacillo is currently Assistant Solicitor General; Member,

During the Conference, Assistant Solicitor General Nestor J. Ballacillo discussed four of these concerns, *viz.*, complementarity, enactment of internal laws, unavailability of immunity, and international cooperation and assistance.

First, under the principle of complementarity, the concern centered on the role of the Court as arbiter of a State's inability or unwillingness to prosecute and the need for making the Rome Statute the law of the land. Ballacillo expounds on this twin concerns, thus:

> Most of the acts punished in the Rome Statute are also punished in our penal statute. Our national police and law enforcement agencies investigate crimes and refer their findings to the local prosecutor for filing of the charges with the appropriate court against those who are probably guilty of committing the crime. As long as this process is being followed genuinely and willingly, under the principle of complementarity, the prosecutor under the Rome Statute [cannot] exercise its *proprio motu* powers. Necessarily, the Court [cannot] exercise its jurisdiction. The concern expressed here is that if the prosecutor exercises his authority despite the insistence of the Philippines to exercise its jurisdiction over the case, who will make the final determination as to whether the State is genuinely and unwilling to carry out the investigation and prosecution of the case.
>
> *The principle of complementarity envisions that in order that the Philippine court may assume jurisdiction over offenses enumerated in the Rome Statute, the ratification would imply incorporation of the Rome Statute as a law of the Philippines. If it [cannot] be so construed, then Congress is expected to enact specific [pieces of] legislation[] to penalize the crimes within the jurisdiction of the International Criminal Court and to vest jurisdiction in our national courts.*[139]

The second concern is closely related to the latter, *i.e.*, the need for enactment of internal laws:

> The question is: Will the ratification of the treaty result in the repeal of domestic laws inconsistent with the provisions of the Rome Statute? The answer is a treaty cannot override an existing law (Gonzales vs. Hechanova, 9 SCRA 230). Since many laws may conflict with certain provisions of the Rome Statute, there is a need to enact laws to make them conform to the provisions of the Rome Statute. There is a specific need to enact laws to place the crimes listed in the Rome Statute within the jurisdiction of the Philippine courts.[140]

Third, there are concerns about Articles 27 (irrelevance of official capacity) and 28 (responsibility of commanders and other superiors), that is:

Philippine Delegation to the Rome Conference; Participant, Oct. 5 Round Table Discussion.

139. *Id.* at 2-3 (emphasis supplied).

140. *Id.* at 3-4.

> While not expressly provided in our present Constitution, the President of the Philippines is immune from all suits. The irrelevance of official capacity and the responsibility of military commanders and other superiors for acts committed under their effective command and control have evoked some concerns by those in the political branches of our Government and in the Philippine military and police establishments. In the local round table conference as well as in other fora, the question was asked: In the remote event that a military commander or superior is haled to the International Criminal Court, will the Philippines provide for his legal defense? The question is far from being theoretical or academic in view of the internal or non-international conflicts that exist in the Philippines.[141]

Finally, concerns were raised on the assumption of the general obligation to cooperate under Articles 86 and 88, which takes the form of the arrest and surrender of a person to the ICC and the preservation and taking of evidence. Focusing on the former, Ballacillo observes:

> At present, the Philippines has several bilateral extradition treaties. In these treaties certain procedures in our jurisdiction must be observed before a person may be extradited. To fulfill its obligations under the Rome Statute, Congress should also enact a law providing for the surrender of a person to the International Criminal Court. When provisions of the Constitution were invoked, the implementation of the extradition treaties proved to be somewhat cumbersome and tended to delay the extradition of a person. The same may happen in the implementation of a law providing for the surrender of a person to the International Criminal Court, if the person who is sought to be surrendered to the International Criminal Court insists on the guarantees under the Philippine Constitution.[142]

141. *Id.* at 5. *See* Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT'L L. 5, 26-32 (2001) [hereinafter Duffy], discussing the issue of immunity as a cogent starting point for considering and resolving this specific issue. Duffy identifies the following recurring constitutional issues:

> The first issue is the compatibility of a state's constitutional prohibition on the extradition of its nationals with the absolute obligation on state parties to the Rome Statute to arrest and surrender suspects to the Court. The second relates to the consistency of constitutional immunities, such as those conferred on heads of states or parliamentarians, with the duty imposed on state parties to arrest and surrender suspects, irrespective of their official status. The third issue concerns the compatibility of constitutional prohibitions on life imprisonment with the Statute's provisions on penalties, which allow the ICC to impose a life sentence in exceptional circumstances.

Id. at 6.

142. *Id.* at 7. *But see* Duffy, *supra* note 141, at 20-26 (arguing vis-à-vis the specific issue of extradition of nationals, *inter alia*, a substantive distinction between "extradition" to another state, *i.e.*, horizontal cooperation, and "surrender" to

d. The Experts' Conference

The Experts' Conference was a CRJA brainchild that the ICC Task Force adopted.[143] Accordingly, on 20 March 2001, the Task Force "reconstitute[d] itself as the National Organizing Committee (NOC) for the purpose of organizing an Expert's [sic] Conference on the International Criminal Court."[144]

The Conference "aims to provide a uniform level of familiarity and knowledge of the ICC among senior government officials in Southeast Asia and a number of Pacific States."[145] The assumption is that the "groundswell of support for the immediate establishment of the [Court]" depends on a "thorough understanding of the [S]tatute," particularly, *inter alia*, "its implications on various constitutions and judicial systems in the domestic level."[146] The experts invited were select legal luminaries in International Law.[147] And the topics discussed were designed to provide a general overview of the ICC and the current status of the Rome Statute in the international community.[148]

an international criminal court, *i.e.*, vertical cooperation; a distinction reflected in the practice of the ICTY and ICTR).

143. Cristina Gates & Ma. Cristina P. Rilloraza, Experts' Conference on the International Criminal Court, Manila, 2001 (Oct. 16-18, 2001) (unpublished brochure, on file with author) [hereinafter Experts' Conference Brochure]; Email letter from Cristina Gates, Secretary General, Center for Restorative Justice in Asia (Aug. 28, 2001) (on file with author).

144. Inter-Agency Task Force on the Establishment of the International Criminal Court, Resolution No. 1, s. 2001, (Mar. 20, 2001). Members of the NOC: Office of the President, Supreme Court, Department of Foreign Affairs, Department of Justice, Office of the Solicitor General, Department of Interior and Local Government, Department of National Defense, Department of Tourism, Commission on Human Rights, University of the Philippines College of Law, and the CRJA. Experts' Conference Brochure, *supra* note 143.

145. Experts' Conference Brochure, *supra* note 143.

146. *Id.*

147. The Experts: Theo van Boven; Emma Bonino; Gianfranco Dell'Alba; Adrian Bos; Jürg Lindenmann; Claus Kress; William Schabas; Isabelle Küntziger; Lionel Yee Woon; Gilbert Bitti; Robert Burley; and, Raul Pangalangan.

148. The topics: International Criminal Court: An End to Impunity; Highlights of the Rome Convention; The International Criminal Court and International Humanitarian Law; Principle of Complementarity between National and Universal Jurisdiction and the Role of the Prosecutor; Crimes Within the Competence of the Court; Crimes Within the Competence of the Court; Issues Relating to Accession and Ratification to the ICC; The ICC and State Parties: Cooperation with the Court and Enforcement of Sentences and Registration Order; States Obligations Regarding the Implementation of the ICC;

III. The ROME Statute: Spine, Sinews, Soul

From a Draft Statute comprised of a preamble and thirteen parts with 116 articles,[149] the adopted Rome Statute emerged from the Rome Conference structurally intact, save for the addition of twelve articles.[150] In establishing what is touted to be "the last great international institution of the Twentieth Century,"[151] the Statute is deemed a "special treaty"[152] since it "articulat[ed] substantive norms of international criminal law" and "is also the constituent document of a new international organization."[153]

Mahnoush Arsanjani, Committee of the Whole Secretary at the Rome Conference, identifies these three principles undergirding the Rome Statute: first, the principle of complementarity; second, the Statute is envisioned to exclusively deal with the most serious crimes of concern to the international

Ratification and Implementation of the ICC: Experiences of France, New Zealand, Canada and Switzerland; Challenges Regarding Ratification and Implementation in Southeast Asia and Pacific States; General Principles of Criminal Law and Sentencing; The Rights and Interests of the Victims in the ICC. Experts' Conference Brochure, *supra* note 143.

149. Draft Statute, *supra* note 86.

150. Due to certain technical and typographical errors in the adopted text, the U.N. Secretary-General sent out to the various governments four separate *procés-verbaux*, respectively effected on 10 November 1998, 12 July 1999, 30 November 1999 and 8 May 2000, containing corrections of the Statute — the first two corrected the English, French, Spanish, Russian, Chinese and Arabic versions; the last two corrected the French and Spanish versions only. *See* http://www.un.org/law/icc/statute/romefra.htm (last modified Feb. 21, 2001); Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 24 n.8 (1999) [hereinafter Arsanjani].

151. Sadat & Carden, *supra* note 114, at 385.

152. Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT'L L. 445, 448 (2000) [hereinafter Danilenko].

153. Sadat & Carden, *supra* note 114, at 389 n.33. Sadat & Carden submit that the delegates in the Rome Conference may be appropriately referred to as "framers" rather than mere "drafters":

> The term "framers" is used in a non-technical sense, but with full cognizance of its constitutional connotations. We originally employed the term "drafters," but rejected that as technically incorrect, for the actual drafters of the Statute were the 25 members of the Drafting Committee who were charged with the elaboration of the text but were not given discretion as to matters of substance.

Id. They further suggest that the Rome Conference in fact "functioned as a legislature of sorts in establishing an international criminal code within the contours of the Rome Treaty," despite that classic objection to establishing the Court, *i.e.*, "the absence of an international sovereign power"; thus, arguing that the Conference was a "quasi-legislative process." *Id.* at 389-91; *see Id.* at 390 n.35, second paragraph.

community as a whole; third, the Statute should, as far as possible, "remain within the realm of customary international law."[154]

Taking its cue from the first two aforesaid underlying principles, this chapter maps out the Statute's substantive criminal law contours by viewing the treaty from an anthropomorphic angle. Thus, the chapter first sketches the Statute's spine or backbone, outlining in broad strokes the jurisdiction of the ICC. It specifies how the Statute vests criminal or penal jurisdiction on the Court — delineating the scope of such jurisdiction and the trigger mechanisms thereof — and delimits its exercise through the provisions on *ne bis in idem*, the applicable law and the principles of legality and prospectivity. The next section surveys the Statute's sinews by enunciating how the Statute criminalizes the core crimes. Finally, the chapter concludes by scanning the Statute's soul or spirit that would vivify the ICC's *modus procedendi et operandi*: the principle of complementarity.

A. *The Statute's Spine*

1. Vesting the ICC's Jurisdiction

a. Criminal Jurisdiction in International Law

Jurisdiction generally refers to "powers exercised by a state over persons, property, or events."[155] These powers may be classified into three axes or categories: first, *legislative or prescriptive jurisdiction*, i.e., "powers to legislate in respect of the persons, property, or events in question"; second, *judicial or adjudicative jurisdiction*, i.e., "the powers of a state's courts to hear cases

154. Arsanjani, *supra* note 150, at 24-25. *See infra* Chapter 3 for a discussion on the third principle.

155. PETER MALANCZUK & MICHAEL BARTON AKEHURST, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 109 (7th rev. ed. 1997) [hereinafter AKEHURST'S]. *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298 (4th ed. 1990) [hereinafter BROWNLIE] (defining jurisdiction as referring "to particular aspects of the general legal competence of states often referred to as 'sovereignty'"; it is "an aspect of sovereignty and refers to judicial, legislative and administrative competence") (citation omitted); Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 71 (2001) [hereinafter Scharf] (describing jurisdiction as "the legitimate assertion of authority to affect legal interests"); Zephyr Rain Teachout, *Defining and Punishing Abroad: Constitutional Limitation on the Extraterritorial Reach of the Offense Clause*, 48 DUKE L.J. 1305, 1310 (1999) [hereinafter Teachout] (referring to it as "the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court") (*citing* Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 241 (1923)).

concerning the persons, property, or events in question"; third, *enforcement jurisdiction*, i.e., "powers of physical interference exercised by the executive, such as the arrest of persons, seizure of property and so on."[156]

When transposed in the field of criminal law, *jurisdiction* may mean a State's "competence under international law to prosecute and punish for crime."[157] International law recognizes "five general principles on which a more or less extensive penal jurisdiction is claimed by States," *viz.*: territorial (or territoriality), nationality, passive personality, protective, and universality.[158]

156. *Id. See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) (enumerating three categories or axes of jurisdiction: jurisdiction to prescribe, jurisdiction to adjudicate and jurisdiction to enforce) (*cited in* Sadat & Carden, *supra* note 122, at 406 n.144); Scharf, *supra* note 114, at 71 (citation omitted) (describing the three categories thus: prescriptive jurisdiction is the "authority to make law applicable to certain persons, territories, or situations; adjudicative jurisdiction is the "authority to subject certain persons, territory or situations to judicial process; and, enforcement jurisdiction is the "authority to compel compliance and to redress noncompliance").

Sadat & Carden opines that the Statute's unorthodox treatment of these jurisdictional axes accentuates both its constitutive nature and revolutionary contribution to international law:

> One intriguing aspect of the Rome Treaty which underscores its nature as a constitutive document is that it combines jurisdiction to prescribe, to adjudicate, and to enforce all in one instrument. And it is perhaps the implementation and implications of the jurisdictional theories of the Statute that are its most revolutionary features. For, through a rather extraordinary process, these three jurisdictional categories classically known to international law have been transformed from norms providing "*which State* can exercise authority over whom, and in what circumstances," to norms that establish under what conditions *the international community*, or more precisely the State Parties to the Treaty, may prescribe international rules of conduct, may adjudicate breaches of those rules, and may enforce those adjudications.

Sadat & Carden, *supra* note 114, at 406 (citation omitted).

157. Draft Convention on Jurisdiction With Respect to Crime, art. 1(b), *in* Research in International Law of the Harvard Law School, *Jurisdiction With Respect to Crime: Draft Convention, with Comment*, 29 AM. J. INT'L L. 439 (Supp. 1935) [hereinafter Harvard Draft Convention]. A *crime* "is an act or omission which is made an offense by the law of the State assuming jurisdiction." *Id.* art. 1(c).

158. Harvard Draft Convention, *supra* note 157, at 445. This draft convention first outlined the principles. Teachout, *supra* note 155, at 1310 n.25. *See also* L. Rao Penna, *The International Criminal Court*, 1 SINGAPORE J. INT'L & COMP. L. 227, 228 (1997) [hereinafter Rao Penna] ("five criteria for assuming criminal jurisdiction"); Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L

The *territorial principle* determines "jurisdiction by reference to the place where the offence is committed."[159] This principle is universally recognized and extends "over internal waters, territorial sea and the superjacent airspace," and "over crimes committed on board ships, aircrafts and spacecraft."[160] Pursuant to the *nationality* or *active personality principle*, which is likewise widely accepted, jurisdiction is determined "by reference to the nationality or national character of the persons *committing* the offence."[161] By virtue of this principle, "the State is enabled to prosecute its national while they are abroad and to execute judgments against them upon property within the State or upon them personally when they return, or the State may prosecute its nationals after they return for acts done abroad."[162] On the other hand, the *passive personality principle* determines jurisdiction "by reference to the nationality or national character of the person *injured* by the offense."[163] The *protective principle* determines jurisdiction "by reference to the national interest injured by the offence."[164] It is based on "the nature of interest injured rather than the place of the act or the nationality of the

L. 383, 391 (1998) [hereinafter Brown] ("principles according to which a state may gain jurisdiction to prosecute criminal acts"). Other principles recognized by some scholars include:

the 'flag principle' (allowing jurisdiction on ships and airplanes registered in the country); the 'representation principle' (allowing one country to stand in for another in the prosecution of a crime when the act is illegal in both places); and the 'principle of distribution of competence' (allowing the state where the offense occurred to waive prosecution in favor of the offender's state of nationality or domicile).

Teachout, *supra* note 155, at 1310 n.25 (quoting IAIN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION 18 (1994)).

159. *Id.*

160. Rao Penna, *supra* note 158, at 228-29 (citation omitted). *See also* Harvard Draft Convention, *supra* note 157, at 480 (asserting that it "is universally recognized that States are competent, in general, to punish all crimes committed with their territory").

161. Harvard Draft Convention, *supra* note 157, at 445 (emphasis supplied); Zsuzsanna Deen-Racsmány, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95 AM. J. INT'L L. 606, 609 (2001) [hereinafter Deen-Racsmány] (writing "[n]ationality gains relevance in international criminal law through the active personality or nationality principle").

162. Harvard Draft Convention, *supra* note 157, at 519. *See also* Brown, *supra* note 158, at 391; Rao Penna, *supra* note 158, at 229-30.

163. *Id.* at 445 (emphasis supplied). *See also* Rao Penna, *supra* note 158, at 230 ("a state may exercise jurisdiction over an alien for an act committed outside its territory where such an act is directly injurious to that state, its nationals, or has a deleterious effect within its territory").

164. *Id.*

offender" and is expressed in the conception that "States are competent to legislate for the protection of their security and credit against injurious acts even though such acts are committed by aliens upon foreign territory."[165] Finally, the *universality principle* or *universal jurisdiction* was initially attached to the crime of piracy.[166] Today, universal jurisdiction is defined as "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[167] The crimes contemplated are those deemed to be "serious crimes under international law," *viz.*: "(1) piracy; (2) slavery; (3) *war crimes*; (4) crimes against peace; (5) *crimes against humanity*; (6) *genocide*; and (7) torture."[168]

b. Triggering the ICC's Jurisdiction

Inquiring into how the ICC would eventually exercise its jurisdiction reveals an ensemble of criminal jurisdiction principles to which the Statute adheres. Article 13 enumerates the trigger mechanisms of the Court's jurisdiction, thus:

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
>
> (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
>
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
>
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

165. *Id.* at 543. *See also* Brown, *supra* note 158, at 391 (The principle "grants states jurisdiction over aliens for acts committed abroad but that present a threat to the security of the state"); Rao Penna, *supra* note 158, at 230 (It is in effect a "long arm theory" that allows a state to overreach its territorial boundaries "to safeguard its interests from harmful acts engaged abroad").

166. Draft Convention on Jurisdiction With Respect to Crime, art. 3, *in* Harvard Draft Convention, *supra* note 157, at 439-42.

167. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, principle 1(1), 28 (2001). *See also* Scharf, *supra* note 155, at 76 (citation omitted); Brown, *supra* note 158, at 391; Rao Penna, *supra* note 158, at 231.

168. *Id.* principle 2(1), at 29 (emphasis supplied).

True universal jurisdiction is granted the ICC only when the U.N. Security Council refers a situation to the Prosecutor, under Article 13(b).[169] In such a case, the ICC "will have jurisdiction regarding the crimes concerned even if committed in non-state parties by nationals of non-state parties and in the absence of consent by the territorial state or the state of nationality of the accused."[170]

When a case is initiated by a State Party or the Prosecutor *motu proprio*, the principles of territoriality and nationality (or active personality) come into play. In setting out the preconditions for the Court's exercise of jurisdiction, Article 12 provides that:

> 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
>
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.
>
> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

This provision therefore requires a nexus between the alleged crime and the State where the crime was committed or the State of the accused person's nationality; provided that at least one of these states is a State Party.[171]

169. Danilenko, *supra* note 152, at 456.

170. Arsanjani, *supra* note 150, at 26.

171. Danilenko, *supra* note 152, at 456. Negotiating Article 12 underwent a series of proposals and counter-proposals, from Germany, the U.K., India, the U.S. and Korea; but, the adopted version does not reflect *in toto* the proposal of any delegation. *See* Danilenko, *supra* note 152, at 455-56 & n.34; van der Vyver, *supra* note 114, at 60-64; Scharf, *supra* note 155, at 77 (citing Kirsch & Holmes, *supra* note 89, at 7).

In her analysis of Article 12(2), Deen-Racsmány observes that the Statute's silence as to the meaning of the terms "national" and "state of nationality" is a potential loophole that would be problematic vis-à-vis cases where the perpetrator: (a) is a multiple national; (b) has changed nationality; (c) is a stateless person; or (d) is a refugee. *See* Deen-Racsmány, *supra* note 161, 609-22 (suggesting solutions to each of the problem-scenarios).

c. Scope of the ICC's Jurisdiction

i. Jurisdiction *Ratione Temporis*

According to Article 11(1), "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute." In cases when a specific state becomes a State Party after the Statute had already entered into force, Article 11(2) stipulates that the Court's jurisdiction is limited to crimes committed after the Statute had entered into force with respect to such "latecomer-State"; unless the said hitherto non-State Party had made a declaration accepting the Court's exercise of jurisdiction over the crime in question pursuant to Article 12(3). This prospective application of the Statute forecloses the possibility of the ICTY and ICTR transferring its caseload to the ICC, an option considered in the early negotiation stages of the Statute.[172]

ii. Jurisdiction *Ratione Loci*

The Court's jurisdiction *ratione loci* or *territorium* is not as expressly or categorically stated as its temporal jurisdiction, rather it varies depending on how the Court's jurisdiction over a particular case had been triggered, as provided in Article 13. The ICC's jurisdiction extends to anywhere in the world — even to nationals of non-party States — when the U.N. Security Council, under its Chapter VII powers, refers a situation to the Court. It is restricted, however, when a State Party refers a situation to the court or the Prosecutor *motu proprio* initiates an investigation. In both instances, the Court's jurisdiction may reach the territory of a non-party State only if: (1) the said non-party State consents to or accepts the Court's jurisdiction; and (2) either the act was committed in the territory of or the accused is a national of such consenting State.[173]

172. Sadat & Carden, *supra* note 114, at 404.

173. *Id.* (*citing* Rome Statute, *supra* note 1, arts. 4(2) & 12(2)). In the limited context where the territorial state gives its consent, the Court's jurisdiction "can be deemed to be based concurrently on the universal and territorial bases of jurisdiction." Scharf, *supra* note 155, at 76. *But see* Christine Veloso Lao, *Safeguarding Sovereignty, Righting "Human Wrongs": A Jurisprudential Justification for the Philippine Ratification of the Rome Statute of the International Criminal Court*, 74 PHIL. L.J. 211, 257 (1999) [hereinafter Lao]; Rao Penna, *supra* note 158, at 244 (both asserting that the ICC's jurisdiction *ratione loci* is based on the universality principle, although Lao further mentions the situation of consenting non-party States). *See* van der Vyver, supra note 114, at 64-65 (outlining applicable rules when the Court's variegated jurisdiction *ratione territorium* is juxtaposed against its subject-matter jurisdiction).

iii. Jurisdiction *Ratione Personae*

Article 25(1), in providing that the ICC "shall have jurisdiction over natural persons pursuant to this Statute," excludes juristic persons — whether states or its organs, or non-state organs — from the Court's jurisdictional reach.[174] A core crime perpetrator "shall be individually responsible and liable for punishment in accordance with [the] Statute." (Article 25(2)). Moreover, pursuant to Article 25(3), such perpetrator "shall be criminally responsible and liable for punishment for" a core crime if that person:

> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> >
> > (ii) Be made in the knowledge of the intention of the group to commit the crime;
>
> (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
>
> (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

The provisions on individual criminal responsibility in Article 25 shall in no way affect the "the responsibility of States under international law." (Article 25(4)).

174. Van der Vyver, supra note 114, at 3. van der Vyver, *inter alia*, extensively discusses the various aspects of the ICC's personal jurisdiction. *See also* Sadat & Carden, *supra* note 114, at 404 (citing the rejection of the proposal of including state culpability as "science fiction").

Article 26 explicitly denies the ICC any jurisdiction "over any person who was under the age of 18 at the time of the alleged commission of a crime."

iv. Jurisdiction *Ratione Materiae*

Article 5(1) enunciates the Court's subject matter jurisdiction, being limited to the most serious crimes of concern to the international community as a whole, namely: (a) The crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) The crime of aggression.

These categories are christened as the "four core crimes."[175] Articles 6, 7 and 8 respectively define the first three core crimes, *viz.*: genocide, crimes against humanity and war crimes. Article 5(2) circumscribes the Court's exercise of jurisdiction over the fourth core crime, thus:

> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 [Amendments] and 123 [Review of the Statute] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.[176]

Furthermore, with regard to war crimes under Article 8, Article 124 provides thus:

> Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Pursuant to Article 9(1), "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8"; such Elements "shall

175. Arsanjani, *supra* note 150, at 30 (quoting U.N. Doc. A/CONF.183/2/Add.1, Art. 5, 11 (1998)). Arsanjani traces the provenance of the term thus: "The draft list that was forwarded to the Rome Conference by the Preparatory Committee listed '(a) the crime of genocide; (b) the crime of aggression; (c) war crimes; (d) crimes against humanity; and (e) [other crimes].' The first four crimes were known as the 'four core crimes.'"

176. *See* Eighth Session Proceedings, *supra* note 124, Annex III (containing the proposals for the definition of the crime of agression); Linda Jan Springrose, *Agression as a Core Crime in the Rome Statute Establishing an International Criminal Court*, 1999 ST. LOUIS-WARSAW TRANSNAT'L L. J. 151-75.

be adopted by a two-thirds majority of the members of the Assembly of States Parties."[177]

2. Delimiting the ICC's Jurisdictional Reach

a. Principle of *Ne bis in idem*

The Court's exercise of its jurisdiction is circumscribed by, *inter alia*, the principle of double jeopardy or *ne bis in idem*. Article 20 pertinently provides:

> 1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
>
> 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
>
> 3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
>
> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
>
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

b. Applicable Law

Article 21 enumerates the law that the ICC will apply, to wit:

> 1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

177. Article 112(1): "An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly." Article 112(2) enumerates its powers and functions.

c. Principles of Legality and Prospectivity

The principle of legality adheres to the "tenets of the maxims *nullum crimen sine lege* and *nulla poena sine lege*";[178] whereas the principle of prospectivity proscribes the enactment of ex post facto laws. A vast majority of domestic justice systems acknowledge both principles as inviolable. On the other hand, international law recognizes these principles primarily in Article 11(2) of the Universal Declaration of Human Rights thus:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.[179]

This provision reverberates in Article 15(1) of the International Covenant on Civil and Political Rights, thus:

178. M. Cherif Bassiouni, *"Crimes Against Humanity"*, *supra* note 50, at 468. According to Bassiouni, critics attack the jurisdiction of the IMT and IMTFE over "crimes against humanity" based, inter alia, on the principles of legality [N.B. he lumps the principles of legality and prospectivity together], thus:

> On this basis, critics have concluded that criminal responsibility should not have been extended from "War Crimes," which existed in positive international law, to "Crimes Against Humanity," which did not. By this extension of the law, they argue, the London Charter violated the 'principles of legality' known in Western European national criminal law systems, namely, the prohibition against ex post facto law and the tenets of the maxims *nullum crimen sine lege* and *nulla poena sine lege*.

Albeit rendered in Latin, the provenance of the maxims is traced to Feuerbach. Lorenzo U. Padilla, *Pagsusuri ng Ilang Salik sa Pagtutuos ng Saguting Krimen*, 46 ATENEO L.J. 497, 503 n.16 (2001) [hereinafter Padilla] (citing FEUERBACH, LEHRBUCH DES GEMEINEN IN DUETSCHLAND GUELTIGEN PEINLICHEN RECTHS § 20 (12d ed. 1836)).

179. Universal Declaration of Human Rights, G.A. Res. 217 A (III), Dec. 10, 1948.

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.[180]

Article 22 articulates the Statute's version of the principle of *nullum crimen sine lege*, to wit:

> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
>
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
>
> 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.[181]

On the other hand, Article 23 expresses the principle of *nulla poena sine lege* in this wise: "A person convicted by the Court may be punished only in accordance with this Statute."

180. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Dec. 16, 1966, 999 U.N.T.S 171 (Signed for the Philippines Dec. 19, 1966. Ratified by the Philippines Oct. 23, 1986). Article 15(2) provides: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

The principles of legality is also embodied in these international instruments: the European Convention on Human Rights (article 7 (1)), the American Convention on Human Rights (article 9) and the African Charter on Human and Peoples' Rights (article 7 (2)). International Law Commission, "Report of the International Law Commission on the work of its forty-eighth session," U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996) *available in* <http://www.un.org/law/ilc/reports/1996/96repfra.htm> [hereinafter ILC 48th Session Report].

181. The U.S. proposal to establish the Elements of Crimes "actually aimed to give teeth to the fundamental legal principle of *nullum crimen sine lege*," *i.e.*, the proposal "was designed to (1) be faithful to customary international law, (2) strike an appropriate balance in accommodating concerns expressed by interested states, and (3) interpret general international law norms with the specificity and rigor appropriate for criminal law." William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars of the International Criminal Court*, 32 CORNELL INT'L L.J. 477, 478 n.6 (1999).

Finally, Article 24 articulates the Statute's prohibition against ex post facto law under the heading "Non-retroactivity *ratione personae*," to wit:

> 1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
>
> 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

B. *The Statute's Sinews*

1. Defining the Core Crimes

a. Crime of Genocide

Article 6 defines the crime of genocide and specifies the acts that would constitute genocide, as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, through: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; and (e) Forcibly transferring children of the group to another group.

In the Finalized draft text of the Elements of Crimes, the Preparatory Commission enumerates three common elements shared by the five acts, *viz.*: (1) Such person or persons [i.e., the victim] belonged to a particular national, ethnical, racial or religious group; (2) The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (3) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.[182]

b. Crimes Against Humanity

The Statute defines crimes against humanity in Article 7(1) as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible

182. Preparatory Commission for the International Criminal Court, "Report of the Preparatory Commission for the International Criminal Court," U.N. Doc. PCNICC/2000/1, Nov. 2, 2000, Part II, "Finalized draft text of the Elements of Crimes," U.N. Doc. PCNICC/2000/1/Add.2, at 6-8 [hereinafter Elements of Crimes].

transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; and (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Article 7(2) amplifies the preceding paragraph in defining some of the key terms used therein. *Attack directed against any civilian population* "means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[183] *Extermination* "includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."[184] *Enslavement* is "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."[185] *Deportation* or *forcible transfer of population* "means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."[186] *Torture* is "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."[187] *Forced pregnancy* "means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law," subject to the proviso that this "definition shall not in any way be interpreted as affecting national laws relating to pregnancy."[188] *Persecution* "means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of

183. Article 7(2)(a).

184. Article 7(2)(b).

185. Article 7(2)(c).

186. Article 7(2)(d).

187. Article 7(2)(e).

188. Article 7(2)(f).

the group or collectivity."[189] *Apartheid* is "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[190] Finally, *enforced disappearance of persons* is "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."[191]

Article 7(3) provides that the term *gender* "refers to the two sexes, male and female, within the context of society."

c. War Crimes

Article 8 defines war crimes by first articulating the *chapeau*, in paragraph 1: "The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[192]

Article 8(2) then defines war crimes into four categories,[193] *viz.*: (1) in Article 8(2)(a), "[g]rave breaches of the Geneva Conventions of 12 August 1949"; (2) in Article 8(2)(b), "[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law"; (3) in Article 8(2)(c), "[i]n the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949; and (4) in

189. Article 7(2)(g).

190. Article 7(2)(h).

191. Article 7(2)(i).

192. This chapeau represents compromise language between those States that pushed for an exclusive threshold — *i.e.*, *only* those crimes committed "as part of a plan or policy or as part of a large-scale commission of such crimes" — and those who argued that "only" unnecessarily raises the threshold. Arsanjani, *supra* note 150, at 33. *See also* Sadat & Carden, *supra* note 114, at 434-35.

193. *Id. See also* Soliman R. Santos, Jr., "The ICC Statute and Non-International Armed Conflict: Some Implications for the Philippines" 5 (Oct. 5, 2001) (unpublished manuscript, on file with the author) [hereinafter Santos]. Audrey I. Benison, War Crimes: A Human Rights Approach to a Humanitarian Law Problem at the International Criminal Court, 88 Geo. L.J. 141 (1999) [hereinafter Benison] (describing Article 8 as having three portions or categories: "grave breaches" of Geneva law, "serious violations" of other law, and cases of non-international armed conflicts).

Article 8(2)(e), "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law." Under each category, the Statute enumerates specific acts, with many provisions of the second and fourth categories being parallel or identical.[194] Thus, the definition may further be conveniently classified under two general headings: "war crimes committed during an international armed conflict," covering thirty-three proscribed acts, and "war crimes committed during a non-international armed conflict," proscribing sixteen specific acts.[195]

In the Elements of Crimes, each of the 49 acts defined as war crimes share two common elements: first, that "[t]he conduct took place in the context of and was associated with an international armed conflict" or "an armed conflict not of an international character," as the case may be; second, "[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict."[196] It further expounds on these two elements, thus:

> With respect to the last two elements listed for each crime:
>
> • There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;

194. *See* Santos, *supra* note 193, at 5-6, observing that:

> Of the 16 specific acts in NIAC, these are virtually or almost all covered by identical or similar specific acts in international armed conflict. The one speficic act in NIAC that is a bit different is that in para. 2 (c) (iv) on sentences and executions without judgment by a regularly constituted court. The closes to this in international armed conflict is para. 2 (a) (vi) on depriving a prisoner of war (POW) or protected person of fair and regular trial.
>
> He goes on the enumerate the "15 specific acts in international armed conflict that are not specific acts in NIAC for purposes of war crimes definition under the ICC Statute."

195. *See* RIGHTS AND DEMOCRACY & THE INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM AND CRIMINAL JUSTICE POLICY, INTERNATIONAL CRIMINAL COURT: MANUAL FOR RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE 84 (2000) [hereinafter MANUAL]. Although Article 8 is silent on the definition of an international armed conflict, the following six cases are suggested by some jurists as armed conflict international in character: (1) armed conflict between states; (2) internal armed conflict that has been recognized as belligerency; (3) internal armed conflict involving one or several foreign interventions; (4) internal armed conflict involving U.N. intervention; (5) wars of national liberation; (6) war of secession. *Id.* at 92.

196. Elements of Crimes, *supra* note 182, at 18-48.

> • In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
>
> • There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with."[197]

i. War Crimes During International Armed Conflict

Under Article 8(2)(a), "war crimes" means "[g]rave breaches of the Geneva Conventions of 12 August 1949." Specifically, such grave breaches consist of any of the eight acts listed below committed "against persons or property protected under the provisions of the relevant Geneva Convention": (i) Willful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.

War crimes, under Article 8(2)(b), means "[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law." In particular, such serious violations include any of the twenty-six acts enumerated below:

> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
>
> (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
>
> (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
>
> (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
>
> (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

197. *Id.* at 18.

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

ii. War Crimes During Non-International Armed Conflicts

Article 8(2)(c) defines "war crimes" as "serious violations of article 3 common to the four Geneva Conventions of 12 August 1949" in cases of an armed conflict not of an international character. Its application though is tempered by Article 8(2)(d): "paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." War crimes under this category "are committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause."[198] Such "serious violations" provided by Article 3 consists of any of the following four acts: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

198. Article 8(2)(c).

Finally, Article 8(2)(e) defines "war crimes" as "[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law." Such laws and customs in particular refer principally to Protocol II and, albeit they refer to international armed conflict, also to Protocol I, the Geneva Conventions and the Hague Conventions.[199] As in the previous category, Article 8(2)(f) qualifies the operation of this fourth category of war crimes by likewise excluding its application "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature;" yet, it further adds that paragraph 2 (e) "applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups." The latter qualifier echoes Article 1(1) of Protocol II and is envisioned to clarify the scope of this final category of war crimes.[200]

It was earlier mentioned that some of the enumerated acts under Article 8(2)(e) and (2)(c) are similar and parallel to each other. But, under this fourth category of war crimes, only twelve acts, as compared to twenty-three in subparagraph (2)(c), are listed:

> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
>
> (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
>
> (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
>
> (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
>
> (v) Pillaging a town or place, even when taken by assault;
>
> (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
>
> (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

199. Arsanjani, *supra* note 150, at 32-33 (citation omitted).

200. *Id.* at 35.

> (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
>
> (ix) Killing or wounding treacherously a combatant adversary;
>
> (x) Declaring that no quarter will be given;
>
> (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
>
> (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

2. Prescribing Penalties for the Core Crimes

Part 7 of the Statute covers the penalties to be imposed by the Court. According to Article 77, the Court may impose a penalty of imprisonment, coupled with an order of a fine or a forfeiture. Subject to article 110 [Review by the Court concerning reduction of sentence], the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. In addition to imprisonment, the Court may order: (a) A fine under the criteria provided for in the Rules of Procedure and Evidence; (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78(1) mandates that in its determination of the sentence, "the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person." Rule 145 of the Finalized draft text of the Rules of Procedure and Evidence incarnates the mandate of Article 78(1).[201] Rule 145(1) provides that in determining the sentence, the Court shall:

201. Preparatory Commission for the International Criminal Court, "Report of the Preparatory Commission for the International Criminal Court," U.N. Doc. PCNICC/2000/1, Nov. 2, 2000, Part I, "Finalized draft text of the Rules of Procedure and Evidence," U.N. Doc. PCNICC/2000/1/Add.1.

(a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person;

(b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime;

(c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

Rule 145(2)(a) lists down the following as mitigating circumstances:

(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;

(ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court[.]

On the other hand, Rule 145(2)(b) enumerates as aggravating circumstances the following:

(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenceless;

(iv) Commission of the crime with particular cruelty or where there were multiple victims;

(v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3;

(vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

Finally, Rule 145(3) streamlines Article 77(1)(b) in stating that: "Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances." Parenthetically, Rules 146 and Rule 147 respectively amplify the imposition of fines under Article 77(2)(a), and the order of forfeiture under Article 77(2)(b).

Article 78(2) empowers the Court to deduct time previously spent in detention in imposing a sentence of imprisonment. And Article 78(3) covers instances when a person has been convicted of more than one crime,

providing that "the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment;" provided that such "period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b)."

Article 79(1) grants the Assembly of States Parties the discretion to establish a Trust Fund "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims." Under Article 79(2), "[t]he Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund." And Article 79(3) provides that "[t]he Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties."

Part 7 concludes with an important "proviso" enunciated in Article 80, thus qualifying the operation of this part of the Statute: "Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part."

C. *The Statute's Soul*

1. Vivifying Spirit

The principle of complementarity is the spirit that would eventually vivify the ICC. Complementarity underlies the exercise of the ICC's jurisdiction and "underpins the entire structure of the ICC."[202] Although the Rome Statute does not define it, the principle of complementarity appears in "cornerstone" provisions of the Statute. The tenth paragraph of the preamble emphasizes that "the International Criminal Court established under this Statute shall be *complementary to national criminal jurisdictions*."[203] Complementarity reverberates in Article 1 which, in constituting the ICC, describes the nature of the Court thus: "[i]t shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be *complementary to national criminal jurisdictions*."[204] Article 17(1), in dealing with issues of admissibility, supplies implicitly what complementarity under the Statute means:

202. Ebdalin, *supra* note 133, at 329. *See also* Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT'L L. 120 (2001) [hereinafter Charney, *Domestic Courts*] (writing that the "concept of complemenarity is fundamental to the design of the ICC Statute").

203. *Id.* Emphasis supplied.

204. *Id.* Emphasis supplied.

> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20 [*Ne bis in idem*], paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.

Thus, the ICC may exercise its jurisdiction only if: "(1) national jurisdictions are 'unwilling or unable' to; (2) the crimes is of sufficient gravity; and (3) the person has not already been tried for the conduct on which the complaint is based."[205] The upshot is that "the ability to bring the perpetrator(s) of crimes within the jurisdiction of the ICC to justice remains the prime responsibility of national states;"[206] or, as aptly put by the Alternate Head of the Philippine delegation to the Rome Conference:

> the ICC is *not intended to operate as a supranational body that will supplant national judicial systems.* Rather, *it is aimed at strengthening such system*, and it can only step in when national authorities are unwilling or unable to act. It is thus, *a default Court that will only act in the absence of any action by national judicial systems.*[207]

The Court is the arbiter as to whether a State is "unwilling or unable genuinely to carry out the investigation or prosecution." In determining "unwillingness," the Court, pursuant to Article 17(2), shall consider the existence of any of the following factors:

> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

205. Sadat & Carden, *supra* note 114, at 414. Complementarity has substantive, procedural and "political" or "prudential" aspects. *Id.*

206. van der Vyver, *supra* note 114, at 70.

207. Ebdalin, *supra* note 133, at 329 (emphasis supplied).

> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

On the other hand, in regard to a State's inability, "the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings" (Article 17(3)).[208] In other words, "the ICC only exercises its jurisdiction when State parties fail to investigate or undertake judicial procedures in good faith, after a crime covered under the Statute has been committed."[209]

2. Catalyzing Effect

The practical import of complementarity may be discerned in the Court's envisioned catalytic function. Jonathan I. Charney describes it thus:

> While many supporters of the international criminal court consider that an active ICC docket would constitute a major step toward suppression of international crimes, *I believe that the real and more effective success will reside in the active dockets of many domestic courts around the world, the ICC having first served as a catalyst, and then as a monitoring and supporting institution.* This is perhaps the best outcome, for the purpose of establishing the ICC is to eliminate impunity for international crimes. A single international court can accomplish little, especially if its fundamental purpose is to promote international mores that discourage impunity. *Success will be realized when the aversion to impunity is internalized by the domestic legal system of all states. The*

208. Article 17 unnerves the concept of state sovereignty. As the PrepCom puts it:

> It was noted that while the determination of "availability" of national criminal systems was more factual, the determination of whether such a system was "ineffective" was too subjective. *Such a determination would place the Court in the position of passing judgment on the penal system of a State.* That would impinge on the sovereignty of national legal systems and might be embarrassing to that State to the extent that it might impede its eventual cooperation with the Court.
>
> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I, U.N. GAOR, 51st Sess., Supp. No. 22, at 38, para. 161, U.N. Doc. A/51/22 (1996) [hereinafter PrepCom Report 1996](emphasis supplied). *See* also Danilenko, *supra* note 152, at 476 (ICC functioning as a higher international court of review for national authorities and courts); Lao, *supra* note 173, at 270-71 (citing one criticism of the ICC as a derogation of judicial power because it exercises a de facto power of judicial review). But, the sovereignty argument was not pursued in Rome owing perhaps to the sensitivity of the delegates to "the general decline of the substantive enclave of state sovereignty in international law." van der Vyver, *supra* note 114, at 74 (citation omitted).

209. MANUAL, *supra* note 195, at 92 & 94.

> *test of the success is not a large docket of cases before the ICC, but persistent and comprehensive domestic criminal proceedings worldwide, facilitated by progress in a variety of contexts toward discouraging international crimes and avoiding impunity.*[210]

Speaking at the Experts' Conference in Manila, Jürg Lindenmann echoes Charney's considered opinion:

> The International Criminal Court is conceived to be complementary to national jurisdiction. *The Rome Statute recalls and enhances the generally accepted principle that the prime responsibility for the prosecution of serious crimes remains with the States. The Rome Statute makes [it] clear that* — to state it bluntly — *States have to do their job first.*
>
> Therefore — ideally — the future Court should have "no work to do." This is...because...*under the Rome Statute, States might live up better than today to their responsibility to ensure effective repression of these crimes wherever they are committed.* I would personally expect the most beneficial achievement of the Rome Statute to be not so much the creation of a new international judicial body as such, but rather its catalyzing effect on national judicial systems. It is in this light that we should examine the work to be undertaken by States with respect to the implementation of the Rome Statute.[211]

The practical implications of the Statute's complementarity principle may perforce oblige States contemplating to be parties thereto "to review the following, to ensure that they can effectively prosecute crimes within the jurisdiction of the Court should they wish to: definitions of crimes, grounds of defence, individual criminal responsibility and inchoate offences, command responsibility, and the rules of procedure and evidence in national criminal justice proceedings."[212]

IV. Core crimes criminalization as *Jus Scriptum*

The third principle underlying the Statute consists in a drafting approach that professes fidelity to customary international law. Such approach was adopted in order to make the Statute palatable to all and was deemed most apt in the definition of crimes; nevertheless, despite this avowed adherence to customary law, there are matters in the provisions defining the core crimes

210. Charney, *Domestic Courts*, *supra* note 202, at 123-24 (emphasis supplied).

211. Jürg Lindenmann, "State Obligations relating to the Implementation of the Rome Statute of the ICC," 2, Oct. 17, 2001, Experts' Conference on the International Criminal Court, Manila (Oct. 16-18, 2001). (unpublished intervention) (on file with the author) [hereinafter Lindenmann] (emphasis supplied).

212. Manual, *supra* note 195, at xi. *See id.* at 84-102 for a thorough discussion of these areas of review.

"that were not 'international customary law,' but had substantial, and in some cases overwhelming, support from the negotiating states."[213] That the Rome Statute is "schizophrenic" stems from its nature as paradigmatic *jus scriptum*, especially in criminalizing the core crimes, *i.e.*, it codifies or restates existing international law and introduces innovations that embody progressive development of international law.

This chapter analyzes this approach by initially inquiring into that peculiar interaction between customary and conventional international law described as *jus scriptum*. Such sojourn serves as the theoretical backdrop for the chapter's next task — dissecting how the Rome Statute is simultaneously a codification and progressive development of international law in its criminalization of the core crimes.

A. *The Rome Statute as* Jus Scriptum

1. Convention & Custom: Independence & Interaction of International Law Sources

Article 38(1) of the Statute of the International Court of Justice ("ICJ Statute") enumerates three primary sources of international law, to wit: international conventions, international custom and general principles of law recognized by civilized nations.[214]

213. Arsanjani, *supra* note 150, at 25. Arsanjani expounds: "The reason for this approach was to make the statute widely acceptable. The proper place for adopting this approach was in the definition of crimes. With the exception of a few articles dealing with individual criminal responsibility, this principle could not have been applied to other provisions of the statute." *See also* Danilenko, *supra* note 152, at 481-82 (citation omitted):

> Many drafters of the Rome Statute held the view that their task was not to create new criminal laws, but only restate crimes already prohibited by international customary law. However, it is well-known that any formulation in writing of general customary rules is a complicated process. It is difficult to maintain a thin line between pure codification of pre-existing law and progressive development of the law. As a result, although the Rome Statute's provisions on crimes tend to restate general substantive criminal law, some elements are clear innovations.

214. Article 38(1), ICJ Statute provides in full:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;

Article 38(1)(a), ICJ Statute speaks of "international conventions," and "[t]he word 'convention' means a treaty," which in turn is synonymous to the following: "agreement, pact, understanding, protocol, charter, *statute*, act, covenant, declaration, engagement, arrangement, accord, regulation and provision."[215] Article 2(1)(a) of the 1969 Vienna Convention defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[216]

Article 38(1)(b), ICJ Statute lists, as the second primary source, "international custom, as evidence of a general practice accepted as law." It has both objective and subjective elements, *viz.*: "a general practice" and "accepted as law" or the so-called *opinio juris*.[217] Although general practice is a "relative concept and cannot be determined in the abstract," it is certain that it "does not require unanimous practice of all states or other international subjects," and state practice consists of what states do, say and do not do (or the doctrine of acquiescence).[218] The psychological or

(d) subject to the provisions of Article 59 [i.e., "The decision of this Court has no binding force except between the parties and in respect of that particular case."], judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision still commands widespread acceptance as authoritatively enumerating the sources of international law. *See* AKEHURST's, *supra* note 155, at 36 ("this provision is usually accepted as constituting a list of the sources of international law"); JOAQUIN G. BERNAS, S.J., FOREIGN RELATIONS IN CONSTITUTIONAL LAW 13 (1995) [hereinafter BERNAS I] (the enumeration is "generally regarded a complete statement of the sources of international law").

215. AKEHURST's, *supra* note 155, at 36 (emphasis supplied).

216. Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331 (Signed for the Philippines May 23, 1969. General entry into force Jan. 27, 1980) [hereinafter Vienna Convention]. *See* AKEHURST's, *supra* note 155, at 130-31 (describing what this definition excluded).

217. AKEHURST's, *supra* note 155, at 39 (citing Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14). For a more comprehensive treatment of this source of international law, see VILLIGER, *supra* note 47, paras. 15-92 (constituting Chapter 1 of his *habilitationschrift* expounding on a modern theory of customary international law).

218. *Id.* at 42-43 *See also* VILLIGER, *supra* note 47, paras. 18-37 (discussing what constitutes State practice), paras. 38-67 (exploring the legal implications of the types of State practice, i.e., "either *active* practice in the sense of adhering to or dissenting from a customary rule, or *passive* conduct"); BERNAS I, *supra* note 214, at 14 (explaining that the language of the *Restatement* concerning customary international law contemplates consistent and general practice, and uniformity of practice).

subjective element divines into why states do what they do. *Opinio juris sive necessitatis* or simply *opinio juris*, the technical term given to this element, is traditionally defined as "a conviction felt by states that a certain form of conduct is required by international law."[219]

Finally, Article 38(1)(c), ICJ Statute talks of "the general principles of law recognized by civilized nations." It has two separate requirements: "General Principles," and "recognition by 'civilized nations.'"[220] While the latter requirement basks under the presumption that all U.N. members are "civilized," the former could not be easily pinned down. In any case, the consensus among publicists is that "'General Principles' are found in the underlying or posited principles or postulates of national legal systems *or* of international law."[221] Pursuant to this "scholarly definition," the phrase has two disjunctive senses: first, it means general principles of *international law*, i.e., it is "a method of using existing sources — extending existing rules by analogy, inferring the existence of broad principles from more specific rules by means of inductive reasoning and so on;" second, it means general principles of *national law*, i.e., "gaps in international law may be filled by borrowing principles which are common to all or most national systems of law; specific rules of law usually vary from country to country, but the basic principles are often similar."[222] "General Principles" has a four-fold function vis-à-vis conventional and customary international law, *viz.*: first, interpretative function (as source of interpretation); second, growth function

219. *Id.* at 44. This traditional definition presumes that the rule imposes a duty. In cases when the rule is permissive — i.e., permitting states to act in a particular way without making such actions obligatory — *opinio juris* means "a conviction felt by states that certain form of conduct is *permitted* by international law." *Id. See also* VILLIGER, *supra* note 47, para. 69 (defining the term as "the conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it").

220. M. Cherif Bassiouni, *A Functional Approach to "General Principles on International Law,"* 11 MICH. J. INT'L L. 768 (1990) [hereinafter Bassiouni, *Functional Approach*].

221. *Id.* at 771 (emphasis supplied).

222. AKEHURST's, *supra* note 155, at 48-49 (emphasis supplied) (citation omitted). *See also* Bassiouni, *Functional Approach*, *supra* note 220, at 768 (positing that, based on the writings of scholars and opinions of tribunals, "General Principles" "are, first expressions of national legal systems, and, second, expressions of other unperfected sources of international law," i.e., conventions, customs, writings of publicists and PCIJ/ICJ decisions); BERNAS I, *supra* note 214, at 15 (limiting the definition to this second sense).

(as a means for developing new norms); third, "gap-filling function" (as supplemental source); and, fourth, corrective function (as modifier).[223]

It is unanimously conceded that the intention behind the ICJ Statute enumeration was not to represent a descending judicial hierarchy. Rather, the "order in which these components of international law are enumerated is...intended...to indicate the order in which they would normally present themselves in the mind of an international judge when called upon to decide a dispute in accordance with international law."[224] Mark E. Villiger explains

223. Bassiouni, *Functional Approach*, *supra* note 220, at 775-81. *See also* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 390 (1953, reprint 1993) [hereinafter CHENG] (enumerating three functions: first, "they constitute the source of various rules of law, which are merely the expression of these principles"; second, "they form the guiding principles of the juridical order according to which the interpretation and application of the rules of law are orientated"; third, "they apply directly to the facts of the case wherever there is no formulated rule governing the matter.") (As to what comprises these principles, Professor Cheng identifies four main categories of general principles, *viz.*: (1) the principle of Self-Preservation; (2) the principle of Good Faith, including the principle of proscribing the abuse of rights; (3) the juridical concept of Responsibility as an indispensable element in any juridical order and the general principles of law comprised in this concept (i.e., principles of individual responsibility, fault, integral reparation and proximate causality); (4) certain general principles of law in Judicial Proceedings (i.e., jurisdiction, power to determine the extent of jurisdiction, *nemo debet esse judex in propria sua causa, audiatur et altera pars, jura novit curia*, proof and burden of proof, principle of *res judicata*)). *Id.* at vii-x, 26. (On the other hand, Akehurst ascribes to it the function of supplemental source; and thus notes that using the phrase in both senses would better serve its purpose as "gap-filler," as international tribunals have done even before the Permanent Court of International Justice was established.) AKEHURST'S, *supra* note 155, at 48.

224. CHENG, *supra* note 223, 22-23. *See also* BERNAS I, *supra* note 214, at 13; MERLIN M. MAGALLONA, A PRIMER IN INTERNATIONAL LAW IN RELATION TO PHILIPPINE LAW 14-15 (1997) [hereinafter MAGALLONA]. The sources supplement each other and are often applied side by side; but, in case of clear conflict, "treaties prevail over custom and custom prevails over general principles and the subsidiary sources [i.e., judicial decisions and publicists]." AKEHURST'S, *supra* note 155, at 57. Other possible sources include: acts of international organizations, the so-called "soft" law, and equity. *Id.* at 52-56. The *Restatement (Third) of Foreign Relations Law of the United States* makes a substantially similar enumeration, but deviates from the order listed in the ICJ Statute, BERNAS I, *supra* note 214, at 13-14. As between treaty and customary law, Villiger suggests that in cases when substantial conflict arises — *i.e.*, "when a customary and a treaty rule on the same subject-matter regulate a situation with different, i.e., incompatible or contradictory results" — the statutory construction principles of *lex posterior derogat legi priori* and *lex specialis derogat legi generali* supplementarily supplies a solution. VILLIGER, *supra* note 47, paras. 87-88.

the import of this silence as to hierarchy of sources on the first and second primary source:

> The silence in Art. 38 as to a hierarchy of sources reflects accurately the structure of the international legal order to which an *a priori* hierarchy of sources is an alien concept. The reason for this is that customary law and treaties are *autonomous sources*: the conditions of their formation, existence and termination are such that the rules of source do not depend for their formation on the rules of the other source. This autonomy of sources necessitates customary law and treaties being equivalents, and any relationship between the two depending on other criteria *in casu*. Some authors have given the different explanation that customary law and treaties must be independent because they can stimulate and influence each other. However, this would appear to be the result rather than the cause of the equivalence: it is precisely because customary law and treaties are autonomous that any one may affect – i.e., abrogate or modify – the other, whereas in a hierarchical relationship *only* one source could influence the other. The equivalent position of the two sources enables us to draw *two fundamental conclusions*. First, the binding force of customary law and treaties must be identical (for if the binding force of one source was "stronger," its rules would prevail in a conflict over rules of the other). As a result, it matters not whether a norm is clad in a customary rule or in a treaty rule, since in either case the effectiveness of the binding force is the same. Second, the fact that rules of one source may supersede rules of the other, facilitates change. Not only is there no "higher" law necessary to achieve this result. Moreover, the requirement of municipal systems of an *acte contraire*, i.e., that a rule cannot be altered by a rule of the same kind, does not apply to international law. In other words, States may abrogate a customary rule simply by concluding a treaty; the latter may again be modified by new customary rule.[225]

Autonomy, however, does not preclude interaction. One of the means by which conventional and customary international law interact centers on the development of *jus scriptum*, i.e., "the transformation of customary law into the written form (codification) and the drafting of new written rules (progressive development)."[226]

a. Visages of *Jus Scriptum*

Jus scriptum is, as it were, "Janus-faced" — having codification of international law as its backward-looking visage and progressive development of international law as its forward-looking visage. *Codification* "signifies the transformation of an existing rule of international law, *lex lata*, into the form of writing, of *jus non-scriptum* into *jus scriptum*."[227] Considering

225. VILLIGER, *supra* note 47, para. 86 (citation omitted)

226. *Id.* at 175.

227. *Id.* at 183.

that the concept alone, when defined negatively, "constitutes neither a formal source of law nor of obligation, and has no binding force *per se*" and that, in view of Article 38(1) of the ICJ Statute, customary law is its normative material, "codification can be defined as *the act, and the result, of the recasting into the written form of a rule which exists* qua *customary law*."[228]

On the other hand, pursuant to Article 15 of the ILC-Statute, the concept of *progressive development* is "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States." When viewed as covering "subjects which have not yet been regulated by international law," — and, as such, clearly embraces innovation, *lex ferenda — progressive development* "may then be defined as the *writing down of new rules*."[229] Moreover, it "also covers the *substantial alteration,* or the *complete reform,* of existing rules" in cases when "*jus scriptum* no longer corresponds to the preexisting customary law."[230] When viewed as formulating rules on subjects "to which the law has not yet been sufficiently developed in the practice of States," the concept's scope is thus broader in that it covers "prospective customary rule."[231]

228. *Id.* "Within this ambit, the concept of codification is not limited to any particular subject and can embrace any field of customary law. Codification even comprises the rewriting of customary law generated by earlier written drafts or conventional texts."

229. *Id.* at 188 (citation omitted).

230. *Id.*

231. Villiger explains:

> This concerns rules which have not yet come into existence but where early patterns of State practice, for instance in the context of a diplomatic conference, indicate a crystallizing customary rule. Hence, the writing down of a *prospective customary rule* also falls within the scope of progressive development. This leads to the question of the moment when a customary rule has to come into existence, so that its transformation into the written form still qualifies as codification. Customary law and *jus scriptum* can interact at any stage during, or after, the drafting process. However, since codification is usually associated with the drafting of the written rule — namely, with the procedures in the ILC and at the diplomatic conference — it would appear *practical* to qualify as codificatory a customary rule which has arisen, and been written down, before or during the *final adoption of the ultimate text* in which it is embodied.
>
> VILLIGER, *supra* note 47, at 189 (citation omitted). He also suggests alternative terms:
>
> While a distinction remains essential, its *weakness* is that codification and development reflect the picture only at the time of the adoption of a written instrument. Now, one of the aim of this study is to illustrate the impact of customary law upon *jus scriptum*. Thus, if erstwhile codificatory rules are subsequently modified by nonidentical customary law, they can no longer reflect the original customary law, and, hence, be termed codificatory; if new rules generate customary law, they no longer constitute progressive development. The consideration that these processes may occur in the early stages of the evolution of draft, well before its final adoption, illustrates the inadequacy of these categories. For this reason, it is suggested that the terms "rules declaratory of customary law", or, for short, "declaratory rules", should be employed rather than codificatory rules. New rules constituting development are, therefore, "non-declaratory rules." This formulation is not restricted to any stage of the convention's evolution and yet addresses the essential question of underlying customary law. It upholds a distinction while still accommodating subsequent developments in the law.

b. Accomplishing *Jus Scriptum* Through Treaties

International law recognizes a convention or treaty as one of the three methods of accomplishing *jus scriptum* — the other two being a code of principles and a U.N. resolution.[232] Treaties possess a threefold legal character: first, they constitute a separate source of obligation in international law; second, the practice surrounding the treaty is of a constitutive nature regarding customary law, although with *a priori* ambivalent effects; and, third, their texts may offer evidence of a customary rule.

As a consequence of its being a separate source of obligation in international law, "[t]o accomplish codification or progressive development by means of a treaty, is to add to the basis of validity of a customary rule the contractual obligation of treaties"; as such, there are then two independent and separate rules with binding force: "the customary rule and the codificatory conventional or treaty rule"; notwithstanding the fact that there are instances when they share identical contents.[233]

On the other hand, the State practice circumscribing the treaty — "e.g., statements of States upon the draft convention, the adoption of the text at the conference, and any invocations after the convention's entry into force by non-parties" — "may conform to, and thus strengthen, any underlying customary rules; conversely, if the preparatory phases disclose inconsistencies in the practice of States, or if States reject or denounce the (declaratory) conventional rule, this will weaken the case for the customary rule."[234]

Finally, in providing evidence of customary rule, conventional texts reflect or declare the underlying customary rule. However, such texts do not actually constitute the customary rule due to the independence of sources. The existence of such a rule depends on other conditions of State practice

232. VILLIGER, *supra* note 47, at 202. They all share the written element and the function to use a written text; they essentially differ in how they deal with the binding nature of a written rule.

233. *Id.* at 219.

234. *Id.* at 221.

and *opinio juris,* and does not require the additional contractual basis, inherent in a convention, for its binding force.[235]

2. Impact of *Jus Scriptum* on International Criminal Law

Taking the principle of legality to heart, the PrepCom pushed for a code-centered criminal court, despite the ILC's reluctance to tread such path, because "[t]here was general agreement that the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*)."[236]

Reflecting upon the Nuremburg precedent, the ILC "recognized the general autonomy of international law over national law with respect to the criminalization of certain acts" when it stated in Principle II of the 1950 Nuremberg Principles that: "The fact the internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."[237] But this supremacy of international criminal law over national law would be operative depending on the nature of the crime concerned, i.e., whether it is a crime under general international law (i.e., customary international law-based) or it is treaty-based (i.e., conventional international law-based):

> [This supremacy] is accepted only in respect to crimes under general international law. Treaty definitions of crimes cannot directly govern acts of individuals because these crimes have to be transformed into domestic law of participating States. If a State Party fails to implement the relevant treaty provision in its domestic law, the mere adoption of a treaty definition of a crime at the international level is insufficient to make the treaty rule applicable to the conduct of private individuals. It is obvious that the failure of State Party to comply with its treaty obligations should not prejudice the rights of an accused individual. As a result, if a national of a State Party that failed to enact the relevant domestic legislation commits a crime on its territory, an accused cannot be held liable for the treaty crime.[238]

235. *Id.*

236. PrepCom Report 1996, *supra* note 208, para. 52 (cited in Danilenko, *supra* note 152, at 481 n.144).

237. Danilenko, *supra* note 160, at 466 (citing Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, [1950] 2 Y.B. Int'l. L. Comm'n. at 374). The ILC reiterated this principle in both the 1954 Draft Code of Offences Against the Peace and Security of Mankind and the 1996 Draft Code of Crimes Against the Peace and Security of Mankind. *Id.* at 466-67 (citation omitted).

238. *Id.* at 467.

Accordingly, the following norms are submitted as governing the invocation of international law to punish individuals for crimes proclaimed as such by international law:

> (1) individuals can be held liable for conduct identified as a crime under customary international law; (2) a state can render individuals acting as agents of government criminally liable under international law for conduct proclaimed to be criminal by treaty arrangements; *a state cannot criminalize the conduct of private individuals by entering into a treaty that proclaims the conduct in question punishable*; and (3) *the international obligation of State Party to the treaty can involve no more tha[n] a commitment to criminalize and to punish the act within the confines of the state's municipal criminal justice system.*[239]

B. Jus Scriptum *Criminalization of the Core Crimes*

1. Restatement and Innovation in Defining the Core Crimes

Articles 6, 7 and 8 of the Rome Statute respectively define the core crimes of genocide, crimes against humanity and war crimes. In doing so, these provisions restate or codify customary international law and introduce innovations, thereby constituting progressive development of international law. Near unanimity supports the view that the four core crimes are in fact "*jus cogens* crimes,"[240] albeit "their precise definition had not yet been

239. van der Vyver, *supra* note 114, at 9 (emphasis supplied).

240. *See* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 67-72 (1996) [hereinafter Bassiouni, *Jus Cogens*]. Bassiouni writes:

> The legal literature discloses that the following international crimes are *jus cogens*: *aggression, genocide, crimes against humanity, war crimes*, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*. This legal basis consists of the following: (1) international pronouncements, or what can be called international *opinio juris,* reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.

Id. at 68 (emphasis supplied) (citation omitted). *Jus cogens* (literally, "the compelling law") or "peremptory norms of general international law" is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, *supra* note 214, art. 53. As to its relation with *obligatio erga omnes* (literally, "an obligation flowing to all"): "*Jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga*

completely agreed upon by all States;" consequently, "States generally seemed confident as to the propriety of defining them as a matter of treaty law at the [Rome] Conference."[241]

a. Crime of Genocide

Article 6 is a verbatim restatement of Article II of the Genocide Convention, except for the replacement of the word *Convention* with *Statute*.[242] The Genocide Convention "has not only been widely accepted as treaty law, but is also regarded to reflect customary international law."[243]

Dubbed as "the ultimate crime and the gravest violation of human rights it is possible to commit,"[244] genocide has attained the status of *jus cogens* and, as such, "is now universally recognized as a crime under international law

omnes pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*"; and these legal obligations include:

> the duty to prosecute or extradite, the nonapplicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of "obedience to superior orders" (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under "states of emergency," and universal jurisdiction over perpetrators of such crimes.

Bassiouni, *Jus Cogens*, *supra* at 240.

241. Sadat & Carden, *supra* note 114, at 406-07 (citation omitted). *See also* Scharf, *supra* note 163, at 80.

242. Arsanjani, *supra* note 150, at 30. *See also* Scharf, *supra* note 155, at 87; Danilenko, *supra* note 152, at 482; Sadat & Carden, *supra* note 114, at 425. Genocide Convention, *supra* note 50, art. II provides:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

243. Danilenko, *supra* note 152, at 482.

244. *United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities; Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide Prepared by Mr. B. Whitaker*, at 5, U.N. Doc. E/CN.4/Sup.2/1985/6 (1995) *quoted in* Scharf, *supra* note 155, at 86. *See also* MANUAL, *supra* note 195, at 88 (characterizing genocide as "the crime of all crimes").

over which a state may exercise universal jurisdiction."[245] Consequently, genocide "was the only crime that received a quick and unanimous consensus" in the Rome Conference.[246]

b. Crimes Against Humanity

A definition of crimes against humanity first appeared in the IMT or Nuremberg Charter under Article 6(c), thus:

> "Crimes Against Humanity": murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated.[247]

Both Article 5(c) of the IMTFE or Tokyo Charter[248] and Article II(c) of the Allied Control Council Law No. 10[249] incorporated this Nuremberg formulation but introduced changes as regards the specific offense of persecution.[250]

245. Scharf, *supra* note 155, at 86, 87.

246. Arsanjani, *supra* note 150, at 30.

247. Darryl Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 44-45 (1999) [hereinafter Robinson] (quoting IMT Charter, *supra* note 45). *See also* Bassiouni, *"Crimes Against Humanity"*, *supra* note 42, at 457, 463.

248. Article 5(c) states:

> Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane act committed against any civilian population before or during the war, or persecution on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Bassiouni, *"Crimes Against Humanity"*, *supra* note 42, at 463 n.19. Bassiouni notes that the Tokyo Chater omitted religious persecution.

249. Allied Control Council Law No. 10, CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE, Jan. 31. 1946, at 50 *cited in* Bassiouni, *"Crimes Against Humanity"*, *supra* note 42, at 464.

250. Robinson, *supra* note 247, at 45. *See also* Bassiouni, *"Crimes Against Humanity"*, *supra* note 42, at 559-66 (tracing the origins of the early normative framework for "Crimes Against Humanity").

Thereafter, the ILC sought to elaborate an acceptable definition of crimes against humanity initially through the 1954 draft Code of Offences against the Peace and Security of Mankind and, then, the 1991 draft Code of Crimes against the Peace and Security of Mankind and its 1996 revision which never developed into an international agreement.[251] The Genocide Convention, the Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention),[252] the General Assembly Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on the Forced Disappearance of Persons paved inroads by respectively identifying genocide, apartheid and enforced disappearance.[253]

The creation of the ad hoc international criminal tribunals by the Security Council represents the next major development in the evolution of crimes against humanity. Both the ICTY and ICTR Statutes define the crime by enumerating identical lists of inhumane acts prefaced by a chapeau that describes the circumstances qualifying the commission of such acts as crimes against humanity.[254] They differ however in that the ICTY Statute requires a nexus to armed conflict, while the ICTR requires a discriminatory motive. The body of jurisprudence developed by the two tribunals also guided the drafting of the Rome Statute.[255]

251. *Id.* at 45 & n.13.

252. Convention on the Suppression and Punishment of the Crime of Apartheid, May 2, 1974, XII-1 D.F.A.T.S. 85, 1015 U.N.T.S. 243 (Signed for the Philippines May 2, 1974. Entered into force for the Philippines Feb. 25, 1978) [hereinafter Apartheid Convention].

253. Robinson, *supra* note 247, at 45 & n.14. Bassiouni enumerates the following "substantive post-Charter instruments which contain penal proscriptions embodying some of the prohibitions contained in 'Crimes Against Humanity'": (1) U.N. General Assembly Resolution of December 11, 1946, "Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal"; (2) 1948 Genocide Convention; (3) ILC Report of July 29, 1950; (4) ILC 1954 Draft Code of Offenses Against the Peace and Security of Mankind (renamed as Draft Code of Crimes in 1987, and adopted by the ILC in 1991); (5) 1973 Apartheid Convention; (6) 1984 Torture Convention; (7) 1985 Inter-American Torture Convention; (8) 1987 European Torture Convention; (9) The four Geneva Conventions of August 12, 1949; and (10) 1977 Protocols I and II, additional to the Geneva Conventions. He includes the last two instruments because they contain the same prohibitions and aim to protect the same humanitarian interests in the context of armed conflicts, albeit they do not technically address "Crimes Against Humanity." Bassiouni, *"Crimes Against Humanity"*, *supra* note 42, at 474-75 (citation omitted).

254. Compare ICTY Statute, art. 5, with ICTR Statute, art. 3.

255. Robinson, *supra* note 247, at *See also* Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307, 310-11 (2000) [hereinafter Chesterman] (discussing the requirement of an armed conflict in the ICTY as one of the most significant difference between the ICTY and ICTR Statutes; and identifying the ICTR Statute's requirement for a discriminatory ground as anoter divergent point from the ICTY Statute).

The fact that no accepted definition existed both as a matter of treaty law or customary international law made the task of defining crimes against humanity one of the most difficult challenges in the Rome Conference.[256] On the other hand, the disparity in the definitions unveils two major problems overshadowing attempts at defining crimes against humanity: "first, distinguishing the crime from war crimes and from crimes under domestic law; second, determining which acts are punishable under international law as a matter of individual criminal responsibility, as opposed to State responsibility for violations of human rights."[257]

Article 7(1) enunciates the *chapeau* for crimes against humanity, thus: "[f]or the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." The Elements of Crime mirrors this *chapeau* by including the following as the last two elements of each crime against humanity describing the context in which the conduct must take place: first, "[t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population"; and, second, "[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population."[258] Commentators ascribe to his *chapeau* the following distinctive features: (1) the absence of a required nexus with armed conflict; (2) the absence of a required discriminatory motive; (3) the "widespread or systematic attack" requirement or criterion; (4) the attack must be directed against "any civilian population;" (5) the element of *mens rea*; (6) the policy element.[259]

256. Sadat & Carden, *supra* note 114, at 426-27 (citation omitted). *See also* Scharf, *supra* note 155, at 88.

257. *Id.* at 427 (citation omitted).

258. Elements of Crimes, *supra* note 182, at 9, para. 2, Introduction to Crimes against humanity, & 9-30.

259. *See* Robinson, *supra* note 247, at 45; Sadat & Carden, *supra* note 114, at 427-32. *See also* Chesterman, *supra* note 255, at 314 (citation omitted), summarizing the definition, thus:

> The requirements for a crime against humanity under the three definitions may be summarized as follows. First, there are the general requirements for an act to fall into the category of crimes against humanity. The act must have been committed: (a) in armed conflict (ICTY Statute only); (b) as part of a widespread or systematic attack; (c) against any civilian population; and (d) on

In disregarding a required nexus to an armed conflict, Article 7 adopts the approach of Control Council Law No. 10 and departs from the formula of the IMT and IMTFE Charters, and the ICTY and ICTR Statutes.[260] Moreover, it thus affirms that crimes against humanity can occur both during armed conflict and times of peace or civil strife.[261]

Article 7 also does not require a discriminatory motive, i.e., "that the crime be committed on national, political, ethnic, racial or religious grounds," except for the specific crime of persecution since discrimination is the essence of the latter.[262] By adopting this approach, the Rome Statute thus follows the same path taken by the IMT and IMTFE Charters. As regards the ad hoc tribunals, the ICTR Statute contains such a requirement; and, albeit the ICTY Statute does not, the Tribunal applied it in the *Tadic* opinion and judgment.[263]

The next four features may be properly characterized as "separate preconditions that must be satisfied before jurisdiction attaches in a particular case in which crimes against humanity are charged."[264]

First, Article 7 requires a stringent threshold test: the commission of the crimes must be a part of a "widespread *or* systematic attack."[265] The ICTR case of *Prosecutor v. Akayesu* defined *widespread* as "massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims" and that of *systematic* as "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."[266] In other

discriminatory grounds (ICTR Statute only). Second, the act must constitute one of the enumerated acts in Article 3(a)-(i). It should be highlighted that the mental element for a crime against humanity incorporates two parts. Initially, it is necessary to establish that the accused knew the context in which his or her acts took place in order for it to be "part of" a widespread or systematic attack. This is a discrete requirement in the chapeaux of Article 7 in the Rome Statute. Next, one must establish the mental element required for the specific act alleged. As will become clear in the case of the ICTR Statute, it is not necessary to prove a third element of subjective intent to discriminate on the part of an accused.

260. Scharf, *supra* note 155, at 88.

261. Robinson, *supra* note 247, at 46.

262. *Id. See also* Sadat & Carden, *supra* note 114, at 428; Chesterman, *supra* note 255, at 326-28.

263. *Id.*

264. Sadat & Carden, *supra* note 114, at 429 (citation omitted).

265. Emphasis supplied.

266. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, para. 580 (Trial Chamber I Sept. 2, 1998), *available at* <www.un.org/ictr>. *See also* Chesterman, *supra* note 255, at 314-21 (explaining the requirement that the conduct must be "committed as a part of a widespread or systematic attack").

words, *widespread* "requires large-scale action involving a substantial number of victims," while *systematic* "requires a high degree of orchestration and methodical planning."[267] But one of the most controversial issue at the Conference was whether these qualifiers should be disjunctive (i.e., widespread *or* systematic) or conjunctive (i.e., widespread *and* systematic), with the delegates divided into two camps — the "like-minded group" pushing for disjunction; while the permanent members of the Security Council, and delegations from the Arab and Asian Groups in favor of conjunction.[268] The solution is enshrined in Article 7(2)(a) that defines "attack directed against any civilian population" to mean "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." This definition then underscores two points: it involves some degree or scale and a policy element.[269]

Second, the attack must be directed against "any civilian population." Dissecting this phrase reveals its import: the term *any* "confirms the well-established principle that the civilians need not be nationals of a foreign power" or, in other words, all civilians are protected; *civilian* "excludes attacks against armed forces"; and *population* "reflects the collective nature of the object of the attack."[270]

Third, the inclusion of the element of *mens rea* "confirms that the accused, while not necessarily responsible for the overarching attack against the civilian population, must at least be aware of the attack."[271] The Elements of Crimes further elucidates

> the last element [i.e., knowledge of a widespread or systematic attack against a civilian population] should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian

267. Robinson, *supra* note 247, at 47.

268. *Id.*

269. *See* Robinson, *supra* note 247, at 47-51 for an extensive discussion of these two points.

270. *Id.* at 51. *See also* Chesterman, *supra* note 255, at 321-26 (dissecting the import and meaning of the operative words in the requirement of "directed against any civilian population," *i.e.*, *civilian* and *population*).

271. *Id. See also* Chesterman, *supra* note 255, at 321.

> population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.[272]

Finally, the attack implies a policy element, i.e., it must be "pursuant to or in furtherance of a State or organizational policy to commit such attack." (Article 7(2)(a)). The policy element of crimes against humanity has been affirmed by various authorities: the drafting history of the Nuremberg Charter, the pronouncements of the Nuremberg Tribunal, the work of the ILC, the decisions of the ICTY, the writings of jurists, and decisions by national courts.[273] According to the Elements of Crimes, the phrase *policy to commit such attacks* "requires that the State or organization actively promote or encourage such an attack against a civilian population."[274] Specifically,

> A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.[275]

Article 7(1) lists eleven specific acts that, considering the *chapeau*, may be deemed crimes against humanity, *viz.*: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty; torture; rape; persecution; enforced disappearance; apartheid; and other inhumane acts. The list echoes those offenses considered crimes against humanity under the IMT Charter and its successor instruments. But the Rome Statute also expands upon the historical list by: (1) "adding two new listed offenses: *apartheid*, and enforced

272. Elements of Crimes, *supra* note 182, at 9, 3, Introduction to Crimes against humanity.

273. Robinson, *supra* note 245, at 48-50. *See also* Chesterman, *supra* note 255, at 316.

274. Elements of Crimes, *supra* note 182, at 9, 3, Introduction to Crimes against humanity.

275. *Id.* n.6. Robinson articulates the import of these preconditions vis-à-vis the prosecution's burden:

> As a result the prosecution must establish an "attack directed against any civilian population," which involves multiple acts and a policy element (a conjunctive but low threshold test), and show that this attack was either widespread or systematic (higher threshold but disjunctive alternatives). If the prosecutor chooses to prove the "widespread" element, the concern about completely unrelated acts is addressed, because of the policy element. If the prosecutor chooses to prove the "systematic" element, some element of scale must still be shown before ICC jurisdiction is warranted, because a course of conduct involving multiple crimes is required.

Robinson, *supra* note 247, at 51.

disappearance of persons"; (2) "expanding the offense of deportation to include 'or forcible transfer of population'"; (3) "expanding the offense of imprisonment to include 'or other severe deprivation of physical liberty in violation of fundamental rules of international law'"; and (4) "expanding the offense of rape to include 'sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.'" [276] Thus, Article 7 "constitutes progressive development of substantive [international criminal] law."[277] That such is the case is underscored by the fact that Article 7(2) saw it fit to explicitly define the following offenses: deportation or forcible transfer of population, forced pregnancy, apartheid and enforced disappearance of persons.[278]

c. War Crimes

Like crimes against humanity, although the general category of war crimes have been uniformly regarded as crimes that, being *jus cogens*, are subject to universal jurisdiction under customary international law, debate rages as to the specific types of acts or offenses that would qualify as war crimes.[279]

In characterizing the specific acts under the general category of war crimes, some observations made in the previous chapter must be duly considered. First, war crimes is subject to the *chapeau* that they must be "committed as part of a plan or policy or as part of a large-scale commission of such crimes."[280] Second, the general category of war crimes is further divided by the Statute into four sub-categories — grave breaches of the Geneva Conventions; serious violations of international armed conflict laws and customs; serious violations of common Article 3 of the Geneva Conventions; and serious violations of non-international armed conflict laws

276. Scharf, *supra* note 155, at 89 (citation omitted). *See also* Sadat & Carden, *supra* note 122, at 432-33.

277. Danilenko, *supra* note 152, at 487.

278. *See supra* page 64. The inclusion of apartheid is based on the following international instruments: the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; the U.N. General Assembly Resolution 2712 of 1970, and the Apartheid Convention. Scharf, *supra* note 155, at 89 & n.128; Robinson, *supra* note 247, at 55 n.74. Enforced disappearance of persons traces its provenance to the U.N General Assembly's 1992 Declaration on the Protection of All Persons From Enforced Disappearances and the Organization of American State's 1994 Inter-American Convention on Forced Disappearance of Persons. Scharf, *supra* note 155, at 90 (citation omitted); Robinson, *supra* note 247, at 55 n.75.

279. Scharf, *supra* note 155, at 91 (citation omitted). *See also* Bassiouni, *Jus Cogens*, *supra* note 240.

280. Article 8(1).

and customs. These four categories, in turn, may be classified under the general headings of "war crimes during international armed conflicts" and "war crimes during non-international armed conflicts."[281] Third, Articles 8(2)(b) and (2)(e) enumerate some parallel or identical acts.

i. War Crimes During International Armed Conflict

The first category focuses on grave breaches of the 1949 Geneva Conventions.[282] The Four Geneva Conventions aim to protect the following classes of war victims: wounded, sick or shipwrecked soldiers; prisoners of war; and civilians.[283] The proscribed acts in Article 8(2)(a) restates the proscriptions under the Geneva Conventions and, thus, are properly codification of customary international law.

Article 8(2)(b) criminalizes "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law." The twenty-six enumerated acts are based on the 1907 Hague Convention,[284] the Protocol I Additional to the Geneva Conventions,[285] and various conventions banning certain weapons.[286] The list does not simply restate existing law, but rather introduces innovations. Article 8(2)(b)(iii) and (e)(iii), under the third category, proscribe: "Intentionally directing attacks against personnel, installations, material, units

281. Article 8(2)(a-c, e).

282. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, II P.T.S. 215, 75 U.N.T.S. 31 (Signed for the Philippines Dec. 8, 1949. Entered into force for the Philippines Sept. 7, 1951) [hereinafter Geneva (I) Convention]; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, II P.T.S. 241, 75 U.N.T.S. 85 (Entered into force for the Philippines Apr. 6, 1953) [hereinafter Geneva (II) Convention]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, II P.T.S. 263, 75 U.N.T.S. 136 (Entered into force for the Philippines Apr. 6, 1952) [hereinafter Geneva (III) Convention]; Geneva Convention (IV) Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, II P.T.S. 333, 75 U.N.T.S. 287 (Entered into force for the Philippines Apr. 6, 1953) [hereinafter Geneva (IV) Convention.

283. *See* MANUAL, *supra* note 195, at 92; Benison, *supra* note 193, at 145.

284. [Hague] Convention [No. IV] Respecting the Law and Customs of War on Land, with annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

285. Protocol (I) Additional to the Geneva Conventions of 12 August 1939, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3 (Signed on Dec. 12, 1978. Subject to ratification, not yet in force) [hereinafter Protocol I].

286. MANUAL, *supra* note 195, at 93.

or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict." This proscription is a completely new instance of war crime. Its inclusion was a compromise struck in lieu of having an altogether separate crime against the U.N. and its associated personnel.[287] The protection, however, is available so long as the elements of humanitarian assistance and U.N. peacekeeping remain civilian or civilian objects; accordingly, situations in which U.N. personnel are involved or take part in hostilities fall outside its ambit.[288]

The proscription in Articles 8(2)(b)(ix) and (e)(vi) of intentionally directed attacks "against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives" is based on Article 27 of the Hague Convention No. IV of 1907, Convention for the Protection of Cultural Property of 1954,[289] and Articles 85(4)(d) and 53 of Protocol I. The innovation consists in the addition of "buildings dedicated to... *education*," upon the insistence of Switzerland and New Zealand, which in turn was allowed provided that the last words of the paragraph was amended from "military purposes" to "military objectives" to reflect a narrower reference.[290]

The NGO lobby effectively pushed for the inclusion of gender-based crimes under Article 8(2)(b)(xxii) and (e)(vi) in view of the proliferation of gender-based crimes in Bosnia and Rwanda.[291]

287. Article 19 of the 1996 ILC Draft Code of Crimes Against the Peace and Security of Mankind provides for "Crimes against United Nations and associated personnel." ILC 48th Session Report, *supra* note 180.

288. Arsanjani, *supra* note 150, at 33. *See also* Danilenko, *supra* note 152, at 488.

289. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

290. Arsanjani, *supra* note 150, at 33-34 (citation omitted) (emphasis supplied). *See also* Danilenko, *supra* note 152, at 488.

291. *Id.* at 34. As Isabelle Küntziger recounts:

> The conflicts in Rwanda and the former Yugoslavia, where sexual crimes were committed on a large scale, led to the specific inclusion of the war crimes of rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation in the Statute for both international and non-international armed conflicts. The primary purpose of negotiations on these crimes at the Rome Conference was to include specific articles on sexual and gender-based crimes, which had previously only been covered implicitly by more general concept of [International Humanitarian Law] such as torture, inhuman treatment, wilfully causing great suffering, or serious injury to body or health, and committing

The NGOs were also the driving force behind Article 8(2)(b)(xxvi) and (e)(vii) that respectively proscribe the "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities," and "[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities." These crimes are based on Article 38 of the Convention on the Rights of the Child[292] and Articles 77(2) of Protocol I[293] and 4(3)(c) of Protocol II.[294] Innovations introduced in Rome include the

outrages upon personal dignity, in particular humiliating and degrading treatment.

Isabelle Küntziger, "The International Criminal Court and International Humanitarian Law," 5, Experts' Conference on the International Criminal Court, Manila (Oct. 16-18, 2001) (unpublished paper, on file with the author) [hereinafter Küntziger].

292. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/49 (1989) (Signed for the Philippines Jan. 26, 1990. General entry into force Sep. 2, 1990). Article 38 provides:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

293. Protocol I, *supra* note 285, art.77(2): "The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest."

294. Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, *adopted* Jun.8, 1977, 1125 U.N.T.S. 609 (Ratified by the Philippines Dec. 11, 1986). Article 4(3)(c) provides that: "Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."

following: first, inclusion of the word *national* in subparagraph (b)(xxvii); second, the use of "armed forces *or groups*" in subparagraph (e)(vii) in order to cover the frequent situation in internal armed conflict that both armed forces and groups are involved; third, both subparagraphs avoid the use of the word *recruited*; fourth, both also qualify the participation of children with the word *actively* to signify the exclusion of situations where the involvement of children in the hostilities is limited to support functions.[295]

The Rome Statute also introduced two new crimes to the laws of war: an intentionally launched attack knowing that such attack will cause "widespread, long-term and severe damage to the natural environment" under Article 8(2)(b)(iv), and population transfers under Article 8(2)(b)(viii), *i.e.*, "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory."[296] As regards population transfer, subparagraph (b)(viii) expands the definition of that crime enshrined in Article 49(6) of Geneva IV by adding the words "directly or indirectly."[297]

ii. War Crimes During Non-International Armed Conflicts

The innovative character of Article 8(2)(c) and (2)(e) lies in one of the criticisms raised against the ICC having jurisdiction over war crimes committed in a non-international armed conflict. The argument states that "war crimes in internal armed conflict, including violations of Additional Protocol II and Common Article 3 of the Geneva Conventions are not yet universally recognized as part of customary international law."[298] The Rome

295. Arsanjani, *supra* note 150, at 34 (citation omitted) (emphasis supplied).

296. Benison, *supra* note 193, at 161.

297. Danilenko, *supra* note 152, at 488 & n.182.

298. Scharf, *supra* note 155, at 91. *See also* Sadat & Carden, *supra* note 114, at 436 & n.336 (noting that the inclusion of Common Article 3 was not particularly controversial, but that of Protocol II was hotly controverted). However, Scharf rebuts this argument thus: "there now exists substantial support for the principle of individual criminal responsibility for violations of international humanitarian law applicable in internal armed conflicts (as contained in Common Article 3 and Additional Protocol II) as a matter of customary international law." Scharf, *supra* note 155 at 96 (citation omitted). He locates the legal underpinnings of this newly-developed principle in various resolutions of the Security Council regarding Rwanda and of the General Assembly, reports by the U.N. Commission on Human Rights, and in the decision of the Appeals Chamber of the Yugoslavia Tribunal in the 1995 *Tadic* case. *Id.* at 96 & nn.167-170; 97 & n.171. His conclusion: "the international community has affirmed the principle of individual criminal responsibility for violations of international humanitarian

Statute, in expressly including war crimes committed in a non-international conflict, embodies progressive development of international humanitarian law. As one commentator puts it: "[o]ne of the major achievements in the ICC Statute is the international criminalisation as war crimes, for the first time, of serious violations of the laws and customs of war applicable to NIACs [i.e., non-international armed conflicts] including serious violations of common Article 3 of the 1949 Geneva Conventions."[299] The inclusion of this hitherto unwelcome category of war crimes was spurred by the following factors: first, "[m]ost of the armed conflicts since Word War II have been non-international armed conflicts"; second, "[t]he general feeling that it [is] precisely in internal armed conflicts that national criminal justice systems are more likely to be unable to adequately respond to violations of the rules of international humanitarian law"; and, third, "[t]he concept of individual criminal responsibility for serious violations committed in non-international armed conflicts is accepted in the case law of the ICTY."[300] Furthermore, the list of proscribed conduct in the aforesaid provisions expands on the enumeration of common Article 3.[301]

law applicable in internal armed conflicts as a matter of customary international law." *Id.* at 97.

299. Santos, *supra* note 193, at 4.

300. Küntziger, *supra* note 291, at 4-5.

301. *Id.* at 5. Common article 3 provides:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> 2. The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

2. Restatement and Innovation in Punishing the Core Crimes

When it comes to punishing the core crimes, the penal or repressive provisions of the pertinent multilateral conventions codify the relevant rule recognized by customary international law. Simply put, the rule entrusts to the domestic penal justice system of each State the responsibility of prescribing the appropriate penalties for the perpetration of the core crimes.

In the case of the crime of genocide, for instance, article VI of the Genocide Convention provides that: "The Contracting Parties *undertake to enact*, in accordance with their respective Constitutions, the *necessary legislation* to give effect to the provisions of the present Convention, and, in particular, *to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.*"[302]

With respect to first category war crimes under the Statute, each of the four Geneva Conventions of 1949 share this common provision:

> The High Contracting Parties undertake *to enact any legislation necessary to provide effective penal sanctions* for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.
>
> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.
>
> In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those

302. Emphasis supplied. Genocide Convention, *supra* note 50, Art. III enumerates the following: "(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."

provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.[303]

The 1977 Protocol I to the Geneva Conventions of 1949 adopts the foregoing enforcement obligation in Article 85; thus: "The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol."

No similar explicit provision may be found under the general category of crimes against humanity since there is no counterpart convention that treats the aforesaid crime. However, a similar commitment to domestic penal system is present, at least with respect to apartheid. Article IV of the Apartheid Convention stipulates that:

> The States Parties to the present Convention undertake:
>
> (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime;
>
> (b) *To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction* persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.[304]

Part 7 of the Rome Statute, in dealing with the imposable penalties, respects this consistent practice, pursuant to the principle of complementarity, via Article 80: "Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part." Yet, Part 7 constitute progressive development in that it prescribes, under Article 77, the

303. Geneva (I) Convention, *supra* note 282, Art. 49; Geneva (II) Convention, *supra* note 282, Art. 50; Geneva (III) Convention, *supra* note 282, Art. 129 (except the last paragraph, which is parsed here, thus: "In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention"); and Geneva (IV) Convention, *supra* note 282, Art. 146 (emphasis supplied).

304. Emphasis supplied. Article II defines the term "the crime of apartheid" by enumerating seven separate "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."

imposition of the penalties of imprisonment, coupled with a fine and forfeiture in cases of conviction by the Court.[305]

V. Taking The Core Crimes Seriously

This chapter squarely addresses the primary problem posed in this paper — whether the core crimes can be construed as criminalized under Philippine domestic law without the enactment of appropriate penal legislation.

The resolution of this issue beckons the study to consider some basic principles of international law from a peculiarly Philippine perspective. Accordingly, the first section restates in general terms the relation between international law and domestic law; and, then, spells out how international law forms part of Philippine domestic law. The second section builds upon the preceding exposition in resolving whether the core crimes can be construed as effectively and adequately criminalized under Philippine domestic law by virtue of the Incorporation Clause or the Treaty Clause. The chapter ends expressing the need for a statutory criminalization of the core crimes.

A. International Law in the Domestic Sphere

1. The Relation of International Law and Municipal Law

The process of an effective implementation of the Rome Statute would vary from State to State depending on how each State construes the relationship between international law and their respective domestic or municipal law. International law literature acknowledges two primary theories on the

305. As regards the exclusion of capital punishment, the Conference President, prompted by the Working Group on Penalties, read out a declaration regarding this omission as the curtain fell on the Conference, to wit:

> The debate at this Conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principles of complementarity between the Court and national jurisdictions, national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislations and practices with regard to the death penalty. Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes.

Press Release L/ROM/22, *supra* note 134.

relation of international and municipal law: the monist and dualist theories.[306] Both theories rest on the assumption "that there is a common field in which international and municipal legal orders can operate simultaneously in regard to the same subject-matter, and the problem then is, which is to be master?"[307]

The monist theory perceives law unitarily and, thus, "understands both international and municipal law as forming part of one and the same legal order."[308] Thus, this approach — following Hans Kelsen's view that the ultimate source of the validity of all law derived from a basic rule or *grundnorm* of international law — concludes that "all rules of international law were supreme over municipal law, that a municipal law inconsistent with international law was automatically null and void and that rules of international law were directly applicable in the domestic sphere of states."[309]

On the other hand, the dualist or pluralist theory "assumes that international law and municipal law are two separate legal systems which exist independently of each other."[310] Consequently, international law has no role in the settlement of domestic conflicts unless it is first made part of the domestic or municipal system.[311] Ian Brownlie expounds:

> Dualist doctrine points to the essential difference of international law and municipal law, consisting primarily in the fact that the two systems regulate

306. AKEHURST'S, *supra* note 155, at 63. *See also* BROWNLIE, *supra* note 155, at 32-34 (referring to the schools of thought as monism and dualism or pluralism). An alternative to the dichotomy is the so-called theory of co-ordination that holds "that the logical consequences of both theories conflict with the way in which international and national organs and courts behave." Proponents of this theory include: Sir Gerald Fitzmaurice who challenges the assumption that international and municipal law operate in a common filed by positing the view that the two systems work in different spheres, wherein each is supreme, and that a conflict of obligations may arise — "an inability of the state on the domestic plane to act in the manner required by international law: the consequence of this will not be the invalidity of the internal law but the responsibility of the state in the international plane"; and Rosseau who characterizes "international law as a law of co-ordination which does not provide for automatic abrogation of internal rules in conflict with obligations on the international plane." *Id.* at 34-35.

307. BROWNLIE, *supra* note 155, at 32.

308. AKEHURST'S, *supra* note 155, at 63.

309. *Id.* Another eminent jurist espousing monism is Hersch Lauterpacht in whose hands "monism takes the form of an assertion of the supremacy of international law even within the municipal sphere, coupled with well-developed views on the individual as a subject of international law." BROWNLIE, *supra* note 155, at 33.

310. *Id.*

311. BERNAS I, *supra* note 214, at 16.

> different subject-matter. International law is a law between sovereign states: municipal law applies within a state and regulates the relation of its citizens with each other and with the executive. On this view, neither legal order has the power to create or alter rules of the other. When municipal law provides that international law applies in whole or in part within the jurisdiction, this is merely an exercise of the authority of municipal law, an adoption or transformation of the rules of international law. In case of conflict between international law and municipal law the dualist would assume that municipal court would apply municipal law.[312]

When translated into concrete State practice vis-à-vis treaties, the monist and dualist theories play out thus:

> Some States generally ratify treaties first, and then the rules included in the treaty automatically become a part of national law upon ratification and publication in an official journal (monist system). Other States, especially those in the Commonwealth, are obliged by their constitutions to prepare implementing legislation before ratifying or acceding to any international treaties (dualist system).[313]

2. International Law as Law of the Land

Since the Rome Statute provisions criminalizing the core crimes embody a codification of customary international law and a progressive development of international law, the attitude of the Philippine domestic legal system towards international law essays a significant role in the process of ratifying and implementing the Rome Statute. Two provisions of the 1987 Philippine Constitution spell out this attitude: the Incorporation Clause and the Treaty Clause.[314]

312. BROWNLIE, *supra* note 155, at 32-33 (citation omitted).

313. MANUAL, *supra* note 195, at 9. Regardless of which theory or system operates in a particular State, changes in municipal law would be inevitable for States Parties to the Rome Statute: "In monist systems also, it is likely that the implementation of the Statute will involve some modifications to existing national laws" — e.g., "every State must create technical mechanisms with which to co-operate with the Court and determine which State institutions or agencies will be competent to ensure co-operation with the Court." *Id.* at 11. Such changes may be effected under three approaches: first, enactment of single piece of implementing legislation; second, amending all relevant pieces of legislation separately; and a hybrid approach, i.e., a single piece of legislation that would also amend all relevant pieces of legislation already in force, as exemplified by Canada's Crimes Against Humanity Act. *Id.* at 11-12.

314. *But see* EDGARDO L. PARAS & EDGARDO C. PARAS, JR., INTERNATIONAL LAW AND WORLD POLITICS 18 (rev. ed. 1994) [hereinafter PARAS & PARAS] (citing four theories vis-à-vis the incorporation of international law into the municipal law of the Philippines, *viz.*: the *transformation* doctrine, the *adoption* doctrine, the *harmonization* doctrine, and the *restricted automatic* doctrine).

a. Incorporation Clause

Section 2, Article II of the 1987 Philippine Constitution provides that "[t]he Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations." This provision has three parts: "(1) renunciation of war; (2) *adoption of the principles of international law*; (3) adherence to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."[315] The second part — the Philippines "*adopts the generally accepted principles of international law as part of the law of the land*" — articulates the Philippine-version of the so-called doctrine of incorporation.[316] The Incorporation Clause is not original to the 1987 Charter. It initially appeared, with the first part, in the 1935 Constitution under Article II, Section 3, which Article II, Section 2 of the 1973 Constitution copied almost verbatim, altering "law of the *nation*" to "law of the *land*" and adding the third part; the 1987 Constitution completely retained the 1973 Charter's version.[317]

According to Joaquin G. Bernas, S.J., the Incorporation Clause says two things: first, "the Philippines, in its relations with other states, considers itself bound by international law," as "a necessary corollary of being a civilized state and member of the family of nations"; second, "it makes 'the generally accepted principles of international law' part of domestic law binding on the

315. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 54 (1996) [hereinafter BERNAS II] (emphasis supplied).

316. AKEHURST'S, *supra* note 155, at 69. Admittedly of British origin, the doctrine of incorporation provides that "customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only in so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority." BROWNLIE, *supra* note 155, at 43. That Article II, Section 2 is the Philippine version of the doctrine, see JORGE R. COQUIA & MIRIAM DEFENSOR SANTIAGO, INTERNATIONAL LAW 14 (3rd ed. 1998) [hereinafter COQUIA & SANTIAGO]; ISAGANI A. CRUZ, INTERNATIONAL LAW 5 (1996 ed.) [hereinafter CRUZ]; PARAS & PARAS, *supra* note 310, at 18; JOVITO R. SALONGA & PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 12 (5th ed. 1992) [hereinafter SALONGA & YAP].

317. BERNAS II, *supra* note 315, at 54-5. The 1935 Constitution version: "The Philippines renounces war as an instrument of national policy, *and adopts the generally accepted principles of international law as part of the law of the Nation*"; the 1973 Constitution version: "The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land*, and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations." (Emphasis supplied.)

members of the national community in their relations with each other."[318] He further explains, as regards the question whether the Philippines is "dualist" or "monist"

> By saying that the Philippines "adopts the generally accepted principles of international law as part of the law of the land," the Constitution manifests its adherence to the "dualist" theory but at the same time bridges the gap between the two systems by making international law part of domestic law. This provision makes the Philippines one of the states which make a specific declaration that international law has the force of domestic law. International law therefor[e] can be used by Philippine courts to settle domestic disputes in much the same way that they would use the Civil Code or the Penal Code and other laws passed by Congress.[319]

i. Scope of the Incorporation Clause

But what does the phrase "generally accepted principles of international law" embrace vis-à-vis the primary sources of international law? It more accurately refers to the second and third primary sources in Article 38 of the ICJ Statute. Thus, "deemed incorporated into Philippine law by virtue of the Incorporation Clause are (1) *customary international law* or international custom, and (2) *general principles of law*"; whereas, treaty rules or conventional international law are excluded.[320] The Supreme Court implicitly affirms this nuanced view when it applied the Incorporation Clause in relation to the 1961 Vienna Convention on Diplomatic Relations, thus: "The Constitution 'adopts the generally accepted principles of international law as part of the law of the land....' *To the extent* that the Vienna Convention is a *restatement*

318. BERNAS I, *supra* note 214, at 10.

319. *Id.* 16. As for the other countries that do, Bernas cites Article 9 of the Austrian Constitution and Article 25 of the Constitution of the Federal Republic of Germany. *Id.* n.11.

320. MAGALLONA, *supra* note 224, at 32 & 37 (emphasis supplied). *See also* SALONGA & YAP, *supra* note 316, at 12 (asserting that the Philippines is "one country which follows the doctrine of incorporation *with respect to customary international law*"(emphasis supplied)); Ballacillo, Challenges, *supra* note 138, at 3 (positing that the Incorporation Clause in the 1987 Constitution "refers only to generally accepted principles of customary international law and not to treaty or conventional international law"); PARAS & PARAS, *supra* note 314, at 18, explaining the RESTRICTED AUTOMATIC doctrine thus:

> where as long as there is constitutional authority, international law is *automatically* considered part of our law, whether or note there is inconsistency with municipal legislation, and whether or not express reference to international law is made in specific statutes. BUT *restricted* in the sense that only GENERALLY ACCEPTED PRINCIPLES OF INTERNATIONAL LAW have been adopted as part of the law of the nation. This would seem to be the Philippine position on the matter.

of the generally accepted principles of international law, it should be *a part of the law of the land*."[321] Based on the previous discussion on *jus scriptum*, the Supreme Court in this case treats the treaty involved as a restatement or codification of customary international law.

Merlin M. Magallona expands on Bernas' assertion on the legal function of the Incorporation Clause, thus:

> As a constitutional mandate, the [I]ncorporation [C]lause assumes the existence of international law which binds the Philippines as a State. It thus becomes a method by which the Philippines can carry out its obligations under international law within its territorial jurisdiction.
>
> Its effect is that international law as Philippine law creates legal rights and obligations within Philippine territory and regulates the conduct of government officials and organs as well as relations of individual citizens with each other and with the government. In this context, questions of international law may be submitted to Philippine courts for decision. The outcome of the litigation, however, does not affect the binding nature of international law in the relation of the Philippines with other States and other international organizations.[322]

On the other hand, the practical value of the Incorporation Clause is akin to that of judicial notice under the Rules of Evidence: "[o]nce the [I]ncorporation [C]lause is invoked in an appropriate case or proceeding in the Philippines and a norm is qualified as one of the "generally accepted principles of international law," it becomes applicable without need of proving it as part of Philippine law. [It] dispenses with that burden of proof."[323] The judiciary's role, therefore, vis-à-vis the Incorporation Clause is "to identify what particular norm or principle of international law belongs to the category of general international law, in relation to specific claims before the court in which that particular norm is to be applied as domestic law."[324] But such "judicial act is not constitutive of what forms part of domestic law"; rather, "it is merely directory what already forms part of domestic law as derived from general international law."[325] In other words, under this particular scheme of "internalizing" international law, the court does not arrogate unto itself the function and prerogative, reserved in the

321. Reyes v. Bagatsing, 125 SCRA 553, 566 (1983) (emphasis supplied) (citation omitted).

322. MAGALLONA, *supra* note 224, at 37.

323. *Id.* at 39.

324. *Id.* at 39-40.

325. *Id.* at 40.

Constitution, of determining what international law norms of principles are to form part of Philippine municipal law.[326]

ii. Incorporated International Law Principles

According to Magallona, the Supreme Court has identified or declared the following international law principles to have been incorporated or adopted as part of the law of the land: (1) rules and principles of land warfare,and of humanitarian law under the Hague Convention and the Geneva Conventions; (2) the principle of *pacta sunt servanda*; (3) human rights as defined in the U.N. Universal Declaration of Human Rights; (4) The principle that "a foreign army allowed to march through a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place"; (5) the principle that judicial acts not of a political complexion of a de facto government established by the military occupant in an enemy territory, is valid under international law; (6) The principle that private property seized and used by the enemy in times of war under circumstances not constituting valid requisition does not become enemy property and its private ownership is retained, the enemy having acquired only its temporary use; (7) the

326. *Id. See also* José M. Roy III, *A Note on Incorporation: Creating Municipal Jurisprudence from International Law*, 46 ATENEO L.J. 635 (2001) [hereinafter Roy] (asserting that "[b]y the incorporation, rules of international law *ipso facto* become operative and effective within the municipal legal system"). Roy, analyzing how the Philippine Supreme Court uses the Incorporation Clause, further observes:

> There appears a good deal of latitude left for the exercise of judicial discretion when it comes to the incorporation of other sources of international law. In the case of customary international law, it would seem that the doctrine of incorporation merely provides a medium for the municipal legal system to graft rules culled from international law. How that process works, and essentially its outcome, however, is more a matter of municipal rather than international law. In determining the existence of a customary rule, for instance, the Court is not particularly concerned with independently evaluating the separate and concurrent presence of a uniform and general practice among states, coupled with *opinio juris*, over a duration of time. Indeed, it appears that the Court is satisfied to do without its own analysis of the existence of these elements. And, at least in some cases, the Court is content to rely on the conclusions of authors....
>
> *A contrario*, there are instances where the Court makes no apparent attempt to verify the status of a customary rule. In other words, the Court has ascertained or rejected a rule of customary international law as a matter of *stare decisis*, without regard as to whether the precedent relied upon identified and examined the presence of the elements of customary international law.
>
> *Id.* at 637-38 (citation omitted).

principle that a State has the right to protect itself and its revenues, a right not limited to its own territory but extending to the high seas; (8) the principle of restrictive sovereign immunity; (9) the principle of diplomatic law that the receiving State has the special duty to protect the premises of the diplomatic mission of the sending State; and (10) the right of a citizen to return to his country.[327]

To illustrate the process of incorporation, the *Kuroda v. Jalandoni*[328] case is taken up here for being squarely at point, at least, as regards the criminalization of war crimes. Former Lieutenant-General Shigenori Kuroda was the Commanding General of the Japanese Imperial Forces in the Philippines from 1943 and 1944. He was charged before a Military Commission — convened by the Chief of Staff of the Armed Forces of the Philippines pursuant to Executive Order No. 68 (E.O. No. 68) issued by President Manuel A. Roxas — for unlawfully disregarding and failing "'to discharge his duties as such commander to control the operations of members of his command, permitting them to commit brutal atrocities and other high crimes against noncombatant civilians and prisoners of the Imperial Japanese Forces, in violation of the laws and customs of war.'"[329] E.O. No. 68, issued on 29 July 1947, established a National War Crimes Office and prescribed rules and regulations governing the trial of accused war criminals.[330] In his petition for prohibition before the Supreme Court,

327. *Id.* at 41-42. The cases where these principles have been identified are, respectively: (1) Kuroda v. Jalandoni, 83 Phil. 171 (1949); (2) Tañada v. Angara, 272 SCRA 18 (1997); La Chemise Lacoste v. Fernandez, 129 SCRA 373 (1984); Agustin v. Edu, 88 SCRA 195 (1979); (3) Reyes v. Bagatsing, 125 SCRA 553 (1983); PAFLU v. Secretary of Labor, 27 SCRA 20 (1969); Boy Scouts of the Philippines v. Araos, 102 Phil. 1080 (1958); Andreu v. Commissioner of Immigration, 90 Phil. 347 (1951); Chriskoff v. Commission on Immigration, 90 Phil. 256 (1951); Borovsky v. Commissioner of Immigration, 90 Phil. 107 (1951); Mejoff v. Director of Prisons, 90 Phil 70 (1951); (4) Dizon v. Phil. Ryukus Command, 81 Phil. 286 (1948); Tubb and Tedrow v. Griess, 78 Phil. 249 (1947); Raquiza v. Bradford, 75 Phil. 50 (1945); (5) Montebon v, Director of Prisons, 78 Phil. 494 (1947); Etorma v. Ravelo, 78 Phil. 145 (1947); Alcantara v. Director of Prisons, 75 Phil. 494 (1945); Co Kim Cham v. Tan Keh, 75 Phil. 113 (1945); (6) Heirs of Tugadi & Pajimola v. MRR, 65 SCRA 593 (1975); Noceda v. Escobar, 87 Phil. 204 (1950); (7) Asaali v. Commissioner of Customs, 27 SCRA 312 (1969); (8) Sanders v. Veridiano, 162 SCRA 88 (1988); (9) Reyes v. Bagatsing, 125 SCRA 553 (1983); and (10) Marcos v. Manglapus, 177 SCRA 668 (1989).

328. 83 Phil. 171 (1949). This illustration is by no means exhaustive; for a deeper analysis of the matter see Roy, *supra* note 326.

329. *Id.* at 176.

330. *See id.* at 181-87 where E.O. No. 68 is reproduced *in toto*. The Military Commission's subject-matter jurisdiction is enunciated thus:

Kuroda prayed, *inter alia*, that E.O. No. 68 be declared illegal and unconstitutional, arguing that:

> [E.O. No. 68] is illegal on the ground that it violates not only the provisions of our constitutional law but also our local laws, to say nothing of the fact (that) the Philippines is not a signatory nor an adherent to the Hague Convention on Rules and Regulations covering Land Warfare and, therefore, petitioner is charged of "crimes" not based on law, national and international.[331]

The Supreme Court, voting nine-to-one, upheld the constitutionality and validity of E.O. No. 68. Building upon the Incorporation Clause of the 1935 Constitution, the tribunal unraveled its *ratio decidendi* thus:

> In accordance with the generally accepted principles of international law of the present day, including the Hague Convention, the Geneva Convention and significant precedents of international jurisprudence established by the United Nations, all those persons, military or civilian, who have been guilty of planning, preparing or waging a war of aggression and of the commission of crimes and offenses consequential and incidental thereto, in

(b) Over Offenses. — The military commissions established hereunder shall have jurisdiction over all offenses including, but not limited to, the following:

(1) The planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(2) Violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or internees or persons on the seas or elsewhere; improper treatment of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; or devastation not justified by military necessity.

(3) Murder, extermination, enslavement, deportation and other inhuman acts committed against civilian populations before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime defined herein, whether or not in violation of the local laws.

Id. at 182. As for the penalty, "[t]he commission may sentence an accused, upon conviction, to death by hanging or shooting, imprisonment for life or for any less term, fine, or such other punishment as the commission shall determine to be proper." *Id.* at 186. The above-enumerated subject-matter jurisdiction is a substantial reproduction of Article 6(a)-(c) of the IMT Charter. *Cf.* IMT Charter, *supra* note 45, art. 6.

331. *Id.* at 176. Kuroda also sought to enjoin and prohibit two American attorneys from participating in the prosecution of his case before the Military Commission and to permanently prohibit the Members of the said Commission from proceeding with the case. *Id.*

violation of the laws and customs of war, of humanity and civilization, are held accountable therefor. Consequently, in the promulgation and enforcement of Executive Order No. 68, the President of the Philippines has acted in conformity with the generally accepted principles and policies of international law which are part of our Constitution.

. . .

[Kuroda] argues that respondent Military Commission has no jurisdiction to try [him] for acts committed in violation of the Hague Convention and the Geneva Convention because the Philippines is not a signatory to the first and signed the second only in 1947. *It cannot be denied that the rules and regulations of the Hague and Geneva conventions form part of and are wholly based on the generally accepted principles of international law.* In fact, these rules and principles were accepted by the two belligerent nations, the United States and Japan, who were signatories to the two Conventions. *Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them, for our Constitution has been deliberately general and extensive in its scope and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory.*[332]

iii. When Incorporated International Law Conflicts With Philippine Municipal Law

How do adopted "generally accepted principles of international law" stand in relation to the Constitution and statutes with respect to the hierarchy of rules? How does one resolve conflicts between these adopted principles of international law and the domestic law of the Philippines? Initially, the basic rule is to harmonize or reconcile the apparent contradiction and thereby give effect to both systems of law.[333] However, when real and irreconcilable conflicts do arise, the resolution hinges on the particular viewpoint wherefrom the problem is considered. From an international viewpoint, international tribunals invariably uphold the supremacy of international law.[334] When viewed from a specifically Philippine domestic law perspective,

332. *Id.* at 177-78 (emphasis supplied).

333. CRUZ, *supra* note 316, at 7. *See also* COQUIA & SANTIAGO, *supra* note 316, at 14 (asserting that "[c]ourts of most states seek to avoid conflicts by interpreting municipal law so as not to contradict international law on the basis that the state is not to be presumed to intend to fail in the discharge of its international obligations"); SALONGA & YAP, *supra* note 316, at 14 (positing that "[p]ractically all municipal tribunals concur in the proposition that the statutes of a State should be presumed to conform to the generally accepted principles of international law and that courts, therefore, should exert every effort to construe a municipal statute so as not to violate the law of nations").

334. *Id. See also* PARAS & PARAS, *supra* note 314, at 23.

the contours of the relation would depend on whether the conflict is with the constitution or a statute.

Consistent with the Philippines' adherence to the dualist system, these incorporated or adopted principles or norms are subordinate to the Constitution. They, as the constitutional text puts it, are adopted "as part of the law of the land" and not as "form[ing] part *of the Constitution.*"[335] But there are, at least, two specific instances where generally accepted principles

335. *Id.* at 47. *See also* BERNAS I, *supra* note 214, at 19 (arguing that "[c]onceivably,...there should be no such conflict between the Philippine Constitution or statutes on the one hand and customary international law on the other because the Constitution when formulated accepted the general principles of international law as part of the law of the land," and positing that conflicts between treaties and the Constitution or statutes are more likely to occur). Justice Gregorio Perfecto puts these principles in their proper place, thus:

There is the mistaken idea that international law had become part of the Constitution and even superior to the primary principles and fundamental guarantees expressly enunciated therein. To correct such a mistake, it is necessary to remember the following basic ideas:

1. That the declaration that the Philippines "adopts the generally accepted principles of international law as part of the law of the Nation" is an enunciation of a general national policy but never intended to lay down specific principles, provisions, or rules superior or even equal to the specific mandates and guarantees in the fundamental law.

2. That "the generally accepted principles of international law" made part of our statute books are not placed in a higher legal hierarchy than any other law that Congress may enact.

3. That said "generally accepted principles of international law" are not fixed and unchangeable but, on the contrary, may undergo development and amplification, amendment and repeal, that is, the same biological rules that govern all laws, including the fundamental one.

4. That the general statement made by the Constitution implies that the principles of international law which should be considered as part of the law of the nation are subject to determination by the agencies of our government, including courts of justice, and once determined they may be amended, enlarged or repealed, exactly as any of act Congress.

5. That those principles are to be gathered from many sources — treaties and conventions, court decisions, laws enacted by legislatures, treatises, magazine articles, historical facts and others — and the majority of them must be sifted from conflicting opinions coming from said sources.

6. That the provisions of the Constitution should always be held supreme and must always prevail over any contrary law without exempting principles of international law, no matter how generally or universally they may be accepted.

Tubb and Tedrow v. Griess, 78 Phil. 249, 260-61 (1947) (Perfecto, J., dissenting).

of international law form part of the Constitution. First, the first part of Section 2, Article II — the provision on renunciation of war — traces its provenance to the Kellog-Briand Pact of August 27, 1928, the fundamental principle of which, i.e., the renunciation of war as an instrument of national policy, is recognized as general international law. Second, juxtaposed with its repeated pronouncement that the principle of sovereign immunity is an adopted "generally accepted principle of international law," the Supreme Court also affirms that such principle is embodied in Section 3, Article XVI of the 1987 Constitution, providing that "[t]he State shall not be sued without its consent."[336]

As far as statutes are concerned, adopted or incorporated international norms or principles are, within Philippine jurisdiction, in parity with statutes — both being "part of the law of the land."[337] As the Supreme Court puts it:

> Withal, the fact that international law has been made part of the law of the land *does not by any means imply the primacy of international law over national law in the municipal sphere.* Under the doctrine of incorporation as applied in most countries, *rules of international law* are given a standing *equal, not superior, to national legislative enactments.*[338]

In case of clear and irreconcilable conflict between the two, the statutory construction maxims of *lex posterior derogat priori* (later rules prevail over the earlier) and *lex specialis derogat generali* (particular or special rules prevail over the general) would apply.[339]

b. Treaty Clause

Section 21, Article II of the 1987 Philippine Constitution provides the Treaty Clause, to wit: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate." The clause has retained the requirement of legislative concurrence expressed in its counterpart in Article VII, Section 10 of the 1935 Constitution and Article VIII, Section 14(1) of the 1973 Constitution,

336. MAGALLONA, *supra* note 224, at 34 (*citing* United States of America v. Guinto, 182 SCRA 644 (1990) and The Holy See v. Rosario, Jr., 238 SCRA 524 (1994)). *See also* BERNAS II, *supra* note 311, at 55 (stating that the Kellog-Briand Pact "inspired" the provision on renunciation of war).

337. *Id.* at 48.

338. Philip Morris, Inc. et al. v. Court of Appeals, 224 SCRA 576, 593 (1993) (citing almost *verbatim* SALONGA & YAP, PUBLIC INTERNATIONAL LAW 16 (4th ed. 1974) [or SALONGA & YAP, *supra* note 316, at 13]) (emphasis supplied).

339. MAGALLONA, *supra* note 224, at 48. *See also* SALONGA & YAP, *supra* note 316, at 13.

except that the present Charter requires Senate concurrence also in "international agreements."[340]

i. Doctrine of Transformation

The Treaty Clause enunciates the second method by which international law becomes part of Philippine domestic law, i.e., by transformation.[341] Magallona describes how Philippine law provides for transformation, thus: "By an act of the legislature, norms of international law may be transformed

340. BERNAS II, *supra* note 315, at 818 & n.253. 1935 Constitution version: "The President shall have *the power, with the concurrence of two-thirds of all the Members of the Senate to make treaties,* and with the consent of the Commission on Appointments, he shall appoint ambassadors, other public ministers, and consuls. He shall receive ambassadors and other public ministers duly accredited to the Government of the Philippines." (Emphasis supplied). 1973 Constitution version: "Except as otherwise provided in this Constitution, *no treaty shall be valid and effective unless concurred in by a majority of all the Members of the National Assembly.*" (Emphasis supplied). The 1935 Constitution version of the treaty clause closely resembles the U.S. Constitution version in art. II, § 2, para. 2: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;...."

341. MAGALLONA, *supra* note 224, at 35 & 49. *See also* Roy, *supra* note 326, at 635-36 & n.3 (writing that "[t]he alternative mode [to incorporation] for the application of rules of public international law, the *doctrine of transformation*, is also found in the Constitution," i.e., the Treaty Clause); SALONGA & YAP, *supra* note 316, at 12:

> In the municipal sphere, the relationship between international law and municipal law is determined by the constitutional law of the individual States. Whether a State follows the doctrine of transformation or the doctrine of incorporation would depend on its constitutional practice. In this connection, a distinction is made between treaties and customary international law. With respect to treaties, several States follow the so-called doctrine of transformation, which require legislative action to make the treaty enforceable in the municipal sphere. However, with respect to customary international law, most states follow the doctrine of incorporation which considers rules of international law as forming part of the law of the land and no further legislative action is needed to make such rules applicable in the domestic sphere. This dichotomy of approach is clearly illustrated by the constitutional practice of several common law countries, such as the United Kingdom, where the customary international law is deemed part of the common law, whereas a treaty would require an enabling legislation to become enforceable by the domestic courts.
>
> Magallona attaches the doctrine of transformation with the Treaty Clause. However, Akehurst discusses the doctrines of incorporation and transformation in relation to customary international law vis-à-vis English common law, see AKEHURST'S, *supra* note 155, at 69 *et seq.*

into Philippine law, or the exercise of legislative powers may determine the specific terms by which treaty rules or conventional international law are to be applied or enforced as part of Philippine law."[342]

According to the Supreme Court, "[a] treaty has two (2) aspects — as an international agreement between states, and as municipal law for the people of each state to observe."[343] As such, under the Treaty Clause, treaties assume a double character or perform a two-fold legal function: it constitutes domestic law and it is or serves as a source of international obligations on the part of the Philippines — i.e., treaties define "the rights and duties of the Philippines as an international person, in relation to other states which are parties to the treaty."[344] Moreover, in contrast to the judiciary's role under the Incorporation Clause, under the Treaty Clause "it is the legislative act that constitutes conventional norms of international law into norms of domestic law"; thus, "Senate concurrence is constitutive of new domestic norms derived from international conventions or treaties."[345] But Senate concurrence is by no means the sole constitutive or operative legal act. Rather, two things must concur in order for a treaty to become valid and effective: first, "that it has entered into force by its own provisions"; second, "that it has been concurred in by the Senate."[346]

342. *Id.* at 49.

343. Guerrero's Transport Services, Inc. v. Blaylock Transportation Services Employees Association-Kilusan (BTEA-KILUSAN), 71 SCRA 621, 629 (1976).

344. MAGALLONA, *supra* note 224, at 50-51.

345. *Id.* at 40. *Cf. supra* text accompanying note 342. The same holds true for the US: "In the vast majority of democratic countries outside the Commonwealth, the legislature, or part of the legislature, participates in the process of ratification, so that ratification becomes a legislative act, and the treaty becomes effective in international law and in municipal law simultaneously. For instance, the Constitution of the United States provides that the President 'shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur' (Article II(2)). Treaties ratified in accordance with the Constitution automatically becomes part of municipal law of the United States." AKEHURST'S, *supra* note 155, at 66.

346. *Id.* at 51. As a consequence, treaty-making Philippine-style has three distinct phases: "negotiation [thru the President], Senate concurrence and actual entry into [force of] the treaty." BERNAS I, *supra* note 214, at 109. Lending his voice to the clause's silence as to who negotiates and makes treaties, Bernas says: "Clearly, however, the provision is found in Article VII which enumerates the powers and limits on the powers of the President. And its American antecedent clearly indicates that the President negotiates and, after concurrence by the Senate, makes the treaty." *Id.* at 214-15. As to who ratifies treaties, former Supreme Court Associate Justice Isagani Cruz elucidates:

> Finally, it should be stressed that under the Constitution of the Philippines, *the power to ratify treaties is vested in the President and not, as commonly believed in the legislature.* The role of the Senate is confined simply to giving or withholding its consent (a "veto power" as Corwin calls it) to the ratification. For that matter, it is competent for the President to refuse to submit a treaty to the Senate or, having secured its consent for its ratification, to refuse to ratify it. But as a rule, of course, he cannot ratify a treaty without the concurrence of two-thirds of all the members of the Senate.
>
> CRUZ, *supra* note 316, at 171. (Emphasis supplied.) But, Senator Aquilino Pimentel holds the view that the Senate ratifies. Speaking about the Senate's request that it be briefed by the President on the controversial RP-US Military Logistics Support Agreement, Pimentel asserts that, "The basis of our request is the fact that the Senate is an indispensable partner of the President in matters of treaties,...We are the treaty-ratifying body mandated by the Constitution." Recto Mercene, *Tito quiet at Cabinet meeting, attends NSC today*, TODAY, Jan. 23, 2002, at 1.

ii. Self-Executing/Non-Self-Executing Dichotomy

The U.S. Supreme Court case of *Foster v. Neilson*[347] introduced the concept of characterizing treaties as self-executing and non-self-executing in relation to interpreting the Supremacy Clause of the U.S. Constitution.[348] Succinctly

347. 27 U.S. (2 Pet.) 253, 7 L. Ed. 415 (1829).

348. The Supremacy Clause, U.S. CONST. art VI, cl. 2, states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> In *Foster* the plaintiff claimed title over a West Florida tract of land based on a Spanish grant. Article 8 of the treaty that transferred sovereignty over the territory covering the disputed land to the U.S. provided that "all the grants of land made before the 24th of January 1818, by His Catholic Majesty, etc. shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty." To the query, "Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass Acts which shall ratify and confirm them?," the U.S. Supreme Court held:
>
> A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> In the United States a different principle is established. *Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract--when either of the parties engages to perform a particular act--the treaty addresses itself to the*

put, a self-executing treaty is "a treaty that may be enforced in the courts without prior legislation by Congress"; whereas, a non-self-executing treaty is "a treaty that may not be enforced in the courts without prior legislative 'implementation.'"[349]

Carlos Manuel Vázquez submits "four distinct types of reasons why a treaty might be judicially unenforceable," *viz.*: (1) under the "intent-based" doctrine a treaty is judicially unenforceable "because the parties (or perhaps the U.S. treaty makers unilaterally) made it judicially unenforceable"; (2) under the "justiciability" doctrine a treaty is judicially unenforceable "because the obligation it imposes is of a type that, under our system of separated powers, cannot be enforced directly by the courts. This branch of the doctrine calls for a judgment concerning the allocation of treaty-enforcement power as between the courts and the legislature"; (3) under the "constitutionality" doctrine a treaty is judicially unenforceable "because the treaty makers lack the constitutional power to accomplish by treaty what they purport to accomplish. This branch of the doctrine calls for a judgment about the allocation of legislative power between the treaty makers and the lawmakers"; and (4) under the "private right of action" doctrine a treaty is judicially unenforceable "because it does not establish a private right of action and there is not other legal basis for the remedy being sought by the party relying on the treaty."[350]

Pertinently, under the constitutionality doctrine, a view is submitted that "treaties that purport to raise revenue, *treaties that purport to make conduct criminal*, and treaties that purport to appropriate money"[351] are inherently non-self-executing. Specifically, the *Restatement (Third) of Foreign Relations Law of the United States*, in § 111, "states that it has been 'assumed' that agreements *creating...a crime or calling for punishment of certain conduct require congressional implementing legislation.*"[352]

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political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the Court.

Foster, 27 U.S. (2 Pet.), at 314, 7 L. Ed., at 435-46 (emphasis supplied).

349. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 722-23 (1995) [hereinafter Vázquez]. *See also* AKEHURST'S, *supra* note 155, at 67 & n.20; Jordan J. Paust, *Self Executing Treaties*, 82 AM. J. INT'L L. 760-783 (1988) [hereinafter Paust].

350. *Id.* at 722-23.

351. *Id.* at 718 (citation omitted)(emphasis supplied).

352. Paust, *supra* note 349, at 778 (citation omitted) (emphasis supplied). Paust however remarks that the *Restatement (Third)* does so cautiously, and in the end, concludes that the notion that some treaties are inherently non-self-executing be abandoned, positing the view that the "constitutionally preferable view is that no treaty is inherently non-self-executing except those which would seek

To date, the Supreme Court has not adopted wholesale the dichotomy into Philippine jurisdiction. However, its application in specific treaty provisions has gained judicial approbation in the recent trademark case of *Mirpuri v. Court of Appeals*.[353] Here, the Supreme Court approvingly cited the characterization made by a foreign commentator that Article 6*bis* of the Convention of Paris for the Protection of Industrial Property, dealing with "well-known trademarks," is self-executing, thus:

> Article 6*bis* was first introduced at The Hague in 1925 and amended in Lisbon in 1952. *It is a self-executing provision and does not require legislative enactment to give it effect in the member country. It may be applied directly by the tribunal and officials of each member country by the mere publication or proclamation of the Convention, after its ratification according to the public law of each state and the order for its execution.*[354]

On the other hand, local commentators acknowledge that the dichotomy can be transplanted on Philippine soil. Magallona observes that generally Senate concurrence alone suffices to render treaties valid and effective and that, consequently, "the Supreme Court has applied treaties to which the Philippines is a party as self-executing instruments, requiring no further prerequisite to their effectivity within Philippine jurisdiction."[355] But,

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to declare war on behalf of the United States." *Id.* 778, 782. *See also* BERNAS I, *supra* note 214, at 111-12 (subscribing to the view that, pursuant to art. VI, section 29(1) of the 1987 Philippine Constitution, treaties requiring expenditure of public funds needs express congressional action).

353. 318 SCRA 516 (1999).

354. *Id.*, at 533 (*citing* STEPHEN P. LADAS, 1 &2 PATENTS, TRADEMARKS, AND RELATED RIGHTS, NATIONAL AND INTERNATIONAL PROTECTION (1975), specifically vol. 2 at 1251-52 and vol. 1 at 209, 233)(emphasis supplied). In footnote 52 of the same case, the Supreme Court made this citation:

> The Paris Convention has 3 classes of provisions: (1) provisions obligating members of the Union to create and maintain certain national law or regulations; (2) provisions merely referring to the national law of each country and making it applicable or permitting each country to pass such legislation as it may choose; and (3) provisions establishing common legislation for all members of the Union and obligating them to grant to persons entitled to the benefits of the Convention the rights and advantages specified in such provisions, notwithstanding anything in their national law to the contrary — Ladas, *supra*, at 209; see also Callman, *supra*, vol. 2, at 1723-1724. *Provisions under the third class are self-executing and Article 6 is one of them* — Ladas, *supra*, vol. 1 at 209.

355. MAGALLONA, *supra* note 224, at 54. Illustrative cases include: Marubeni v. Commissioner of Internal Revenue, 177 SCRA 500 (1989) (concerning the Tax Convention with Japan); La Chemise Lacoste v. Fernandez, 129 SCRA 373 (1984) (concerning the Paris Convention for the Protection of Industrial Property); KLM Royal Dutch Airlines v. Court of Appeals, 65 SCRA 237 (1975) (concerning the Convention for the Unification of Certain Rules

it is possible that a treaty itself could require the enactment of implementing legislation or the adoption of administrative measures to provide for its application and enforcement. Ultimately, therefore, the question as to whether a treaty is self-executing or not "may be decided by the character of the treaty, by the intent of the state parties or by its object and purpose, as indicated in its language."[356] In the same vein, and echoing the aforesaid assumption in American law, Bernas opines that Philippine ratification of the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly on 9 December 1999, would not adequately criminalize terrorism under Philippine domestic law because the treaty is non-self-executing:

> Moreover, *even if the Convention should be ratified by the Philippines and thus should become law of the land, it will still not be enough to criminalize the offense.* The Convention as worded is *not self-executing.* Each State party to the Convention is enjoined by the text to "take such measures as may be necessary to establish its jurisdiction over the offenses" described. *Indeed, the commonly accepted international law doctrine is that international criminal legislation does not become domestic law unless adopted by local statute.* The Philippines can pass that statute even before the UN Convention...comes into force.[357]

Relating to International Air Travel); and World Health Organization v. Aquino, 48 SCRA 242 (1972) (concerning the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations). *Id.* at 54-55. Bernas concedes that treaties may be non-self-executing: "There may also when the language of the treaty needs *further action by Congress before it can be fully implemented.* For instance, *the treaty itself might require the parties to enact implementing legislation as a pre-condition for effectivity.*" BERNAS I, *supra* note 214, at 111 (emphasis supplied). Roy suggests the possibility that the self-executing issue could be relevant in the Philippine setting, to wit:

> Be that as it may, challenges to the validity of the transformation of treaty obligations are not unknown in this jurisdiction. Admittedly, some difficulty may be encountered when the provisions of the treaty differ from the content of municipal law, or when they present new matters not previously addressed by legislation. *This may lead to questions regarding whether the treaty or any of its provisions is self-executing, consequently determining the need for further legislative enactment apart from ratification and approval.*

Roy, *supra* note 326, at 636 (citation omitted) (emphasis supplied).

356. *Id.* at 55. According to Vázquez, *Frolova v. USSR*, 761 F.2d 370, 373-76 (7TH Cir. 1985), illustrates the Justiciability Doctrine in enumerating the following factors as relevant to determine whether a treaty is self-executing:

> (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligation imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting private right of action; and (6) the capability of the judiciary to resolve the issue.

Vázquez, *supra* note 349, at 711.

iii. When Treaties Conflict With Philippine Domestic Law

In the hierarchy of rules, treaties are measured, as to their legality and validity, against the Constitution, with the Supreme Court having the power to determine whether a treaty is constitutional or valid.[358] Consequently, when a treaty contravenes the Constitution, such treaty would be invalid and inoperative as domestic law. But when the Supreme Court does declare a treaty unconstitutional, such declaration does not divest the treaty in question of its character as international law, because "[u]nder the 'dualist' theory, which the Constitution accepts, the unconstitutionality of a treaty is purely a domestic matter."[359]

On the other hand, following the U.S. rule on the matter, under Philippine jurisdiction, treaties and statutes stand in full parity with each other.[360] The Supreme Court, by way of an *obiter dictum* in *Abbas v. Commission on Elections*, suggests as much in delineating the relationship between a statute, Republic Act No. 6734 (The Organic Act for the Autonomous Region in Muslim Mindanao), and the Tripoli Agreement, thus:

> Assuming for the sake of argument that the Tripoli Agreement is a binding treaty or international agreement, it would then constitute part of the law of the land. *But as internal law it would not be superior to R.A. No. 6734, an enactment of the Congress of the Philippines, rather it would* be *in the same class as the latter.* Thus, if at all, *R.A. No. 6734 would be amendatory of the Tripoli Agreement, being a subsequent law.*[361]

In cases of irreconcilable conflict between the two, the rules of *lex posterior derogat priori* and *lex specialis derogat generali* would, as in the case of

357. Joaquin G. Bernas, S.J., *Criminalizing terrorism*, TODAY, Feb. 27, 2002, at 8 (emphasis supplied).

358. *See* 1987 PHILIPPINE CONST. art. VIII, § 5(2)(a).

359. BERNAS I, *supra* note 212, at 19.

360. *See* BERNAS I, *supra* note 214, at 20 (describing the U.S. rule that treaties and statutes are equal in rank and positing that said rule would apply in the Philippines).

361. 179 SCRA 287, 294 (1989) (citation omitted) (emphasis supplied). But in an earlier *obiter dictum*, the Court said, "[i]n other words, our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, *but, also, when it runs counter to an act of Congress.*" Gonzales v. Hechanova, 9 SCRA 230, 243 (1963). This *obiter* thereby suggests that statutes stand on a higher plane than treaties.

the Incorporation Clause, likewise apply,[362] but qualified with caveat that the rules apply only in the domestic sphere — the treaty retains its character as international law.[363]

B. *The Core Crimes as Crimes of the Land*

Since international law becomes "law of the land" in the Philippines either by incorporation or transformation, the Incorporation and Treaty Clauses provide the key in resolving whether the Rome Statute criminalization of the core crimes can be construed as an effective and adequate criminalization under Philippine domestic law. In the previous chapter, this paper has shown how the Statute's criminalization of the core crimes is paradigmatic *jus scriptum*. As such, the Statute's manner of defining and punishing the core crimes may be aptly characterized as simultaneously a codification of customary international law and an embodiment of progressive development in international law.

1. Criminalization by Incorporation

a. Proscription of Conduct

In defining the core crimes, the Rome Statute codifies or restates customary international law because genocide, crimes against humanity, and war crimes are deemed crimes under customary or general international law. Moreover, some commentators even argue that these three categories of crimes have attained *jus cogens* status. That the Statute restates existing customary law is most evident when it defined the crime of genocide by wholesale transplantation of its definition under the Genocide Convention. Yet, the Statute also innovates in defining crimes against humanity and war crimes, constituting progressive development of international law.

In defining crimes against humanity, the Statute introduces both implicit and explicit innovations. The implicit innovation consists in the fact that Article 7 of the Rome Statute represents the first accepted definition of crimes against humanity as a matter of both conventional and customary international law, and resolves the divergence in the definition or conception of the crime enshrined in the Statute's predecessor instruments by disregarding a nexus to armed conflict and a discriminatory motive requirement. On the other hand, the explicit innovation pertains to the expansion of the list of acts that falls under this category of crime. Specifically, Article 7 adds two new offenses, apartheid and enforced disappearance of

362. MAGALLONA, *supra* note 224, at 61. *See also* BERNAS I, *supra* note 214, at 20 (specifying the rule of *lex posterior derogat priori*).

363. BERNAS I, *supra* note 214, at 20

persons, and expands the scope of the offenses of deportation, imprisonment and rape.

Under the war crimes category of serious violations of the laws and customs applicable to international and non-international armed conflict, the Rome Statute introduced the following innovations: (1) adds attacking U.N. and associated personnel as an offense; (2) proscribes attacks directed against buildings dedicated to education; (3) includes gender-based offenses; (4) expands the prohibition on conscripting of children under fifteen years of age; (5) introduces as a new offense attacks that would cost environmental damage; and, (6) expands the heretofore definition of the offense of population transfer. But the most telling innovation of the Rome Statute remains to be the inclusion of war crimes committed in a non-international conflict.

The foregoing innovations do not enjoy the status of customary international law, albeit over time they may attain such status; rather, they are properly norms under conventional international law. Since the Incorporation Clause of the Philippine Constitution covers customary international law and the "general principles of civilized nations," it cannot incorporate into domestic law the full panoply of the core crimes as defined by the Statute.

b. Prescription of Penalties

The preceding chapter argued that Part 7 of the Statute, in prescribing particular penalties to be imposed by a permanent international court created via a multilateral treaty, represents a departure from customary international law. According to such customary rule, the international community entrusts the prescription of penalties that may be imposed upon core crimes perpetrators to the domestic penal justice system of individual States. The complementarity principle's primacy secures the Statute's fidelity to customary law. But, that the Rome Statute penalizes the commission of the core crimes is thus wholly a matter of conventional international law. Moreover, the very idea of entrusting the prosecution of core crimes perpetrators to a multilateral treaty-based permanent international criminal tribunal when the national criminal jurisdiction of a State is adjudged by such tribunal as unwilling or unable is per se a progressive development of revolutionary proportions. A similar conclusion is thus reached: the punishment of the core crimes under the Rome Statute cannot be construed as incorporated into Philippine domestic law via the Incorporation Clause.

2. Criminalization by Transformation

a. Proscription of Conduct

If the Incorporation Clause falls short in incorporating the core crimes as crimes of the land, would ratification of the Rome Statute by the Philippine President, coupled with Senate concurrence, adequately define the core crimes under Philippine domestic law through transformation? An affirmative answer seems inevitable. In other words, the Treaty Clause would suffice to fill in the inadequacy of the Incorporation Clause and to cover the progressive development that the Rome Statute has wrought in declaring and defining the specific acts that constitute the core crimes.

b. Prescription of Penalties

However, a comparable categorical answer is not forthcoming when faced with the element of punishing the core crimes. An adequate answer must delve into: first, an inquiry on how the Philippines has complied with its treaty obligations with respect to punishing specific core crimes conduct that are subject of pre-Rome Statute conventions; and, second, an inquiry into the characterization of the Rome Statute applying the self-executing/non-self-executing treaty-dichotomy, with due emphasis on the obligations that States Parties must undertake as regards the criminialization of the core crimes, consistent with the principle of complementarity.

i. Legislative Lethargy

The Philippines is generally remiss in complying with its obligation under international law to enact legislation that penalizes the core crimes, specifically, genocide, war crimes and apartheid. Under the Genocide Convention, the Geneva Conventions of 1949 and the Apartheid Convention, to which treaties the Philippines is a State Party either by ratification or accession,[364] State Parties willingly shoulder the obligation or

364. (1) *Genocide Convention*: instrument of ratification signed on 23 June 1950; instrument of ratification deposited with the U.N. on 7 July 1950; concurred in by the Senate via Senate Resolution No. 9 of 28 February 1950, which concurrence was amended by Senate Resolution No. 18 of 16 May 1950. FOREIGN SERVICE INSTITUTE, PHILIPPINE TREATIES INDEX 1946-1982 134 (1983). (2) *Geneva Convention I*: concurred in by the Senate via Senate Resolution No. 20 of 16 May 1950; ratified by the President and deposited RP instrument of ratification with the Swiss Federal Council 7 March 1951; proclaimed by the President via Proclamation No. 260, s. 1956. *Id.* at 155. (3) *Geneva Convention II*: concurred in by the Senate via Senate Resolution No. 80 of 2 May 1952; instrument of ratification deposited with Swiss Federal Council 6 October 1953; proclaimed by the President via Proclamation No. 258, s. 1958. *Id.* at 156. (4) *Geneva Convention III*: concurred in by the Senate via Senate Resolution No. 89 of 19 May 1952; instrument of ratification signed by the President 20 August 1952; instrument of ratification deposited with Swiss Federal Council 6 October 1952; proclaimed by the President via Proclamation No. 261, s. 1956. *Id.* at 154. (5) *Geneva Convention IV*: concurred in by the Senate via Senate Resolution No. 91 of 21 May 1952; instrument of ratification signed by the President 20 August 1952; instrument of ratification deposited with Swiss Federal Council 6 October 1952; proclaimed by the President via Proclamation No. 262, s. 1956. *Id.* at 163. (6) *Apartheid Convention*: the Philippines' instrument of ratification was deposited on 26 January 1978. *Id.* at 135.

undertaking, parsed in more or less similar words, "to enact legislation necessary to provide effective penal sanctions" against persons found guilty of the acts proscribed in the aforesaid conventions.[365] In fact, according to the National Implementation database maintained by the Advisory Service on International Humanitarian Law of the ICRC, the Philippines has, to date, no statute that expressly prescribes the penalties for grave breaches of Geneva Conventions on 1949 and its 1977 Protocols.[366] The case of the Genocide

365. *See supra* text accompanying notes 303-305.

366. *See* <http://www.icrc.org/ihl-nat.nsf/WebLAW?OpenView&Start=30&Count=30&Expand=38#38> (visited Dec. 30, 2001). This database provides documentation and commentaries concerning the implementation of international humanitarian law at the national level. As far as the Philippines is concerned, the Advisory Service identifies the following: (1) 1987 Constitution – articles II, III, VI, VIII, XIII; (2) P.D. No. 1643 (1979), as amended – Act to Incorporate the Philippine National Red Cross; (3) Revised Penal Code – arts. 2, 11-14, 89-90, 114-125, 134-138; (4) Commonwealth Act No. 408 (1938) – Articles of War, arts. 77-83, 105; (5) Presidential Memorandum Order No. 393 (1991) – directing the AFP and PNP to reaffirm their adherence to the principles of humanitarian law and human rights in the conduct of security/police operations [DND and DILG Joint Circular 2-91 (Sept. 9, 1991) – providing implementing guidelines to M.O. No. 393; PNP Memorandum (Nov. 4, 1991) echoing M.O. No. 393]; (6) R.A. No. 7055 (1991) – Act strengthening civilian supremacy over the military; (7) Guidelines on human rights and improvement of discipline in the AFP, Jan. 2, 1989; (8) Executive Order No. 264 (1987) – providing for the citizen armed forces; (9) Presidential Memorandum Order No. 259 (1995) – requiring human rights education and training of law enforcement, police, military, and prison personnel; (10) R.A. No. 7438 (1992) – Act defining certain rights of persons arrested, detained or under custodial investigation as well as the duties of the arresting, detaining and investigating officers, and providing penalties thereof; (11) Presidential Memorandum Order No. 209 (1988) – directing all units of the AFP and PNP to strictly comply with required legal process in all cases of arrests and detentions; (12) Presidential Memorandum Order No. 398 (1988) – providing for a policy and guidelines on the delivery of goods and services to the countryside [Memorandum Circular No. 139 – prescribing guidelines implementing M.O. No. 398]; (13) AFP Chief of Staff Directive (1998) – Protection and rehabilitation of innocent civilians affected by AFP counterinsurgency operations; (14) AFP Chief of Staff Instructions (1990) – on

Convention proves to be more damning because the Philippines made this three-fold reservation when it ratified the treaty:

> 1. With reference to article IV of the Convention, the Philippine Government cannot sanction any situation which would subject its Head of State, who is not a ruler, to conditions less favorable than those accorded other Heads of State, whether constitutionally responsible ruler or not. The Philippine Government does not consider said article, therefore, as overriding the existing immunities from judicial processes guaranteed certain public officials by the Constitution of the Philippines.
>
> 2. With reference to article VII of the Convention, the Philippine Government does not undertake to give effect to said article until *the Congress of the Philippines has enacted the necessary legislation defining and punishing the crime of genocide*, which legislation, under the Constitution of the Philippines, cannot have any retroactive effect.
>
> 3. With reference to articles VI and IX of the Convention, the Philippine Government takes the position that nothing contained in said articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said articles. With further reference to article IX of the Convention, the Philippine Government does not consider said article to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law.[367]

facilitating delivery of goods and services to the countryside; (15) AFP Chief of Staff Instructions (1989) – safety of innocent civilians and treatment of the wounded and the dead; (16) Executive Order No. 212 (1987) – amending P.D. No. 169 on reporting the wounded by medical practitioners; (17) R. A. No. 7610 (1992) – Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act, art. X; (18) AFP Chief of Staff Directive (1991) – policies and guidelines on the protection of children in armed conflict.

367. *See* <www.unhcr.ch/html/menu3/b/treaty1gen.htm> (visited Nov. 10, 2001) (emphasis supplied). Article VII provides:

> Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.
>
> The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

An "oblique" exception to this lethargic stance is the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1996, VI-1 D.F.A.T.S. 128, 660 U.N.T.S. 195 (Signed for the Philippines Mar. 7, 1966. Entered into force for the Philippines Jan. 4, 1969) [Concurred in by the Senate S. Res. No. 21, Xth Cong. (1967); Instrument of Ratification signed by the President, 15 August 1967; Instrument of Ratification deposited on 15 September 1967. FOREIGN SERVICE INSTITUTE, PHILIPPINE TREATIES INDEX 1946-1982 135 (1983).]. Its Article 4 provides that States Parties, *inter alia*:

> (a) Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize the participation in such organizations or activities as an offense punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.
>
> Pursuant to this mandate, then President Ferdinand E. Marcos issued Presidential Decree No. 966 on 20 July 1976, imposing penalties for the violation of the Convention, to wit:
>
> Sec. 2. Violation of this Decree, as well as of Article 4, paragraphs a, b and c of the International Convention on the Elimination of All Forms of Discrimination, shall be punished with:
>
> a. Imprisonment of not less than ten days nor more than six months, if the offender is guilty of the dissemination and advocacy of policies based on racial superiority or hatred; incitement to racial discrimination; membership in any organization or participation in organized or other propaganda activities, which promote or incite racial discrimination; or providing assistance to racist activities, including the financing thereof.
>
> b. Imprisonment of not less than one month nor more than one year, if the offender is guilty of inciting to acts of violence against any race or group of persons of another color or ethnic origin or is an officer or organizer of an organization engaged in propaganda activities, which promote or incite racial discrimination.

ii. The Statute as Non-Self-Executing

A cursory analysis of its character, object and purpose, and the intent of its State Parties reveals that the Rome Statute is properly a non-self executing treaty. The Statute is a multilateral treaty that, in establishing a permanent international criminal court, articulates substantive norms of international criminal law specifically through the criminalization of the core crimes. This fact *per se* invests the Statute with a non-self-executing character, following the assumption of the *Restatement (Third) of the Foreign Relations Law of the United States* that treaties creating a crime or calling for punishment of certain conduct require implementing legislation.[368]

On the other hand, the centrality of the complementarity principle underscores the obligation of States Parties to ensure that their respective national criminal justice systems conform to the Rome Statute. Pursuant to this principle, the "Statute encourages States to exercise their jurisdiction

368. *See infra* text accompanying note 348.

over the ICC crimes,"[369] with the effective prosecution of these crimes is "ensured by taking measures at the national level and by enhancing international cooperation."[370] Accordingly, what national level measures should States Parties undertake, or what are the obligations that States Parties ought to fulfill under the Statute? Such obligations fall under three categories, *viz.*: (1) There are legal obligations *strictu sensu* deriving from the Statute[;] (2) There are what might be called "indirect" obligations arising out of the Statute for reasons of complementarity of the ICC; measures that States may wish to take in order to ensure that they do not lose their own jurisdiction vis-à-vis the ICC[;] and (3) finally, there are several provisions in the Statute according to which States [P]arties have the possibility to make certain declaration or choose certain modalities in the[ir] cooperation with the Court.[371]

Subsumed under the first category are provisions of the Rome Statute that touch on issues of cooperation which necessarily oblige States Parties to enact implementing legislation — specifically, they include Part 9 (international cooperation and judicial assistance), Articles 27 (irrelevance of official capacity), 59 (arrest proceedings), 109 (fines and forfeiture measures), 70(4)(a) (requiring States Parties to "extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article").[372] The second category consists in the definition of the core crimes,[373] the general principles of criminal law[374] — specifically, Articles 25 (individual criminal responsibility) and 28 (responsibility of commanders and other superiors) — and the possibility of granting amnesties and pardons by national authorities.[375] Finally, the third category covers organizational issues, financing and instances where the Statute allows States to make certain choices.[376]

Although the Rome Statute does not explicitly "require States Parties to enact criminal legislation or to [incorporate] in their domestic law the crimes as defined in the Statute,"[377] prudence and fidelity to complementarity favors enacting such legislation:

369. MANUAL, *supra* note 195, at 84.

370. Preamble, sec. 4.

371. Lindenmann, *supra* note 211, at 4.

372. *Id.* at 4-6.

373. Articles 5 to 8.

374. Part 3.

375. *Id.* at 6-7.

376. *Id.* at 7-8.

377. Küntziger, *supra* note 291, at 2.

> While there is no direct obligation deriving from the Statute for States to implement the definition of crimes under the jurisdiction of the Court,...it may certainly be wise for States to ensure compatibility of their national penal law with those definitions in order to avoid all danger of losing their national jurisdiction as opposed to the international jurisdiction of the ICC. The general idea of the [ICC]...is to fill [a] lacuna in the prosecution of grave crimes of international concern. But, again, the first and foremost determination must be to fill such lacuna on the national level.[378]

Is there a lacuna in the prosecution of grave crimes of international concern in the domestic law of the Philippines? The obligation to prosecute the core crimes under the Philippine criminal jurisdiction necessarily presumes that such core crimes are in fact defined and, accordingly, punished under domestic law. One line of argument submits that the doctrine of transformation sufficiently fills in the vacuum:

> Among the international treaties and conventions ratified by the Philippines are the Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions, and the International Convention on the Suppression and Punishment of the Crime of Apartheid. *By virtue of the Philippine legislature's ratification of these conventions, the Philippines has recognized the crime of genocide and apartheid as defined by the former two conventions, as well as the customary norms of international humanitarian law. Thus, despite the fact that the Philippines has enacted no penal legislation expressly punishing the commission of genocide, apartheid or the violation of the customary norms of international humanitarian law — particularly the 'grave breaches' and 'serious violations' identified in the Geneva Conventions of 1949 — the commission of such offenses are, by virtue of the ratification of the two conventions that have already entered into force, crimes under Philippine law.* Therefore, the perpetrators of such crimes ought to be punished accordingly.[379]

The previous discussion on how the Rome Statute represents both codification and progressive development in the criminalization of the core crimes, and the "apathetic" attitude of the Philippines vis-à-vis punishing genocide, apartheid and grave breaches of the 1949 Geneva Conventions, adequately tempers the sweeping conclusions of the above-cited argument. Succinctly put, the question persists: how could the Philippines comply with the imperative that "the perpetrators of such crimes ought to be punished accordingly," sans specific legislation prescribing the penalties for such crimes?

iii. Betrayal by Silence

The silence of Philippine substantive criminal law in prescribing penalties for perpetrators of the core crimes impacts on three aspects of the country's

378. Lindenmann, *supra* note 211, at 6.

379. Lao, *supra* note 173, at 233 (emphasis supplied).

domestic criminal justice system, *viz.*: adherence to the principle of legality, vesting criminal jurisdiction of the courts, and the statutorily prescribed penalties.

The principle of legality is well entrenched in Philippine domestic law as a cardinal principle of penal law[380] and as a matter of "indigenous" internal law, incorporated international law and conventional international law. The Revised Penal Code provides that "[n]o felony shall be punishable by any penalty not prescribed by law prior to its commission."[381] The Supreme Court has construed the Old Penal Code counterpart of this provision, thus:

> Article 21 is not a penal provision. It neither defines a crime nor provides a punishment for one. It has simply announced the policy of the Government with reference to the punishment of alleged criminal acts. It is a guaranty to the citizen of the State that no *act* of his will be considered criminal under the Government has made it so by *law* and has provided a penalty. It (art. 21) is a declaration that no person shall be subject to criminal prosecution for any act of his until after the State has *defined* the *misdemeanor* or *crime* and *has fixed a penalty therefor.*[382]

380. RAMON AQUINO, I The Revised Penal Code 5 (1987 ed.), 12 [hereinafter AQUINO]. Aquino enumerates three cardinal features of principles of penal law, *viz.*: (1) Principle of legality and prospectivity; (2) Principle of generality; (3) Principle of territoriality. *Id.* at 12-13. As regards the first principles, he writes:

> The principle of legality and prospectivity means that all offenses must be defined by law and penal laws generally have prospective effect. The principle is found in arts. 3, 21 and 22 of the Revised Penal Code and is embodied in the maxims, *nullum crimen sine lega* and *nulla poena sine lege.* It is sanctioned by the constitutional prohibition against *ex post facto* legislation.
>
> *Id.* at 12.

381. Act No. 3815, An Act Revising the Penal Code and other Penal Laws, Art. 21 (amended 1932) [hereinafter REV. PENAL CODE].

382. United States v. Parrone, 24 Phil. 29, 35 (1913) *cited in* LUIS B. REYES, I The Revised Penal Code: Criminal Law I (14th ed., 1998) 574 [hereinafter Reyes]. The Old Penal Code version of Article 21 provides that "[n]o felony or misdemeanor shall be punishable by any penalty not prescribed by law prior to its commission." Padilla explains the principle in the native tongue, thus:

> Upang maging krimen, dapat na pinarurusahan ng batas ang kagagawan o pagkukulang, tuntuning batay naman sa kasabihang "*nullum crimen, nulla poena sine lege,*": walang krimen, ni kaparusahan, kung walang batas na nagsasakrimen at nagpaparusa sa kagagawan o pagkukulang. Mahaba ang naging kasaysayan ng simulaing ito, na kumakatawan sa isa sa pinkamahalgang kaunlarang tinamo ng batas kriminal sa kasalukuyan, ang *garantia criminal* (*nullum crimen sine praevia lege poenali*).
>
> Madalas maiturong dapat unawain ang pariralang "pinarurusahan ng batas" sa kahulugang "pinarurusahan ng Binagong Kodigong Penal" at hindi ng isang pasadya o espesyal na batas kung isang krimen, delito o pelonyo and tinutukoy, upang maipahiwatig ang pagkakaiba ng "krimen" o "pelonyo" na pinarurusahan ng Binagong Kodigong Penal at ng "krimen," "paglabag" of "sala," na pawang higit na malalawak na kataga at sumasakop sa mga kagagawang pinarurusahan ng mga pasadya o ispesyal na batas at ordinansa. Bagama't may katwiran ang gayong pananaw, higit pa sa konseptong ito ang talagang kinakatawan ng naturang parirala, na naglalayong magpahayag sa pinagmulang Kodigo nito, ng napakahalagang simulain ng "legalidad" (o pagkaayon-sa-batas ng ano mang pagsasakrimen ng mga kagagawan). Tinitiyak nito ng tanging maituturing na krimen at mapapatawan na kaparusahan yaon lamang mga kagagawang binigyan ng kalikasang kriminal sa pamamagitan ng batas. Isa itong hakbang na kumakatawan ng napakahalagang pag-unlad mula sa panahon kung kailan maituturing ng mga hukom na krimen ang mga kagagawang hindi naman tahasang binigyan ng gayong kaurian ng batas mismo o sa pamamagitan ng batas.
>
> Padilla, *supra* note 186, at 503-04 (2001) (citation omitted). For Feuerbach, there are three fundamental principles of modern criminal law: (1) *nulla poena sine lege*; (2) *nulla poena sine crimine*; at (3) *nullum crimen sine poena legali.* FEUERBACH, LEHRBUCH DES GEMEINEN IN DUETSCHLAND GUELTIGEN PEINLICHEN RECTHS § 20 (12d ed. 1836), *discussed in* 1 EUGENIO CUELLO CALON, DERECHO PENAL 176 cited in Padilla, *supra* note 178, at 504 n.17.

383. In *Reyes v. Bagatsing*, 125 SCRA 553, 566 n.34 (1983), the Supreme Court, per Chief Justice Fernando, observes:

> The Philippines can rightfully take credit for the acceptance, as early as 1951, of the binding force of the Universal Declaration of Human Rights even if the rights and freedoms therein declared are considered by other jurisdictions as merely a statement of aspirations and not law until translated into the appropriate covenants. In the following cases decided in 1951, Mejoff v. Director of Prisons, 90 Phil. 70; Borovsky v. Commissioner of Immigration, 90 Phil. 107; Chriskoff v. Commissioner of Immigration, 90 Phil. 256; Andreu v. Commissioner of Immigration, 90 Phil. 347, the Supreme Court applied the Universal Declaration of Human Rights.

On the other hand, the Supreme Court deems the Universal Declaration of Human Rights as having binding force,[383] whereas the Philippines is a State Party to the International Covenant on Civil and Political Rights. The firm foothold that the principle of legality occupies in Philippine criminal law thus undercuts the ability of the country to prosecute the commission of the core crimes, considering the legislative inaction to prescribe penalties thereto.

Under the Philippine penal law system, the vesting of criminal jurisdiction to the courts is, as a general rule, pegged on the prescribed penalty punishing the commission of a crime. For instance, the Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts exercises, *inter alia* "[e]xclusive original jurisdiction over all offenses punishable with imprisonment not exceeding six (6) years irrespective of the amount of fine, and regardless of other imposable accessory or other penalties, including the civil liability arising from such offenses or predicated thereon,

irrespective of kind, nature, value or amount thereof;"[384] whereas, the Regional Trial Courts "shall exercise exclusive original jurisdiction in all criminal cases not within the exclusive jurisdiction of any court, tribunal or body, except those now falling under the exclusive and concurrent jurisdiction of the Sandiganbayan which shall hereafter be exclusively taken cognizance of by the latter."[385] On the other hand, the Sandiganbayan exercises exclusive original jurisdiction over felonies or offenses committed by public officials of specified rank.[386] Sans statutory prescription of penalties, which Philippine court may then exercise original jurisdiction over the core crimes?

Finally, the argument that the transformation of the Rome Statute into Philippine domestic law necessarily includes the adoption of the penalties prescribed in Part 7 of the Statute seems to fill in the gap. Since no specific legislation prescribes penalties for the commission of the core crimes, Philippine courts may impose the penalties under Part 7 of the Statute. Incongruence is immediately apparent. The maximum penalty that the ICC may impose is life imprisonment. Under Philippine criminal law, capital punishment may be imposed on crimes that are "heinous for being grievous, odious and hateful offenses and which, by reason of their inherent or manifest wickedness, viciousness, atrocity and perversity are repugnant and outrageous to the common standards and norms of decency and morality in a just, civilized and ordered society."[387] The core crimes, in subsuming what are widely recognized as the most egregious crimes, would, it is submitted, readily qualify as heinous crimes under Philippine penal law. Yet, in the absence of an express prescription of penalties corresponding to the core crimes, Philippine courts could impose the maximum penalty of life

384. Batas Pambansa Blg. 189, § 32(b), Judiciary Reorganization Act of 1980, (1980), amended by Republic Act No. 7691, § 2 (1994).

385. *Id.* § 20. In other words, vis-à-vis the criminal jurisdiction of the Metropolitan Trial Courts, the Regional Trial Courts has exclusive jurisdiction over all offenses punishable with imprisonment exceeding six (6) years irrespective of the amount of fine, and regardless of other imposable accessory or other penalties, including the civil liability arising from such offenses or predicated thereon, irrespective of kind, nature, value or amount thereof.

386. *See* Presidential Decree No. 1606, § 4 (1978), amended by Republic Act No. 8249, § 4 (1997). Parenthetically, AQUINO submits that: "War crimes are not offense under the Penal Code. They are offenses against the laws of war and are tries and punished by military commissions. Civil courts will not interfere with the trial of such offenses." AQUINO, *supra* note 380, at 27 (*citing* Cantos v. Styer, 76 Phil. 748 (1946); Yamashita v. Styer, 75 Phil. 563 (1945), 66 S.Ct. 340; Kuroda v. Jalandoni, 83 Phil. 171 (1949); Raquiza v. Bradford, 75 Phil. 50 (1945)). *But see* Uy v. Sandiganbayan, 312 SCRA 77 (1999) (qualifying the court-martial jurisdiction vis-à-vis the jurisdiction of the Sandiganbayan).

387. Republic Act No. 7659, preamble, third (1993).

imprisonment on a convicted core crime perpetrator when the act committed if taken as an ordinary offense would have merited the death penalty.

The absence of legislation punishing perpetrators of, at least, the crimes of genocide and grave breaches of the Geneva Conventions seem to suggest that the courts when confronted with such cases should apply the penalties imposed on felonies or crimes, as prescribed respectively by the Revised Penal Code or a special penal statute, that approximate an act constituting either genocide or war crime. One writer describes such an approach as a compromise or second-best in relation to the aspiration to establish a regime of accountability to dislodge impunity, thus:

> A fourth second-best approach is *to take legal action against perpetrators for lesser offenses than the genocide, war crimes, crimes against humanity, or other serious human rights violations actually committed. One version of this is prosecution for "ordinary crimes" (such as murder or rape) where national legislation provides only for such offenses and not for the greater, international crimes.* Another frequently used mechanism for taking legal action for a lesser offense is deprivation of citizenship or immigrant status and, possibly, deportation on the ground that the individual violated immigration regulations by failing to disclose his criminal acts when applying for immigrant status or citizenship.[388]

Resorting to such second-best approach betrays the Philippines' unwavering commitment to the dignity of human beings and protection of all human rights, and tarnishes its image of being a consistent supporter of human rights and justice for the core crimes victims.[389]

C. *Getting Our Job Done*

The Rome Statute stands on an optimistic presumption. That the Statute indirectly obligates State Parties thereto to expressly criminalize the core crimes under their respective domestic law stems from the fact that the drafters of the Statute intended to remain within the realm of customary international law in defining the said crimes. In other words, since genocide, some acts under crimes against humanity, and war crimes are in fact codified

388. Madeline H. Morris, *International Guidelines Against Impunity: Facilitating Accountability*, 59 LAW & CONTEMP. PROBS. 29, 32 (1996) (citation omitted) (emphasis supplied). Morris enumerates the other second-best approaches to full criminal prosecution: (1) pursuing "accountability only for some subset of the individuals responsible for the crimes"; (2) using some form of plea bargaining; (3) providing a sentence-reduction for all perpetrators without the requirement of any plea bargain in order to "relieve the state of the long-term burden of supporting a massive prison population and/or in the interests of reconciliation." *Id.* at 31.

389. *See supra* text accompanying notes 2 & 3.

under conventional international law, the Statute presumes that those who would become State Parties have already complied with their treaty obligations to investigate, prosecute and punish perpetrators of the aforesaid crimes. Accordingly, to require criminalization would be redundant. However, such a presumption falls flat on its face before the Philippine experience wherein domestic law is ill-equipped to effectively prosecute and suppress the core crimes, primarily due to legislative lethargy. Moreover, one should not discount the fact that the criminalization of the core crimes under the Rome Statute likewise represents progressive development of international law. Consequently, prudence dictates that a State Party should ensure

> that its national law incorporates definitions of the crimes that reflect the Statute's provisions in their entirety because the Statute has refined international criminal law with respect to the definitions of the offences in some instances. These definitions were adopted by 120 States participating in the Rome Conference. Therefore, they represent the views of the majority of States, in terms of the current state of international criminal law. They are based on existing treaty and customary law proscriptions, and take into account the jurisprudence of the ICTY/R. Therefore, all States that incorporate these definitions into their national laws are indicating their strong support for international norms and standards.[390]

Such prudence should suit Philippine policy-makers as well. Three reasons are apparent. First, such legislation optimizes the operation of the principle of complementarity in that the country's national criminal justice system would thus be fully equipped to carry out its primary responsibility of investigating, prosecuting and punishing perpetrators of the core crimes. Otherwise, the Philippines could be adjudged as being, in the terms of Article 17(1)(a), "unwilling or unable genuinely to carry out the investigation or prosecution" of core crimes perpetrators. Second, statutorily criminalizing the core crimes under Philippine domestic law would fully safeguard the principle of legality fundamental to criminal law and recognized by both the Rome Statute and the Philippines. Third, the Rome Statute is a non-self-executing treaty. As such, it is inevitable that implementing statute ought to be enacted by the Philippine legislature in compliance with the maxim of *pacta sunt servanda*. It has been noted that such implementing legislation would primarily touch on issues of international cooperation and judicial assistance — parenthetically, even the judiciary might have to do its part in implementing the Rome Statute in view of the fact that the Constitution reposes the power of promulgating the Rules of Court in the Supreme Court. Since an implementing statute would be enacted anyway, the Philippines might as well go the full route by expressly criminalizing the core crimes in the very same implementing statute.

390. MANUAL, *supra* note 195, at 88.

VI. CONCLUSION

A. Resolving the Principal Questions

As the 124TH State Signatory to the Rome Statute, the Philippines is currently deliberating on whether to ratify the Statute. Since the process of becoming a State Party requires Senate concurrence, the Statute is being subjected to a thorough assessment by the Executive Department. Borne of such scrutiny is a slew of complex constitutional and legal issues. The foregoing study addresses one such issue: whether the core crimes can be construed as criminalized — i.e., defined and punished — under Philippine domestic law sans statutory criminalization, in the event that the Philippines ratify the Statute. The question is raised and resolved in view of, first, the principle of complementarity that would eventually vivify the ICC, and, second, the principle of legality fundamental in any national criminal justice systems.

1. *Jus Scriptum* Criminalization

In epitomizing the development of *jus scriptum*, the Rome Statute codifies existing norms of customary international law and also embodies progressive development of international law, particularly in the area of International Human Rights Law, International Criminal Law and International Humanitarian Law. That the Statute restates customary norms and introduces elements of innovation is most pronounced in its criminalization of the core crimes.

In defining the core crimes, the Statute codifies customary international law because the general categories of genocide, crimes against humanity and war crimes are well entrenched in international law such that, to some, they have risen to the status of *jus cogens*. Such restatement of existing customary law is most evident in the Statute's verbatim adoption of the definition of genocide enunciated in the Genocide Convention. But, the Statute also innovates in identifying the specific acts or omissions that fall under each category of core crimes. That the Statute embodies progressive development of international law is best exemplified by the fact that it is considered to have, for the first time, defined in a multilateral treaty crimes against humanity and war crimes committed in non-international armed conflicts.

The same dynamics of restatement and innovation operates in how the Statute punishes perpetrators of the core crimes. By virtue of the principle of complementarity, the Statute entrusts the investigation, prosecution and punishment of core crimes perpetrators to the respective national criminal jurisdiction of its States Parties. The innovation consists precisely in the fact that a permanent international criminal court has been established and is empowered to investigate and prosecute core crimes perpetrators, and, upon conviction, to impose penalties of imprisonment, coupled with forfeiture

and/or fine. Prior to the Rome Statute, any referral to an international tribunal has been on an *ad hoc* basis and ultimately founded upon the collective will of a relatively small group of States — either the victors of war or the U.N. Security Council.

2. Ineffective and Inadequate Criminalization by Incorporation and Transformation

Under the Philippine legal system, international law becomes domestic law or "law of the land" by way of either incorporation or transformation. By virtue of the Incorporation Clause the "generally accepted principles of international law" are adopted or incorporated as law of the land. On the other hand, the Treaty Clause provides that treaties ratified by the Philippines are transformed into domestic law — "made valid and effective" — by virtue of Senate concurrence.

a. Interstices in Incorporation

The Incorporation Clause adopts or incorporates into Philippine municipal law "generally accepted principles of international law." Specifically the Incorporation Clause covers these two primary sources of international law: customary international law and the so-called "general principles of law of civilized nations." It excludes international law norms or principles that are entirely treaty-based. In other words, the Incorporation Clause makes codified or restated customary international law part of the law of the land, but leaves untouched elements of progressive development in international law. Since the criminalization of the core crimes in the Rome Statute is paradigmatic *jus scriptum*, the Philippine cannot completely rely on the Incorporation Clause to criminalize the core crimes under its domestic law in a manner that would satisfy the stringent standards of the principles of complementarity and legality.

b. Gaps in Transformation

Through the Treaty Clause conventional international law is transformed into law of the land. Since a treaty is one method of accomplishing *jus scriptum*, the transformative effect of the Treaty Clause covers both codified customary international law and progressive development of international law. Accordingly, it seems that the operation of the Treaty Clause would result into an effective and adequate criminalization of the core crimes under Philippine domestic law. This study submits that such result would be true in proscribing the core crimes, but illusory in prescribing penalties thereto.

A treaty ratified by the Philippines is generally effective and valid as domestic law even in the absence of an implementing statute. However, this does not discount the possibility that a treaty may be non-self-executing such

that the enactment of relevant implementing statute becomes a condition *sine qua non*. The Rome Statute is one such treaty. Apart from the existence of persuasive authority supporting the proposition that treaties criminalizing certain conduct are inherently non-self-executing, the pertinent pre-Rome Statute treaties treating the core crimes — duly ratified by the Philippines — directly obligate States Parties thereto to enact penal legislation. The subsistence of such predecessor instruments accounts for the fact that, in the Rome Statute, there is merely an indirect obligation to criminalize the core crimes. Unfortunately, despite its anti-impunity rhetoric, the Philippines keeps, by and large, a lethargic record of compliance with this obligation. This deafening silence in prescribing penalties for the commission of the core crimes reveals a lacuna in the ability of the country's criminal justice system to investigate, prosecute and punish core crimes perpetrators. Ratification of the Rome Statute sans statutory criminalization of the core crimes perpetuates the lacuna, and, worse, invites a possible ICC finding that the criminal justice system of the Philippines is unwilling genuinely to carry out the investigation and prosecution of the core crimes.

3. The Prudent Position: Congressional Criminalization of the Core Crimes

The Philippines has consistently supported the efforts of the international community to establish a permanent international criminal court having jurisdiction over "the most serious crimes of concern to the international community as a whole." Ratifying the Rome Statute would arguably be the country's most eloquent expression of its commitment to achieve an "efficient and effective dispensation of justice." Yet, it should not ratify the Statute for the sake of ratifying it. It is, thus, the considered position of this thesis that the enactment of an implementing legislation to the Rome Statute that, *inter alia*, expressly criminalizes the core crimes under domestic law, is the most prudential means by which the Philippines can continue to take the establishment of the ICC seriously, and, in choosing to do so, to really take "the most serious crimes of international concern" seriously.

B. Recommendations

1. Methods of Criminalization

In positing the view that the Philippines should statutorily criminalize the core crimes, the next logical step for this study is to propose a specific piece of legislation consistent with the Rome Statute. However, the expressed purpose of this thesis precludes taking such further step. Suffice it here to identify possible options in effecting such statutory criminalization, *viz.*: first, adoption of definitions taken verbatim from Articles 6, 7 and 8 of the Statute, or that refer to them directly; second, adoption of a series of independent

offenses connected with each of the acts listed in Articles 6, 7 and 8; and, third, use existing general law offenses to prosecute the perpetrators of genocide, crimes against humanity and war crimes, using offenses sufficiently serious to describe the crime perpetrated.[391] Moreover, comparative criminal law research might be necessary to buttress the adoption of any of the aforesaid methods, especially the last.[392]

2. Addressing Other Philippine Concerns

The singular focus of this thesis on criminalization of the core crimes leaves the other legal concerns raised in the October 5 Roundtable Discussion unresolved — i.e., enactment of laws placing the core crimes within the jurisdiction of Philippine courts, the impact of the Statute's provisions on irrelevance of official capacity and responsibility of military commanders and other superiors, and the obligation to cooperate in the arrest and surrender of persons and in evidence procurement and preservation. That they remain such does not in anyway denigrate their importance. In fact, each concern may reasonably merit separate treatment.

391. Adapted from MANUAL, *supra* note 195, at 89, 91-92 & 95.

392. *See* Bassiouni, *Functional Approach*, *supra* note 220, at 814-16.

Testing the Legality of the Attack on Afghanistan

*Michelle Ann U. Juan**

ABSTRACT

The United Nations (U.N.) was established primarily to ensure the maintenance of world peace and security and save future generations from the scourge of war. To this end, with respect to the entitlement of states to use force, the matter was meant to be resolved by the combined application of Articles 2(4) and 51 of the U.N. Charter. Consequently, the Charter effectively removes from the states the power to unilaterally determine if and when the use of force is justified, by limiting the right to use force in self-defense to instances when "an armed attack" occurs.

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