

# The Enlargement of the Definitions of Genocide and Crimes Against Humanity in the Philippines — Republic Act No. 9851

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## I. INTRODUCTION

The ambitious purpose of mankind to repress heinous crimes had its origins from the beginning of history. Nevertheless, the 19th Century already counts significant efforts by international diplomats and humanitarian leaders, efforts that crystallized in the 20th Century with the creation of the Tribunals of Nuremberg and Tokyo.

Both the Convention on the Prevention and Punishment of the Crime of Genocide (Convention on Genocide)<sup>1</sup> and the principles and provisions

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of International Humanitarian Law (IHL) have been central in the fight against impunity of heinous crimes. IHL experienced a great development with the adoption of the Geneva Conventions of 1949, which currently have a universal character. As of 2011, 194 States are parties to the Conventions, 171 to Additional Protocol I, and 166 to Additional Protocol II.<sup>2</sup>

The States Parties to the Geneva Conventions and their Additional Protocols of 1977 have accepted their obligation to prevent and halt acts that contravene these instruments, whether they are committed in an international or non-international armed conflict.

Under the Geneva Conventions, States 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” foreseen in their provisions.<sup>3</sup> Furthermore, under Article 5 of the Convention on Genocide, 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 other acts enumerated in Article 3.<sup>4</sup>

The Republic of the Philippines has been a party to the Geneva Conventions since October 1952,<sup>5</sup> to the Convention on Genocide since 7 July 1950,<sup>6</sup> and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity since 15 May 1973.<sup>7</sup>

Recognizing the relevance of the implementation of international provisions repressing war crimes, crimes against humanity, and genocide at

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1. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Convention on Genocide].
2. INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 2011 506 (2011).
3. Convention (IV) Relative to the Protection of Civilian Persons in Times of War, art. 146, *adopted* Aug. 12, 1949, 75 U.N.T.S. 287.
4. Convention on Genocide, *supra* note 1, art. 5.
5. *See generally* International Committee of the Red Cross, Treaties and States Parties to Such Treaties, *available at* <http://www.icrc.org/ihl> (last accessed June 30, 2013).
6. Convention on Genocide, *supra* note 1, at 278.
7. 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *adopted* Nov. 26, 1968, 754 U.N.T.S. 73.

the national level,<sup>8</sup> the Congress of the Philippines approved Republic Act (R.A.) No. 9851, entitled “An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide[,] and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes” in December 2009.<sup>9</sup>

This Article aims to study two major developments in Philippine legislation that are integrated in R.A. No. 9851, enlarging the protection of a person and/or groups of persons in cases of genocide and crimes against humanity. The first one is the inclusion of two categories to the definition of the crime of genocide. Aside from acts with intent to destroy, in whole or in part, those groups enumerated in the Convention on Genocide, such as “national,” “ethnic,” “racial,” or “religious” groups, R.A. No. 9851 adds the “social” group” and “any other similar stable and permanent group” as victims of genocide.<sup>10</sup>

The second enlargement in the protection of fundamental rights is the categorization of the crime of persecution against any identifiable group or collectivity on the ground of “sexual orientation” as a crime against humanity.<sup>11</sup>

## II. ORIGINS OF THE SPECIFIC PHILIPPINE LEGISLATION ON WAR CRIMES, CRIMES AGAINST HUMANITY, AND GENOCIDE: SENATE BILL NO. 2669 AND R.A. NO. 9851

In the Philippines, a Senate Bill was submitted to sanction the most horrendous violations that can be committed both in times of armed conflict

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8. See CONG. REC. Vol. 1-9, at 10, 14th Cong., 3d Reg. Sess. (Aug. 18, 2009). A highly illustrative example would be the statement made by Representative Lorenzo R. Tañada III during the final approval by the Senate —

Armed conflict is evident in our country today. We have the longest running communist insurgency in Asia. Muslim secessionist movement in Southern Philippines is also of similar, if not more, urgent concern. Both armed conflicts have taken their toll not only of the combatants from each side but more unfortunately, on the civilians caught in the crossfire. Both armed conflicts have become compelling reasons for our country to have a law that will protect civilians in an armed conflict.

*Id.*

9. An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes [Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity], Republic Act No. 9851 (2009).

10. *Id.* § 5 (a).

11. *Id.* § 6 (h).

and in the absence of one. As a result of several efforts, on 8 October 2008, Senate Bill No. 2669 (the Bill) was submitted jointly by the Committees on Justice and Human Rights and Foreign Relations in substitution of Senate Bills Nos. 583, 1446, 1542, and 1861, with Senators Francis G. Escudero, Richard J. Gordon, and Miriam P. Defensor-Santiago as sponsors.<sup>12</sup> On 4 February 2009, during the presentation of the Bill for consideration, Senator Gordon recalled that

[i]n the Declaration of Principles and State Policies found in our Constitution, it is stated that the Philippines adopts the generally accepted principles of international law as part of the law of the land. Nevertheless, there is a need to codify these crimes within the domestic legal system to fully comply with Philippine obligations under various treaties and conventions, to keep pace with developments in the definition of international criminal law, and more importantly, to ensure that those who commit war crimes, genocide, and crimes against humanity are not afforded impunity for their acts.<sup>13</sup>

Since the very beginning of the discussion of the Bill, the potential conflict between international law and domestic law was already foreseen. In his submission, Senator Gordon said that because of the gravity of the crimes covered by the Bill and because of its character as a special law, the Bill would have precedence over other related or similar Philippine laws on war.<sup>14</sup> Moreover, Senator Gordon explained that the intent of the Bill was

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12. An Act Defining and Penalizing Crimes Against International Humanitarian Law and Other Serious International Crimes, Operationalizing Universal Jurisdiction, Designating Special Courts, and for Related Purposes, Committees on Justice and Human Rights & Foreign Relations, S. Rep. No. 134, 14th Cong., 2d Reg. Sess. (2009).

13. S. JOURNAL Sess. No. 48, at 1530, 14th Cong., 2d Reg. Sess. (Feb. 4, 2009). This Bill No. 2669, to define and penalize crimes against International Humanitarian Law (IHL) and other serious international crimes, consolidated Senate Bill No. 1446 by Senator Gordon himself, Senate Bill No. 583 by Senator Jinggoy Estrada, Senate Bill No. 1861 by Senator Defensor-Santiago, Senate Bill No. 1542 by Senator Miguel Zubiri, a fellow member of the Red Cross and governor of the International Red Cross, and Senate Bill No. 2589 by Senator Manuel Villar. It was also mentioned by Senator Gordon that the counterpart bills in the Lower House include House Bill No. 1748 by Representative Roilo Golez, former vice-chairman of the Red Cross, House Bill No. 2591 by Representative Simeon Datumanong, and House Bill No. 3002 by Representative Rufus Rodriguez, which were also deliberated upon by the Committee on Justice and Human Rights in November 2008. Also, a technical working group had been formed and started meeting on 29 January 2009. *Id.*

14. *Id.* at 1536.

“to clear any doubt that the Philippines is a humanitarian nation that will punish anyone who violated humanitarian rights with impunity.”<sup>15</sup>

In a very exceptional situation, the Senate Bill was discussed and even approved before the Philippines became a State Party to the Rome Statute of the International Criminal Court (ICC).<sup>16</sup> During the discussions in the Senate, a question as regards the need to accede to the ICC before the approval of the Bill was discussed.<sup>17</sup> On the matter, Senator Aquilino Q. Pimentel, Jr. noted that Senator Jamby A. Madrigal made an annotation to her signature, which said that “she would prefer the ICC to be ratified first before the Senate takes action on the bill.”<sup>18</sup> However, he noted that the ICC had not been forwarded yet to the Senate by the Office of the President, but, to him, this form of neglect by the Office of the President should not stifle the obligation of the Senate to adhere to international agreements that protect humanity against crimes.<sup>19</sup>

Senate Bill No. 2669 was discussed several times in a dozen sessions between February and May 2009. The drafted provisions regarding war crimes were the most discussed.<sup>20</sup> R.A. No. 9851 was adopted on 11 December 2009. A year and a half later then, the Philippines acceded to the Rome Statute.<sup>21</sup>

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15. *Id.*

16. See United Nations News Center, Philippines Ratifies the Rome Statute of the ICC, available at <http://www.un.org/apps/news/story.asp?NewsID=39416#.UcMvNT5p6Fc> (last accessed June 30, 2013). The Philippines became a party to the Rome Statute in August 2011. *Id.*

17. S. JOURNAL Sess. No. 49, at 1566, 14th Cong., 2d Reg. Sess. (Feb. 4, 2009).

18. S. JOURNAL Sess. No. 54, at 1642, 14th Cong., 2d Reg. Sess. (Feb. 18, 2009). Asked how the non-ratification of the ICC treaty could be reconciled with the passage of the IHL bill, Senator Gordon said that the Philippines had already ratified the Geneva Conventions which cover most of the crimes addressed in the bill. In fact, he pointed out that in the bill’s Declaration of Principles, it is so stated that the Philippines adopts the internationally accepted principles of international law as part of the law of the land. *Id.*

19. *Id.*

20. See generally S. JOURNAL Sess. Nos. 48, 49, 54, 55, 57, 58, 59, 74, 75, 76, & 78, 14th Cong., 2d Reg. Sess. (Feb.–May 2009). Senate Bill No. 2669 was entitled “An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes.” Meanwhile, in the final version of R.A. No. 9851, the title of the Act was changed to “An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes.”

21. United Nations News Center, *supra* note 16.

### III. CRIME OF GENOCIDE AND THE INCLUSION OF OTHER GROUPS IN THE DEFINITION OF R.A. NO. 9851

In Section 5, R.A. No. 9851 defines the crime of genocide as follows —

- (a) For the purpose of this Act, “genocide” means any of the following acts with intent to destroy, in whole or in part, a national, ethnic, racial, religious, *social or any other similar stable and permanent group* as such:
  - (1) Killing members of the group;
  - (2) Causing serious bodily or mental harm to members of the group;
  - (3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (4) Imposing measures intended to prevent births within the group; and
  - (5) Forcibly transferring children of the group to another group.
- (b) It shall be unlawful for any person to directly and publicly incite others to commit genocide.<sup>22</sup>

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22. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 5 (emphasis supplied).

The notion that genocide might constitute destruction of groups “entirely or in part” appeared in the Preamble of United Nations (U.N.) General Assembly Resolution 96 (I), which was adopted in December 1946. *See* G.A. Res. 96 (I), para. 1, U.N. GAOR, 1st Sess., U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

It is important to note that the expression “in whole or in part” refers to the intent of the perpetrator and not to the result. As the International Law Commission noted in its 1996 Report on the Draft Code of Crimes, it is not necessary to achieve the final result of the destruction of a group in order for a crime of genocide to have been committed. It is enough to have committed any of the acts listed in the Article with the clear intention of bringing about the total or partial destruction of a protected group as such. U.N. Economic & Social Council, Draft Convention on the Crime of Genocide 20, U.N. Doc. E/447 (June 26, 1947) & U.N. General Assembly, Draft Convention on the Crime of Genocide, Note by the Secretary-General 3, U.N. Doc. A/362 (Aug. 25, 1947).

Moreover, some interpretations focus on groups in a geographic sense. It is relevant to mention hereby that destroying all members of a group within a continent, or a country, or an administrative region or even a town, might satisfy the “in part” requirement of Article II. *See* William A. Schabas, *Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide*, 61 RUTGERS L. REV. 183 (2008).

In *Prosecutor v. Krstic*, the Trial Chamber held that “the physical destruction may target only a part of the geographically limited part of the larger group because the perpetrators of the genocide regard the intended destruction as sufficient to

The wording of the above section is identical to the one provided in Article 2 of the Convention on Genocide<sup>23</sup> and Article 6 of the Rome Statute,<sup>24</sup> except for the inclusion in the definition of genocide acts with the intent to destroy in whole or in part “social or any other similar stable and permanent group as such.”<sup>25</sup>

*A. Origins of the Definition of the Crime of Genocide*

The concern for the protection of national, racial, ethnic, and religious groups from persecution could be traced to the Peace of Westfalia of 1648.<sup>26</sup> From its part, the protection of these groups by international law on human rights could trace its origins to the first efforts to regulate wars through IHL, under which occupying belligerents were required to respect “the lives of persons and their private property, as well as religious convictions and practice.”<sup>27</sup>

The term genocide was coined by Raphael P. Lemkin in his 1944 work, *Axis Rule in Occupied Europe*.<sup>28</sup> According to William A. Schabas, Lemkin had an active participation in the origins of the legal prohibition of genocide, as he worked as consultant to the United Nations (U.N.) Secretary-General throughout the drafting of the Genocide Convention.<sup>29</sup> Lemkin created the term “genocide” from two words, *genos*, which means race, nation, or tribe in ancient Greek, and *caedere*, which means to kill in Latin.<sup>30</sup> The word “genocide,” then, pertains to a coordinated plan of “different actions aiming

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annihilate the group as a distinct entity in the geographic area at issue.”  
Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 590 (Aug. 2, 2001);  
See also Prosecutor v. Sikirica et al., Case No. IT-95-8-S, Judgment, ¶ 68 (Nov. 13, 2001).

23. Convention on Genocide, *supra* note 1, art. 2.
24. Rome Statute of the International Criminal Court art. 6, July 1, 2002, 2187 U.N.T.S. 561.
25. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 5 (a).
26. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 15 (2000 ed.).
27. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land art. 46, *entered into force* Jan. 26, 1910, 187 C.T.S. 227.
28. SCHABAS, *supra* note 26, at 14 (citing RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944 ed.)).
29. SCHABAS, *supra* note 26, at 24-25.
30. *Id.* at 25.

at the destruction of essential foundations of the life of [a national] group, with the aim of annihilating the group as such.”<sup>31</sup>

The “objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and economic existence of national groups and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.”<sup>32</sup>

Lemkin conceived “genocide” as a crime “directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.”<sup>33</sup> The crime of genocide is essentially confined to the physical destruction or extermination of a group, as contrasted with crimes against humanity, which extends to various forms of “persecution,” meaning “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>34</sup>

The Author agrees with Schabas that Lemkin’s definition “was narrow, in that it addressed crimes directed against ‘national groups’ rather than ‘groups’ in general.”<sup>35</sup> Nevertheless, Schabas makes a statement that would be of great importance to the interpretation and appreciation of R.A. No. 9851. He believes that the definition formulated by Lemkin had a broad character since “it contemplated not only physical genocide but also acts aimed at destroying the culture and livelihood of the group.”<sup>36</sup> As originally conceived by Lemkin, the crime of genocide would be committed by “every

31. *Id.* at 27. The inclusion of inciting to commit genocide as a crime constituting genocide is to be found in Section 5 (b) of R.A. No. 9851, which qualifies as genocide the act of “directly and publicly incit[ing] others to commit genocide.” See Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 5 (b).

This finds precedence in Article 2 (3) (c) of the Statute of the International Criminal Tribunal for Rwanda and Article 4 (3) (c) of the Statute of International Criminal Tribunal for former Yugoslavia. See Statute of the International Criminal Tribunal for Rwanda art. 2 (3) (c), Nov. 8, 1994, 33 I.L.M. 1598 (1994) & Statute of the International Criminal Tribunal for the former Yugoslavia art. 4 (3) (c), May 5, 1993, 32 I.L.M. 1159 (1993).

32. *Id.* at 25 (citing LEMKIN, *supra* note 28, at 79).

33. *Id.*

34. Rome Statute of the International Criminal Court, *supra* note 24, art. 7, § 2 (g).

35. SCHABAS, *supra* note 26, at 25. According to Schabas, “Lemkin’s interest on the subject dated to his days as a student at Lvov University, when he intently followed attempts to prosecute the perpetrators of the massacres of the Armenians.” *Id.*

36. *Id.*



policy aiming at the destruction or the aggrandizement of one of such groups to the prejudice or the detriment of another.”<sup>37</sup>

Over time, there have been several initiatives to amend the definition of the crime set out in the Genocide Conventions. As stated clearly by Schabas, “the law concerning genocide has itself passed through a period of unprecedented dynamism, as concepts and principles have been explored and clarified.”<sup>38</sup>

Having in mind this dynamic tendency impacting the definition of genocide on one hand, and the wording of R.A. No. 9851 containing an enlargement to cover other potential groups that could be victims of this heinous crime on the other, it is relevant to emphasize once more that the crime of genocide is essentially confined to the physical destruction or extermination of a group, as contrasted with crimes against humanity, which extends to various forms of “persecution,” meaning “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>39</sup>

*B. The New Categories Included in R.A. No. 9851: Social and Any Other Similar Stable and Permanent Group — Comparative Legislation and Developments*

*1. Inclusion of Other Categories to the Definition of Genocide*

The inclusion in R.A. No. 9851 of “social or any other similar stable and permanent group” in the definition of genocide undoubtedly has relevant implications at both national and international levels. Before analyzing the phrase and new categories of groups added by R.A. No. 9851 to the definition given by the Convention on Genocide, the Author would like to recall the wording of the Vienna Convention on the Law of the Treaties of 1969 (VCLT) regarding the interpretation of treaties.

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37. *Id.* at 29 (citing LEMKIN, *supra* note 28, at 93). Lemkin noted the need to revisit international legal instruments, mainly The Hague Regulations of 1907, and urged their revision to incorporate a definition of genocide that should consist of

[t]wo essential parts — [firstly,] every action infringing upon the life, liberty, health, corporal integrity, economic existence, and the honor of the inhabitants when committed [by reason of belonging] to a national, religious[,] or racial group; and [secondly], every policy aiming at the destruction of the aggrandizement of one of such groups to the prejudice or detriment of another.

*Id.*

38. William A. Schabas, *Genocide Law in a Time of Transition: Recent Developments in the Law of Genocide*, 61 RUTGERS L. REV. 162, 163 (2008).

39. Rome Statute of the International Criminal Court, *supra* note 24, art 7, § 2 (g).

According to Article 31 (1) of the VCLT, which provides the general rule of interpretation, a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>40</sup>

Moreover, Article 32 of the same allows reference to preparatory work of a treaty to confirm the meaning and application of Article 31 and/or to determine the meaning when the provision “leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.”<sup>41</sup>

The International Criminal Tribunal for former Yugoslavia (ICTY) has listed the following sources as guides for interpreting the crime of genocide in international law: first, the Convention on Genocide second, “the object and purpose of the Convention as reflected in the *travaux préparatoires*,” third, case law from domestic adjudication and international ad hoc tribunals; fourth, the publications of international authorities; fifth, the preparatory work of the Report of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind; and sixth, the preparatory work of the Rome Statute for the ICC.<sup>42</sup>

40. Vienna Convention on the Law of the Treaties art. 31 (1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

41. *Id.* art. 32. One of the first codifications of customary law on the crime of Genocide is the U.N. General Assembly Resolution 96 (I), which established a non-exhaustive list of protected groups. Under this Resolution, Genocide was defined as

*the denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the [U.N.].*

G.A. Res. 96 (I), I, at 188-89, U.N. Doc. A/231 (Dec. 14, 1946) (emphasis supplied).

The Resolution continued to affirm that “[m]any instances of such crimes of genocide have occurred when racial, religious, political, *and other groups* have been destroyed, entirely or in part.” Stating that the punishment of the crime of genocide was a matter of international concern, the General Assembly affirmed in the Resolution “that genocide is a crime under international law[,] which the civilized world condemns, and for the commission of which[,] principals and accomplices — whether private individuals, public officials[,] or statesmen, and whether the crime is committed on religious, racial, political, *or any other grounds* — are punishable.

*Id.*

42. Prosecutor v. Stakic, Case No. IT-97-24-T, Trial Judgment, ¶ 501 (July 31, 2003). *See also* Krstic, Case No. IT-98-33-T, Trial Judgment, ¶ 541.

As stated above, legislative and judicial works, both at national and international levels, are very useful sources that can provide evidence of customary law. International case law and state practice, for example, have in several instances challenged the “exclusiveness” of the Convention on Genocide’s list.<sup>43</sup> In this line, the Author is of the opinion that the specific wording included in the definition of genocide under R.A. No. 9851 could find its origins in the 2 September 1998 decision of the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v. Akayesu*.<sup>44</sup> In its judgment, the Trial Chamber considered the enumeration of protected groups in the Convention on Genocide, as well as in Article 2 of the Tribunal’s Statute, to be too restrictive.<sup>45</sup> The Trial Chamber concluded that the drafters of the 1948 Genocide Conventions meant to encompass all “stable” and “permanent” groups.<sup>46</sup>

As for national provisions sanctioning the crime of genocide, the Canadian legislation, which was adopted in 2000 for the implementation of the Rome Statute, defined genocide as an attempt to destroy “an identifiable group of persons,” to the extent that the definition is consistent with “genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations.”<sup>47</sup> It is to be

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43. David Shea Bettwy, *The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding Under Customary International Law?*, 2 NOTRE DAME J. INT’L & COMP. L. 167 (2012).

44. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (Sep. 2, 1998).

45. *Id.* ¶ 510-16. The ICTR was the first international court to try an offender for genocide. It is possible to affirm that the “ICTR remains the international criminal jurisdiction with the most elaborate case law on the crime of genocide.” Claus Krefß, *The Crime of Genocide in International Law*, 6 INT’L CRIM. L. REV. 461, 467 (2006).

46. *Akayesu*, Case No. ICTR-96-4-T, ¶ 510-16. *See also* *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 57 (Dec. 6, 1999) & *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 162 (Jan. 27, 2000). In this case, the Trial Chamber faced the task of interpreting a convention written 50 years ago, with no guidance from any international jurisprudence. It is decisively a judgment that marked an important point in the development of the international law of genocide. *Id.*

47. Crimes Against Humanity and War Crimes Act, R.S.C. 2000, c. 24 (Can). According to Article 4 (3), “genocide” means

an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes

understood that the Canadian legislation deemed the definition in the Rome Statute to be consistent with customary international law, and therefore, the Canadian Parliament foresaw the evolution of the definition of genocide so as to include groups other than those enumerated in the Convention on Genocide.

There are other criminal codes around the world that include “social groups” to the definition of genocide, besides the four categories of the Genocide Conventions. Just like R.A. No. 9851, the criminal codes of Estonia, Latvia, Paraguay, and Slovenia specifically included “social groups” in the definition of genocide.<sup>48</sup> Cases in point, Article 90 of Estonia’s Criminal Code includes “group resisting occupation or any other social group;”<sup>49</sup> Section 71 of the Latvian Criminal Code includes the category of “social class;”<sup>50</sup> Article 319 of Paraguay’s Criminal Code omits the category of racial groups, but includes “social groups” and “communities;”<sup>51</sup> Peru’s Criminal Code omits racial groups but includes social ones;<sup>52</sup> in Article 172 of Romania’s Criminal Code, the word “communities” was included;<sup>53</sup> and lastly, Slovenia extends the traditional definition of genocide in Article 373 (1) (2) of its Criminal Code to “social and political groups.”<sup>54</sup>

Now, how may the category of “social groups” be defined?

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a contravention of the law in force at the time and in the place of its commission.

*Id.*

48. Jan Wouters & Sten Verhoeven, *The Domestic Prosecution of Genocide* (A Working Paper for the Leuven Center for Global Government Studies) 7, available at [https://ghum.kuleuven.be/ggs/publications/working\\_papers/new\\_series/wp51-60/wp55.pdf](https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp51-60/wp55.pdf) (last accessed June 30, 2013).

49. *Id.* at 7.

50. *Id.* at 12.

51. *Id.* at 7.

52. *Id.*

53. *Id.*

54. Wouters & Verhoeven, *supra* note 48, at 7. In the case of Belarus, Article 127 of its Criminal Code includes the category “other groups determined by any arbitrary criteria;” Article 313 of the Criminal Code of Burkina Faso and Article 1 of The Congo’s Law No. 8-98 of 31 October 1998 includes the same provision of “groups determined by any arbitrary criteria;” Chapter 11, Section 6 of the Criminal Code of Finland includes “other comparable groups;” in France, Article 211-1 of its Criminal Code, includes “groups determined by any arbitrary criteria;” in Latvia, Section 71 of its Criminal Code replaces “religious groups” by “groups defined by collective belief or faith; and lastly, in Article 431-1 of the Criminal Code of Senegal, “groups determined by any other criterion” is included. *Id.*

This would definitely be the task of the national and, to some extent, the international tribunals.<sup>55</sup> Lemkin, as one of the fathers of the concept of genocide, wrote about the existence of “techniques of genocide in various fields,” which may be political, social, cultural, economic, biological, physical, religious, and even “*moral*.”<sup>56</sup>

One of the future challenges in protecting mankind against the crime of genocide would be the determination of whether the enlargement of the definition of the crime by the incorporation of new protected groups will result in a greater and more effective sanctions on the atrocities related to this crime. The incorporation of new groups as victim of genocide at the international level must also be a clear result of emerging customary international law as stated in Article 38 of the Vienna Convention, according to which its two elements are: (1) state practice and (2) *opinio juris sive necessitatis* or *opinio juris*, which is the “recognition that a rule of law or legal obligation is involved.”<sup>57</sup>

## 2. Interpreting the Phrase “Any Other Similar Stable and Permanent Group”

In assessing the preparatory documents for its judgment, the Trial Chamber in *Akayesu* determined that the crime of genocide was allegedly perceived as targeting only “stable” groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more “mobile” groups, which one joined through individual voluntary commitment, such as political and economic groups.<sup>58</sup> This theory of the “stable” and “permanent” groups was retaken by the Darfur Commission of Inquiry in its February 2005 Report, in which the Commission stated that this broad interpretation had not been challenged by States, concluding that it “may therefore be safely held that that interpretation and expansion has become part and parcel of international customary law.”<sup>59</sup>

In order to determine that a group is “stable” and “permanent,” some criteria for identification of the members of the group have to be established. Antonio Cassese created a two-step analysis on this specific matter: first, the case in which people were treated as belonging to one of the protected groups — the community and perpetrator’s perspective; and second, to

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55. This category is not included in any international instrument as of the date of this writing.

56. SCHABAS, *supra* note 26, at 28.

57. See *North Sea Continental Shelf* (Ger. v. Den; Ger. v. Neth.), Judgment, 1969 I.C.J. 4, 43 (Feb. 20, 1969).

58. *Akayesu*, Case No. ICTR-96-4-T, ¶ 511.

59. U.N. Security Council, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, ¶ 501, U.N. Doc. S/2005/60 (Feb. 1, 2005).

analyze if the group considered itself as belonging to one of the protected groups — the victim’s perspective.<sup>60</sup>

In the case of *Prosecutor v. Bagilishema*<sup>61</sup> at the ICTR, the Trial Chamber affirmed that “[a]lthough membership of the targeted group must be an objective feature of the society in question, there is also a subjective dimension.”<sup>62</sup> According to the Chamber —

A group may not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterize the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.<sup>63</sup>

On the subjective and objective criteria, the ICTY, in its judgment of the *Prosecutor v. Brđjanin*,<sup>64</sup> stated that the “target of an accused’s genocidal intent is to be determined by objective and subjective criteria.”<sup>65</sup> As regards the subjective element, the Chamber added that “the relevant protected group may be identified by means of the subjective criterion of the stigmati[z]ation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial[,] or religious characteristics. In some instances, the victim may perceive himself or herself to belong to the aforesaid group.”<sup>66</sup>

The approach of the International Court of Justice (ICJ) is slightly different. In the Application of Convention on Prevention and Punishment

60. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 139 (2008 ed.).

61. *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment (June 7, 2001).

62. *Id.* ¶ 65.

63. *Id.* See also *Musema*, Case No. ICTR-96-13-T, ¶¶ 161-62. Meanwhile, the ICTR, in the case of *Prosecutor v. Kajelijeli*, affirmed that the membership of a group is “a subjective rather than objective concept.” *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 811 (Dec. 1, 2003).

64. *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Judgment (Sep. 1, 2004).

65. *Id.* ¶ 684. On the contrary, the Supreme Court of Estonia has ruled that the crime of genocide requires that the perpetrator deems the destruction of the group justifiable or necessary because of certain characteristics of the group, membership of which is based on objective criteria that cannot be changed by the members themselves. *Prosecutor v. Paulov*, Estonian Supreme Court, Cassation Judgment, No. 3-1-1-31-00, ¶ 21 (Mar. 2000).

66. *Brđjanin*, Case No. IT-99-36-T, ¶ 683.

of Crime of Genocide, the court stated that the crime of genocide “requires an intent to destroy a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not.”<sup>67</sup>

As a conclusion, the determination of the relevant protected group should be made on a case-to-case basis, referring to both objective and subjective criteria.<sup>68</sup> These criteria should be founded on Lemkin’s conception of the crime of genocide as the act of destroying “essential elements of the world community.”<sup>69</sup> Finally, the groups protected under genocide law must be valuable enough to the human race such that their extermination would constitute the most devastating international crime.<sup>70</sup>

#### IV. THE DEFINITION OF CRIMES AGAINST HUMANITY IN R.A. NO. 9851 AND ITS ENLARGEMENT VIS-À-VIS THE ROME STATUTE

Section 6 of R.A. No. 9851 sanctions the crimes qualified by the Act as “Other Crimes Against Humanity,” which requires, as one of the two elements for its commission, that it is a part of a widespread or of a systematic attack directed against any civilian population.<sup>71</sup> Therefore, this category does not pertain to isolated or sporadic events, but to events, which are part of a policy or of a wide practice of atrocities tolerated or condoned by a government or a *de facto* authority.

Under R.A. No. 9851, persecution is one of the crimes against humanity. Chapter II, Section 3 (p) of R.A. No. 9851 provides that persecution is “the intentional and severe deprivation of fundamental rights contrary to international law by reason of identity of the group or

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67. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 43, 124–25 (Feb. 26, 2007). The court referred to General Assembly Resolution 96 (I), which contrasted genocide, as “the denial of the existence of entire human groups,” with homicide, considered as “the denial of the right to live of individual human beings.” *Id.* at 125.

68. Schabas, *supra* note 38, at 167.

69. LEMKIN, *supra* note 28, at 91.

70. Shea Bettwy, *supra* note 43, at 178–80.

71. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 6.

Article 7 (1) (h) of the Rome Statute sanctions “persecution” as a crime against humanity using the same wording as R.A. No. 9851. In Paragraph 1, Article 7, “crimes against humanity” is defined 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.” Rome Statute of the International Criminal Court, *supra* note 24, art. 7, ¶ 1.

collectivity.”<sup>72</sup> The crime of persecution in this Section adds an extra category to the grounds of protection, enlarging the categories already foreseen in international law —

- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, sexual orientation 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 defined in this Act.<sup>73</sup>

The inclusion of persecution on the ground of sexual orientation in R.A. No. 9851 enlarges existing protection in international instruments, reflecting a development in international law, which the Senators who proposed the Bill considered essential to be included as such. Among the earlier provisions sanctioning the crime of persecution as a crime against humanity, one can mention the statutes both of the ICTY and ICTR. Article 5 of the ICTY’s Statute entitled Crimes Against Humanity provides —

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts.<sup>74</sup>

Meanwhile, in the statute of the ICTR, it is Article 3 that sanctions Crimes Against Humanity, as follows —

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial[,] or religious grounds: (a) [m]urder; (b) [e]xtermination; (c) [e]nslavement; (d) [d]eportation; (e) [i]mprisonment; (f) [t]orture; (g) [r]ape; (h) [p]ersecutions on political, racial[,] and religious grounds; (i) other inhumane acts.<sup>75</sup>

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72. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 3 (p). Article 7 (2) (g) of the Rome Statute provides the same definition of persecution as R.A. No. 9851. See Rome Statute of the International Criminal Court, *supra* note 24, art 7, § 2 (g).

73. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 6 (h).

74. Statute of the International Criminal Tribunal for the former Yugoslavia art. 5, *adopted* May 25, 1993, 32 I.L.M. 1159.

75. Statute of the International Criminal Tribunal for Rwanda art. 3, *concluded* Nov. 8, 1994, 33 I.L.M. 1598.



As one can see from the provisions, the statute of the ICTY explicitly includes only three grounds of persecution, namely: political, racial, and religious; whereas the ICTR's statute adds two more: national and ethnic.<sup>76</sup> Nevertheless, both provide a protection *numerous apertus* including the category of other "inhumane acts."

In the case of the Rome Statute, pursuant to Article 7 (1) (h), the list of crimes constituting crime against humanity of persecution include

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.<sup>77</sup>

It is clear that the drafters of the Rome Statute embraced "a broad and innovative concept" of crimes against humanity, "capable of addressing a range of atrocities in peacetime committed against groups and individuals."<sup>78</sup>

76. It is important to note that the national and ethnic grounds are included in the first part of the law, but not retaken in (h) when determining the grounds for committing the crime of persecution. See Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, § 6 (h).

77. Rome Statute of the International Criminal Court, *supra* note 24, art. 7, § 1 (h) (emphasis supplied).

Other international and ad hoc tribunals have the power to prosecute crimes of persecution, pursuant to the following statutory provisions: Regulation No. 2000/15 on the Establishment of Panels With Exclusive Jurisdiction Over Serious Criminal Offenses § 5 (1) (h) & 5 (2) (f), U.N. Doc. UNTAET/REG/2000/15; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Royal Kram No. NS/0801/12, as Amended, arts. 3 & 5 (2001) (Cambodia); U.N. Security Council, Statute of the Special Court of Sierra Leone (Established Pursuant to S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000)) art. 2 (h), *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnDrMJeEw%3d&tabid=176> (last accessed June 30, 2013); Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, art. 9, June 6, 2003, 2329 U.N.T.S. 1 (entered into force Apr. 29, 2005); & Law of the Iraqi Higher Criminal Court, Al-Waqeah al-Iraqia [Iraqi Official Gazette] 4006 of Oct. 18, 2005 art. 12 (1) (h) & (2) (f) (Iraq).

78. Schabas, *supra* note 38, at 162. In his article, Schabas mentions some scholars that have proposed new definitions in order to enlarge the scope of the term, among them Israel W. Charny, Vahakn N. Dadrian, Helen Fein, Frank Chalk, and Kurt Jonassohn. *Id.* at 163.

This innovative concept included gender as one of the grounds of persecution.

In the document *Elements of the Crime* by the International Criminal Court, there are six elements listed constituting the crime of persecution. They are:

Element 1 — The perpetrator severely deprived, contrary to international law,<sup>79</sup> one or more persons of fundamental rights.

Element 2 — The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.

Element 3 — Such targeting was based on political, racial, national, ethnic, cultural, religious, *gender* as define in article 7, paragraph 3 of the Statute, or other grounds that are universally recognized as impermissible under international law.

Element 4 — The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.<sup>80</sup>

Element 5 — The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

Element 6 — The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>81</sup>

With the inclusion of “gender” as one of the grounds for the commission of the crime of persecution, the Rome Statute recognizes that the crime cannot be interpreted narrowly, as stated by previous cases of international tribunals, leaving the important task to enlarge further the categories to the international community, as a result of the interpretation of the category “other inhumane acts.”

In *Prosecutor v. Kupreškić et al.*,<sup>82</sup> six accused were charged under Count 1 with the crime of persecution pursuant to Article 5 (h) of the Yugoslav Statute.<sup>83</sup> In reaching its conclusions for a definition of the crime of

79. In this portion of the Article, the *Elements of the Crimes* has a footnote that says that “this requirement is without prejudice to paragraph 6 of the General Introduction to the *Elements of Crimes*.” INTERNATIONAL CRIMINAL COURT, *ELEMENTS OF CRIMES* n.21 (2011).

80. Herein, the footnote reads, “It is understood that no additional mental element is necessary for this element other than that inherent in element 6.” *Id.* n.22.

81. *Id.* at 10.

82. *Prosecutor v. Kupreškić, et al.*, Case No. IT-95-16, Judgment (Jan. 14, 2000).

83. *Id.* ¶ 33. The Prosecution alleged in the indictment that within the period of October 1992 until April 1993, the accused persecuted Bosnian Muslim

persecution, the Chamber — having analyzed international and national case law — summarized the *actus reus* of persecution as entailing indicators discussed as follows:

- (a) A narrow definition of persecution is not supported in customary international law.<sup>84</sup> Persecution has been described by courts as a wide and particularly serious crime committed against the Jewish people and other groups by the Nazi regime.
- (b) In their interpretation of persecution, courts included murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.
- (c) Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights.
- (d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. In reality, persecutory acts are often committed pursuant to a discriminatory policy or a widespread discriminatory practice.
- (e) As a corollary to (d), discriminatory acts charged as persecution must not be considered in isolation, they have to be examined in their context and weighed for their cumulative effect.<sup>85</sup>

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inhabitants of the Ahmici Šantici region with the aim of removing them from the village and surrounding areas, through systematic killing of the civilians, destruction of their homes and property, and detention and expulsion of Bosnian Muslims from the region. *Id.*

84. Cherif M. Bassiouni, referring to definitions found in dictionaries from around the world, compiled the following definition of the terms “persecute” or “persecution” —

State action or policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim’s beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic, etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.

CHERIF M. BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 327 (1999 ed.). Bassiouni relied on: Arabic, Danish, Dutch, English, French, German, Greek, Hungarian, Italian, Japanese, Norwegian, Polish, Portuguese, Romanian, Russian, Spanish, Swedish, and Turkish sources. This definition of crimes of persecution was discussed in great detail in *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Opinion and Judgment, ¶ 695 (May 7, 1997). The Tribunal commended Bassiouni’s attempts to fill what the Tribunal referred to as “definitional vacuum.” *Id.*

85. *Kupreškic, et al.*, Case No. IT-95-16, ¶ 615.

A. *The Inclusion of “Gender” by the Rome Statute as a Category in the Crime of Persecution as a Crime Against Humanity*

“Gender” in the Rome Statute is defined as referring “to the two sexes, male and female, *within the context of society*. The term ‘gender’ does not indicate any meaning different from the above.”<sup>86</sup>

According to Rhonda Copelon, the reference to two sexes reflected the Vatican and the Islamists’ position, but the phrase “in the context of society” was explicitly intended to incorporate the sociological or social construction of gender.<sup>87</sup> The last sentence, which was sought by the small group of anti-gender delegations in the hopes of excluding sexual orientation, was seen by the majority of delegations as superfluous.<sup>88</sup> As one can clearly conclude, Article 7 (3) of the Rome Statute does not take into account sexual orientation; the deliberations at the Rome Conference became so contentious and litigious that the issue surrounding the definition of “gender” to include sexual orientation was left to the ICC judges to determine at a later stage through their work.

In Valerie L. Oosterveld’s view, this definition was formulated to show that gender is a construct built upon social understandings of what is expected of the male and female biological sexes.<sup>89</sup> She makes a contrast between the definitions of gender as provided in the Rome Statute and the U.N. which states that “the [U.N.] has taken the opposite approach of defining ‘gender,’ sometimes in substantial detail. While the definitions differ, they generally stress the socially constructed nature of ‘gender’ — sometimes contrasting it with the biologically determined nature of ‘sex’ — they note the complexity of this construction and the influence of culture, politics, economics, race, and other variables, and they identify the time and context of ‘gender.’”<sup>90</sup>

As regards the specific case of the crime of persecution, the United Nations High Commissioner for Refugees (UNHCR) Guidelines on Gender-Related Persecution note that “[t]here is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which

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86. Rome Statute of the International Criminal Court, *supra* note 24, art. 7, ¶ 3 (emphasis supplied).

87. Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law*, 46 MCGILL LAW J. 217, 237 (2000).

88. *Id.*

89. See Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, HARV. HUM. RTS. J., Vol. 18, 2005 [hereinafter Oosterveld, *Definition of Gender*].

90. *Id.* at 71.

inflict severe pain and suffering — both mental and physical — and which have been used as forms of persecution, whether perpetrated by State or private actors.”<sup>91</sup>

The second critical lesson learned from refugee law is that gender identity is complex. Gender is a “relational concept,” referring to the relationship between women and men based on socially constructed identities, roles, and responsibilities assigned to a particular sex. These social constructions and the relations between men and women change over time and from culture to culture. The meaning of “gender” is undoubtedly context-specific.<sup>92</sup> Persecution of women, however, does not refer to a group in the narrow sense but rather to “a group understood as a multiplicity of individuals which share a common feature.”<sup>93</sup>

At the ICTR, the Trial Chamber in *Prosecutor v. Nahimana, et al.*,<sup>94</sup> discussed the concept of gender persecution<sup>95</sup> in the context of the Rwanda conflict and ruled that “Tutsi women, in particular, were targeted for persecution. The portrayal of the Tutsi women as femme fatale, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly[.]”<sup>96</sup> The Trial Chamber stated that “[b]y defining the Tutsi woman as an enemy in this way, RTLM and Kangura articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.”<sup>97</sup>

Oosterveld says that, with regard to national systems, “Australia’s ‘Guidelines on Gender Issues for Decision Makers’ on refugee and

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91. United Nations High Commissioner for Refugees (UNHCR), *UNHCR Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 9, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter *Guidelines on International Protection No. 1*].

92. Oosterveld, *Definition of Gender*, *supra* note 89, at 88.

93. See Kai Ambos & Steffen Wirth, *The Current Law on Crimes against Humanity*, CRIMINAL LAW FORUM 2002 at 77.

94. *Prosecutor v. Nahimana, et al.*, Case No. ICTR-99-52-T, Judgment, ¶ 1072 (Dec. 3, 2002).

95. The ICTY and ICTR have both examined the crime of persecution in some detail. See *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion & Judgment, ¶ 345 (May 7, 1997); ICTY, *Kupreskic, et al.*, Case No. IT-95-16-T, ¶ 621; *Prosecutor v. Naletilic*, Case No. IT-98-34-T, Judgment, ¶ 634 (Mar. 31, 2003); *Nahimana*, Case No. ICTR-99-52-T, ¶ 1072; & *Stakic*, Case No. IT-97-24-T, ¶ 806.

96. *Nahimana, et al.*, Case No. ICTR-99-52-T, ¶ 1079.

97. *Id.*

humanitarian visa applications correctly notes that ‘gender-based persecution is sometimes more subtle than other forms’ of persecution.”<sup>98</sup>

B. “Sexual Orientation” as One of the Grounds for Persecution Included in R.A. No. 9851 Under Crimes Against Humanity

Alfred C. Kinsey once said regarding men —

Males do not represent two discrete populations, heterosexual[,] and homosexual. The world is not to be divided into sheep and goats. Not all things are black nor all things white[.] The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior, the sooner we shall reach a sound understanding of the realities of sex.<sup>99</sup>

According to the Yogyakarta Principles,<sup>100</sup> sexual orientation “is understood to refer to each person’s capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.”<sup>101</sup> Sexual identity and sexual behavior are closely related to sexual

98. Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-based Prosecution*, 17 DUKE J. COMP. & INT’L L. 49, 55 (2006) (citing Department of Immigration and Multicultural Affairs of Australia, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers*, ¶ 4 (1996)) [hereinafter Oosterveld, *International Criminal Court*].

99. ALFRED C. KINSEY, ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 639 (1948 ed.).

100. The Yogyakarta Principles — Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (A Set of Principles Relating to Sexual Orientation and Gender Identity), available at [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf) (last accessed June 30, 2013) [hereinafter The Yogyakarta Principles]. The Principles were developed by the International Court of Justice and the International Service for Human Rights, and were unanimously adopted during an expert meeting in Yogyakarta, Indonesia, from November 6-9, 2006. See The Yogyakarta Principles, About the Yogyakarta Principles, available at [http://www.yogyakarta-principles.org/principles\\_en.htm](http://www.yogyakarta-principles.org/principles_en.htm) (last accessed June 30, 2013).

101. The Yogyakarta Principles, *supra* note 100, at 6. “Sexual orientation” is integral to “gender identity” which is understood to

refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical[,] or other means) and other expressions of gender, including dress, speech[,] and mannerisms.

*Id.* at 8.

orientation, but they are different, with sexual identity referring to an individual's conception of themselves and sexual behavior referring to actual sexual acts performed by the individual, and orientation referring to "fantasies, attachments[,] and longings."<sup>102</sup>

In defining sexual orientation and gender identity, the Yogyakarta Principles qualify both of them as "integral to every person's dignity and humanity and must not be the basis for discrimination or abuse."<sup>103</sup> It is important to underline that courts in various jurisdictions have likewise affirmed that sexual orientation relates not just to conduct or a series of sexual acts, but equally to a person's identity and how he or she seeks to express it.<sup>104</sup>

Persecution on the grounds of sexual orientation is narrowly related to the principle of non-discrimination, which is enshrined in Articles 2 (1) and 26 of the International Covenant on Civil and Political Rights (ICCPR), and in Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as in the Preamble to the 1951 Convention relating to the Status of Refugees<sup>105</sup> reiterates the principle that "human beings shall enjoy fundamental rights and freedoms without discrimination."<sup>106</sup>

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102. Laura Reiter, *Sexual Orientation, Sexual Identity, and the Question of Choice*, CLINICAL SOCIAL WORK JOURNAL, vol. 17, no. 2, Summer 1989, at 145.

According to the author, sexual orientation differs from sexual identity in that it encompasses relationships with others, while sexual identity is a concept of self.

103. The Yogyakarta Principles, *supra* note 100, at 6.

104. See *Guidelines on International Protection No. 1*, *supra* note 91, at ¶ 5.

105. Convention Relating to the Status of Refugees of 1951, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

106. *Id.* pmbl. See also International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] & International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. The non-discrimination provisions on account of "sex" or "other status" in the ICCPR and ICESCR, as well as in Article 2 of the Convention on the Rights of the Child, are to be taken as including sexual orientation, as affirmed by the Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, and the Committee on the Rights of the Child. See Convention on the Rights of the Child art. 2, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3. The same interpretation has been adopted by the European Court of Human Rights (ECHR) in relation to Article 14 (Prohibition of Discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 211.

The other interrelated principle is equality. The first paragraph of the Preamble of the Yogyakarta Principles recalls that “all human beings are born free and equal in dignity and rights, and that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, [color], *sex*, language, religion, political or other opinion, national or social origin, property, birth[,] or *other status*.”<sup>107</sup>

In the Philippines, the Preamble of the 1987 Constitution secures to the Filipino people “the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, *equality*, and peace.”<sup>108</sup> Equality is also mentioned in Article II, Section 2 of the Constitution, according to which, 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.”<sup>109</sup>

These rights and principles are highly relevant to the subject at hand. UNHCR Guidelines on Gender-Related Persecution identify discrimination on account of one’s sexual orientation as potentially amounting to persecution because “the claimant has refused to adhere to socially or culturally defined roles or expectations of behavior attributed to his or her sex.”<sup>110</sup> This document recognizes that many States and societies impose gender and sexual orientation norms on individuals through custom, law, and violence and seek to control how they experience personal relationships and identify themselves. Undoubtedly, the policing of sexuality remains a major force behind continuing gender-based violence and gender inequality.

Again the UNHCR, in the document entitled Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, departs from the fact that persecution “can be considered to involve serious human

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107. The Yogyakarta Principles, *supra* note 100, at 8. (emphasis supplied). The introduction of the Yogyakarta Principles concludes by affirming that they are based in “binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright.” *Id.*

108. PHIL. CONST. pmbl. (emphasis supplied).

109. PHIL. CONST. art. II, § 14 (emphasis supplied). Moreover, in Article III, Section 1, the Philippine Constitution states that “no person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.” PHIL. CONST. art. III, § 1.

Finally, in Article II, Section 14 of the Constitution, “[t]he State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.” PHIL. CONST. art. II, § 14.

110. *Guidelines on International Protection No. 1*, *supra* note 91, at ¶ 16.



rights violations,”<sup>111</sup> which includes “threats to the right to life or freedom, as well as other kinds of serious harm, as assessed in light of the opinions, feelings, and psychological make-up”<sup>112</sup> of the person. According to this, the analysis of the situation has to take into account that “a pattern of harassment and discrimination could, on cumulative grounds, reach the threshold of persecution,”<sup>113</sup> and that any consideration of a case or situation has to have a holistic approach.<sup>114</sup> The relevance of the psychological element is highlighted by a UNHCR Handbook as follows — “[w]here measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution, if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his [or her] future existence.”<sup>115</sup>

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111. UNHCR, Guidance Note for Refugee Claims Relating to Sexual Orientation or Gender Identity (Issued by the UNHCR to Clarify Applicable Law and Legal Standards) ¶ 10, available at <http://www.refworld.org/docid/48abd5660.html> (last accessed Jun. 30, 2013) [hereinafter UNHCR, Guidance Note].

112. UNHCR, *Guidelines for International Protection Number 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 16, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012) [hereinafter *Guidelines for International Protection Number 9*].

113. UNHCR, Guidance Note, *supra* note 111, ¶ 10.

114. A claimant’s sexuality or sexual practices may be relevant to a refugee’s claim where he or she has been subject to persecutory — including discriminatory — action on account of his or her sexuality or sexual practices. In such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behavior attributed to his or her sex. The most common claims involve homosexuals, transsexuals, or transvestites, who have faced extreme public hostility, violence, abuse, severe, or cumulative discrimination. *Id.* ¶ 16.

Crawley recounts a case in which a Russian woman who was a lesbian was subjected to various forms of discrimination. The Canadian Refugee Determination Division found that the claimant’s sexual orientation and ethnicity increased her vulnerability to rape and physical assault by marginalizing her economically and socially, “[t]aking into account the claimant’s sexual orientation, her ethnic identity[,] and her identity as a woman, the Canadian authorities determined that there was a reasonable chance of her being persecuted if she returned to Russia.” Oosterveld, *International Criminal Court*, *supra* note 98, at 80. Crawley also cites the case of a female-to-male transsexual from Lebanon, in which the claimant was granted refugee status because “Lebanon is a highly traditional and patriarchal society where deviation from well-defined gender roles is not tolerated.” *Id.*

115. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (A Handbook Relating to Procedures and Criteria for Determining

Same-sex relationships are currently illegal in 76 countries<sup>116</sup> and punishable by death in five countries — Iran, Mauritania, Saudi Arabia, Sudan, and Yemen.<sup>117</sup> Some 30 countries have decriminalized homosexuality in the last two decades.<sup>118</sup> Criminal laws prohibiting same-sex consensual relations between adults have been found to be both discriminatory and to constitute a violation of the right to privacy. It is clear that the very existence of such laws, irrespective of whether they are enforced and of the severity of the penalties they impose, may have far-reaching effects on the enjoyment of the fundamental human rights of LGBT<sup>119</sup> persons.<sup>120</sup>

A law can be considered as persecutory per se, for instance, where it reflects social or cultural norms which are not in conformity with international human rights standards.<sup>121</sup> Nevertheless, where “harsh punishments are imposed that do not conform to international human rights standards, such as the death penalty or severe corporal punishment, including flogging, their persecutory character is particularly evident.”<sup>122</sup> States have an

Refugee Status) ¶ 55, available at <http://www.unhcr.org/3d58e13b4.html> (last accessed June 30, 2011).

Furthermore, in its Guidance on Claims relating to Sexual Orientation, UNHCR affirms that “discrimination will amount to persecution where such measures, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned.” *Guidelines for International Protection Number 9*, *supra* note 112, ¶ 11.

116. UNHCR, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, ¶ 40, U.N. Doc A/HRC/19/41 (Nov. 17, 2011) [hereinafter *U.N. LGBT Report 2011*].

117. *Id.* ¶ 45.

118. *Id.* ¶¶ 40-43.

119. Lesbian, gay, bisexual, and transgender (LGBT). “The terms lesbian, gay, bisexual, and transgender are used throughout the report, but often abbreviated to LGBT. These terms are used to refer to same-sex behavior, identities, or relationships and non-binary gender identities. In several places in the text, discrimination against intersex persons is also addressed.” *Id.* ¶ 5.

120. *Guidelines on International Protection No. 1*, *supra* note 91, ¶ 17.

121. *Id.* ¶ 18.

122. UNHCR, Guidance Note, ¶ 19. The Yogyakarta Principles provide —

Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

The Yogyakarta Principles, *supra* note 100, at 12.

obligation to protect everyone from discrimination on grounds of sexual orientation or gender identity.<sup>123</sup>

As stated above, currently there are at least five countries the death penalty may be applied to those found guilty of offences relating to consensual, adult conduct. In addition to violating rights to life, privacy, and non-discrimination, application of the death penalty in these circumstances violates Article 6 of the ICCPR, which provides that, in countries that have not abolished the death penalty, a “sentence of death may be imposed only for the most serious crimes.”<sup>124</sup> Both the Commission on Human Rights and the Human Rights Committee have confirmed that the death penalty for non-violent acts such as sexual relations between consenting adults constitutes a violation of international human rights law.<sup>125</sup>

All these developments in the International Law of Human Rights show the increasing concern of the international community in fighting discrimination and persecution based on grounds of sexual orientation. U.N. entities started as early as 2006 in the integration of issues related to sexual orientation and gender identity into their work.<sup>126</sup> The principle of non-discrimination is, as qualified by the U.N. in its LGBT Report 2011, a “core human rights principle embodied in the Charter of the [U.N.], the Universal Declaration of Human Rights[,] and core human rights treaties.”<sup>127</sup> Non-discrimination clauses in international instruments require that the rights set forth be made available to everyone, and States ensure that “their laws, policies and programmes are not discriminatory in impact.”<sup>128</sup>

Therefore, the inclusion of sexual orientation as one of the grounds of persecution in the list of Crimes Against Humanity in R.A. No. 9851 has to be understood and interpreted under the light of these developments. The provisions of Article 38 of the Statute of the International Court of Justice are of high relevance to interpret and apply Section 6 (h) of R.A. No. 9851. According to this Article, international custom, as evidence of a general

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These provisions require States, among others, to “repeal all forms of crime that the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them.”  
*Id.* at 13.

123. *U.N. LGBT Report 2011*, *supra* note 116, ¶ 16.

124. ICCPR, *supra* note 106, art. 6 (2).

125. See United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee: the Sudan*, U.N. Doc. CCPR/C/SDN/CO/3 (Aug. 29, 2007).

126. *U.N. LGBT Report 2011*, *supra* note 116, ¶ 16.

127. *Id.* ¶ 6.

128. *Id.*

practice accepted as law, as well as the general principles of law recognized by civilized nations, are amongst the sources of interpretation of International Law.<sup>129</sup>

#### V. CONCLUSION

The Philippine draft legislation on war crimes, crimes against humanity, and genocide which started as a common project presented by several Senators — Senate Bill No. 2669 — is a very laudable initiative. The project, that became R.A. No. 9851, has several provisions that go beyond the Rome Statute and reflects the latest developments in International Human Rights Law and International Criminal Law.

In the case of the crime of genocide, R.A. No. 9851 includes two new categories of groups protected by the provisions, namely, “social” and “any other similar stable and permanent group.” In including other groups than the four ones provided for originally in the Convention on Genocide — national, ethnical, racial, or religious — the Philippines joins a significant number of countries whose criminal law provisions encompass other groups to protect from the Crime of Crimes. The *numerus apertus* character of the second group allows the incorporation of new categories resulting from developments in International Law.

The other provision studied in the Article regards the enlargement of the definition of crimes against humanity by R.A. No. 9851, vis-à-vis amongst others, the Rome Statute. The inclusion of “gender” by the Statute as a category in the crime of persecution as a crime against humanity already reflected the concern of the international community in prosecuting numerous crimes related directly to gender. The inclusion of “sexual orientation” as one of the grounds for persecution sanctioned in Section 6 of R.A. No. 9851 reflects undoubtedly the progression of the protection of vulnerable groups under International Law of Human Rights.

Hopefully these new categories of crimes would never need to be prosecuted because it would on no account be necessary. Nevertheless, the determination of the legislators in proposing these norms is evident: through a pioneering law set new international standards in the protection and sanction of all these heinous crimes.

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129. Rome Statute of the International Criminal Court, *supra* note 24, art. 38.