

Indeed, proof of suability of the state is a necessary precondition to the adjudication of its liability. For, if at the outset, a state is able to effectively foreclose the assumption of jurisdiction by a court over the subject-matter involved, then any determination on the merits as to its liability will likewise be barred effectively. Conversely, even if suability is possible, but a finding of liability on the part of the state impossible, embarking on an attempt to defeat sovereign immunity will prove to be futile, to say the least, and the remedy of specific performance becomes more apparent than real for the private contracting party.

At present, different legal rules and principles govern issues of state suability and liability and, unfortunately, fail to provide any solution to this current deadlock faced by private claimants. Perhaps a fair conclusion that may be drawn from this noticeable conflict between state suability and sovereign immunity *vis-à-vis* state responsibility and execution through specific performance is that it may be rooted in the prevailing clash between municipal and international legal rules and principles.

This is not to say though that specific performance can never be an available remedy for private claimants in such cases involving the breach of contract by a state. Whether the international community must await a further evolution through state practice of the rules governing state liability and execution for breach of contract, or an assignment of entirely different rules altogether, the widespread recognition of specific performance as a remedy in the face of an arbitrary and tortuous contractual breach cannot be denied. Considering then its acceptance as a form of relief in most civilized municipal legal systems, one may consider that specific performance may well be deemed the remedy more than the cure to this dilemma — a remedy which can certainly give new life to the living law of contractual relationships.²⁵⁸

Ratification of the Rome Statute at the Crossroads: Issues and Perspectives In Order To Render Philippine Courts Fully Competent To Prosecute Crimes Covered by the Rome Statute

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I. INTRODUCTION	936
II. UNDERPINNINGS OF THE INTERNATIONAL CRIMINAL COURT	938
A. Fundamental Principles	
B. Jurisdiction and Admissibility of Claims	
III. REGIME OF NON-IMPOSITION OF THE DEATH PENALTY UNDER THE ROME STATUTE.....	941
A. Conflict with Philippine Law	
B. Monist-Dualist Perspectives	
C. International Standards on the Imposition of Death Penalty	
IV. CRIMES COVERED BY THE ROME STATUTE VIS-À-VIS PHILIPPINE PENAL LAWS	947
A. Article 6 - Genocide	
B. Article 7 - Crimes Against Humanity	
C. Article 8 - War Crimes	
V. CONCLUSION	979
A. Issue of Imposition of Death Penalty	
B. Issue of Sufficiency of Philippine Penal Legislation	

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.

- Robert Jackson[†]

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²⁵⁸ Schwebel, *Breach of Contract*, supra note 231, at 424.

I. INTRODUCTION

The International Criminal Court (ICC) is an idea whose time has come to fruition. Hailed as the most significant achievement of human rights advocates, the Rome Statute of the International Criminal Court (Rome Statute) aims to punish individual perpetrators of the most serious crimes of concern to the international community.² While States are generally competent and often legally obligated under international law to investigate, prosecute, and punish violators of international humanitarian law, they have often been either unable or unwilling to apply the law.³ With the ICC now in place, it is hoped that the days when ruthless leaders and other State actors escape punishment for grave violations of human rights are numbered. The fundamental objective behind the establishment of the ICC is to replace a culture of impunity with a culture of accountability.⁴

Soon after the establishment of the United Nations (UN), discussions on the idea of an international criminal court were commenced in the legislation of the Genocide Convention and other works but encountered a deadlock in the 1950s.⁵ For half a century in the UN, it had been perceived as impossible to establish a permanent international tribunal to prosecute and punish violators of international criminal law.⁶ In 1989, however, Trinidad and Tobago proposed to the General Assembly of the UN the creation of an international criminal court in order to aid in the fight against narcotics trafficking.⁷ Spurred by this proposal, in part by the work of the International Law Commission (ILC) on the Draft Code of Crimes Against the Peace and Security of Mankind, the General Assembly, through Resolution 47/33, requested the ILC to undertake the elaboration of a draft

1. U.S. Chief Prosecutor, Nuremberg Tribunal.
2. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 5(1) (1998) [hereinafter Rome Statute].
3. ROY LEE, THE ROME CONFERENCE AND ITS CONTRIBUTIONS TO INTERNATIONAL LAW, THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE 1 (1999).
4. PHILIPPE KIRSCH, THE WORK OF THE PREPARATORY COMMISSION, THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 1 (2001).
5. Mitsue Inazumi, *The Meaning of the State Consent Precondition in Article 12(2) of the Rome Statute of the International Criminal Court: A Theoretical Analysis of the Source of International Criminal Jurisdiction*, 49 NETH. INT'L L. REV. 2, 160 (2002).
6. LEE, *supra* note 3, at 27.
7. CHERIF BASSIOUNI, OBSERVATIONS CONCERNING THE 1997-98 PREPARATORY COMMITTEE'S WORK, THE INTERNATIONAL CRIMINAL COURT: OBSERVATIONS AND ISSUES BEFORE THE 1997-1998 PREPARATORY COMMITTEE; AND ADMINISTRATIVE AND FINANCIAL IMPLICATIONS 5 (1997).

statute for a permanent international criminal court.⁸ This set in motion the negotiations for the foundation of the ICC, beginning with the deliberations of the Preparatory Committee on the Establishment of an International Criminal Court in New York in 1996 concerning the 1994 ILC's draft statute⁹ and culminating in the adoption of the Rome Statute in 1998.¹⁰

On 28 December 2000, the Philippines became the 124th signatory to the Rome Statute.¹¹ As the country prepares for the ratification of the Rome Statute, its preparedness in terms of complying with its obligations under the Statute, especially in the area of prosecution and punishment of perpetrators of crimes covered, must be assessed. Governments from all regions of the world have already taken initiatives along this line through intergovernmental dialogue about how the ICC will work and through the development of national implementing legislation.¹²

The Rome Statute disallows the imposition of the death penalty even for the most serious crimes of concern to the international community.¹³ Philippine law, on the other hand, imposes the death penalty on certain heinous crimes.¹⁴ This perceptible conflict will impact on the assumption of jurisdiction by Philippine courts over crimes covered by the Rome Statute, particularly in the imposition of the appropriate penalty in a situation where the crime is punishable by death under Philippine law.

Another area of concern is the fact that, while some of the crimes covered by the Rome Statute involve acts that also constitute offenses punishable under Philippine law, there are other crimes under the Rome

8. *Id.*

9. MAURO POLITI, THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT AT A CROSSROADS: ISSUES AND PROSPECTS AFTER THE FIRST SESSION OF THE PREPARATORY COMMITTEE, THE INTERNATIONAL CRIMINAL COURT: OBSERVATIONS AND ISSUES BEFORE THE 1997-1998 PREPARATORY COMMITTEE; AND ADMINISTRATIVE AND FINANCIAL IMPLICATIONS 115 (1997).
10. KIRSCH, *supra* note 4, at 8.
11. Pedro Roman A. Ariston, Taking the Most Serious Crimes of International Concern Seriously (2002) (unpublished J.D. thesis, Ateneo School of Law) (on file with the Ateneo School of Law) (citing Department of Foreign Affairs of the Philippines, DFA Press Release No. 171-00, Dec. 29, 2000; Maria Talosig, *RP Signs Treaty for Int'l Court's Creation*, TODAY, Jan. 4, 2001, at 1 & 10).
12. Daryl Mundis & Mark Rees, *International Courts and Tribunals*, 36 THE INTERNATIONAL LAWYER 2, 585 (2002).
13. Rome Statute, art. 77.
14. An Act to Impose Death Penalty on Certain Heinous Crimes, Amending for that Purpose the Revised Penal Laws, and For Other Purposes, Republic Act No. 7659, §§ 2-20 (1993).

Statute that are completely alien to Philippine law. The inadequacy of Philippine penal legislation in this respect is replete with implications on the competence of Philippine courts to prosecute crimes covered by the Rome Statute.

This article aims to resolve the conflict between the Rome Statute and Philippine municipal law with respect to the imposition of the death penalty. In this regard, this article intends to answer the question of what penalty a Philippine court must apply if it is called upon to decide a case involving an offense covered by the Rome Statute upon which Philippine law enjoins the imposition of the death penalty.

This article further aims to make a comparative analysis of offenses covered by the Rome Statute and their specific elements vis-à-vis crimes penalized by Philippine law which have similar elements. The objective here is to identify the laws that need to be amended or revised in order to enable Philippine courts to assume jurisdiction over crimes covered by the Rome Statute. With respect to the crimes under the Rome Statute which are not at all part of the *corpus* of Philippine penal legislation, this article addresses the issue pertaining to the need for the enactment of entirely new laws in order to confer jurisdiction upon Philippine courts.

In pursuing such aims, this article shall examine the substantive provisions of the Rome Statute relating to penalties and crimes falling within the jurisdiction of the ICC. There shall be an inquiry into the elements of each act falling under each category of the most serious crimes, namely, genocide, crimes against humanity and war crimes, there being no definition for the crime of aggression yet.¹⁵ On this basis, a comparison with crimes having similar import under Philippine law shall be made.

II. UNDERPINNINGS OF THE INTERNATIONAL CRIMINAL COURT

A. Fundamental Principles

1. Complementarity

One of the most difficult legal problems in creating an international criminal court was to devise a system whereby the Court would not impair, but would supplement, the exercise of national jurisdiction.¹⁶ Some States, while supporting the establishment of an international criminal court, were reluctant to create a body that could infringe upon national sovereignty.¹⁷

15. Rome Statute, art. 5, ¶¶ 1-2.

16. LEE, *supra* note 3, at 27.

17. JOHN HOMES, THE PRINCIPLE OF COMPLEMENTARITY, THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE 41 (1999).

To address this problem, the principle of complementarity was enshrined in the Rome Statute.¹⁸

The principle of complementarity means that the ICC will complement, but not supersede, national jurisdiction.¹⁹ Thus, the Preamble of the Rome Statute provides as follows: "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national jurisdictions."²⁰

The direct import of complementarity is that national courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions.²¹ The ICC will only assume jurisdiction if the national courts are unwilling or unable to carry out the investigation or prosecution.²²

2. *Nullum Crimen Sine Lege*

This principle is articulated in article 22 of the Rome Statute, thus:

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 favor 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.

This provision echoes the incantations of earlier international human rights instruments. The Universal Declaration of Human Rights provides:

No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, 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 offense was committed.²³

18. LEE, *supra* note 3, at 27.

19. *Id.*

20. Rome Statute, Preamble, ¶ 10.

21. LEE, *supra* note 3, at 27.

22. Rome Statute, art. 17, ¶ 1 (a).

23. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 11 (2), at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).

The International Covenant on Civil and Political Rights adopts the same principle, thus:

No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, 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 offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.²⁴

3. Non-Retroactivity *Ratione Personae*

Article 24 of the Rome Statute provides:

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 judgment, the law more favourable to the person being investigated, prosecuted, or convicted shall apply.

B. Jurisdiction and Admissibility of Claims

The jurisdiction of the ICC shall be limited to the most serious crimes of concern to the international community, to wit: (1) genocide; (2) crimes against humanity; (3) war crimes; and (4) aggression.²⁵ Notwithstanding that the acts in question may constitute a crime within the jurisdiction of the ICC, the Court shall determine that the case is inadmissible under any of the following circumstances:

- (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, paragraph 3;

24. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 15 (1), 21 U.N. GAOR Supp. (No. 16), Mar. 23, 1976, U.N. Doc. A/63/16 (1966), 999 U.N.T.S. 171.

25. Rome Statute, art. 5, ¶ 1.

- (d) The case is not of sufficient gravity to justify further action by the Court.²⁶

In relation to number 3 above, article 20, paragraph 3 provides:

3. No person who has been tried by another court for conduct also proscribed under Articles 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.

III. REGIME OF NON-IMPOSITION OF THE DEATH PENALTY UNDER THE ROME STATUTE

A. Conflict with Philippine Law

The penalties that the ICC may impose on a person convicted of a crime covered by the Rome Statute are limited to (1) imprisonment for a specified number of years, not to exceed thirty years, and (2) a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.²⁷ Nevertheless, this is understood to be without prejudice to the imposition of accessory penalties, such as fine and forfeiture of proceeds, property, and assets derived directly or indirectly from the commission of the crime.²⁸ By adopting the principle of *nulla poena sine lege*, the Rome Statute expressly declares that a person convicted by the Court may be punished only in accordance with the Statute.²⁹ The Court is therefore not authorized to impose the death penalty.³⁰

In contrast, there are certain crimes punishable by death under Philippine Law. Republic Act No. 7659 imposes the penalty of death on the following crimes: treason, piracy and qualified piracy, qualified bribery.

26. *Id.* art. 17, ¶ 1.

27. *Id.* art. 77, ¶¶ 1 (a) & (b).

28. *Id.* art. 77, ¶¶ 2 (a) & (b).

29. *Id.* art. 23.

30. Ralph Henham, *Some Issues For Sentencing in the International Criminal Court*, 52 INT'L & COMP. L.Q. 81, 85 (2003).

parricide, murder, infanticide, kidnapping and serious illegal detention, robbery with violence against and intimidation of persons, destructive arson, rape with homicide, plunder, certain violations of the Dangerous Drugs Act, and cannapping under certain circumstances.³¹

It should be noted that the ICC concedes the primary right to prosecute individuals for crimes covered by the Rome Statute to the State which has jurisdiction over the offense. In fact, the ICC shall determine that a case is inadmissible if the case is being investigated or prosecuted by a State which has jurisdiction over it, unless such State is unwilling or unable genuinely to carry out the investigation or prosecution.³² The deference accorded by the ICC to the domestic jurisdiction of a State is further reinforced by the provision in the Rome Statute that the ICC shall not try a person who has already been tried by another court for conduct which is the subject of the complaint,³³ unless the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC or were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner inconsistent with an intent to bring the person concerned to justice.³⁴

In light of the foregoing, the question that arises is: what penalty should be imposed if cases are brought before Philippine courts for the prosecution of crimes covered by the Rome Statute which, under Philippine Law, are punishable by death? To answer this question, due consideration must be given to the policy adopted by Philippine courts when faced with a conflict between a treaty binding upon the Philippines and a municipal law. It is also apropos to take into account prevailing international norms with respect to the imposition of the death penalty.

B. Monist-Dualist Perspectives

Controversies arising from diametrically opposed views espoused by international law, on one hand, and municipal law, on the other, have given rise to two schools of thought, namely, monism and dualism, which provide paradigm for the resolution of conflicts between the two legal systems.³⁵

31. R.A. No. 7659, §§ 2-20.

32. Rome Statute, art. 17, ¶ 1 (a).

33. *Id.*, arts. 17 & 20, ¶¶ 1 (c) & 3.

34. *Id.*, art. 20, ¶ 3 (a) & (b).

35. D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 68-71 (5d ed. 1998).

The monists espouse a unitary view of law that considers international law and municipal law as parts of a single legal system.³⁶ Municipal law is seen as ultimately deriving its validity from international law and, as such, the latter cannot be subject to domestic law, not even to constitutional limitations.³⁷ Conversely, dualist doctrine regards international law and municipal law as entirely separate from one another, each one operating on a distinct field and regulating a different subject matter.³⁸ The proponents of this doctrine posit that international law can be applied by municipal courts only when it has been transformed or incorporated into municipal law.³⁹ Thus, when municipal legislation allows the application of international law, this is merely on sufferance and is an example of the supreme authority of the State within its own domestic jurisdiction, rather than of any influence maintained by international law within the internal sphere.⁴⁰ Moreover, international law as incorporated into municipal law is subject to constitutional limitations applicable to all domestic laws, and may be repealed by an act of the legislature.⁴¹

Under the Philippine Constitution, the Philippines adopts the generally accepted principles of international law as part of the law of the land.⁴² Implicit in this provision is the acceptance of the dualist view that international law becomes part of municipal law only if it is incorporated into municipal law, and corollarily, of the doctrine of transformation that international law can become part of municipal law only if it is transformed into domestic law through the appropriate constitutional machinery such as an act of Congress.⁴³ The supremacy of municipal law within the domestic sphere has been upheld by the Supreme Court in a number of cases. The dissent of Justice Perfecto in *Tubb and Tedrow v. Giress*⁴⁴ provided the guidelines for the resolution of conflicts between international law and municipal law by Philippine courts, thus:

36. MALCOLM N. SHAW, INTERNATIONAL LAW 99 (1986).

37. LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 140 (1987) [hereinafter HENKIN ET AL., INTERNATIONAL LAW].

38. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32 (5d ed. 1999).

39. HENKIN ET AL., INTERNATIONAL LAW, *supra* note 37, at 140.

40. SHAW, *supra* note 36, at 98 (1986) (citing ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 37 (8d ed. 1955)).

41. HENKIN ET AL., INTERNATIONAL LAW, *supra* note 37, at 140.

42. PHIL. CONST. art II, § 2.

43. See, JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 61 (2003 ed.).

44. *Tubb and Tedrow v. Giress*, 78 Phil. 260, 261 (1947).

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 act of 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.

In subsequent cases, the pronouncements of the Supreme Court have been more categorical. In *Philip Morris v. Court of Appeals*,⁴⁵ the Supreme Court spoke of a universal acquiescence and comity to the effect that an international agreement is subordinate to municipal law where the conflict is brought before a municipal tribunal.⁴⁶ Further, in *Emerald Garment*

45. *Philip Morris v. Court of Appeals*, 224 SCRA 576 (1993).

46. *Id.* at 593 (citing EDGARDO L. PARAS, INTERNATIONAL LAW AND WORLD ORGANIZATION 20 (1971 ed.)).

Manufacturing Corp. v. Court of Appeals,⁴⁷ the Supreme Court clarified that the fact that international law has been made part of the law of the land does not in any way suggest that international law is superior to national law. To resolve any lingering doubt on this issue, the Supreme Court, relying on past precedent,⁴⁸ stated that, in a situation where the clash between international law and the constitution or a statute of local application is irreconcilable and the tribunal is called upon to choose between a rule of international law and municipal law, the municipal law should be upheld for the reason that courts are organs of municipal law and are accordingly bound by it in all cases.⁴⁹

C. International Standards on the Imposition of Death Penalty

The Universal Declaration of Human Rights contains a general provision recognizing the right to life, thus: "Everyone has the right to life, liberty and security of persons."⁵⁰

The International Covenant on Civil and Political Rights (ICCPR), in turn, goes beyond such general recognition and proceeds to articulate a series of limitations on the imposition of capital punishment:⁵¹

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. When the deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

47. *Emerald Garment Manufacturing Corp. v. Court of Appeals*, 251 SCRA 621 (1995).

48. *Ichong v. Hernandez*, 101 Phil. 1155 (1957); *Gonzales v. Hechanova*, 9 SCRA 230 (1963); *In re Garcia*, 2 SCRA 984 (1961).

49. *Secretary of Justice v. Lantion*, 322 SCRA 197 (2000).

50. Universal Declaration of Human Rights, art. 3.

51. LOUIS HENKIN ET AL., HUMAN RIGHTS 886 (1999) [hereinafter HENKIN ET AL., HUMAN RIGHTS].

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant.⁵²

Having signed and ratified the ICCPR,⁵³ the Philippines is bound by it.⁵⁴ The above-cited provision, however, does not oblige State parties to abolish the death penalty, but merely enjoins them to limit its application to the most serious crimes.⁵⁵ The expression "most serious crimes" is construed restrictively to mean that the death penalty should be an exceptional measure.⁵⁶

A consideration of some cases decided by the United Nations Human Rights Committee (UNHR Committee) further sheds light to the import of the ICCPR limitations on the imposition of the death penalty. In *Cox v. Canada*,⁵⁷ the United States of America (US) requested for the extradition of an American citizen, Keith Cox, pursuant to the 1976 Extradition treaty between Canada and the US. The potential extraditee was wanted on two charges of first degree murder which, under US law, was punishable by death. The question presented before the UNHR Committee was whether Canada would violate its obligations under the ICCPR if it were to extradite Mr. Cox to face the possible imposition of the death penalty. Finding no violation of the ICCPR in Canada's decision to extradite Mr. Cox, the UNHR Committee held that:

The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes.

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52. International Covenant on Civil and Political Rights, art. 6.
53. See, International Service for Human Rights, Ratification Information, Main Human Rights Treaties, at <http://www.ishr.ch/> (last accessed Feb. 16, 2007).
54. PHIL. CONST. art VII, § 21.
55. Human Rights Committee, *General Comment 6, Article 6* (1982), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.5 (Apr. 26, 2001).
56. *Id.* at *General Comment 6, Article 7*.
57. *Cox v. Canada*, U.N. Doc. CCPR/C/52/D/539/1993 ¶¶ 16.2, 16.4-16.5 (1994).

The Committee observes that the domestic abolition of capital punishment does not release Canada of its obligations under extradition treaties.

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The Committee finds that Canada's decision to extradite without assurances (that the death penalty would not be imposed) was not taken arbitrarily or summarily. The evidence before the Committee reveals that the Minister of Justice reached a decision after hearing argument in favor of seeking assurances.⁵⁸

In *Kindler v. Canada*,⁵⁹ the person involved had already been convicted for first degree murder and kidnapping in Pennsylvania before he escaped to Canada.⁶⁰ The UNHR Committee held that the extradition of Kindler to face possible exposure to the "death row phenomenon" would not violate Canada's obligations under the ICCPR as the same neither requires the abolition of the death penalty nor forbids States that had abolished the death penalty to extradite fugitives to States that maintained the death penalty.⁶¹

No doubt, the ICCPR does not prohibit the imposition of the death penalty. While the Second Optional Protocol to the ICCPR expressly obligates State parties to take all necessary measures to abolish the death penalty within their respective jurisdictions,⁶² the Philippines is not a party to this Protocol.⁶³

IV. CRIMES COVERED BY THE ROME STATUTE VIS-À-VIS PHILIPPINE PENAL LAWS

The Rome Statute gives States the primary right to prosecute individual perpetrators of crimes covered by it and the ICC will not assume jurisdiction over a particular case if it is already being investigated or prosecuted by a State which has jurisdiction.⁶⁴ The ICC will likewise refuse to take cognizance of a case which has been investigated by a State having jurisdiction over it, and which such State has decided not to prosecute.⁶⁵

The primary right of States to undertake the prosecution of offenders at the domestic level, however, must be understood to be limited by the

58. *Id.*
59. See generally, *Kindler v. Canada*, U.N. Doc. CCPR/48/D/470/1993 (1993).
60. HENKIN ET AL., *HUMAN RIGHTS*, *supra* note 51, at 913.
61. *Id.*
62. International Covenant on Civil and Political Rights, art. 1 (2).
63. See, International Service for Human Rights, Ratification Information, Main Human Rights Treaties, at <http://www.ishr.ch/> (last accessed Feb. 16, 2007).
64. Rome Statute, art. 17 (a).
65. *Id.* art. 17 (b).

principle of *nullum crimen sine lege* which, as discussed earlier, signifies that a person shall only be held criminally responsible if the conduct in question constitutes, at the time of its commission, a crime within the jurisdiction of the ICC.⁶⁶

The Philippine penal law system also adheres to the principle of *nullum crimen sine lege*, as no less than the Constitution proscribes the enactment of an *ex post facto* law,⁶⁷ or one which makes criminal an act done before the passage of the law and which was innocent when done, and punishes such an act.⁶⁸ An act, which when committed was not a crime, cannot be made so by statute.⁶⁹ Thus, when the information filed with a court charges acts which are not punished by law, such court must dismiss the case,⁷⁰ and should it consider the acts proper to repress, it can only submit a recommendation to the Chief Executive, through the Department of Justice, stating its reasons why the acts should be made the subject of penal legislation.⁷¹ It is clear therefore that, under Philippine law, an act must be considered a crime at the time of its commission before prosecution may be commenced in court.

While it is true that the Philippines is a party to a number of international human rights instruments that could be a proper source of the obligation to criminalize and prosecute certain acts,⁷² the right or duty to prosecute itself can only be invoked when supported by a duly enacted law that places such acts within the jurisdiction of Philippine courts.⁷³ That reliance upon the Rome Statute alone would not be sufficient for purposes of enabling Philippine courts to prosecute and impose penalties upon the offenses covered therein has already been dealt with in another article.⁷⁴ What this article shall provide is a comparative analysis of the crimes included in the Rome Statute vis-à-vis offenses having similar elements under Philippine law in order to identify specifically the crimes which may be taken cognizance of by Philippine courts under the current state of the law, and those which still need legislation to confer jurisdiction upon

66. *Id.* art. 22 (1).

67. PHIL. CONST. art III, § 22.

68. *Mejia v. Pamaran*, 160 SCRA 457 (1988).

69. *People v. Carballo*, 62 Phil. 653 (1936).

70. ANTONIO L. GREGORIO, *FUNDAMENTALS OF CRIMINAL LAW REVIEW* 31 (9d ed. 1997).

71. *An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE]*, art. 5 (1930).

72. International Covenant on Civil and Political Rights, art. 1 (2).

73. PHIL. CONST. art III, § 22; *REVISED PENAL CODE*, art. 5.

74. *See, Ariston, supra* note 11.

Philippine courts. In this regard, articles 6, 7, and 8 of the Rome Statute, together with their corresponding elements, shall be examined.

A. Article 6 - Genocide

The customary definition of genocide⁷⁵ contemplates acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.⁷⁶ Absent intent, there can be no genocide notwithstanding the commission of any of the acts included in the enumeration.⁷⁷ In the adoption of the elements of the crime of genocide, the delegates to the Preparatory Commission for the ICC expressed the concern that some contextual element was needed to capture the notion of scale or threat to a group, so as not to include isolated hate crimes.⁷⁸

The characterization of acts as genocide does not depend on the status of the perpetrators, whether public officials or private individuals.⁷⁹ In this light, a government may be presumed to have encouraged or condoned prohibited acts if such acts, especially if committed by its officials, have been

75. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of the International Court of Justice, I.C.J. Reports at 15 (1951).

76. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III), 78 U.N.T.S. 277 (1948) [hereinafter Genocide Convention]; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 2 (b), U.N. Doc. S/25704, Annex (1993) [hereinafter Statute of the Yugoslavia Tribunal]; International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., art. 2 (b) UN Doc. S/INF/50 (1994) [hereinafter Statute of the Rwanda Tribunal]; *Id.* art. 4 (the element of intent to destroy is a common feature of all acts of genocide under article 6 of the Rome Statute in conjunction with the Finalized Draft Text of the Elements of Crimes prepared by the Preparatory Commission for the International Criminal Court.).

77. *See, THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIME AND RULES OF PROCEDURE AND EVIDENCE* 41-45 (2001).

78. VALERIE OOSTERVELD, *THE CONTEXT OF GENOCIDE, AS ADOPTED IN THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 45 (2001).

79. Genocide Convention, art. 4.

repeated or notorious, and no steps have been taken to prevent them or to punish the perpetrators.⁸⁰

I. Acts of Genocide

There are five acts which, when committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, would constitute the crime of genocide, to wit: (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.⁸¹

(a) Killing members of the group

The elements of this mode of committing genocide include the following:

1. The perpetrator killed one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial, or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.⁸²

Some delegates found it unusual that a person may be held guilty of genocide for a single act of killing, but this must be understood in the overall context of the elements which required genocidal intent, that is, intent to destroy the ethnical group in whole or in part.⁸³

Under Philippine law, the act of killing one or more persons may constitute murder,⁸⁴ homicide,⁸⁵ or infanticide,⁸⁶ depending on the attendant circumstances. Murder consists of the following elements:

80. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1986).

81. Rome Statute, art. 6.

82. Finalized Draft Text of the Elements of Crimes, Report of the Preparatory Commission for the International Criminal Court, PCNICC/2000/1/Add.2 at 6 [hereinafter Report on Elements of Crimes].

83. CHARLES GARRAWAY, ELEMENTS OF THE SPECIFIC FORMS OF GENOCIDE, AS ADOPTED IN THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 50 (2001).

84. REVISED PENAL CODE, art. 248.

85. *Id.* art. 249.

86. *Id.* art. 255.

1. That a person was killed.
2. That the accused killed him.
3. That the killing was attended by any of the following qualifying circumstances:
 - a. With treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defense, or of means or persons to insure or afford impunity;
 - b. In consideration of a price or reward;
 - c. By means of inundation, fire, poison, explosion, shipwreck, stranding of a vessel, derailment or assault upon a railroad, fall of an airship, by means of motor vehicles, or with the use of any other means involving great waste and ruin;
 - d. On occasion of any of the calamities enumerated in the preceding paragraph, or of an earthquake, eruption of a volcano, destructive cyclone, epidemic, or other public calamity;
 - e. With evident premeditation;
 - f. With cruelty, by deliberately and inhumanly augmenting the suffering of the victim, or outraging or scoffing at his person or corpse.
4. The killing is not parricide or infanticide.⁸⁷

Murder may be committed with only one of the qualifying circumstances being present.⁸⁸ Homicide, on the other hand, is committed by a person who kills another without the attendance of any of the circumstances which qualifies the killing to parricide⁸⁹ or murder,⁹⁰ while infanticide is defined as the killing of a child less than three days of age.⁹¹

From the foregoing, it is readily apparent that, under Philippine law, none of the crimes that involve the killing of a person requires the element of intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, which is an essential element of genocide committed by killing one or more persons.⁹²

87. *Id.* art. 248; LUIS B. REYES, THE REVISED PENAL CODE, CRIMINAL LAW 472 (14d ed. 1998).

88. United States v. Labai, 17 Phil. 242-43 (1910).

89. Article 246 of the Revised Penal Code provides that any person who shall kill his father, mother, or child, whether legitimate or illegitimate, or any of his ascendants or descendants, or his spouse, shall be guilty of parricide.

90. REVISED PENAL CODE, art. 249.

91. *Id.* art. 255.

92. Rome Statute, art. 6 (a); Report on Elements of Crimes, *supra* note 82, at 6.

(b) *Causing serious bodily or mental harm to members of the group*

This contemplates an act which caused serious bodily or mental harm to one or more persons belonging to a particular national, ethnical, racial, or religious group, wherein the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.⁹³ The conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence, or inhumane or degrading treatment.⁹⁴ This is based on the decision of the International Criminal Tribunal for the Former Rwanda (ICTR) in *Prosecutor v. Akayesu*,⁹⁵ where the Trial Chamber held: "The Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, rape, sexual violence, persecution."⁹⁶

The crimes which, under Philippine law, involve the infliction of serious bodily or mental harm are rape,⁹⁷ mutilation,⁹⁸ and serious physical injuries.⁹⁹ Rape under the Rome Statute means the invasion of the body of a person by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or another person, or by taking advantage of a coercive environment, or, the invasion was committed against a person incapable of giving genuine consent.¹⁰⁰ On the other hand, under Philippine law, there are two ways by which rape may be committed. The first mode is when a man has carnal knowledge of a woman under any of the following circumstances: (1) by using force or intimidation, (2) when the woman is deprived of reason or otherwise unconscious, (3) by means of fraudulent machination or grave abuse of authority, and (4) when the woman is under twelve years of age or demented.¹⁰¹ Here, the first circumstance required for the act to qualify as rape, namely, by using force or intimidation could already embrace the mode of committing rape under the Rome Statute, which speaks of the use of force or threat of force. In the same manner, the second and third circumstances enunciated in the Revised Penal Code can be considered as specific instances where rape is committed against a person

incapable of giving genuine consent, as envisaged by the Rome Statute. The major difference, however, lies in the fact that while, under the Rome Statute, the concept of invasion of another person's body is intended to be broad enough to be gender-neutral,¹⁰² only a woman may be the injured party under the first mode of committing rape under Philippine law.¹⁰³

The second mode of committing rape under Philippine law is when the offender commits an act of sexual assault by any of the following means: (1) by inserting his penis into another person's mouth or anal orifice, or (2) by inserting any instrument or object into the genital or anal orifice of another person.¹⁰⁴ The second act of sexual assault here may be committed by a female.¹⁰⁵ The broadened concept of rape introduced by this amendment remains restrictive as it acknowledges only one way of committing a sexual assault upon a male victim, and any of the qualifying circumstances under the first mode of committing rape is still required.¹⁰⁶

Mutilation is committed in two ways: (1) by intentionally mutilating another by depriving him, either totally or partially, of some essential organ for reproduction; or (2) by intentionally making other mutilation, that is, by lopping or clipping off any part of the body of the offended party, other than the essential organ for reproduction, to deprive him of that part of his body.¹⁰⁷ On the other hand, serious physical injuries is committed by wounding, beating, or assaulting another person in a manner that results in any of the following: (1) the injured person becomes insane, an imbecile, impotent, or blind as a consequence of the physical injuries inflicted; (2) the injured person loses the use of speech or the power to hear or to smell, or loses an eye, a hand, a foot, an arm, or a leg, or loses the use of any such member or becomes incapacitated for the work in which he was theretofore habitually engaged, in consequence of the physical injuries inflicted; (3) the person injured becomes deformed, or loses any other member of his body, or loses the use thereof, or becomes ill or incapacitated for the performance of the work in which he was habitually engaged for more than ninety days, as a consequence of the physical injuries inflicted; or (4) the injured person becomes ill or incapacitated for labor for more than thirty days.¹⁰⁸ While rape, mutilation, and serious physical injuries may be subsumed to the broader crime of causing serious bodily or mental harm under the Rome

93. Rome Statute, art. 6 (b); Report on Elements of Crimes, *supra* note 82, at 6.

94. See generally, Rome Statute; Report on Elements of Crimes, *supra* note 81, at 6.

95. See generally, *Prosecutor v. Akayesu*, Judgment No. ICTR-96-4-T (1998).

96. GARRAWAY, *supra* note 83, at 51 (citing *Prosecutor v. Akayesu*, Judgment No. ICTR-96-4-T at ¶ 504 (1988)).

97. REVISED PENAL CODE, art. 266-A.

98. *Id.* art. 262.

99. *Id.* art. 263.

100. Report on Elements of Crimes, *supra* note 82, at 12.

101. REVISED PENAL CODE, art. 266-A; *People v. De Leon*, 320 SCRA 495 (1999).

102. Report on Elements of Crimes, *supra* note 82, at 12.

103. REVISED PENAL CODE, art. 266-A.

104. *Id.*

105. *Id.*

106. *Id.*

107. REVISED PENAL CODE, art. 262; REYES, *supra* note 87, at 510.

108. REVISED PENAL CODE, art. 263.

Statute, all of the foregoing still lack the essential element of intent to destroy, in whole or in part, an ethnical group¹⁰⁹ in order to be on all fours with genocide.

(c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*

The term "conditions of life" may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.¹¹⁰ In order to commit the offense, no actual destruction is needed, the infliction of the conditions being sufficient.¹¹¹ There is no crime of similar import under Philippine law.

(d) *Imposing measures intended to prevent births within the group*

As in the previous crime, no result is required for the commission of this offense, the imposition of measures aimed at preventing births within the group being sufficient to hold the perpetrator liable.¹¹² There is no crime which approximates the nature of this mode of committing genocide under Philippine law.

(e) *Forcibly transferring children of the group to another group*

This crime consists of the following elements:

1. The perpetrator forcibly transferred one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The transfer was from that group to another group.
5. The person or persons were under the age of eighteen years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.¹¹³

The term "forcibly" is not limited to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress,

109. Report on Elements of Crimes, *supra* note 82, at 6.

110. *Id.* at 7.

111. GARRAWAY, *supra* note 83, at 52.

112. *Id.* at 53.

113. Report on Elements of Crimes, *supra* note 82, at 7-8.

detention, psychological oppression, or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.¹¹⁴

Under Philippine law, the commission of such forcible transfer of children may constitute kidnapping and serious illegal detention if the following elements concur:

1. That the offender is a private individual.
2. That he kidnaps or detains another, or in any other manner deprives the latter of his liberty.
3. That the act of detention or kidnapping must be illegal.
4. That in the commission of the offense, any of the following circumstances is present:
 - a. That the kidnapping or detention lasts for more than three days;
 - b. That it is committed simulating public authority;
 - c. That any serious physical injuries are inflicted upon the person kidnapped or detained or threats to kill him are made; or
 - d. That the person kidnapped or detained is a minor, female, or a public officer.¹¹⁵

If the person who detains another without legal grounds is a public officer or employee, the crime is arbitrary detention.¹¹⁶

While the crime of forcibly transferring children as contemplated by the Rome Statute may, on certain occasions, constitute the offense of kidnapping and serious illegal detention or arbitrary detention, as the case may be, the circumstances provided by the Revised Penal Code under which such crimes may be committed are very limited. For instance, a private person who, without simulating public authority, kidnaps another, without any other circumstance being present, would not fall within the ambit of the law.¹¹⁷ Further, the above-cited elements do not include intent to destroy an ethnical or racial group, an element common to all acts of genocide.¹¹⁸

114. *Id.* at 7.

115. REVISED PENAL CODE, art. 267; *People v. Mercado*, 131 SCRA 501 (1984).

116. REVISED PENAL CODE, art. 124.

117. *Id.* art. 267.

118. Rome Statute, art. 6 (a)-(e); Report on Elements of Crimes, *supra* note 82, at 6-8.

B. Article 7 - Crimes Against Humanity

A crime against humanity is one that is committed as part of a widespread or systematic attack directed against any civilian population,¹¹⁹ whether it occurs during an international armed conflict or an internal strife.¹²⁰ The proscription against crimes against humanity is customary under international law.¹²¹ An attack is considered widespread if it has some scale, affecting multiple victims.¹²² It is systematic if it is pursuant to a common policy despite the absence of a methodical orchestration.¹²³ Thus, while proof of systematic governmental planning is an integral element,¹²⁴ evidence that the acts themselves demonstrate a policy to commit those acts, whether formalized or not, is sufficient.¹²⁵

1. Acts Considered as Crimes Against Humanity

The Rome Statute defines a crime against humanity as any of the acts enumerated in article 7 (1) thereof when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.¹²⁶ An "attack directed against any civilian population" means a course of conduct involving the multiple commission of the acts referred to in article 7 (1) of the Rome Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.¹²⁷

119. Proceedings of the American Society of International Law, 90th Annual Meeting 610 (1996); RUSSELL M. ROBINSON, *THE ELEMENTS OF CRIMES AGAINST HUMANITY, THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIME AND RULES OF PROCEDURE AND EVIDENCE* 57 (2001).

120. U.N. ESCOR, 50th Sess., E/CN.4/Sub2/1998/13 (1998); Theodore Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 428 (1998).

121. See, e.g., Statute of the Yugoslavia Tribunal, *supra* note 75; Statute of the Rwanda Tribunal, *supra* note 75; Rome Statute. See generally, Prosecutor v. Tadić, Opinion and Judgment, Mo. IT-94-1-T (1997); Prosecutor v. Furundžija, No. IT-95-17/1-T (1998); Prosecutor v. Delalić, Judgment, No. IT-96-2-T (1998); Prosecutor v. Akayesu, Judgment No. ICTR-96-4-T (1998); Prosecutor v. Kunarac, Judgment, Case No. IT-96-23T (2001).

122. ROBINSON, *supra* note 119, at 63.

123. *Id.*; Akayesu, Judgment, No. ICTR-96-4-T at ¶ 599.

124. Meron, *supra* note 120, at 428.

125. Prosecutor v. Tadić, No. IT-94-1-T, Decision on Form of the Indictment, ¶ 653 (1995).

126. Rome Statute, art. 7, ¶ 1.

127. *Id.* art. 7, ¶ 2 (a).

(a) Murder

Murder, as a crime against humanity, consists of the following elements:

1. The perpetrator killed one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The 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.¹²⁸

The concept of murder under Philippine law is more restrictive as it requires that the act of killing be accompanied by at least one of the following qualifying circumstances: (1) with treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defense, or of means or persons to insure or afford impunity; (2) in consideration of a price or reward; (3) by means of inundation, fire, poison, explosion, shipwreck, stranding of a vessel, derailment or assault upon a railroad, fall of an airship, by means of motor vehicles, or with the use of any other means involving great waste and ruin; (4) on occasion of any of the calamities enumerated in the preceding paragraph, or of an earthquake, eruption of a volcano, destructive cyclone, epidemic, or other public calamity; (5) with evident premeditation; (6) with cruelty, by deliberately and inhumanly augmenting the suffering of the victim, or outraging or scoffing at his person or corpse.¹²⁹ As earlier discussed, the other offenses under Philippine law which involve the act of killing are (1) homicide if none of the qualifying circumstances of murder be present,¹³⁰ and (2) infanticide if the victim be a child less than three days of age.¹³¹

The broad idea of murder under the Rome Statute, where the term "killed" is understood to be interchangeable with the term "caused death" without any qualifying circumstance,¹³² can be said to embrace all the offenses involving the act of killing under Philippine law. None of such offenses under Philippine law, however, includes the element of "widespread or systematic attack directed against a civilian population,"¹³³ which is an integral component of murder as a crime against humanity.¹³⁴

128. Report on Elements of Crimes, *supra* note 82, at 9.

129. REVISED PENAL CODE, art. 248 (as amended by R.A. No. 7659).

130. *Id.*, art. 249.

131. *Id.* art. 255.

132. Report on Elements of Crimes, *supra* note 82, at 9.

133. REVISED PENAL CODE, arts. 248, 249 & 255.

134. Report on Elements of Crimes, *supra* note 82, at 9.

(b) Extermination

Extermination is committed when the following elements concur:

1. The perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.
2. The conduct constituted, or took place as part of, a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. 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.¹³⁵

The 1948 report of the United Nations War Crimes Commission indicated that extermination meant murder on a large scale and that it included implication in the policy of extermination without any direct connection with actual acts of murder.¹³⁶ Under the Rome Statute, 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.¹³⁷ This is based on the language of the 1948 Genocide Convention.¹³⁸

While the act of killing one or more persons may constitute murder, homicide, or infanticide under Philippine law, none of these offenses contemplates a situation where murder is carried out on a large scale as part of a widespread or systematic attack against a civilian population.¹³⁹

(c) Enslavement

There is enslavement when: (1) the perpetrator exercised any or all of the powers attaching to the right of ownership over a person, such as by purchasing, selling, lending, or bartering such person or persons, or by imposing on them a similar deprivation of liberty; and (2) the conduct was

¹³⁵. *Id.* at 10.

¹³⁶. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UN WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 194 (1948).

¹³⁷. Rome Statute, art. 7, ¶ 2 (b).

¹³⁸. Genocide Convention, art. II (c); DARRYL ROBINSON, THE CONTEXT OF CRIMES AGAINST HUMANITY, THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIME AND RULES OF PROCEDURE AND EVIDENCE 82 (2001).

¹³⁹. REVISED PENAL CODE, arts. 248, 249 & 255.

committed as part of a widespread or systematic attack directed against a civilian population.¹⁴⁰ It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labor, or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.¹⁴¹

Under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, a person of servile status means a person in the condition or status resulting from any of the following institutions or practices:¹⁴²

1. Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
2. Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labor on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
3. Any institution or practice whereby:
 - (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group;
 - (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
 - (iii) A woman, on the death of her husband, is liable to be inherited by another person.
4. Any institution or practice whereby a child or young person, under the age of eighteen years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor.¹⁴³

¹⁴⁰. Report on Elements of Crimes, *supra* note 82, at 10.

¹⁴¹. *Id.*

¹⁴². E.S.C. Res. 608, U.N. ESCOR, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries, art. 7 (b) (1956) [hereinafter Abolition of Slavery].

¹⁴³. *Id.* art. 1.

Under Philippine law, the crime of slavery is committed when the offender purchases, sells, kidnaps, or detains a human being for the purpose of enslaving such human being.¹⁴⁴ Acts constituting debt bondage may be punishable under the Revised Penal Code or the Anti-Trafficking in Persons Act of 2003 depending on the attendant circumstances. Under the Revised Penal Code, if the person subjected to labor against his will is a minor and such subjection occurs under the pretext of reimbursing himself of a debt incurred by an ascendant, guardian, or person entrusted with the custody of such minor, the crime committed is exploitation of child labor.¹⁴⁵ However, if the person compelled to work against his will for the purpose of enforcing the payment of a debt is the debtor himself and is not a minor, then the crime is services rendered under compulsion in payment of debt.¹⁴⁶

Under the Anti-Trafficking in Persons Act of 2003, debt bondage refers to the pledging by the debtor of his/her personal services or labor or those of a person under his/her control as security or payment for a debt, when the length and nature of services is not clearly defined or when the value of services as reasonably assessed is not applied towards the liquidation of the debt.¹⁴⁷

From the foregoing, it appears that the concept of slavery under the Rome Statute is broader than that under the Revised Penal Code, as the former includes the exercise of any of the powers attaching to ownership and similar deprivations of liberty,¹⁴⁸ while the latter contemplates only the purchase, sale, kidnapping, or detention of a person in order to enslave him.¹⁴⁹ The definition of debt bondage, however, under the Anti-Trafficking in Persons Act of 2003 follows the language of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.¹⁵⁰

With respect to forced labor, the Preamble of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery makes reference to the Forced Labor

144. REVISED PENAL CODE, art. 272.

145. *Id.* art. 273.

146. *Id.* art. 274.

147. An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children Establishing Necessary Institutional Mechanisms for the Protection and Support of the Trafficked Persons, Providing Penalties for its Violations and for Other Purposes [Anti-Trafficking in Persons Act of 2003], Republic Act No. 9208, § 3 (g).

148. Report on Elements of Crimes, *supra* note 82, at 10.

149. REVISED PENAL CODE, art. 272.

150. R.A. No. 9208, § 3 (g).

Convention of 1930¹⁵¹ which, in turn, defines the term "forced or compulsory labor" to mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.¹⁵² Under Philippine law, forced labor refers to the extraction of work or services from any person by means of enticement, violence, intimidation or threat, use of force or coercion, including deprivation of freedom, abuse of authority, or moral ascendancy, debt bondage or deception.¹⁵³

The crime of enslavement under the Rome Statute also includes trafficking in persons, in particular women and children.¹⁵⁴ In this regard, the Anti-Trafficking in Persons Act of 2003 provides:

It shall be unlawful for any person, natural or juridical, to recruit, transport, transfer, harbor, provide, or receive a person by any means, including those done under the pretext of domestic or overseas employment or training or apprenticeship, for the purpose of prostitution, pornography, sexual exploitation, forced labor, slavery, involuntary servitude or debt bondage.¹⁵⁵

In all of the aforementioned slave-related practices criminalized under Philippine law, the element of "widespread or systematic attack directed against a civilian population"¹⁵⁶ does not appear.

(d) Deportation or forcible transfer of population

"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.¹⁵⁷ An essential element of this crime is that the conduct must be committed as part of a widespread or systematic attack directed against a civilian population.¹⁵⁸ There is no crime having the same meaning under Philippine law.

151. Abolition of Slavery, *supra* note 143, Preamble.

152. Forced Labour Convention, General Conference of the International Labour Organisation, 14th Sess., art. 2 (1) (1928).

153. R.A. No. 9208, § 3 (d).

154. Report on Elements of Crimes, *supra* note 82, at 10.

155. R.A. No. 9208, § 4.

156. Report on Elements of Crimes, *supra* note 82, at 10.

157. Rome Statute, art. 7, ¶ 2 (d).

158. Report on Elements of Crimes, *supra* note 82, at 11.

(e) *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*

This crime is committed when the perpetrator imprisons one or more persons or otherwise severely deprives one or more persons of physical liberty in a manner that is violative of fundamental rules of international law.¹⁵⁹ Further, the conduct must be committed as part of a widespread or systematic attack directed against a civilian population.¹⁶⁰

Under Philippine law, the imprisonment or severe deprivation of a person's liberty without legal grounds may constitute kidnapping and serious illegal detention if, in the commission of the offense, any of the following circumstances is present: (1) the kidnapping or detention lasts for more than three days; (2) it is committed simulating public authority; (3) any serious physical injuries are inflicted upon the person kidnapped or detained or threats to kill him are made; or (4) the person kidnapped or detained is a minor, female, or a public officer.¹⁶¹ If the offender is a public officer, the crime is arbitrary detention.¹⁶²

The concept of imprisonment or other severe deprivation of a person's liberty under the Rome Statute has a broader scope than the crime of kidnapping and serious illegal detention under the Revised Penal Code, as the latter excludes cases of detention not attended by any of the circumstances therein mentioned.¹⁶³ Moreover, the element of widespread or systematic attack directed against a civilian population¹⁶⁴ is not essential to the crime of kidnapping and serious illegal detention.

(f) *Torture*

Torture means 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.¹⁶⁵ While some authorities hold that acts of torture must be committed by or at the instigation of or with the consent of a public official,¹⁶⁶ this has been consistently interpreted to include non-State

159. *Id.*

160. *Id.*

161. REVISED PENAL CODE, art. 267; *People v. Mercado*, 131 SCRA 501 (1984).

162. REVISED PENAL CODE, art. 124.

163. REVISED PENAL CODE, art. 267; *Mercado*, 131 SCRA at 501.

164. Report on Elements of Crimes, *supra* note 82, at 11.

165. Rome Statute, art. 7, ¶ 2 (e).

166. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 at art. 1 (1984), entered into force June 26, 1987.

actors¹⁶⁷ as certain armed conflicts involve some officials of non-State entities.¹⁶⁸ It is understood that no specific purpose need be proved for this crime, albeit the acts must form part of a widespread or systematic attack directed against a civilian population.¹⁶⁹

Under Philippine law, the intentional infliction of severe physical pain or suffering, may constitute slight,¹⁷⁰ less serious,¹⁷¹ or serious¹⁷² physical injuries depending on the gravity of the injuries caused. However, if the infliction of physical suffering is done by mutilating another by depriving him of some essential organ for reproduction or any other part of his body, then the crime committed is mutilation.¹⁷³

It thus appears that torture may only be punished under Philippine law if the infliction of physical pain or suffering results in some manifest physical injury or mutilation of a part of the body of the offended party. Further, the element of widespread or systematic attack directed against a civilian population is not material to the commission of any of the aforementioned crimes under the Revised Penal Code.¹⁷⁴ Finally, there is no law which punishes the act of inflicting severe mental suffering upon a person in the custody or under the control of the accused. The provision in the Revised Penal Code relating to ignominy, or the existence of circumstances that add disgrace and obloquy to the material injury,¹⁷⁵ refers to the humiliating

167. *See generally*, H.L.R. v. France, 745 Eur. Ct. H.R. (1997); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. ¶ 88 (1989); *Chahal v. United Kingdom*, 23 Eur. Hum. Rts. Rep. 413 ¶ 79 (1997); ELEMENTS OF CRIME AND RULES OF PROCEDURE AND EVIDENCE 127 (2001).

168. *Prosecutor v. Delalić*, Judgment, No. 1T-96-2-T at ¶ 473 (1998); The International Criminal Court Act 2001 (Elements of Crime) Regulations 2001 Statutory Instrument No. 2505, art. 8, ¶¶ 2 (a) (ii) & (2) (c) (i); GEORG WITSCHER & WIEBKE RUCKERT, CRIME AGAINST HUMANITY OF ENFORCED DISAPPEARANCE OF PERSONS, THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 63, 127-28 (2001); *see generally*, H.L.R. v. France, 745 Eur. Ct. H.R. (1997); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. ¶ 88 (1989); *Chahal v. United Kingdom*, 23 Eur. Hum. Rts. Rep. 413 ¶ 79 (1997); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7 (1999).

169. Report on Elements of Crimes, *supra* note 82, at 12.

170. REVISED PENAL CODE, art. 266.

171. *Id.* art. 265.

172. *Id.* art. 263.

173. *Id.* art. 262.

174. *Id.* arts. 262-63 & 265-66.

175. *U.S. v. Abaigar*, 2 Phil. 417 (1903).

effects of the crime committed¹⁷⁶ and is only considered an aggravating circumstance.¹⁷⁷ It is not treated as a distinct offense.¹⁷⁸

(g) *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity*

All of the offenses included in this provision require that the conduct be committed as part of a widespread or systematic attack directed against a civilian population.¹⁷⁹

Rape means the invasion of the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.¹⁸⁰ Here, the invasion must be committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁸¹

Under Philippine law, there are two ways by which rape may be committed. The first mode of committing rape is when a man has carnal knowledge of a woman under any of the following circumstances, *viz.*: (1) by using force or intimidation; (2) when the woman is deprived of reason or otherwise unconscious; (3) by means of fraudulent machination or grave abuse of authority; and (4) when the woman is under twelve years of age or demented.¹⁸² As discussed earlier, the first circumstance required for the act to qualify as rape, namely, by using force or intimidation, can already embrace the mode of committing rape under the Rome Statute which speaks of the use of force or threat of force. Moreover, the second and third circumstances enunciated in the Revised Penal Code can be considered as specific instances where rape is committed against a person incapable of giving genuine consent, as envisaged by the Rome Statute. The major difference, however, lies in the fact that while, under the Rome Statute, the concept of invasion of another person's body is intended to be broad enough

176. GREGORIO, *supra* note 70, at 159.

177. REVISED PENAL CODE, art. 14, ¶ 17.

178. *Id.*

179. Report on Elements of Crimes, *supra* note 82, at 12-15.

180. *Id.* at 12.

181. *Id.*

182. REVISED PENAL CODE, art. 266-A.

to be gender-neutral,¹⁸³ only a woman may be the injured party under the first mode of committing rape under Philippine law.¹⁸⁴

The second mode of committing rape under Philippine law is when the offender commits an act of sexual assault by any of the following means: (1) by inserting his penis into another person's mouth or anal orifice, or (2) by inserting any instrument or object into the genital or anal orifice of another person.¹⁸⁵ The second act of sexual assault here may be committed by a female.¹⁸⁶ The broadened concept of rape introduced by this amendment remains restrictive as it acknowledges only one way of committing a sexual assault upon a male victim, and any of the qualifying circumstances under the first mode of committing rape is still required.¹⁸⁷

The crime of forced pregnancy included in this provision involves the confinement of one or more women forcibly made pregnant with the intent of affecting the ethnic composition of any population.¹⁸⁸ Under Philippine law, if sexual intercourse occurs under circumstances that would qualify the offense as rape, and it is further attended by the fact that the victim is under the custody of military authorities or any law enforcement or penal institution, the crime committed is qualified rape.¹⁸⁹ On the other hand, if a woman is taken against her will and with lewd design, and she is subsequently raped, the complex crime of forcible abduction with rape is committed.¹⁹⁰ However, none of these crimes under Philippine law considers the element of purposely making the woman pregnant in order to affect the ethnic composition of any population.

Sexual slavery refers to the exercise of any or all of the powers attaching to the right of ownership over one or more persons, wherein the perpetrator caused such person or persons to engage in one or more acts of a sexual nature.¹⁹¹ While sexual slavery may occur under circumstances that qualify the offense as rape under Philippine law, the latter does not capture the essence of slavery denoting the exercise of powers attaching to the right of ownership. Further, the element of "widespread or systematic attack against a civilian population" is not recognized in the Revised Penal Code provision on rape.

183. Report on Elements of Crimes, *supra* note 82, at 12.

184. REVISED PENAL CODE, art. 266-A.

185. *Id.*

186. *Id.*

187. *Id.*

188. Report on Elements of Crimes, *supra* note 82, at 14.

189. REVISED PENAL CODE, art. 266-B.

190. REYES, *supra* note 87, at 880.

191. Report on Elements of Crimes, *supra* note 82, at 13.

Enforced prostitution is committed by causing one or more persons to engage in acts of a sexual nature by force, or by threat of force or coercion, or by taking advantage of a coercive environment or the incapacity to give genuine consent of such person or persons.¹⁹² The perpetrator obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.¹⁹³

Under the Revised Penal Code, enlisting the services of women for the purpose of prostitution or profiting by prostitution gives rise to the crime of white slave trade which, however, does not involve the element of force or threat of force or coercion.¹⁹⁴ The Anti-Trafficking in Persons Act of 2003 prohibits the recruitment, transportation, transfer, harboring, providing, or receiving of a person by any means, including those done under the pretext of domestic or overseas employment or training or apprenticeship, for the purpose of prostitution.¹⁹⁵ Here, the definition of prostitution as any act or transaction involving the use of a person for sexual intercourse or lascivious conduct in exchange for profit or any other consideration again excludes the element of force or threat of force or coercion.¹⁹⁶ If the persons subjected to sexual intercourse or lascivious conduct in exchange for profit or due to the coercion or influence of any adult, syndicate, or group are below eighteen years of age or those over but are unable to fully take care of themselves because of a physical or mental disability, the crime committed is child prostitution.¹⁹⁷ In all of the above-mentioned offenses, the element of widespread or systematic attack against a civilian population is not recognized.¹⁹⁸

The crime of enforced sterilization, which is the deprivation of the biological reproductive capacity of one or more persons in a manner that is neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent,¹⁹⁹ has no functional equivalent under Philippine law.

192. *Id.*

193. *Id.*

194. REVISED PENAL CODE, art. 341.

195. R.A. No. 9208, § 4 (a).

196. *Id.* § 3 (c).

197. An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, and For Other Purposes [Special Protection of Children Against Abuse, Exploitation and Discrimination Act], Republic Act No. 7610, §§ 3 (a) & 5.

198. REVISED PENAL CODE, art. 341; R.A. No. 9208, §§ 4 (a) & 3 (c); R.A. No. 7610, §§ 3 (a) & 5.

199. Report on Elements of Crimes, *supra* note 82, at 14.

(h) *Persecution*

Persecution is the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or its collectivity.²⁰⁰ The group subjected to persecution is specifically targeted based on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law.²⁰¹ The conduct must be committed as part of a widespread or systematic attack directed against a civilian population.²⁰² There is no crime of similar import under Philippine law.

(i) *Enforced disappearance of persons*

"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support, or acquiescence of, a State or 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.²⁰³ This definition draws from the language of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance²⁰⁴ which defines enforced disappearance as a situation where persons are arrested, detained, or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.²⁰⁵ The acts constituting enforced disappearance must be committed pursuant to a widespread or systematic attack directed against a civilian population.²⁰⁶

Under Philippine law, the arrest, detention, or abduction of persons which lasts for a considerable period of time may constitute kidnapping and serious illegal detention if in the commission of the offense, any of the following circumstances is present: (1) the kidnapping or detention lasts for

200. Rome Statute, art. 7, ¶ 2 (g).

201. Report on Elements of Crimes, *supra* note 82, at 15.

202. *Id.*

203. Rome Statute, art. 7, ¶ 2 (i).

204. WITSCHERL & RUCKERT, *supra* note 168, at 99.

205. United Nations Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res.47/133 (1992).

206. Report on Elements of Crimes, *supra* note 82, at 16.

more than three days; (2) it is committed simulating public authority; (3) any serious physical injuries are inflicted upon the person kidnapped or detained or threats to kill him are made; or (4) the person kidnapped or detained is a minor, female, or a public officer.²⁰⁷ If the offender is a public officer, the crime is arbitrary detention.²⁰⁸

While the authorization, support, or acquiescence of, a State or political organization is an integral element of the crime against humanity of enforced disappearance of persons,²⁰⁹ it is not required in the commission of kidnapping and serious illegal detention under Philippine law.²¹⁰ Further, the element of "widespread or systematic attack directed against a civilian population" is not included in the crime of kidnapping and serious illegal detention.²¹¹

(j) *The crime of apartheid*

The crime of apartheid denotes the commission of inhumane acts 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.²¹² The commission of inhumane acts must be part of a widespread or systematic attack directed against a civilian population.²¹³ This crime has no functional equivalent under Philippine law.

(k) *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body, or to mental or physical health*

This "catch-all" provision, which follows the precedents of the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, is simply a recognition of the fact that it is impossible to exhaustively enumerate all inhumane acts which may properly be considered crimes against humanity.²¹⁴

207. REVISED PENAL CODE, art. 267; *People v. Mercado*, 131 SCRA 501 (1984).

208. REVISED PENAL CODE, art. 124.

209. Report on Elements of Crimes, *supra* note 82, at 16.

210. REVISED PENAL CODE, art. 267.

211. *Id.*

212. Rome Statute, art. 7, ¶ 2 (h).

213. Report on Elements of Crimes, *supra* note 82, at 16.

214. WITSCHEL & RUCKERT, *supra* note at 168, at 106-107.

C. *Article 8 - War Crimes*

The ICC 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.²¹⁵ This is so because the systematic or large-scale occurrences of war crimes are primarily the situations that are of concern to the international community.²¹⁶ The formulation, however, does not mean that the ICC may not exercise jurisdiction in cases of isolated war crimes.²¹⁷

1. War Crimes based on the Geneva Conventions

Statutes of recent international tribunals²¹⁸ specifically refer to the "grave breaches" provisions of the 1949 Geneva Conventions²¹⁹ pertaining to war crimes. The term "grave breaches" refers to crimes committed against persons protected under the Geneva Conventions,²²⁰ or persons who find themselves in the hands of a party to the conflict of which they are not nationals.²²¹ However, the views expressed by the International Criminal Tribunal for the Former Yugoslavia on this matter will give the ICC further guidance.²²² In this regard, the tribunal held in *Prosecutor v. Tadic* that the term protected persons should be given a wider construction without limiting it to nationals of the other party, and accordingly, control by such party over persons in a given territory may be regarded as a crucial test.²²³

(a) *Willful killing*

The war crime of willful killing is committed when, in an international armed conflict, a person kills one or more persons protected under the

215. Rome Statute, art. 8 (1).

216. HERMAN VON HERBEL, WAR CRIMES IN THE ROME STATUTE, THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 110 (2001).

217. *Id.*

218. Statute of the Yugoslavia Tribunal, art. 2; Statute of the Rwanda Tribunal, art. 4.

219. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, arts. 3-4 (1949).

220. KNUT DORMANN, ET AL., THE CONTEXT OF WAR CRIMES, THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 116 (2001) [hereinafter DORMANN, ET AL., CONTEXT].

221. Geneva Convention, art. 4.

222. DORMANN, ET AL., CONTEXT, *supra* note 220, at 117.

223. *Prosecutor v. Tadic*, Opinion and Judgment, Mo. IT-94-1-T at ¶ 166 (1997).

Geneva Conventions.²²⁴ As earlier discussed, the act of killing one or more persons may constitute murder, homicide, or infanticide under Philippine law depending on the attendant circumstances. However, none of the aforementioned offenses under Philippine law contemplates a large-scale commission of such crimes pursuant to any plan or policy.²²⁵

(b) Torture or inhuman treatment, including biological experiments

Torture is committed when, in an international armed conflict, the perpetrator inflicts severe physical or mental pain upon persons protected under the Geneva Conventions for such purposes as obtaining information or a confession, punishment, intimidation, or coercion or for any reason based on discrimination of any kind.²²⁶ This is largely based on the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment²²⁷ which *ad hoc* Tribunals considered to reflect customary international law.²²⁸ The inclusion of the element of purpose was deemed necessary in order to distinguish torture from the crime of inhuman treatment.²²⁹

As earlier observed, the intentional infliction of severe physical pain may constitute slight,²³⁰ less serious,²³¹ or serious²³² physical injuries under Philippine law, depending on the gravity of the injuries caused. However, if the infliction of physical suffering is done by mutilating another by depriving him of some essential organ for reproduction or any other part of his body, then the crime committed is mutilation.²³³ Thus, torture may only be punished under Philippine law if the infliction of physical pain or suffering results in some manifest physical injury or mutilation of a part of the body of the offended party. Further, the elements of (1) a plan or policy to commit torture and (2) the purpose for committing it, such as to obtain information

224. Report on Elements of Crimes, *supra* note 82, at 18-19.

225. REVISED PENAL CODE, arts. 248-249 & 255.

226. Report on Elements of Crimes, *supra* note 82, at 19.

227. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 1 (1984).

228. KNUT DORMANN, ELEMENTS OF SPECIFIC FORMS OF WAR CRIMES, THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 126 (2001) [hereinafter DORMANN, ELEMENTS].

229. *Id.* at 127.

230. REVISED PENAL CODE, art. 265.

231. *Id.* art. 265.

232. *Id.* art. 263.

233. *Id.* art. 262.

or a confession, are not recognized in Philippine law. Lastly, the infliction of severe mental pain is not considered a distinct crime under Philippine law.

The war crime of inhuman treatment has essentially the same meaning as torture, that is, the infliction of severe physical or mental suffering, but without the element of purpose.²³⁴ Thus, the discussions relating to torture apply here, excepting the part dealing with purpose.

The crime of biological experiments included in this provision is committed by subjecting a protected person to a particular biological experiment for non-therapeutic and non-medical reasons in a manner that seriously endangers the physical or mental health or integrity of such person.²³⁵ If the conduct of the experiment entails the act of administering injurious substances or beverages, and serious physical injury results thereby, the perpetrator may be held liable for the crime of administering injurious substances or beverages under Philippine law.²³⁶ However, the restrictive circumstances under which this crime may be committed under Philippine law are not consonant to the broad language of the Rome Statute, since the latter does not distinguish as to the kinds or forms of biological experiments.²³⁷

(c) Willfully causing great suffering, or serious injury to body or health

This crime is committed by causing great physical or mental pain to, or serious injury to the body or health of one or more protected persons in an international armed conflict.²³⁸ The discussion in the previous subsection in relation to torture also applies here, except that the element of purpose is immaterial in this type of war crime.

(d) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly

This war crime is committed when, in an international armed conflict, the perpetrator destroyed or appropriated certain property protected under the Geneva Conventions in an extensive and wanton manner and under circumstances not justified by military necessity.²³⁹ The determination of the unlawful acts covered by this provision must be seen in light of specific provisions of the Geneva Conventions and the Hague Regulations of 1907 which provide distinct standards of protection for specific protected

234. Report on Elements of Crimes, *supra* note 82, at 19.

235. *Id.* at 20.

236. REVISED PENAL CODE, art. 264.

237. Report on Elements of Crimes, *supra* note 82, at 20.

238. *Id.*

239. *Id.* at 20-21.

property.²⁴⁰ For instance, the protection afforded to civilian hospitals against attacks under articles 18 and 19 of Geneva Convention No. IV has a definition distinct from the protection of property in occupied territories under article 53 of the same Convention.²⁴¹

Under Philippine law, the unlawful appropriation of property belonging to another may give rise to the crime of occupation of real property or usurpation of real rights in property if the following elements concur:

1. That the offender takes possession of any real property or usurps any real rights in property;
2. That the real property or real rights belong to another;
3. That violence against or intimidation of persons is used by the offender in occupying real property or usurping real rights in property;
4. That there is intent to gain.²⁴²

From the foregoing, it will be observed that while the broad language of the Rome Statute has no regard for the manner in which the property was appropriated, the crime of occupation of real property or usurpation of real rights in property under Philippine law requires the element of violence against or intimidation of persons.²⁴³

The war crime of extensive destruction of property may constitute the crime of arson and other crimes involving destruction punishable under the Revised Penal Code with varying penalties depending upon the kind of property burned or destroyed, the manner of burning or destruction, and the resulting casualties.²⁴⁴ However, none of the offenses involving extensive destruction and appropriation of property under Philippine law depends on the classification of property as protected property.²⁴⁵

(e) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power

This crime refers to the act of coercing one or more persons protected under the Geneva Conventions, by act or threat, to take part in military operations

240. DORMANN, ELEMENTS, *supra* note 228, at 132.

241. *Id.*

242. REVISED PENAL CODE, art. 312; REYES, *supra* note at 87, at 722.

243. *Id.*

244. REVISED PENAL CODE, arts. 320-326; *see generally*, Amending the Law on Arson, Presidential Decree No. 1613 (1979).

245. REVISED PENAL CODE, arts. 312 & 320-326; REYES, *supra* note 87, at 722; *see generally*, P.D. No. 1613.

against that person's own country or otherwise serve in the forces of a hostile power.²⁴⁶ There is no crime having similar elements under Philippine law.

(f) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial

This provision, being based on the grave breaches provision of the third and fourth Geneva Conventions,²⁴⁷ proscribes the act of depriving one or more protected persons of a fair and regular trial by denying judicial guarantees as defined under the aforementioned Conventions.²⁴⁸ The offenses under Philippine law which have the closest parallelism to this war crime are malicious delay in the administration of justice²⁴⁹ and knowingly rendering unjust judgment.²⁵⁰ There is malicious delay in the administration of justice when a judge, before whom a proceeding is brought, acts with malice in causing delay in such proceeding.²⁵¹ On the other hand, the crime of knowingly rendering unjust judgment is committed when a judge renders a judgment which he knows to be contrary to law, or is not supported by the evidence, or both.²⁵² These offenses under Philippine law, however, include only the acts therein specified, and they do not purport to cover all instances wherein a person may be said to have been deprived of his right to a fair and regular trial.

(g) Unlawful deportation or transfer or unlawful confinement

The crime contemplated by this provision consists in the deportation, transfer or confinement of a person protected under the Geneva Conventions in the context of an international armed conflict.²⁵³ Under Philippine law, the unlawful confinement of a person may constitute the crime of kidnapping and serious illegal detention if the confinement is accompanied by any of the following circumstances: (1) the kidnapping or detention lasts for more than three days; (2) it is committed simulating public authority; (3) any serious physical injuries are inflicted upon the person kidnapped or detained or threats to kill him are made; or (4) the person

246. Report on Elements of Crimes, *supra* note 82, at 21.

247. *Id.*; DORMANN, ELEMENTS, *supra* note 228, at 135.

248. Report on Elements of Crimes, *supra* note 82, at 21.

249. REVISED PENAL CODE, art. 207.

250. *Id.* art. 204.

251. *Id.* art. 207.

252. REYES, *supra* note 87, at 357.

253. Report on Elements of Crimes, *supra* note 82, at 22.

kidnapped or detained is a minor, female, or a public officer.²⁵⁴ If the perpetrator is a public officer, the crime is arbitrary detention.²⁵⁵

It thus appears that the restrictive language of the provision on kidnapping and serious illegal detention under Philippine law does not include unlawful deportation and transfer of persons, while only criminalizing confinement under the specified circumstances.

(h) *Taking of hostages*

In the commission of this crime, the perpetrator detained or otherwise held hostage one or more persons protected under the Geneva Conventions, with the perpetrator threatening to kill, injure or continue to detain such person or persons for the purpose of compelling a State, an international organization, a person, or group of persons to act or refrain from acting in a certain manner.²⁵⁶ As earlier observed, the detention of a person without legal grounds may constitute the crime of kidnapping and serious illegal detention or arbitrary detention, as the case may be. The discussion in the preceding subsection thus applies here, with the further observation that the element of threatening to kill or injure the person held hostage as a means of compulsion exerted upon State or non-State entities does not appear under Philippine law.²⁵⁷

2. Other war crimes in an international armed conflict

The following acts are considered serious violations of the laws applicable in an international armed conflict:

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in the hostilities;
- (b) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (c) 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;

²⁵⁴ REVISED PENAL CODE, art. 267.

²⁵⁵ *Id.* art. 124.

²⁵⁶ Report on Elements of Crimes, *supra* note 82, at 22-23.

²⁵⁷ REVISED PENAL CODE, arts. 124 & 267.

- (d) 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;
- (e) Attacking or bombarding by whatever means, towns, villages, dwellings or buildings which are undefended, and which are not military objectives;
- (f) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (g) 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;
- (h) 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;
- (i) 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;
- (j) 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;
- (k) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (l) Declaring that no quarter will be given;
- (m) Destroying or seizing the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
- (n) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (o) 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;
- (p) Pillaging a town or place, even when taken by assault;

- (q) Employing poison or poisoned weapons;
- (r) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (s) 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;
- (t) 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 the Rome Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (u) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (v) 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;
- (w) Utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations;
- (x) 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;
- (y) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;
- (z) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.²⁵⁸

Except to the extent that paragraphs (e), (f), (j), (k), (n), (u), (v), and (x) are akin to certain war crimes and crimes against humanity previously discussed, the crimes enumerated above do not have any functional equivalent under Philippine law.

²⁵⁸ Rome Statute, art. 8, ¶ 2 (b).

3. War crimes in an armed conflict not of an international character

During the negotiations of the Rome Statute, most delegations supported, both for legal and political reasons, the recognition in the Rome Statute of war crimes committed in internal armed conflicts, but a minority of the delegations were adamantly repulsive to the idea.²⁵⁹ Eventually, the agreement was reached to include the prohibitions contained in article 3 common to the Geneva Conventions, and a list of other well-established and fundamental prohibitions.²⁶⁰

Any of the following acts, when 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, is a serious violation of article 3 common to the four Geneva Conventions:

- (a) Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
- (b) Committing outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (c) Taking of hostages;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.²⁶¹

With the exception of paragraphs (a) and (b), which are similar to certain war crimes previously discussed, there is no crime under Philippine law having similar elements as any of the foregoing.

4. Other war crimes in armed conflicts not of an international character

Any of the following acts is a violation of the laws and customs applicable in armed conflicts not of an international character:

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (b) 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;

²⁵⁹ EVA LA HAYE, OTHER SERIOUS VIOLATIONS IN INTERNAL ARMED CONFLICTS, THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE 213 (2001).

²⁶⁰ *Id.* at 213-14.

²⁶¹ Rome Statute, art. 8, ¶ 2 (c).

- (c) 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;
- (d) 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;
- (e) Pillaging a town or place, even when taken by assault;
- (f) 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;
- (g) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- (h) 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;
- (i) Killing or wounding treacherously a combatant adversary;
- (j) Declaring that no quarter will be given;
- (k) 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 or seriously endanger the health of such person or persons;
- (l) Destroying or seizing the property of an adversary, unless such destruction or seizure be imperatively demanded by the necessities of the conflict.²⁶²

Except as regards paragraphs (f), (h), (i), (k), and (l) which involve acts of comparable nature as some of the war crimes and crimes against humanity earlier discussed, there is no crime of similar import under Philippine law as any of the foregoing.

V. CONCLUSION

This article is premised on the fact that the Philippines has signed, and is in the process of ratifying, the Rome Statute. As earlier elucidated, the issues sought to be resolved here are those that impact on the preparedness of the Philippines to carry out its obligations under the Rome Statute after it has been ratified.

A. Issue of Imposition of Death Penalty

With respect to the issue of whether Philippine courts may properly impose the death penalty when they assume jurisdiction over crimes covered by the Rome Statute which, under Philippine law, are punishable by death, the answer must be in the affirmative. The constitutional framework of the Philippines being essentially dualist in nature, any conflict between treaty law and municipal law must be resolved in favor of the latter. Further, there is no binding rule of international law which prevents Philippine courts from imposing the death penalty. It should be noted that the ICCPR does not prohibit, but only regulates, the imposition of the death penalty. And while the Second Optional Protocol to the ICCPR aims at the abolition of the death penalty, the Philippines is not a party to this Protocol.

B. Issue of Sufficiency of Philippine Penal Legislation

As far as concerns the second issue, the following presentation shows what laws need to be amended or created in order to enable Philippine courts to assume jurisdiction over crimes covered by the Rome Statute.

In order to have jurisdiction over acts of genocide:

1. Article 248 of the Revised Penal Code on murder must be amended to include a situation where the killing of one or more persons is committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, without need for any qualifying circumstance before the offense becomes punishable.
2. There must be a law passed punishing the following acts which have the common element of intent to destroy, in whole or in part, a national, ethnical, racial or religious group:
 - a. Causing serious bodily or mental harm to members of a group;

The law must specifically include within its coverage acts of torture, rape, sexual violence or inhuman or degrading treatment.
 - b. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

²⁶² *Id.* art. 8, ¶ 2 (e).

The acts punishable must include deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.

- c. Imposing measures intended to prevent births within the group; and
- d. Forcibly transferring children of one group to another group.

In order to have jurisdiction over crimes against humanity:

1. Article 248 of the Revised Penal Code on murder must be amended to include the act of killing one or more persons as part of a widespread or systematic attack directed against a civilian population without any qualifying circumstance.
2. The Anti-Trafficking in Persons Act of 2003 must be amended to include the situation where acts of slavery and trafficking are committed as part of a widespread or systematic attack directed against a civilian population.
3. Article 267 of the Revised Penal Code on kidnapping and serious illegal detention and/or article 124 on arbitrary detention must be amended to cover imprisonment and other severe deprivations of liberty as part of a widespread and systematic attack directed against a civilian population.
4. Article 266-A of the Revised Penal Code on rape must be amended to include the invasion of the body of a person, male or female, as part of a widespread or systematic attack directed against a civilian population, without need for any qualifying circumstance in order to be punishable as such.
5. There must be a law passed punishing the following acts when committed as part of a widespread or systematic attack directed against a civilian population:
 - a. Deportation or forcible transfer of population;
 - b. Torture;
 - c. Sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - d. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law;
 - e. Enforced disappearance of persons; and
 - f. The crime of apartheid.

In order to have jurisdiction over war crimes under the Geneva Conventions:

1. Article 248 of the Revised Penal Code on murder must be amended to include the act of killing one or more persons protected under the Geneva Conventions in an international armed conflict, without need for any qualifying circumstance in the commission of the offense.
2. There must be a law passed to punish the following acts when committed against one or more persons protected under the Geneva Conventions in an international armed conflict, pursuant to a plan or policy or as part of a large-scale commission of these crimes:
 - a. Torture or inhuman treatment, including biological experiments;
 - b. Willfully causing great suffering, or serious injury to body or health;
 - c. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - d. Compelling a prisoner of war or other protected person to serve in the forces of a hostile power;
 - e. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - f. Unlawful deportation or transfer or unlawful confinement; and
 - g. Taking of hostages.

In order to have jurisdiction over other war crimes in an international armed conflict, there must be a law passed to criminalize the following acts when committed in an international armed conflict pursuant to a plan or policy or as part of a large-scale commission of these crimes:

1. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in the hostilities;
2. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
3. 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;

4. 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;
5. Attacking or bombarding by whatever means, towns, villages, dwellings or buildings which are undefended, and which are not military objectives;
6. Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;
7. 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;
8. 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;
9. 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;
10. 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;
11. Killing or wounding treacherously individuals belonging to the hostile nation or army;
12. Declaring that no quarter will be given;
13. Destroying or seizing the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
14. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
15. 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;

16. Pillaging a town or place, even when taken by assault;
17. Employing poison or poisoned weapons;
18. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
19. 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;
20. 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;
21. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
22. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
23. Utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations;
24. 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;
25. 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; and
26. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

In order to have jurisdiction over war crimes committed in an armed conflict not of an international character, there must be a law passed punishing the following acts when 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:

1. Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
2. Committing outrages upon personal dignity, in particular, humiliating and degrading treatment;
3. Taking of hostages; and

4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

All of the foregoing acts are committed as part of a plan or policy or as part of a large-scale commission of such crimes.

In order to have jurisdiction over other war crimes committed in armed conflicts not of an international character, there must be a law passed criminalizing the following acts considered as violations of the laws and customs applicable in armed conflicts not of an international character:

1. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
2. 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;
3. 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;
4. 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;
5. Pillaging a town or place, even when taken by assault;
6. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
7. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
8. 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;
9. Killing or wounding treacherously a combatant adversary;
10. Declaring that no quarter will be given;
11. 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; and

12. Destroying or seizing the property of an adversary, unless such destruction or seizure be imperatively demanded by the necessities of the conflict.