SAFEGUARDING SOVEREIGNTY, RIGHTING 'HUMAN WRONGS': A JURISPRUDENTIAL JUSTIFICATION FOR THE PHILIPPINES' RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

by Christine Veloso Lao

TABLE OF CONTENTS

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INTRODUCTION

A. Statement of the problem

What is obscured by the pronouncement that the twentieth century is the century of scientific and technological advances is the fact that it is also the century of advances in the protection and promotion of human rights. The horrors spawned by the great wars of the last century forced the world to acknowledge the inherent dignity of every person, regardless of race, nationality, creed or gender. Immediately after the Second World War, the world expressed its recognition of the moral obligation to respect human rights by entering international agreements that promote peace through the promotion and protection of human rights.

A major development in the protection of human rights was the recognition of what retired Supreme Court Justice Isagani A. Cruz has called "human wrongs"— human rights violations left unchecked and abetted by all

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branches of the government.[1] The development of the concept of "human wrongs," together with the attendant notion of international crimes, gradually emerged from the Nuremberg and Tokyo War Tribunals that prosecuted the Nazi and Japanese perpetrators of war-time atrocities.[2]

However, the moral obligation that propelled states to enter international agreements, pledge cooperation to international organizations, and recognize international crimes did not easily translate into enforceable obligations; thus, revolutionary moves to promote peace and respect for human rights were routinely stymied by governments who argued against enforcement mechanisms on the ground that these mechanisms violated their sovereignty.

One enforcement mechanism that has endured rough sailing at the hands of an uncooperative world is the International Criminal Court (ICC). Envisioned as early as 1919, the International Criminal Court was established only in July 1998 through the approval of the Rome Statute of the International Criminal Court at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, Italy from 15 June to 17 July 1998. The creation of this permanent world court has been called "monumental" for the following reasons:

1. The Rome Statute recognizes the following international crimes: genocide, crimes against humanity, war crimes, and aggression. It provides that the ICC may prosecute individuals who commit acts constituting such crimes;

2. The Statute makes individuals, and not states, accountable for crimes within the purview of the International Criminal Court.

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[1] "Human wrongs" is a term coined by Justice Isagani A. Cruz in a lecture given at the University of the Philippines Law Center on 22 May 1997. He used the term to denote the concept of human rights violations left unchecked by all branches of the government. *See*, ISAGANI A. CRUZ, HUMAN RIGHTS AND WRONGS: PROCEEDINGS OF THE 1997 JORGE BOCOBO LECTURE HELD ON 22 MAY 1997 AT THE LECTURE ROOM, BOCOBO HALL, U.P. LAW CENTER, DILIMAN, QUEZON CITY (1998) at 7, 26 and 34.

[2] The significance of the Nuremberg Trials is that they firmly established that there existed certain crimes of international concern—crimes that include a broader range than those simply termed as "war crimes." *See*, Roger Clark, *Nuremberg and Tokyo in Contemporary Perspective*, *in* THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES (Timothy McCormack and Gerry Simpson, eds., 1997), 171,185.

This implies that once an individual becomes an international criminal, he loses the protection of his own state;

3. The Statute provides that the Court may acquire jurisdiction over individuals of states who commit the international crimes enumerated therein, whether the reason arises from international or local conflicts; and

4. The Statute grants the ICC jurisdiction over individuals who are nationals of states who did not join the statute in certain situations. This makes *all* people from *all* states—whether or not a party to the Rome Statute—under the responsibility to uphold human rights.[3]

Although these four victories bring the enforcement of international human rights obligations[4] to unprecedented levels, the ICC has been criticized by states that feel that its functions unduly restrict state sovereignty:[5] "The international community's continued reliance on the principle of state sovereignty precludes widespread implementation of human rights tribunals, generally under the precept of preserving law and order."[6]

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[3] Victoria Ballesteros, *Milestones in 1998: the Year in Retrospect*, 4 HUMAN RIGHTS AGENDA (1998) at 7.

[4] In particular, only the "most universal human rights—first generation human rights, or civil and political human rights—such as those embodied in the four Geneva Conventions are aimed to be enforced by the ICC. This is due to the fact that only such rights are generally considered to be *jus cogens* norms, or norms from which no derogation is permissible. *See*, Gautam Rana, *And Justice for All: Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators*, 30 VAND. J. OF TRANS'L L. 349, 354 n. 21 and n. 22 (1997).

[5] Among the countries that initially expressed disfavor regarding the establishment of an ICC because of its alleged violation of the principle of sovereignty are China, India, and Singapore. *See*, Gautam Rana, *And Justice for All: Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators*, 30 VAND. J. OF TRANS'L L. 349, 353, n. 18 (1997).

[6] Leo Kuper, *The Sovereign Territorial State: The Right to Genocide, in* GENOCIDE: ITS POLITICAL USE IN THE 20TH CENTURY 161 (1981). Previous attempts by the world community to universally punish human rights violators were also repeatedly rebuffed at the slightest hint that such moves would undermine self determination and sovereignty. *See*, Gautam Rana, *And Justice for All: Normative Descriptive Frameworks for the Implementation of Tribunals to Try Human Rights Violators*, 30 VAND. J. OF TRANS'L L. 349, 362 (1997).

Although the Philippines was one of the 120 states that approved the creation of the ICC through the enactment of the Rome Statute in 1998, it has neither signed nor ratified the treaty. Shortly before the end of his term, former President Fidel V. Ramos issued Administrative Order No. 387, which provided for the creation of a task force responsible for the following:

> 1. To undertake studies and researches pertaining to the proposed establishment of the ICC;
>
> 2. To formulate policy recommendations as input in the review and consolidation of the Philippine government's position regarding the matter;
>
> 3. To identify and recommend legislative measures necessary in the furtherance of the foregoing;
>
> 4. To serve as a forum for the resolution of issues and concerns pertaining to the establishment of the ICC; and
>
> 5. To pursue other related functions deemed necessary by the President.[7]

Already, some quarters have warned that the Rome Statute is patently unconstitutional and an affront to Philippine sovereignty. In particular, the ICC is seen as a threat to the exercise of national judicial, legislative and executive power, and the protection of the rights of accused to due process and against double jeopardy.

This paper characterizes the International Criminal Court as yet another attempt of the community of nations to preserve peace through the enforcement of human rights—a concern that the Philippines is bound to uphold both constitutionally,[8] and as a member of the community of nations. However, it recognizes the existence of several problems that the ICC is perceived to pose to

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[7] Adm. Ord. No. 387 (1998), sec. 3. The Task Force is composed of representatives from the following agencies: the Department of Foreign Affairs; the Department of Justice; the Office of the Solicitor General; the Office of the Executive Secretary or Office of the Chief Presidential Legal Counsel; the Department of Interior and Local Government, and the U.P. College of Law. *See*, Adm. Ord. No. 387 (1998), sec. 2.

[8] CONST. art. XI, sec. 11; CONST. art. XIII, sec. 1; CONST. art. XIV, sec. 3, para. 2.

state sovereignty, particularly Philippine sovereignty. Thus it asks whether the Philippines ought to proceed with the ratification of the Rome Statute of the International Criminal Court, bearing in mind the challenges posed by the Statute on the Philippine Constitution. The paper concludes with a possible justification derived from Philippine jurisprudence that may be used to support the ratification of the Rome Statute.

B. *Relevance of the Study: The ICC and the Philippines in the Context of Globalization*

The significance of studying international organizations such as the International Criminal Court and their impact on state sovereignty is magnified when viewed in the context of the phenomena of globalization.

Globalization has been defined as, "a process of gradual elimination of economic borders and the concomitant increase in international exchange and transnational interaction."[9] This process is manifested in the slow, but steady disappearance of the traditional barriers — foremost of which are trade barriers — that states place between themselves. Instead of these barriers, more and more governments around the world are fostering closer ties with each other.[10]

Yet far from being solely an economic phenomenon, globalization has created new challenges in the spheres of politics and law. In particular, the upsurge in human rights protection and the world wide spread of democracy have

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[9] Michael Dolan, *Global Economic Transformation and Less Developed Countries*, in GLOBAL TRANSFORMATION AND THE THIRD WORLD 259 (Robert Slater, et. al., eds., 1993).

[10] This move toward closer ties has resulted in regional collaborations such as the European Union (EU), the Association of South East Asian Nations (ASEAN), the Canada-U.S. Free Trade Agreement (AFTA), the North American Free Trade Agreement between Canada, Mexico and the U.S.A. (NAFTA), the Australia-New Zealand Free Trade Agreement, and the European Economic Community. International conferences such as the Asia-Pacific Economic Conference (APEC) and agreements such as the General Agreement on Tariff and Trades (GATT) also show the "serious desire of states to work together toward a progressive global village—the world. *See*, Amabelle Asuncion, *The Changing Face of Citizenship: Forcing a Center into a Decentralizing World*, 73 PHIL. L.J. 724, 731 (1999).

also been characterized as 'political globalization': "*Globalization* is also a political event, as *evidenced by the spread of democracy and human rights among nations*."[11]

The closer interaction between states has made it necessary for states to facilitate their dealings with each other through the creation of agreements and the enactment of rules to govern themselves. Inevitably, these agreements and rules affect the municipal law of individual nations. The changes wrought by globalization on the municipal laws and policies of particular states have often come under fire from the citizens of individual states: "The growing interdependence among states has 'narrowed [the state's] scope, lessened its autonomy, and constricted its capacity to adapt,' especially with the burgeoning international component in domestic affairs."[12] In other words, there is widespread belief that state sovereignty is being undermined by associations and agreements formed to facilitate the process of globalization.

Similarly, the proponents of globalization recognize the battering that state sovereignty receives at the hands of globalization:

> ...[T]he persuasive force of economic rationality has increasingly revealed the inadequacy of the nation-state concept and its aspect of absolute sovereignty. The presence of transnational corporations... illustrates the importance of a production and distribution system which transcends traditional political boundaries. Countries, too, have increasingly become more interdependent for mutual survival and prosperity.[13]

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[11] Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 430 (1997). Emphasis supplied.

[12] *Id.*, citing in part James N. Rosenau, *The State in an Era of Cascading Politics: Wavering Concepts, Widening Competence, Withering Colossus, or Weathering Change?*, *in* THE ELUSIVE STATE 17, 23 (James Caporaso, ed., 1989).

[13] Chee Meow, *The Political Implications of Economic Cooperation and Non-cooperation in the ASEAN Region*, *in* 1980 ASEAN ECONOMIC COOPERATION: PROCEEDINGS OF THE ASEAN ECONOMIC RESEARCH UNIT WORKSHOP 24 (Chia Siow Yue, ed., 1980).

> Whether we like it or not...powerful economic forces of globalization are weakening the ability of the state to regulate its own economy, and we may live to see the day when the traditional State has as much influence in global economic affairs as a single province has in national economic affairs.[14]

Unlike those who fear globalization, the proponents of this view welcome the death of the state and the demise of the concept of state sovereignty, not only because globalization is inevitable, but because of the belief that these concepts are "stumbling block[s]...to meaningful and realistic analyses of real...issues."[15] Foremost among these issues is the concept of a common humanity shared by all people "that is often obscured by the concept of nationality or citizenship":[16]

> [When s]tates lose their previous form—they can no longer exercise sovereignty nor maintain their respective governments nor restrict their territory nor differentiate their people—there can be no intruders, strangers or two-faced opportunists. This means that the previous states are in equal position, which in turn implies that their citizens are also to be treated equally. [17]

In other words, they seem to argue that in order for true equality and respect for common humanity to be achieved today, it is preferable — if not necessary — for state sovereignty to be cast aside in favor of a "new world order" wherein all states equally participate in the task of building a world that cares for the basic humanity of all people, promote respect for human rights — both civil and political rights, as well as economic, social, and cultural rights — and cooperate in the enforcement of laws that provide equal treatment for all.

This "new world order," however, has yet to arrive. As it is, the world is still comprised of states that deal with each other on the international plane on the basis of self-interest. The move towards a globalized world, therefore, must be viewed by each State in the context of its own struggle to achieve political and

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[14] Keith Griffin, Studies in Globalization and Economic Transitions, 23 (1996).

[15] Ferguson and Mansbach, Between Celebration and Despair: Constructive Suggestions for Future International Theory, 35 INT'L STUDIES Q. 382, 383 (1991).

[16] Amabelle Asuncion, *The Changing Face of Citizenship: Forcing a Center into a Decentralizing World*, 73 PHIL. L. J. 724, 735 (1999).

[17] *Id.* at 737.

economic autonomy and protect its interests from incursions of others that do not wish it well.

To study the International Criminal Court and its effects on Philippine sovereignty, therefore, is to study how globalization is changing the manner in which Philippine sovereignty is exercised.

C. *Jurisprudential Justification and Framework:* Tañada v. Angara *and Other Philippine Cases on the Principle of Auto-Limitation*

"...[G]lobalization...the new millennium buzz word...[is] ushering in a new borderless world..." So begins Justice Panganiban's *ponencia* in the Supreme Court's resolution of the case of *Tañada v. Angara.*[18] In Philippine jurisprudence, this case is virtually synonymous to globalization. At issue was whether or not the ratification of the WTO-GATT Agreement by the Senators was done with grave abuse of discretion. Senator Wigberto Tañada claimed that his colleagues abused their discretion because they ratified an agreement that was unconstitutional on two grounds. First, Tañada alleged that the WTO-GATT Agreement required the Philippines to place its nationals and products on the same footing as those of foreign countries, thus violating the constitutional mandate to develop a self-reliant and independent national economy effectively controlled by Filipinos,[19] to give preference to qualified Filipinos, and to promote preferential use of Filipino labor, domestic materials and locally produced goods.[20] Second, Tañada claimed that the same Agreement intruded, limited and impaired the constitutionally mandated powers of the Supreme Court and Congress.

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[18] G.R. No. 118295, 2 May 1997, 272 SCRA 18.

[19] CONST. art. II, sec. 19.

[20] CONST. art. XII, sec. 12.

Although the case is more popularly known for the Supreme Court's resolution of the first issue in favor of the constitutionality of the WTO-GATT Agreement,[21] the Court's reasoning process in resolving the second issue holds much more relevance in determining whether or not an international agreement impairs the State's exercise of sovereign powers of its Judiciary, Legislature, and Executive branch.

The reasoning process used by the Court in *Tañada v. Angara* to resolve the second issue shall be discussed in detail by this paper, and shall form the basis for building a case to support the proposition that the ICC does not infringe upon the exercise of national legislative, judicial and executive powers.

A key principle in resolving the issues in *Tañada v. Angara* was the Supreme Court's recognition of the "principle of auto-limitation":

> By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by, or derived from a convention or pact...Thus when the Philippines joined the United Nations as one of its fifty-one charter members, *it consented to restrict its sovereign rights under the 'concept of sovereignty as auto-limitation.'*[22]

This concept is by no means new to Philippine jurisprudence. In the earlier case of *Reagan v. Commissioner of Internal Revenue*,[23] the Supreme Court explained this concept by saying:

> ...[A]ny state may, by its consent, express or implied, submit to a restriction of its sovereign rights. There may thus be a curtailment of

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[21] The Supreme Court held that the Declaration of Principles and State Policies of the Constitution are mere aids or guides in the exercise of judicial and legislative powers. They are not self-executing principles ready for enforcement of the courts. Thus although they mandate a bias in favor of Filipino goods, services, labor and enterprises, it recognizes, at the same time, the need for business exchange with the rest of the world on the basis of reciprocity and equality. The policy of a "self-reliant and independent national economy," said the Court, "does not necessarily rule out the entry of foreign investments, goods and services..." and contemplates "neither economic seclusion nor mendicancy in the international community." *See*, Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 58-59.

[22] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 67. Emphasis supplied.

[23] G.R. No. L-26379, 27 December 1969, 30 SCRA 968.

> what otherwise is a power plenary in character. That is the concept of sovereignty as auto-limitation, which... "is the property of a state-force due to which it has the exclusive capacity of self-determination and self-restriction." A State, then, if it chooses to, may refrain from the exercise of what otherwise is illimitable competence.[24]

How this principle is exercised in a manner that is not inconsistent with the Constitution and the sovereignty of the State is what this paper hopes to clarify by examining the framework employed by the Court in *Tañada v. Angara, Reagan v. CIR, People v. Acierto*[25], and *People v. Gozo*,[26] all of which suggest criteria for determining whether or not an international treaty, covenant or agreement violates the sovereignty of a State.

D. Scope of the Study and Overview of the Paper

This paper argues that the International Criminal Court is an enforcement mechanism necessary to ensure that human rights will be respected around the world. It also stresses that the International Criminal Court is indispensable in an age where globalization has made the commission of serious human rights violations a concern of humanity as a whole, and not only of a particular state.

However, this paper recognizes the concern of several delegations in the Rome Conference regarding the potentially debilitating effect that the Tribunal may have on a State's exercise of governmental functions. It therefore examines closely the provisions of the Rome Statute Establishing the International Criminal Court and asks whether the ICC derogates upon the sovereignty of nations when it prosecutes and punishes the proponents of international crimes. Furthermore, it examines possible constitutional problems posed by the ICC Statute and asks whether the Philippines should ratify the Rome Statute.

The first chapter of this paper shows the inherently "pro-individual" and "anti-state" roots of the human rights movement by characterizing the latter as a

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[24] Reagan v. CIR, G.R. No. L-26379, 27 December 1969, 30 SCRA 968, 973.
[25] 92 Phil. 534 (1953).
[26] G.R. No. L-36409, 26 October 1973, 53 SCRA 476.

movement against state oppression. It proposes that the 1987 Philippine Constitution, popularly called "the Human Rights Constitution,"[27] as well as the worldwide emergence of human rights in the post-war era are direct consequences of humanity's experience with state oppression and excesses.

The second chapter of this paper argues the case for the establishment of the International Criminal Court and examines the provisions of the Rome Statute Establishing a Permanent International Criminal Court, particularly those that pertain to the Court's jurisdiction. This argument is framed in the context of the groundswell of support for human rights in the post-war era.

The third chapter examines the objections lodged by several states during the negotiations conducted for the creation of the ICC, particularly the charge that the latter institution violates the traditional concept of sovereignty, as this is embodied in the Constitution of particular states.[28] It likewise examines the relevance of such objections to Philippine law.

The fourth and final chapter evaluates these objections in the light of Philippine law and builds a case in favor of the Philippines' ratification of the Rome Statute. It examines the Supreme Court's rulings in *Tañada v. Angara*, *Reagan v. Commissioner of Internal Revenue*, *People v. Acierto* and *People v. Gozo*, and draws from these cases a set of criteria that determines whether or not the Rome Statute interferes in the exercise of national judicial, executive, and legislative powers. In employing the criteria gleaned from these cases, the paper is also able to resolve problems involving the right to due process. The use of the criteria gleaned from these cases thus provides a "jurisprudential justification" for ratifying the Rome Statute Establishing the International Criminal Court.

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[27] ALBERTO MUYOT, HUMAN RIGHTS IN THE PHILIPPINES 1986-1991, at 27 (1992).

[28] In particular, this paper discusses problems concerning the right to due process.

I. HUMAN RIGHTS AS A STRUGGLE AGAINST STATE OPPRESSION

The term "human rights" generally refers to the *legal concept* of human rights at the international level. This concept was formalized in several United Nations instruments after the Second World War. [29] However, the legal concept of human rights is rooted in earlier lines of thought that seek to explain the basis for the "moral unity of man."[30]

While the human rights identified in the Universal Declaration of Human Rights are arguably present in the precepts of some of the most ancient religions present in both the East and West,[31] human rights as codified in international instruments, have been criticized for being derived mainly from the Western philosophical tradition.[32] From this tradition, two lines of thought are identified as having first attempted to explain the basis of norms regulating human conduct: real law constituted either of conventional law derived from agreement among men or natural law inspired by divine origin as both the Stoics and early Christians believed.[33] Natural law became the moral basis for the existence of "human rights"—rights that existed not as mere concessions granted by the State to its citizens. Instead, *these rights were deemed to transcend the State,* and were inalienable.[34]

Dean Merlin Magallona of the University of the Philippines College of Law has interpreted the emergence of human rights as one that has emerged alongside revolutionary struggles in human history:

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[29] Noteworthy among these instruments are the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

[30] M. Radin, *Natural Law and Natural Rights,* 59 YALE L. R. 214 (1950).

[31] Sedfrey Candelaria, *Philosophy of Human Rights and Emerging Perspectives: Western Versus the Eastern Concept—The Asean Scenario, in* 1998 PHILIPPINE PEACE AND HUMAN RIGHTS REVIEW, at 40 (1998). Atty. Candelaria states that apart from Christianity, Confucianism, Buddhism, Hinduism and Islam contain several precepts reflective of the Universal Declaration of Human Rights.

[32] *Id.* at 39.

[33] Merlin M. Magallona, *On the "Philosophical Basis" of Human Rights, in* MERLIN M. MAGALLONA, INTERNATIONAL LAW ISSUES IN PERSPECTIVE 147 (1996). Subsequently, Scholastic philosophers distinguished divine law from "natural law," imbuing the latter with "transitional elements from divine law to conventional or man-made law."

[34] *Id.*

> As we look back in history, we see the great formative stages of human rights in periods of sharp antagonism of classes and social interests exploding into revolutionary upheavals. In the clash of philosophical ideas reflecting the struggle of social forces, history screens out philosophies which impede the expanding socialization of freedom, and those that embody the 'felt necessities of the times' continue to prevail.[35]

Thus Magallona argues that in the struggle that displaced state power, "the natural-law theory of the transcendental nature of human rights persisted in the thinking of men and continued to influence their revolutionary motivation in destroying the sources of feudal oppression and misrule."[36] Whenever the State enforced its "oppressive rule" over the inhabitants of a particular territory by recognizing only the "concrete man-made rights of citizens," these citizens would re-affirm human rights that transcended the State, and would justify their struggle to overthrow state oppression by claiming that their struggle is a struggle for human rights.[37] Consequently, the development of human rights is due in large part to the interests of the protagonists of each of these struggles: "If the protagonists appeared to be fighting for ideas, it is because those ideas coincided with [their] interests. They struggled for those interests as reflected in ideas and fought for ideas in defense of interests."[38] Hence, one contemporary human rights publicist wrote:

> The present catalogue of human rights contained in the International Bill of Human Rights can be traced back to three different revolutionary movements,...[F]irst, the "bourgeois" revolutions, particularly in France and America in the last quarter of the eighteenth century; second, the socialist, anti-exploitation revolutions of the first two decades of this century; and third, the anti-colonialist revolutions that began immediately after the Second World War and culminated in the independence of many nations around 1960. The third revolutionary movement affected recent international human rights texts by giving a privileged status to self-determination and non-discrimination.[39]

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[35] *Id.* at 145.

[36] *Id.* at 147-148.

[37] *Id.* at 148.

[38] *Id.* at 149.

[39] S.P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 440 (1981).

From this perspective, the emergence of rights discourse in the late eighteenth century and the emerging primacy of human rights in the twentieth century speak of humankind's refusal to be assimilated and controlled wholesale by an oppressive State.

A. Post-EDSA Philippines and the Human Rights Constitution

That human rights are an assertion of the citizen's supremacy over state oppression is demonstrated by the emergence of human rights discourse in the Philippines during the Martial Law era. The Martial Law years were fraught with countless instances of human rights violations performed by government officials and agents who arbitrarily used the repressive force of the State to subdue its citizens. The people's victory at EDSA in 1986 was immediately followed by the ratification of the 1987 Constitution which has been called the 'human rights Constitution' because human rights were clearly the cornerstones of the Charter.[40] The Bill of Rights[41] and article XIII on social justice and human rights have likewise been called the "heart of the Constitution,"[42] as they provide the building blocks for the building of "a just and humane [Philippine] society."[43]

1. Constitutional protection of human rights

In article XI section 11, the Charter provides that "full respect for human rights is guaranteed and the dignity of every person is recognized." In line with this, the Constitution mandates Congress to "give the highest priority to the enactment of measures that protect and enhance the right of all people to human dignity..."[44] The high priority given to human rights protection is further emphasized in article XIV on Education, Science, Technology, Arts, Culture and Sports, which embody the State's commitment to the youth who represent the country's future. The Constitution mandates that education "shall inculcate

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[40] MUYOT, *supra* note 27.

[41] CONST. art. III secs. 1-22.

[42] Wigberto Tanada, J.B.L. Reyes, Cecilia Munoz-Palma, *Foreword, in* HUMAN RIGHTS READER: TOWARDS A JUST AND HUMANE SOCIETY, at ix (Ed Garcia, ed., 1990).

[43] CONST. Preamble.

[44] CONST. art. XIII, sec. 1.

patriotism, nationalism, foster love of humanity, respect for *human rights*..."[45] among other values and objectives in our youth. Human rights, therefore, become an integral part of the vision to construct a better society.

More particularly, the Constitution has imposed even higher standards of limitation to state power by drawing up an exhaustive Bill of Rights.

Not only did the 1987 Constitution reproduce substantially all the guarantees found in the Bill of Rights in the 1935 and 1973 Constitutions, but it also added the following prohibition against torture: "No torture, force, violence threat, intimidation or any other means which vitiate free will shall be used" against the accused, as a reaction to its high incidence during the Marcos regime.[46] It also prohibits "secret detention places, solitary, incommunicado, or other similar forms of detention."[47] To discourage the use of torture in obtaining evidence, the Bill of Rights also makes inadmissible any confession or admission obtained through the use of torture and other means which vitiate the free will of the accused.[48] Furthermore, the Constitution provides that "the employment of physical, psychological or degrading punishment against any prisoner or detainee, or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law.[49]

In addition to these provisions, all of which manifest a profound commitment to human rights, particularly civil and political rights, the Constitution also formed the Commission on Human Rights (CHR), whose chief function is to "investigate, on its own, or on complaint by any party, all forms of human rights violations involving civil and political rights..."[50] Interpreting its mandate, the CHR, through Resolution No. A-88-045,[51] delineated cases of human rights violations covered by its investigatory powers, thereby making explicit what the Philippine government considers and recognizes as "human wrongs":

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[45] CONST. art. XIV, sec. 3, para. 2 (Emphasis supplied).

[46] CONST. art. III, sec. 12, para. 1.

[47] CONST. art. III, sec. 12, para. 2.

[48] CONST. art. III, sec. 12, para. 3.

[49] CONST. art. III, sec. 19, para. 2.

[50] CONST. art. XIII, sec. 17.

[51] Commission on Human Rights, Res. No. A-88-045 (July 26, 1988), *in* MUYOT, *supra* note 27, at 30.

> The civil and political rights guaranteed in the Constitution and in statues are human rights violations *per se*...or are "easily and readily discernable as palpable transgressions of *any of the basic rights of a human being as defined by the Universal Declaration of Human Rights and international covenants and treaties on human rights, to which the Philippines is a signatory*." (Emphasis supplied)[52]

In other words, the Philippine State has made it a priority not only to protect the human rights it has expressly recognized in its Constitution; more importantly, it has expressed its recognition of human rights standards embodied in the Universal Declaration of Human Rights, international covenants and treaties.

2. The Philippines' International Obligation to Protect Human Rights

a. The Incorporation Clause

The Philippine Constitution provides two ways by which the Philippine state incurs an international obligation. The first is embodied in what is known as the Incorporation Clause:

> The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land* and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations. (emphasis supplied)[53]

According to Dean Merlin Magallona of the University of the Philippines, College of Law, "generally accepted principles of international law" are customary norms of international law and general principles of law that the Philippines, by virtue of the Incorporation Clause, considers part of Philippine law.[54] The effect of the Incorporation Clause is that international law is incorporated into Philippine law, thereby "creating legal rights and obligations within Philippine territory, and regulating the conduct of government and organs, as well as the relations of individual citizens with each other and with the

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[52] MUYOT, *supra* note 27, at 29, *citing* Samuel M. Soriano, *Prosecution and Mediation of Human Rights Cases*, 3 JUDGES JOURNAL 30, 32 (1988).

[53] CONST. art. II, sec. 2.

[54] Merlin Magallona, A Primer in International Law in Relation to Philippine Law, 34-35 (1996) [hereinafter, Magallona II].

government."[55] In several cases, the Supreme Court recognized human rights as defined in the Universal Declaration of Human Rights as part of Philippine law based on international customary law by virtue of the Incorporation Clause.[56]

b. The Treaty Clause

The second means by which international obligations are formed on the part of the Philippine State is embodied in the Treaty Clause of the 1987 Constitution. The Treaty Clause provides that international conventions or treaties to which the Philippines is a party, are recognized as valid and effective as part of domestic law and as a source of international obligations *if concurred in by the Senate, and if the treaties or conventions have entered into force by their own terms.*[57] In order that a treaty may be considered part of Philippine law, the Senate's ratification of the treaty or convention is necessary.

c. Customary international law and treaty norms in Philippine law concerning international criminal law

A glance at the number of international human rights instruments ratified by the Philippines will make a person believe that the Philippines is one of the leading countries in the espousal of human rights.[58] These ratified

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[55] *Id.*, at 33.

[56] Among these cases are Reyes v. Bagatsing, G.R. No. L-65366, 9 November 1983, 125 SCRA 553; PAFLU v. Secretary of Labor, G.R. No. L-22228, 27 February 1969, 27 SCRA 40; and Borovsky v. Commissioner, 90 Phil. 107 (1951).

[57] CONST. art. VII, sec. 21.

[58] Amnesty International and the U.N. count the following among the treaties and international conventions the Philippines has ratified:

- The International Covenant on Civil and Political Rights
- The Optional Protocol to the ICCPR
- The Convention on the Prevention and Punishment of the Crime of Genocide
- The 1949 Geneva Conventions
- The International Covenant on Economic, Social and Cultural Rights
- International Convention on the Suppression and Punishment of the Crime of Apartheid
- The International Convention on the Elimination of All Forms of Racial Discrimination
- The Convention on the Elimination of All Forms of Discrimination Against Women

international treaties and conventions have made the norms and provisions embodied therein legally demandable and enforceable as Philippine law.

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

In addition to ratifying the above conventions, the Philippines has acceded[59] to a number of treaties that recognize the existence of certain international crimes. Among these are the following:

- Convention On The Non-Applicability Of Statutory Limitations To War Crimes And Crimes Against Humanity (accession, May 15, 1973; entry into force, November 11, 1970, by virtue of article 8)

- The International Labor Organization (ILO) Freedom of Association and Protection of the Right to Organize Convention
- The ILO Right to Organize and Collective Bargaining Convention
- The ILO Abolition of Forced Labor Convention

See, Amnesty International, Asia: Signatures, ratifications and accessions to selected human rights instruments, in HUMAN RIGHTS READER: TOWARDS A JUST AND HUMANE SOCIETY, at 451 (Ed Garcia, ed., 1990). *See, also,* UN Treaty Series Online, (visited, 31 January 2000) <http://untreaty.un.org/English/sample/English Internet Bible/part I/chapter XVIII/ treaty10.asp>

[59] Accession is "a method by which a State, under certain conditions, becomes a party to a treaty of which it is not a signatory and in the negotiation of which it did not take part." *See,* MERLIN MAGALLONA, A PRIMER ON THE LAW OF TREATIES, 12 (1997) [hereinafter, MAGALLONA III].

- Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (accession, July 18, 1986; entry into force, June 26, 1987, in accordance with article 27 (1))

- Amendment to article 17(7) and 18(5) of the Convention Against Torture (accession, November 27, 1996)

- Slavery Convention (accession, July 12, 1955; entry into force, July 7, 1955)

In acceding to the above treaties, the Philippines has expressed its recognition of the norms and principles embodied in the above conventions as well. While the absence of Senate action in the Philippines' accession to these conventions fail to transform the norms recognized by these conventions into Philippine law through the Treaty Clause, it can be claimed that such norms have become part of Philippine law through the Incorporation Clause.

It is clear from the foregoing discussion that the Philippines has bound itself to the promotion and protection of human rights, especially the prevention of the commission of certain crimes recognized by the international community to be crimes against humanity itself. More importantly, the Philippines' ratification and accession to international conventions protecting human rights through the recognition and punishment of these international crimes have incorporated or transformed these internationally recognized crimes into part of the law of the land. It thus becomes necessary for the Philippines to find ways and means by which it may enforce its international obligation to recognize and condemn international crimes.

On 24 March 1998, then President Fidel V. Ramos signed Administrative Order No. 387 which created an International Criminal Court Task Force to study and formulate policy recommendations on the Philippine government's position on the ICC, as well as to recommend legislative measures necessary in furtherance of the Philippine's cooperation with other nations in setting up the ICC.

The Preamble of the Administrative Order emphasizes the Philippines' commitment to finding a viable means of "enhancing international criminal justice enforcement":

> Whereas the proposed establishment of the International Criminal Court has received strong support from the global community owing to the rising incidence of international crimes that has undermined international peace and stability;
>
> Whereas the Philippines has signified its support for the establishment of the International Criminal Court as a legal mechanism that will enhance international criminal justice enforcement;
>
> Whereas, the recent resolve of the global community to establish a new international legal order predicated on consensus and collective action has brought forth a number of complex issues requiring serious consideration by a group of experts from the legal field in order for the involvement of the Philippines in the Preparatory Committee of the International Criminal Court to be come more meaningful...[60]

B. *Human Rights as a Worldwide Concern: The Emergence of Human Rights Institutions and Instruments in the Twentieth Century*

The Philippines' recognition of human rights took place in the context of a much broader movement of human rights protection that gained impetus after the Second World War. Like the growth of human rights discourse in the Philippines, the origins of human rights protection on the international plane were in large part due to the oppressive action of states and their leaders during the two world wars. The perpetration of genocide, war crimes and other crimes against humanity led by certain state leaders such as Hitler so shocked the world's conscience that human rights quickly became a worldwide concern at the end of World War II.

The First and Second World Wars were occasions that showed how the excesses of a State ultimately result in the widespread commission of violent acts

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[60] Adm. Ord. No. 387 (1998), Preamble.

that trample upon the inherent dignity of human beings. The states that waged these wars could find no justification for the demise of millions. This led to certain developments which heralded the emergence of human rights as a worldwide concern at the end of the twentieth century. First, the very same states that contributed to the unjustifiable sacrifice of human lives during the war began to recognize the existence of crimes committed against all humankind, and sought ways by which the perpetrators of these crimes may be held accountable. Second, at the end of the Second World War, several international instruments codified such crimes committed against all humankind. These two developments necessitated the creation of a tribunal to prosecute and punish those found guilty of acts recognized and codified in international instruments as crimes committed against all of humanity.

3. The Recognition of Crimes Against Humanity and War Crimes and the International Community

Although the concepts of war crimes and crimes against humanity gradually developed from the Roman concept of *bellum injustum*, it was during the early twentieth century and after the two World Wars that international criminal law began to take shape. The number of acts that breached existing restrictions on warfare,[61] the gravity of the crimes[62] committed, as well as the flagrancy with

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[61] Remigiusz Bierzanek lists as some of the major restrictions on warfare developed in the second half of the nineteenth century to be: The Treaty of Paris of 1856 which outlawed privateering; the first Red Cross Convention concerning the amelioration of the conditions of the wounded and sick in armed forces in the field which was concluded in Geneva in 1864; The Hague Conference, which codified the rules of land warfare in 1907, as well as the other Hague Conventions concerning particular fields of the law of warfare and neutrality. All these conventions are only some of many conventions that form a fairly comprehensive body of rules imposing numerous restrictions on the belligerents in dealing with enemy armies and civilian populations. *See*, Remigiusz Bierzanek, *The Prosecution of War Crimes, in* I A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT 561 (M. Cherif Bassiouni and Ved P. Nanda, eds., 1973).

[62] Bierzanek states that World War I was fraught with instances when the following crimes were committed on a large scale: Massacres, torture, the arrest and execution of hostages, artillery and aerial bombardments of open towns, sinking of merchant ships without any regard for the safety of passengers and crew, collective penalties, use of shields formed of living human beings, attacks on hospitals, looting and wanton destruction of public and private property, methodical and deliberate devastation of private industries, disregard of the rights of the wounded, prisoners of war and women and children. *See*, Remigiusz Bierzanek, *The*

which they were committed, appalled the world at the end of the First World War. The pressure of public opinion demanded the trial and punishment of war criminals. Thus, on 25 January 1919, the Paris Peace Conference appointed a Commission to inquire into and report violations of international law alleged against Germany and her Allies.[63] Two months later, the Commission specified a list of offenses that violated the laws and customs of war.[64]

Prosecution of War Crimes, *in* I A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT 562 (M. Cherif Bassiouni and Ved P. Nanda, eds., 1973).

[63] Remigiusz Bierzanek, *The Prosecution of War Crimes*, *in* I A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT (M. Cherif Bassiouni and Ved P. Nanda, eds., 1973) 562.

[64] *Id.*, at 563. The following is the list of offenses specified by the Commission:

1. Murders and massacres; systematic terrorism.
2. Putting hostages to death.
3. Torture of civilians.
4. Deliberate starvation of civilians.
5. Rape.
6. Abduction of girls and women for the purpose of forced prostitution.
7. Deportation of civilians.
8. Internment of civilians under inhuman conditions.
9. Forced labor of civilians in connection with the military operations of the enemy.
10. Usurpation of sovereignty during military occupation.
11. Compulsory enlistment of soldiers among the inhabitants of occupied territory.
12. Attempts to denationalize the inhabitants of occupied territory.
13. Pillage.
14. Confiscation of property.
15. Exaction of illegitimate or exorbitant contributions and requisitions.
16. Debasement of currency and issue of spurious currency.
17. Imposition of collective penalties.
18. Wanton devastation and destruction of property.
19. Deliberate bombardment of undefended places.
20. Wanton destruction of religious, charitable, educational and historic buildings and monuments.
21. Destruction of merchant ships and passenger vessels without warming and without provision for the safety of passengers and crew.
22. Destruction of fishing boats and relief ships.
23. Deliberate bombardment of hospitals.
24. Attack on and destruction of hospital ships.
25. Breach of other rules of the Red Cross.
26. Use of deleterious and asphyxiating gases.
27. Use of explosive or expanding bullets and other inhuman appliances.

In its inquiry into war crimes, the Commission also noted the atrocities committed by the Central Powers against their own nationals, such as the Turkish authorities' massacre of the Armenian population in 1915-1917 and the crimes committed by the Austrian troops against the Italian national minority within Austrian territory. This Commission was the first to identify the Armenian massacre and the crimes committed against the Italians as "crimes against humanity" that ought to be prosecuted at the soonest possible time.[65]

The Commission's findings were adopted to a limited extent by the Treaty of Versailles, which envisioned the formation of an international criminal court to prosecute the German Emperor Wilhelm II Hohenzollern for "a supreme offense against international morality and the sanctity of treaties."[66] It was obvious, however, that the world had not yet learned its lesson from the strife wrought by World War I. Despite the work of the Committee, no international prosecution took place due to political considerations.[67] The German Supreme Court took over the Committee's task of investigating the persons whose names were drawn up by the Commission, and prosecuted only twenty-two. Of these, only twelve were convicted.[68] Germany's insignificant number of prosecutions and convictions barely disguised its leaders' desire to wage another world war. However, Germany's cavalier treatment of war criminals was matched by the adamant objection of the United States and Japan to the idea that "crimes against the law of humanity" existed.[69]

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28. Directions to give no quarter.
29. Ill-treatment of wounded and prisoners of war.
30. Employment of prisoners of war on unauthorized work.
31. Misuse of flags of truce.
32. Poisoning of wells.

[65] M. Cherif Bassiouni, *The Journey Toward the International Criminal Court*, *in* No Peace Without Justice: Rome, 15 June - 17 July Diplomatic Conference for the Establishment of an International Criminal Court, Compilation of UN Documents and Draft ICC Statute before the Diplomatic Conference 1 (M. Cherif Bassiouni, ed., 1998) [hereinafter, Bassiouni I].

[66] Treaty of Versailles (1919), art. 227, *in* III Treaties, Conventions, International Acts, protocols and Agreements between the United States of America and Other Powers, 1910-1923, at 3329 (Redmond, ed., 1923).

[67] Bassiouni I, *supra* note 65, at 1.

[68] *Id.*

[69] *Id.* The American representatives to the Commission objected to the concept of war waged against the "laws and principles of humanity" arguing that the former were not a sufficiently reliable standard of conduct and that "war was and is by its very nature inhuman

This objection quickly disappeared when the tragic lessons taught by World War II became evident:

> It was not until World War II...that the rulers of states finally decided to cast off the old armor of prejudice which had led them to declare any international penal justice as impossible, as the idea of repressing acts committed by states as well as by individuals endangering directly or indirectly the supreme legal good, i.e., peace, was often regarded as the manifestation of a dangerous revolutionary statement.[70]

The war crimes committed by Germany and the Axis forces during the Second World War, particularly, Germany's conduct of war and treatment of the population of occupied countries, did not merely violate existing laws of warfare; they were "*outright bids to exterminate whole nations, particularly the Jewish national groups, large sections of the Polish people, and peoples of the Soviet Union.*"[71] This development made the prosecution and punishment of international war criminals the principal means by which the whole-scale violation of human rights may be put to a stop.

While the war was still in progress, the Allied Powers took steps toward planning the post-war prosecution and punishment of war criminals. On October 20, 1943, they set up a Commission for the Investigation of War Crimes.[72] In the light of the atrocities committed by the Axis forces, the Commission understood the term "war crimes" to pertain not only to violations of the laws and customs of warfare, but also to crimes against humanity and crimes against peace.[73] It recognized that the catalogue of war crimes established by the 1919 Commission

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[and even] acts consistent with the laws and customs of war, although...inhuman [were] nevertheless not subject to punishment by a court of justice," for "the laws and principles of humanity are not certain, varying with time, place and circumstance, and accordingly, it [must] be [left] to the conscience of the individual judge." *See*,Bierzanek, *supra* note 63, at 564.

On the other hand, the Japanese delegates to the Peace Conference Commission decried "the consequences which would be created in the history of international law by the prosecution for breaches of the laws and customs of war of enemy heads of states before a tribunal constituted by the opposite party." *See*, Bierzanek, *supra* note 63, at 567.

[70] V. Pella, La Guerre-Crime et Les Criminels de Guerre, 16 (1946), *in* Bierzanek, *supra* note 63, at 571.

[71] Bierzanek, *supra* note 63, at 571.

[72] *Id.*, at 574.

[73] *Id.*

established by the Paris Peace Conference was not an exhaustive list of such crimes and extended the list by adding "indiscriminate mass arrests" to the catalogue.[74] As to crimes against humanity, the Commission felt that the concept of war crimes should be extended to cover atrocities committed on racial, political or religious grounds in enemy territory.[75]

Taking into consideration the recommendations of this Committee, the Four Major Allies signed what became known as the London Agreement of August 8, 1945, to which the Charter of the International Military Tribunal (IMT) was annexed.[76] Nineteen other governments subsequently acceded to the treaty.[77] An important innovation introduced by the Charter of the IMT was its provision for individual liability and punishment, as opposed to state responsibility, for the violation of international law.[78] The IMT was the first to prosecute individuals, irrespective of their rank or position, for "crimes against peace,"[79] "war crimes,"[80] and "crimes against humanity."[81]

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[74] *Id.*

[75] *Id.* at 575.

[76] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter, London Agreement].

[77] Bassiouni I, *supra* note 65, at 2.

[78] London Agreement, *supra* note 76, at art. 6.

[79] London Agreement, art. 6. Crimes against peace included the planning, preparation, initiation or waging of a war of aggression; or a war in violation of international treaties, agreements, or assurances; or participation in a common conspiracy for the accomplishment of any of the foregoing.

[80] London Agreement, art. 6. War crimes include violations of the laws and customs of war.

[81] London Agreement, art. 6. Crimes against humanity included murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political , racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

To facilitate the prosecution of persons charged with the crimes contained in the Charter of the IMT, the Allied Control Council governing Germany[82] passed Law No. 10, which established national tribunals for this purpose in the Allies' respective zones of occupation. The first series of trials that were held pursuant to Law No. 10 were the Nuremberg Trials, wherein twenty-four "major war criminals" were indicted, and twenty-two were tried.[83]

The establishment of the International Military Tribunal for the Far East (IMTFE) followed the creation of the IMT. The former was created through General Douglas MacArthur's promulgation of the Tokyo Charter in his capacity as Supreme Allied Commander for the Pacific Theater.[84] The IMTFE prosecuted twenty-eight persons.[85]

The Nuremberg and Tokyo War Tribunals put on trial major war criminals of Germany and Japan to impose retribution for the crimes committed during the war period and "to erect a signpost of deterrence for the future."[86] In other words, the Nuremberg and Tokyo judgments not only punished those responsible for acts such as murder and extermination of ethnic groups, deportation and enslavement — all of which were deemed as crimes according to the principles of criminal law common to civilized nations; more importantly, the

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[82] The body was composed of the Four Major Allies of the Second World War.

[83] Bassiouni I, *supra* note 65, at 2. Additional trials pursuant to Law No. 10 were carried out in the Four Allies' zones of occupation. These were called, "Subsequent Proceedings." More than 15,000 people were prosecuted in these proceedings. In addition, many of the countries formerly occupied by Germany prosecuted German military personnel and nationals who had cooperated with the German occupying forces.

[84] Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo Establishing the International Military Tribunal of the Far East, 19 January 1946, T.I.A.S. No. 1589, 4 Bevans 20.

[85] Bassiouni I, *supra* note 65, at 2. The Allies in the Far East then proceeded to prosecute in the territories they respectively occupied or colonized, Japanese prisoners of war for war crimes. Australia held 296 trials; China, 605; Netherlands, 448; Philippines, 72; United Kingdom, including proceedings undertaken by Canada, 314; and the United States, 314.

[86] Christian Tomuschat, *A System of International Criminal Prosecution is Taking Shape*, INTERNATIONAL COMMISSION OF JURISTS: THE REVIEW 56(No. 50 1993).

principles underlying the Nuremberg and Tokyo judgments became the foundation for the establishment of an international criminal court.[87]

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[87] *Id.* In Resolution 95 (I) of 11 December 1946, the General Assembly affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal," and initiated the explicit drafting of these principles (Resolution 95/I of December 11, 1946, *in* Bierzanek, *supra* note 63, at 578). The General Assembly then charged the International Law Commission (ILC) with developing a Code of Offences Against the Peace and Security of Mankind and elaborating a statute for international criminal jurisdiction (Bassiouni I, *supra* note 65, at 2).

By 1950, the ILC adopted a report containing a formulation of principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal. *See, Report of the International Law Commission*, U.N. GAOR V, Supp. 12 (A/1316) 11-14 (1950).

The first principle is based on the following passage of the judgment of the Nuremberg Tribunal:

> That international law imposes duties and liabilities upon individuals as well as upon states has long been recognized...Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced (TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947) *in* Bierzanek, *supra* note 63, at 578).

The ILC translated this excerpt into Principle I which states: "Any person who committed an act which constitutes a crime under international law is responsible therefor and liable for punishment." (*See, Report of the International Law Commission*, U.N. GAOR V, Supp. 12 (A/1316) 11-14 (1950)).

This principle was the first expression of the world's adoption of the idea that "international law may impose duties on individuals directly without any interposition of internal law."(Bierzanek, *supra* note 63, at 578). This idea differed greatly from the generally accepted notion that states, and not individuals, are the subjects of international law.

Principle II follows the radical bent of Principle I by providing that even if internal law does not impose a penalty for an act which constitutes a crime under international law, international law may still hold liable a person who committed such an act (Bierzanek, *supra* note 63 at 587).

Principles III further provides that the fact that the person who committed an act considered a crime under international law acted as head of state or as a responsible government official does not relieve him form responsibility under international law.

Principle IV also similarly provides that the fact that such a person acted on the orders of his government or of a superior does not excuse his actions provided a moral choice was in fact open to him.

Principle VI defines three categories of international crimes as these were defined in the Charter annexed to the London Agreement of 1945: crimes against peace; war crimes; and

4. International instruments condemning international crimes

Two major responses to the Nuremberg and Tokyo Trials were the Genocide Convention of 1948[88] and the four Geneva Conventions of 1949.[89]

In 1948, the UN successfully gave greater precision to some categories of crimes against humanity and war crimes through the approval of the text of a Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, Genocide Convention). Article II of the Convention defines the crime of genocide, and article VI states that persons charged with the crime shall be "tried by a competent tribunal of the State in the territory of which the act was

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crimes against humanity. Principle VI reads: The crimes hereinafter set out are punishable as crimes under international law:

Crimes Against Peace:

- Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

War Crimes:

- Violations of the laws or customs of war which include but are not limited to murder, ill-treatment or deportation to slave-labour, or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages or devastation not justified by military necessity.

Crimes Against Humanity:

- Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

This categorization of international crimes is reproduced in the Rome Statute of the ICC, as three of the four crimes under the subject matter jurisdiction of the tribunal.

[88] U.N. GAOR Res. 96 (I), December 11, 1946; Res. 260 A (III), December 9, 1948; 78 U.N.T.S. 277.

[89] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 August 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Conditions of Wounded Soldiers and Shipwrecked Men of Armed Forces at Sea, 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relating to the Treatment of Prisoners of War, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 12 August 1949, 6 U.S.T. 3518, 75 U.N.T.S. 287.

committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

The four Geneva Conventions of 1949 are likewise significant because they lay down the customary norms of international humanitarian law, including an enumeration of acts which these customary norms consider as "grave breaches" and "serious offenses" tantamount to war crimes.

The Genocide Convention and the Geneva Conventions were followed by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[90] which was enacted on December 9, 1968. It provided that no statutory limitation shall apply to war crimes as defined by the Charter of the International Military Tribunal of Nuremberg, to the "grave breaches" enumerated in the Geneva Conventions of August 12, 1949 for protection of war victims,[91] as well as to crimes against humanity whether committed in time of war or peace, eviction by armed attacks, inhuman acts resulting from the policy of apartheid and the crime of genocide *even if such acts do not constitute a violation of the domestic law of the country in which they were committed.*[92]

In addition to these conventions, several treaties[93] and international agreements were contracted between 1954-1989. These treaties and instruments increasingly sought to define genocide, war crimes, aggression and crimes against humanity with greater precision. Some of these treaties, such as those on genocide and apartheid, called for international tribunals to try the crimes they condemned. All these developments in the realm of formal international criminal law strengthened initiatives toward the establishment of an ICC.

The recognition of the existence of crimes against humanity, as well as the plethora of international instruments condemning the use of force and the

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[90] G.A. Res./2391 (XXIII), December 9, 1968.

[91] G.A. Res./2391 (XXIII), December 9, 1968, art. I (a).

[92] G.A. Res./2391 (XXIII), December 9, 1968, art. I (b).

[93] See, Protocol Additional to the Geneva Conventions of 12 August 1949 and Relative to the Protection of Victims of Armed Conflicts, 12 December 1977 at 1125 U.N.T.S. at 3; Draft Code of Crimes Against the Peace and Security of Mankind: Report of the International Law Commission on the Work of Its Forty-Fifth Session, 3 May – 23 July 1993, in U.N.G.A. 48th Sess. Official Records Supp., 10 at 21, U.N. Doc A/48 10 (1993).

commission of crimes against humanity, in the post-war era manifests a clamor to enforce the moral obligation to protect human rights. It speaks of humanity's desire to transform what previously was a mere moral duty into a legal and enforceable obligation. It became increasingly apparent that to enforce this obligation necessitated the creation of an international criminal tribunal.

II. THE CASE FOR THE INTERNATIONAL CRIMINAL COURT

A. *History of the International Criminal Court*

The establishment of the ICC began with the UN General Assembly's formal endorsement of principles underlying the International Military Tribunals' judgments in Nuremberg and Tokyo in Resolution 95 (I) of 11 December 1946. Soon after, it asked the International Law Commission (ILC) to draft a statute creating an international criminal court that would generalize the lessons drawn from the trials of German and Japanese war criminals. Furthermore, the realization that "individual responsibility, as opposed to the somewhat abstract responsibility of states as collective entities, would lend teeth to international rules on minimum standards of civilization and could, therefore operate as a powerful deterrent,"[94] the ILC was likewise requested to develop a Code of Offences Against the Peace and Security of Mankind and to elaborate a statute for international criminal jurisdiction.[95]

Politicking during the Cold War era stymied further discussions on the subject.[96] Although the Draft Code of Offences prepared by the ILC and the work

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[94] Tomuschat, *supra* note 86, at 57.

[95] Bassiouni I, *supra* note 65, at 2.

[96] M. Cherif Bassiouni narrates that the turf wars during the Cold War era caused the creation of committees that were assigned to do work under the ILC's original mandate. The creation of these committees caused innumerable delays in the creation of the ICC. For instance, despite the fact that in 1951, the ILC's Committee on International Criminal Jurisdiction finished its draft on subject, it was asked by the General Assembly to produce a more acceptable text. Subsequently, the subject of international criminal jurisdiction was taken from the ILC's mandate, and the work was given to a newly created committee. When this new committee completed its work in 1953, the General Assembly tabled the text it produced because the ILC had not yet completed its work on the Code of Offences. When the ILC completed itself the next year, the General Assembly again refused to discuss its output because

of two separate Committees created by the General Assembly on related issues (international criminal jurisdiction and aggression) were reconsidered by the General Assembly in 1978, it was only in 1989 when states exhibited a renewed interest in discussing the creation of an international criminal tribunal. In a special session of the General Assembly on drug trafficking, A.N. Robinson, then Prime Minister of Trinidad and Tobago, assumed a leadership role within the Caribbean and Latin American countries to rekindle interest in the question of international criminal jurisdiction.[97] Through Robinson, Trinidad and Tobago proposed the possibility of establishing an international criminal court to prosecute major drug traffickers. Since major governments opposed the idea, the suggestion did not succeed.[98] Nevertheless, the 1989 Special Session on Drug Trafficking caused the ILC to look for models for an institution with international criminal jurisdiction.

The dramatic shift in worldwide opinion concerning international criminal jurisdiction became evident when the UN Security Council issued Resolution 827 (1993) of 25 May 1993.[99] The Resolution established the "International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991." Popularly known as the International Criminal Tribunal for Yugoslavia, or ICTY, this tribunal was given the jurisdiction to prosecute the following crimes: genocide, crimes against humanity and war crimes. With the exception of "crimes against peace," its mandate included all of the crimes that were identified by the Nuremberg Charter.[100]

The creation of the ICTY was soon followed by the creation of the International Criminal Tribunal for Rwanda (ICTR) in 1994. Both Security Council-created *ad hoc* tribunals contributed to the growing interest in the creation of a permanent ICC. These two tribunals provided the psychological,

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another newly created committee whose task it was to define "aggression" as a crime under international law, had not yet completed its work. The Committee on Aggression completed its work only in 1974. *See*, Bassioun I, *supra* note 65, at 3. Tomuschat is also of the opinion that the delays in the creation of the ICC were due in large part to tensions engendered by the Cold War. *See*, Tomuschat, *supra* note 86, at 57.

[97] Bassiouni I, *supra* note 65, at 3.

[98] *Id.*

[99] UN G.A. Res. 4654 (XLVI), 46th Sess., Official Records, Supplement 49, at 286, UN Doc. A/46687 (1991).

[100] Bassiouni I, *supra* note 65, at 4.

political and legal breakthrough for the existence of the ICC and the concept of international accountability of individuals for gross and massive crimes against all of humanity. In addition, they underscored the fact that military and political responses to genocide, war crimes and crimes against humanity were insufficient.

The relative successes of both tribunals proved that an ICC could exist and function. Thus, shortly after the ICTR was created, the ILC produced a draft statute for the ICC. An Ad Hoc Committee established by the General Assembly reviewed this draft statute. By 1996, the ILC had produced a new and final text of the Draft Code.

In 1996, the UN General Assembly set up a Preparatory Committee for the Establishment of an International Criminal Court which produced a "consolidated text" submitted to the Diplomatic Conference held in Rome between 15 June and 17 July 1998. The output of the Rome Conference of 1998 was the Rome Statute for the Establishment of a Permanent International Criminal Court (ICC).

B. Salient features of the International Criminal Court

Thus far, this paper has outlined the emergence of human rights as a worldwide concern, especially in the aftermath of World War II. It has described this development as one which has increasingly been formalized in international agreements among states, and one which slowly, but surely moved toward the recognition and penalization of international crimes, which include genocide, war crimes, and crimes against humanity. The latter phenomenon has given rise to the need for mechanisms to enforce the obligations imposed by international human rights agreements and treaties.

At the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome from 15 June to 17 June 1998, all the developments previously outlined by this paper converged in the establishment of the International Criminal Court. The Statute of the Court, otherwise known as the Rome Statute of the International Criminal Court,

was approved by 120 states, as against seven that voted against it, and twenty-one that abstained from voting.[101]

The Rome Statute provides that it shall enter into force on the first day of the month after the sixtieth day following the date of the deposit of the sixtieth instrument of ratification, acceptance, approval or accession with the UN Secretary General.[102] The Statute will remain open for signature until 31 December 2000.[103]

1. An independent tribunal

In an article entitled, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference,*[104] John Washburn, co-chair of the Washington Working Group on the International Criminal Court and French lawyer Fanny Benedetti, both of whom attended the Rome Conference, write that a major concern of the delegates was to insulate the ICC from political influence.[105]

This concern was addressed by the delegates' choice of creating the ICC through the enactment of a treaty. The Nuremberg and Tokyo Tribunals were widely criticized for being created by the victors of World War II, and as such, were the dispensers of "victors' justice." The International Criminal Tribunals of Yugoslavia and Rwanda were equally held suspect because they were created by virtue of UN Security Council Resolutions.[106] Chapter VII of the UN Charter

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[101] Floresita Conda, Notes on the International Court of Justice vis-à-vis the International Criminal Court, 14 THE WORLD BULLETIN 103, 104 (May-August 1998); Fanny Benedetti and John Washburn, Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference, 5 GLOBAL GOVERNANCE 1, 27 (1999). The seven states that rejected the treaty were: the United States, Israel, China, Iraq, Yemen, Libya and Qatar.

[102] Rome Statute of the International Criminal Court, Doc. A-Conf. 1839* of 17 July 1998, art. 126 (1) (1998) *in* 14 THE WORLD BULLETIN 119, 198 (May-August 1998).

[103] *Id.* at art. 125 (1).

[104] Fanny Benedetti and John Washburn, Drafting the International Criminal Court Treaty : Two Years to Rome and an Afterword on the Rome Diplomatic Conference 5 GLOBAL GOVERNANCE 1, 15 (1999).

[105] *Id.*, at 18.

[106] The ICTY was created by UN Security Council Resolution 827 on 25 May 1993. *See,* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), reprinted

gives the Security Council broad responsibilities "with respect to threats to the peace, breaches of the peace and acts of aggression," with specific authority to decide what measures shall be taken to maintain or restore international peace and security.[107] The UN Security Council created the ICTY and ICTR through the exercise of its powers under Chapter VII. Many states, especially developing countries, read into the Security Council's creation of these tribunals, the fact that the Security Council is flexing its muscle to keep states in line, in the name of protecting peace. Furthermore, these states distrust the ICTY and ICTR because they suspect that the latter institutions are venues for the Security Council to prosecute nationals of states the latter are unfriendly with:

> The creation of...ad hoc tribunals has advanced the cause of international justice, but it has raised questions of fairness and political privilege. For example, why have such tribunals been created for the former Yugoslavia and Rwanda but not for Chechnya, Somalia, Cambodia or the Persian Gulf War? The answer lies in their creation. The decision to create an ad hoc tribunal falls to the United Nations Security Council, and is therefore subject to the full range of considerations that influence that political body. Foremost among these is the possibility of a veto by any of the Security Council's five permanent members. No matter how successful the ad hoc tribunals may be at dealing with specific crimes, their selective creation and narrow focus creates an impression of unfairness and unequal treatment. [108]

The creation of the ICC through the enactment of the Rome Statute avoids the politicization that may result from the involvement of the Security Council. It also avoids administrative difficulties inherent in the creation of ad hoc tribunals, as well as national constitutional prohibitions on the establishment

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in 32 I.L.M. 1203 (1993). The Statute of the ICTY as adopted by the Security Council is an Annex to the UN Secretary General;s report on the ICTY. *See, Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808*, U.N. Doc. S/25704/Add. 1/Corr.1 (1993). The ICTR was created by UN Security Council Resolution 955 on 8 November 1994. *See*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994).

[107] UN CHARTER, art. 39-41.

[108] Bartram S. Brown, Primacy or Complementarity: Reconciling the Jurisdiction of the National Court and the International Criminal Tribunal, 23 YALE J. OF INT'L L. 383, 386 (1998).

of special courts.[109] Since a treaty is enacted through an agreement forged between the States, it is generally presumed to have been created in accordance with the will of the parties thereto. It is likewise presumed that states that enter into such treaties have taken care, or will take care of domestic laws that are inconsistent with the law of the treaty. Those who become parties to the treaty are bound to comply in good faith with treaty obligations by enforcing these obligations in the domestic realm:

> One of the oldest and most fundamental rules in international law is *pacta sunt servanda*—international agreements must be performed in good faith...A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties...A state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations taken.[110]

That there are constitutional or administrative proscriptions against certain treaty provisions does not stop them from being open to international sanctions for noncompliance to the treaty in the international realm.[111]

Another means by which the independence of the court is ensured is apparent in article 2 of the Rome Statute which provides: "The [ICC] shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the ICC on its behalf."[112] This provision clearly declares that the ICC is an institution independent from the UN. Thus, in order that the ICC and the UN may establish a relationship between themselves, an agreement between these two institutions must be approved by the States Parties to the Rome Statute.

Finally, the ICC ensures that no State shall claim a monopoly over the Court, even as the ICC Statute provides that the seat of the Court shall be at The

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[109] L. Rao Penna, *The International Criminal Court*, 1 SINGAPORE J. OF INT'L AND COMP. L. 227, 237 (1997).

[110] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 66 .

[111] Vienna Convention on the Law of Treaties (entered into force, 27 January 1980; ratified by the Philippines on 15 November 1972.), art. 27. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

[112] Rome Statute, *supra* note 102, art. 2.

Hague in Netherlands ("the host State"),[113] by providing that the ICC needs to enter into a headquarters agreement with the host State to be approved by the Assembly of States Parties.[114] Furthermore, it may sit elsewhere, whenever it considers it desirable.[115]

2. The Composition of the ICC

Eighteen judges of different nationalities and representing the principal legal systems of the world shall serve the Court. They are required to be persons of high moral character, impartiality and integrity who possess qualifications required of the occupants of the highest judicial offices in their countries.[116] Additionally, they are to have either (a) criminal trial experience, such as that possessed by a judge, prosecutor or advocate in criminal cases, or (b) recognized competence in international law, particularly international humanitarian law and international human rights law.[117]

Each State Party may nominate not more than two qualified and willing persons of different nationalities.[118] From this set of nominees, the States Parties elect eighteen judges by secret ballot. Ten judges are elected from among the persons nominated as having criminal trial experience. The next eight are elected from among those nominated as having recognized competence in international law.

The Rome Statute provides that the ICC shall be composed of the following organs: (a) The Presidency; and (b) An Appeals Chamber, a Trial Chamber, and a Pre-Trial Chamber; (c) The Office of the Prosecutor; and (d) The Registry.[119]

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[113] *Id.*, at art. 3, para. 1.
[114] *Id.*, at art. 3, para. 2.
[115] *Id.*, at art. 3, para. 3.
[116] *Id.*, at art. 36, para. 3 (a).
[117] *Id.*, at art. 36, para. 3 (b).
[118] *Id.*, at art. 36, para. 7.
[119] *Id.*, at art. 34.

a. The Presidency[120]

Upon election, the judges elect from among themselves the President, the first and second Vice Presidents, and two 'alternate Vice Presidents.' All enjoy a term of three years. The President and Vice Presidents constitute the Presidency, which is the organ responsible for the ICC's administration, pre-trial proceedings and other judicial functions of a procedural or preliminary nature.

b. The Chambers[121]

The Presidency will constitute an Appeals Chamber consisting of the President and six other judges, three of whom have recognized competence in international law. The President presides over this chamber.

Judges who are not in the Appeals Chamber constitute the Trial Chambers and other chambers such as the Pre-Trial Chamber. They also substitute for members of the Appeals Chamber when the latter are disqualified or unavailable.

Each Trial Chamber consists of five judges, three of whom have criminal trial experience. Their members shall be nominated by the Presidency. A judge who is a national of a complainant state, or of the state of nationality of the accused, cannot be a member of a chamber dealing with that particular case.

c. The Procuracy[122]

The Procuracy is an independent organ responsible for the investigation of complaints and the conduct of prosecutions. The Prosecutor, who is assisted by one or more Deputy Prosecutors, are to be of different nationalities, but must all be persons of high moral character, with high competence and experience in the prosecution of criminal cases. They are elected by an absolute majority of States Parties. To ensure the independence of the organ, the ICC Statute explicitly

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[120] *Id.*, at art. 38.
[121] *Id.*, at art. 39.
[122] *Id.*, at art. 42.

provides that a member of the Procuracy shall not seek or act on the instructions from any external source.[123]

d. The Registry[124]

The Registry is responsible for the non-judicial aspects of the administration of the Court. The principal administrative officer of the ICC is the Registrar, who is elected by an absolute majority by secret ballot. A Deputy Registrar may also be elected.

3. The nature, legal status, and powers of the Tribunal

The independence of the ICC is further emphasized by the fact that it has an international legal personality all its own, as well as wide-reaching powers. This makes the ICC a powerful subject of public international law.

Article 4 of the Rome Statute further provides that the Court shall have legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes[125] and may exercise its functions and powers as provided in the Statute on the territory of any State Party and, *by special agreement, on the territory of any other State.*[126] The far-reaching powers of the Court and the conditions by which it may exercise its powers in the territory of States that are not party to the Rome Statute must be scrutinized, lest they show evidence of being derogative of such states' sovereignty.

4. Jurisdiction of the Court

A discussion on the ICC's jurisdiction must proceed in three parts: a discussion on the preconditions to the exercise of its jurisdiction and the mechanisms triggering the exercise of the Court's jurisdiction; a discourse on the four fundamental elements of its competence; and a disquisition on the principles limiting its exercise of competency.

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[123] *Id.*, at art. 42, para. 1.
[124] *Id.*, at art. 43.
[125] *Id.*, at art. 4, para.1.
[126] *Id.*, at art. 4, para. 2.

a. Preconditions to the exercise of jurisdiction and trigger mechanisms

The preconditions to the ICC's exercise of jurisdiction are found in article 12, which provides that the Court may exercise its jurisdiction if: (1) a State accepts the jurisdiction of the Court with respect to crimes referred to in article 5 by becoming a party to the Rome Statute;[127] or (2) if a State that is not a party to the Rome Statute lodges a declaration with the Registrar accepting the exercise of jurisdiction by the Court with respect to a particular crime in question.[128] In other words, the ICC's jurisdiction extends not only to States Parties, but also to states which, though not parties to the Statute, "opt in" by accepting the jurisdiction of the Court with respect to a particular crime.

States that "opt in" may refer to the Prosecutor a situation in which one or more of the crimes enumerated in article 5 of the Statute appears to have been committed.[129] Furthermore, the Prosecutor may *motu proprio* initiate an investigation in respect of such crimes in cases where the state "opting in" is the *locus delicti,* or when it is the state of nationality of the accused.[130] In return, the State that "opts in" must "cooperate with the Court without any delay or exception" and render assistance requested by the ICC.[131]

The Rome Statute adopts a restrictive approach as to who may trigger the exercise of the Court's jurisdiction. According to article 13, only the following may set the criminal proceeding in motion:

(a) A State Party (or a state that "opts in" to the ICC's jurisdiction) refers a situation in which one or more of the crimes in article 5 appear to have been committed;[132]

(b) The Prosecutor initiates an investigation in respect of a crime *motu proprio;*[133] and

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[127] *Id.*, at art. 12, para. 2 (a).
[128] *Id.*, at art. 12, para. 3.
[129] *Id.*, at art. 13.
[130] *Id.*, at art. 12, para. 2; art. 13.
[131] *Id.* at art. 12, para. 3.
[132] *Id.*, at art. 13 (a).
[133] *Id.* at art. 13 (c).

(c) The Security Council, acting under Chapter VII of the Charter of the United Nations refers a situation in which one or more of the crimes in article 5 appear to have been committed.[134]

In the first case, the ICC is duty-bound to determine whether one or more specific persons should be charged with the commission of the crime that the State Party or the State that has "opted in" to the ICC's jurisdiction has referred to it.

In the second case, the Prosecutor, upon receiving the information referred to it, must determine whether the complaint is spurious or not.[135] If spurious, the Prosecutor informs the Pre-Trial Chamber that there is no reasonable basis to proceed and that there is reason to believe that the investigation would not serve the interests of justice.[136] On the other hand, if the Prosecutor concludes that a *prima facie* case exists, he or she submits to the Pre-Trial Chamber a request to initiate investigation.[137] Should the Pre-Trial Chamber refuse to authorize the investigation, the Prosecutor may still present a subsequent request based on new facts or evidence regarding the same situation.[138]

In the third case, the Security Council's referral grants the ICC compulsory jurisdiction over the situation referred to it by the Security Council, even if the State against whom the reference has been made has not accepted the ICC's jurisdiction, or has not ratified the Statute. Although this provision would do away with the creation of future *ad hoc* tribunals,[139] it has been criticized for conferring jurisdiction over a State that has not ratified the treaty, nor opted in to the ICC's jurisdiction.

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[134] *Id.* at art. 13 (b).

[135] *Id.* at art. 15, para. 3; para. 6.

[136] *Id.*, at art. 53, para. 1 (c).

[137] *Id.*, at art. 15, para. 3.

[138] *Id.*, at art. 15, para. 5.

[139] M Cherif Bassiouni has pointed out the defects of ad hoc tribunals to include the following: Because they only try offenders in certain conflicts, these tribunals and their laws and penalties raise fundamental questions about compliance with principles of legality and about general considerations of fairness. *See,* M Cherif Bassiouni, *From Versailles to Rwanda in 75 Years:The Need to Establish a Permanent International Criminal Court,* 10 HARV. HUM. RTS. J. 11, 60 (1997) [hereinafter, Bassiouni II].

In all three cases, the Prosecutor receives the information referred to him or her, and decides to initiate an investigation if:

(a) The information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been, or is being committed;

(b) The case is, or would be admissible, i.e., that the preconditions to the exercise of jurisdiction would be satisfied; and

(c) There are substantial reasons to believe that an investigation would not serve the interests of justice.[140]

If there is no sufficient legal or factual basis for prosecution, or if the case is inadmissible, or if a prosecution is not in the interests of justice, the Prosecutor shall inform the Pre-Trial Chamber of his or her findings. [141] The Pre-Trial Chamber may, *motu proprio*, or upon the request of the State making the referral or the Security Council, review the decision of the Prosecutor.[142]

Properly speaking, therefore, there are two major "filtering mechanisms" between a state's complaint and the ICC's cognizance of the complaint: first, the Prosecutor's review of the information received from the State or the Security Council; and second, the action of the Pre-Trial Chamber concerning either the decision of the Prosecutor to investigate *motu proprio,* the latter's finding that there is no sufficient basis for a prosecution.

b. Four fundamental elements of ICC's competence

A discussion of ICC's jurisdiction must necessarily discuss four fundamental elements of its competence: its *ratione loci; ratione personae; ratione temporis;* and *ratione materiae.*

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[140] Rome Statute, *supra* note 102, at art. 53, para. 1.
[141] *Id.*, at art. 53, sec. 2.
[142] *Id.*, at art. 53, sec. 3.

i. Ratione loci

The ICC's *ratione loci,* or territorial jurisdiction, is based on the principle of universality and extends over persons for alleged crimes committed anywhere in the world. Whether or not the suspects have committed the crimes within the territory of a state that is a party to the Rome Statute, the ICC may prosecute them as long as they are found within the territory of a State Party.[143] The Rome Statute further provides that the ICC may also attain jurisdiction over accused individuals — whether or not nationals of States Parties — located in territories of states who are not parties of the Rome Statute under certain circumstances.[144] In other words, what determines the exercise of the ICC's territorial jurisdiction is the presence of the suspect within the territory of a State Party or a State that is not a party to the statute, but which "opts in" to the ICC's jurisdiction.

The rationale behind the use of universality as basis for ICC's *ratione loci* is the fact that the ICC's object is to prosecute and punish crimes committed against humanity itself. Thus, regardless of the *situs delicti*[145] or place where the crime is committed, an accused found in the territory of a State Party may fall under the ICC's jurisdiction.

ii. Ratione Personae

The ICC's personal jurisdiction extends only over persons who are accused of having committed any of the crimes enumerated in article 5 of the Rome Statute. Following the Nuremberg Tribunal's exhortation, "Crimes of international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced"; the term "person," as this is used in the Rome Statute, pertains to human beings or natural persons, and not to states.[146]

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[143] *Id.*, at art. 25, para. 2.

[144] *Id.*, at art. 12.

[145] In private international law, the *situs delicti* generally determines the state that may take jurisdiction over a person accused of committing a crime. *See,* JOVITO SALONGA, PRIVATE INTERNATIONAL LAW 426 (1995).

[146] Article 26 (6) of the Rome Statute states that the ICC has no jurisdiction over states. In contrast to this, the Statute of the International Court of Justice (ICJ) provides that states and international organizations, are subject to the ICJ's jurisdiction.

The principle of individual responsibility provides that all who planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of international crimes shall be held responsible for the latter.[147] That a person is in a position of superior authority, such as that of a head of government or other government official is not a mitigating factor.[148] Neither does the defense of obedience to superior orders relieve one's responsibility. However, there is one exemption from criminal responsibility: Article 26 provides that all persons under the age of eighteen at the time of the commission of the crime are exempt.

Even if the State of his or her nationality is not a party to the Rome Statute, a person may still be subject to ICC prosecution and punishment, provided he or she is accused of committing a crime under article 5 of the Rome Statute and is found within the territory of a State Party or a State which has "opted in" to the ICC's jurisdiction.[149]

It must be noted, however, that individual responsibility for a crime recognized by article 5 of the Rome Statute does not take away any responsibility of the State under international law for the violation of international human rights obligations.[150]

iii. Ratione Temporis

With regard to temporal jurisdiction, the ICC incorporates the criminal law principle, *nullum crimen, nullum poena sine lege.* Article 11 of the Rome Statute provides that the Tribunal shall have jurisdiction only with regard to crimes committed after the Rome Statute's entry into force. However, if a State becomes a party to the Statute after the latter's entry into force, the ICC may exercise jurisdiction only with regard to crimes committed after the entry into force of the Statute for that particular State, unless the latter had made a declaration that it accepts the exercise of jurisdiction of the Court and files this with the Registrar, as provided in article 12(3).

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[147] Rome Statute, *supra* note 102, at art. 25, para. 3.
[148] *Id.*, at art. 27.
[149] *Id.*, at art. 25, para. 2; art. 12.
[150] *Id.*, at art. 25, para. 4.

iv. Ratione materiae

The Rome Statute provides that the ICC shall have jurisdiction over the following crimes: genocide,[151] crimes against humanity, war crimes, and the crime of aggression.

Article 6 of the Rome Statute adopts the definition of genocide given by the Convention on the Prevention and Punishment of the Crime of Genocide. The latter provides that genocide consists of any of the following acts, when committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group:

a. killing members of the group;

b. causing serious bodily or mental harm to the members of the group;

c. deliberately inflicting conditions of life calculated to bring about the group's physical destruction in whole or in part;

d. imposing measures intended to prevent births within the group;

e. forcibly transferring children of the group to another group.[152]

Article 7 of the ICC Statute uses the term "crimes against humanity" to refer to inhumane acts of a very serious nature that may be committed in armed conflict, whether international or internal in character, when such acts are committed as part of a widespread, systematic attack directed against any civilian population. Drawing inspiration from the crimes against humanity first recognized in the Charter and Judgment of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council for Germany, the same article enumerates the following acts as crimes against humanity when executed under the conditions described above:

1. murder;

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[151] *Id.*, at art. 6.

[152] Genocide Convention, *supra* note 82.

2. extermination;

3. enslavement;

4. deportation and forcible transfer of populations;

5. imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

6. torture;

7. rape;

8. sexual slavery;

9. enforced prostitution;

10. forced pregnancy;

11. enforced sterilization or any other form of sexual violence of comparable gravity;

12. persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious and other grounds, including gender, that are universally recognized as impermissible under international law;

13. enforced disappearance of persons;

14. apartheid;

15. other inhumane acts of similar character intentionally causing great suffering or serious injury to body, or to mental and physical health.[153]

The Rome Statute uses the term "war crimes" to denote a number of acts that, under customary international law, include any of the following: violations of

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[153] Rome Statute, *supra* note 102, at art. 7.

the Laws and Customs of War as embodied in the 1907 Hague Convention (IV),[154] as well as the Regulations annexed thereto; the 'grave breaches' of the

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[154] *Id.*, at art. 8 sec. 2 (b). The Nuremberg Tribunal expressed that the list of crimes contained in the 1907 Hague Convention (IV) and the Regulations annexed thereto is declaratory of the laws and customs of war recognized by all civilized nations. In other words, this list is considered in customary international law as serious violations of the laws and customs of war applicable in international armed conflicts. The list includes the following acts which are also included in article 8 section 2 (b) of the Rome Statute:

1. Intentionally directing attacks against the civilian population or against individual civilians not taking part in the hostilities;
2. Intentionally directing attacks against "civilian objects";
3. Intentionally directing attacks against personnel, installations, materials, units or vehicles involved in humanitarian assistance or peacekeeping missions in accordance with the UN Charter, as long as they are entitled to the protection given to civilians or "civilian objects";
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 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 means of defense, has surrendered;
7. Making improper use of a flag of truce, or of the flag or military insignia and uniform of the enemy, or of the UN, as well as the 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;
10. Subjecting persons in power of an adverse party to physical mutilation or scientific experiments of any kind that are not justified by medical, dental or hospital treatment of the person, nor carried out in his or her interest, and which cause his or her death or seriously endanger his or her health;
11. Killing or wounding treacherously individuals belonging to the hostile nation or army;
12. Declaring that no quarter will be given;

Geneva Conventions of 12 August 1949[155] that are applicable to international armed conflicts; and the 'serious violations' of article 3 common to the four

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13. Destroying or seizing the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war;
14. Declaring the rights and actions of the nationals of a hostile party abolished, suspended or inadmissible in a court of law;
15. Compelling the nationals of a 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 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 those with a hard envelop which does not entirely cover the core or is pierced with incisions;
20. Employing weapons, projectiles and materials 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 constituting a grave breach under the Geneva Conventions;
23. Utilizing the presence of a civilian or other protected person to render certain points immune from military operations;
24. Intentionally directing attacks against buildings, materials, medical units and transport and personnel, using the emblems of the Geneva Conventions;
25. Intentionally starving civilians as a method of warfare, including depriving them of impending relief supplies provided for under the Geneva Conventions; and
26. Conscripting or enlisting children under fifteen years into the national armed forces or using them to actively participate in hostilities.

[155] Rome Statute, *supra* note 102, at art. 8 (2). The Geneva Conventions constitute rules of international humanitarian law and are accepted as customary laws applicable in international armed conflicts. In providing for the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the UN Security Council reaffirmed the individual criminal responsibility of persons who order the commission of 'grave breaches' of the 1949 Geneva Conventions, including the following acts, which are reproduced in article 8 (2) of the Rome Statute:

1. willful killing;

Geneva Conventions of 12 August 1949.[156] In addition, article 8, paragraph 2 (e) of the Statute confers jurisdiction on other serious violations of laws and customs of war applicable to non-international armed conflicts.[157]

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2. torture or inhuman treatment, including biological experiments;
3. willfully causing great suffering or serious injury to body or health;
4. extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
5. compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
6. willfully depriving a prisoner of war or civilian of the right to a fair and regular trial;
7. unlawful deportation or transfer, or unlawful confinement of a civilian;
8. taking civilians as hostage.

[156] Rome Statute, *supra* note 102, at art. 8 para. 2 (c). Serious violations of article 3 common to the 1949 Geneva Conventions include the following acts 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 d' combat* by sickness, wounds, detention or any other cause) enumerated in article 8 paragraph 2 (c) of the Rome Statute:

1. Violence to life and person: murder, mutilation, cruel treatment and torture;
2. Committing outrages upon personal dignity, humiliating and degrading treatment;
3. Taking hostages;
4. Passing sentences and carrying out executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees generally recognized as indispensable.
5. While this list applies to non-international armed conflict, it does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

[157] These include:

1. Intentionally directing attacks against the civilian population or against individual civilians not taking part in the 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, materials, units or vehicles involved in humanitarian assistance or peacekeeping missions in accordance with the UN Charter;
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;

Unlike the other three crimes recognized by article 5 of the Rome Statute, the crime of aggression, though placed under the jurisdiction of the ICC, is undefined. Article 5 paragraph 2 of the Statute thus provides that the ICC's jurisdiction over the crime of aggression shall commence only upon the adoption of the States Parties of a definition covering the acts constituting the crime. The Statute's failure to enumerate acts constituting aggression is due to the fact that the delegates to the Rome Conference failed to reach an agreement with regard to an acceptable definition of aggression.

c. Principles and mechanisms limiting the ICC's jurisdiction

In laying down the jurisdiction of the ICC, the Rome Statute not only showed the extent of the Court's competency; it also laid down the limits to the Tribunal's exercise of jurisdiction. While the four areas of the Court's competency show the scope, as well as the inherent limits to the ICC's jurisdiction, the Rome

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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 fifteen into armed forces or groups or using them to actively participate in hostilities;
8. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians is involved or imperative military reasons demand;
9. Killing or treacherously wounding a combatant or adversary;
10. Declaring no quarter will be given;
11. Subjecting persons in power of another party to physical mutilation or medical or scientific experiments which are not justified by the medical, dental or hospital treatment of the person nor carried out in his or her interest and which cause death to, or seriously endanger the health of the person; and
12. Destroying or seizing the property of an adversary unless such destruction or seizure is imperatively demanded by the necessities of the conflict.

This enumeration applies to armed conflicts not of an international character, but not to situations of internal disturbances such as riots, isolated and sporadic acts of violence and similar acts. Rather, it applies to armed conflicts taking place in the territory of a State where there is protracted armed conflict between governmental authorities and organized armed groups or conflicts between such groups.

Statute contains provisions which expressly define the bounds that keep the Court's power from interfering with a state's exercise of sovereignty.

i. Complementarity

The significance of this principle is evident in that it is alluded to in the Preamble of the Rome Statute, as well as in the latter's first article:

> Preamble
>
> ...Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,
>
> Resolved to guarantee lasting respect for the enforcement of international justice,
>
> [We h]ave agreed as follows:
>
> Part I. Establishment of the Court
>
> Article 1
>
> The Court
>
> An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and *shall be complementary to national criminal jurisdictions.* The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.[158]

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[158] Rome Statute, *supra* note 102, at Preamble, para. 10; art. 1.

A discussion paper prepared by the United Kingdom during the negotiation of the Rome Statute explains the concept of complementarity:

> 1. The term has been coined...to reflect an aspect of the relationship between the International Criminal Court and national authorities including courts.
>
> 2. The intention is that all proper decisions by national authorities in connection with matters of interest to the ICC should be respected by the ICC and that no action should be taken by it in such cases. This principle applies not only to national decisions to prosecute or not to prosecute, and to court decisions of acquittal or conviction, but also to decisions by national authorities to seek assistance, including extradition, from another State, and decisions by such another State to cooperate accordingly, particularly where the other State is under an international obligation to do so.
>
> 3. It will be apparent that complementarity is, therefore, a constant in the arrangements for the ICC, and needs to be taken into account at each point at which the respective roles of the ICC and national authorities can or do coincide... (Emphasis supplied)[159]

Simply put, the principle of complementarity provides that the ICC cannot exercise its jurisdiction over cases where a state is exercising, or has exercised its competency. Article 17 of the Rome Statute provides the situations wherein the ICC defers from exercising its competency in favor of a State:

> a. When a case is being investigated or prosecuted by a State with jurisdiction over it, unless such State is unwilling or unable genuinely to carry out the investigation or prosecution;[160]

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[159] United Kingdom Discussion Paper on International Criminal Court and Complementarity, (visited 31 January 2000), <gopher//natldocs/prepcom1/complementarity/.uk>

[160] Rome Statute, *supra* note 102, at art. 17, para. 1 (a).

b. When a case is already investigated by a State with jurisdiction over it, and the State has decided not to prosecute the person concerned, unless the former's decision resulted from its unwillingness or inability to genuinely prosecute the accused;[161]

c. When a person has already been tried for conduct subject of a complaint, and such trial was not conducted to shield the person concerned from criminal responsibility for crimes under the ICC's jurisdiction, or when the trial is not marked by signs showing that it was not conducted independently, impartially, or in a way that is inconsistent with the intent to bring the person to justice;[162] and

d. When the case is not sufficiently grave to further action by the Court.[163]

Article 17 shows that the parties to the Rome Statute clearly intended that the ICC refrain from replacing national criminal justice systems. Instead, the ICC was intended to supplement the national justice system. Only when the national system is ineffective can the ICC flex its muscle to prosecute and suppress crimes of international concern.

In a nutshell, the principle of complementarity exists in the ICC Statute to safeguard the principle that "under international law, the exercise of police power and penal law has been, and still is, a prerogative of states, and the ICC's jurisdiction is its only exception."[164]

ii. Ne Bis in Idem

The principle of *ne bis in idem* imposes a double jeopardy limitation on the ICC's exercise of jurisdiction over cases that have already been passed upon by domestic courts:

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[161] *Id.* at art. 17, para. 1 (b).
[162] *Id.* at art. 17, para. 1 (c).
[163] *Id.* at art. 17, para. 1 (d).
[164] Penna, *supra* note 109, at 240.

> No person who has been tried by another court for conduct...[comprising genocide, crimes against humanity, and war crimes] shall be tried by the Court with respect to the same conduct...[165]

This, however is not an absolute limitation. The ICC may exercise its jurisdiction if the proceedings conducted 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, under the circumstances, was inconsistent with an intent to bring the person concerned to justice.[166]

It must be noted, however, that the *ne bis in idem* principle likewise imposes a double jeopardy limitation on national jurisdictions.[167] Article 20 paragraph 2 provides that "...no person shall be tried before another court for a crime [constituting genocide, crimes against humanity, war crimes or aggression] for which that person has already been convicted or acquitted by the [ICC]." There are no circumstances enumerated in the Statute that allow national courts to review a case that has already been decided by the ICC.

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[165] Rome Statute, *supra* note 102, at art. 20, para. 3.

[166] *Id.*

[167] Penna goes so far as to suggest that the double jeopardy limitation on "another court" refers to the limitation on the exercise of jurisdiction not only of national or domestic courts, but also of other international tribunals such as the ICTY and ICTR. *See,* Penna, *supra* note 109, at 240.

III. A CRITIQUE OF THE INTERNATIONAL CRIMINAL COURT

Thus far, this paper has characterized the emergence of human rights as one that is inherently opposed to the traditional notion of the state's absolute power over its citizens. The human rights movement is one that has historically asserted the dignity, liberty and autonomy of individual citizens against oppression of any sort, particularly that foisted upon citizens by the state itself. This is why human rights became a cornerstone of the 1986 Philippine Constitution which was ratified after the oppressive Marcos regime had come to an end. This is likewise the impetus behind the international move to formalize recognized human rights obligations in treaties and international conventions after the excesses of states during the Second World War resulted in the senseless slaughter of millions.

The postwar recognition of rights that are shared by all persons across all nations, of different color, creed and gender, has been recognized as a form of "political globalization", a movement and goal that is shared by all peoples of the world. It has inevitably caused nations to pool their efforts in ensuring that their collective recognition of rights translates into enforceable rules and obligations that punish those who willfully disregard the rights of others. International efforts to create an enforcement mechanism for punishing those who commit "human wrongs" culminated in the creation of the International Criminal Court (ICC).

However, as a result of the inherently pro-individual and anti-state roots of the human rights movement, moves to enforce human rights obligations, particularly through the ICC's punishment of crimes that affect all of humanity, have been met with the charge that the ICC compromises state sovereignty. This does not bode well for both the Court and the world, as state sovereignty becomes the stumbling block to the universal enforcement of human rights protection.

On the other hand, there is a need for states, such as the Philippines, which are still weighing whether they should become party to the treaty, to examine closely the provisions of the ICC vis-à-vis their own laws, particularly, their constitutions. To become party to a treaty that is unconstitutional results in a State being unable to fulfill the obligations imposed by the Rome Statute domestically. This, in turn, makes the State vulnerable to sanctions in the international realm.

This section examines the objections raised by different countries and non-government organizations during the Preparatory Committee meetings between 1996 and 1998, particularly those that were raised on the ground that the ICC Treaty violates state sovereignty.

A. Complementarity and Diminished Sovereignty?

In theory, the principle of complementarity limits the Court's exercise of jurisdiction to situations when national courts fail to fulfill their legal responsibility to prosecute and punish the perpetrators of the crimes enumerated under article 5 of the Rome Statute. Opponents of the Court, however, claim that the principle of complementarity is a mere myth, one that actually allows the diminution of state sovereignty as this is exercised by the three branches of government: the judiciary, the legislature, and the executive.

1. Derogation of national judicial power?

a. A de facto power of judicial review?

In a previous chapter, this paper noted that only in cases where the proceedings in national criminal justice systems are ineffective or unavailable can the ICC exercise its jurisdiction. However, it is the ICC that determines whether a trial conducted by a national court was unwilling or unable to genuinely prosecute a case.[168]

Since the ICC is given the power to decide whether a particular trial conducted by a national court is effective or not, the ICC is criticized for having the power to invalidate national trials.[169] In other words, it is criticized for being able to exercise a kind of judicial review power over national criminal justice systems.

The *ne bis in idem* principle has also been criticized for being contrary to the principle of complementarity. During the Fiftieth Session of the United

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[168] Rome Statute, *supra* note 102, at art. 17, pars. 2 and 3.

[169] Gary Dempsey, *Reasonable Doubt: The Case against the Proposed International Criminal Court* (visited 31 January 2000) < http://www.cato.org/pubs/pas/pa-311es.html>.

Nations General Assembly, Ambassador Chen Shiqiu, China's representative to the Sixth Committee on the Establishment of an International Criminal Court expressed that while China was pleased that the complementarity principle was incorporated into the Statute creating the Court, it was less pleased with the provision on *ne bis in idem*:

> The provision about *n[e] bis in idem*...is another example of non-observance of the complementarity principle. As a result of this article, the International Criminal Court could become a de facto superior court or review court to national courts. This would be contrary to the [complementary] nature of the International Criminal Court.[170]

This critique of the Court is significant for the Philippines because the 1987 Constitution provides that only Philippine courts, particularly the Supreme Court, may have the final say in the interpretation of the law of the land. This latter principle is embodied in article VIII, section 1 of the Constitution, which provides: "Judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law." Furthermore, article VIII, section 4 of the Constitution, also provides:

> All cases involving the constitutionality of a treaty, international or executive agreement or law, which shall be heard by the Supreme Court *en banc*, including those involving the constitutionality, application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations, shall be decided with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon.[171]

Thus, to allow the ICC to determine what constitutes "effective" or "ineffective" domestic criminal trials indirectly forces states to adopt the rulings of the ICC, which supplant the decisions of the national courts.

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[170] Chen Shiqiu, Statement by the Representative of China to the Sixth Committee on the Establishment of an International Criminal Court, 30 October 1995 (visited 31 January 2000) <gopher//gopher.igc.apc.org.70/00/orgs/icc/natldocs/chin1195.txt>.

[171] Const. art. VIII, sec. 4, para. 2.

2. Derogation of national legislative power?

The ICC has also been criticized for its alleged propensity to meddle into the national legislative process. This criticism has its source in article 123 of the Rome Statute, which serves as a "review clause." It provides:

> 1. Seven years after the entry into force of this Statute, the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5...
>
> ...
>
> 2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of the States Parties, convene a Review Conference.

Critics of this particular provision point out that many advocates of the Court do not want to limit the Court's purview to the core offenses--all of which, save aggression, are generally recognized as acts that are reprehensible because of their nature of being wide-scale violations of human rights. For example, Trinidad and Tobago originally brought up the subject of establishing an international criminal court in order to prosecute international drug traffickers.[172] The Russian Federation has expressed its desire to include terrorism as one of the crimes subject of proceedings held in the ICC.[173] Other suggested "crimes" include, "committing outrages upon personal dignity,"[174] and "serious threats to the environment."[175] Since the issue of whether or not these acts constitute crimes is not yet settled as a matter of international law, parties who wish to expand the court's domain to include these acts as those under the Court's competency are feared to be able to penalize these acts which are not yet considered crimes under

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[172] Gaile Ramoutar, Statement of Trinidad and Tobago on Oct. 21, 1997 (visited 31 January 2000) <gopher//gopher.igc.apc.org.70/00/orgs/icc/natldocs/526A/trinidad>.

[173] Russian federation statement 2 November 1995 (visited 31 January 2000) <gopher//gopher.igc.apc.org.70/00/orgc/icc/natldocs/russ 1195.txt>.

[174] Dempsey, *supra* note 169.

[175] *Id.*

the general principles of international law nor under domestic law. This constitutes an impairment of the legislative power of sovereign nations.

In the Philippines, legislative power is vested "in the Congress of the Philippines, which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum."[176] That the ICC Statute allows States Parties to amend the Rome Statute and make punishable acts which are not criminalized by Philippine legislation thus poses, at least ostensibly, a challenge to Philippine national legislative power.

3. Derogation of national executive power?

The possible expansion of the list of crimes via the review clause of the Rome Statute creates problems concerning the ICC's purported interference in the exercise of national executive power. The United States has repeatedly expressed its displeasure over any possible inclusion of terrorism and international drug trafficking to the ICC's purview, on the ground that to do so may cause interference with the crime-fighting operations of their Department of Justice, Federal Bureau of Investigation and other drug enforcement agencies.[177] Although the Rome Statute provides that the Prosecutor must ask States Parties as well as other states that normally would exercise jurisdiction concerning a particular matter if investigations are being undertaken on an international level before the ICC conducts its own investigations,[178] critics of the ICC argue that letting an outside organization know about sensitive government operations will increase security risks and provide opportunities for the leakage of confidential information, both of which result in national investigations being compromised.

Furthermore, a closer look at the pertinent provision in the Rome Statute reveals that although the Prosecutor is mandated to defer his or her investigation when a State so requests, the Rome Statute nevertheless provides that the Pre-

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[176] CONST. art. VI, sec. 1.

[177] Dempsey, *supra* note 169.

[178] Rome Statute, *supra* note 102, at 18.

Trial Chamber may order the Prosecutor to continue investigations in spite of the State's request for a deferral.[179]

In the Philippines, the President is the seat of executive power. The Constitution provides that "[t]he executive power shall be vested in the President of the Philippines,"[180] and that he "shall ensure that the laws be faithfully executed."[181] Hence, all measures designed to implement, execute and enforce the law throughout the State ought to emanate from the Presidency. That the ICC Prosecutor may conduct its own investigations concerning crimes that may have taken place within Philippine territory gives reason to believe that the national executive power may be compromised by the Rome Statute-sanctioned actions of the ICC Prosecutor.

B. The Lost Right of Due Process

The Cato Institute argues that individuals brought before the ICC lose their right to due process because the crimes laid forth in article 5 of the Rome Statute, particularly aggression, are so vague that they fail what is commonly known as the "void for vagueness" test. The Philippine Supreme Court has described the void for vagueness test thus:

> ...[A] statute or act may be said to be vague when it lacks comprehensible standards that men "of common intelligence must necessarily guess at its meaning and differ to its application..." But the act must be utterly vague on its face, that is to say, it cannot be clarified by either a saving clause or by construction.[182]

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[179] Article 18, paragraph 2 of the Rome Statute provides: Within one month of receipt of that notice, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5, and which relate to the information provided in the notifi ation to States. At the request of the State, the Prosecutor shall defer to the State's investigation of those persons *unless the Pre-Trial Chamber, on application of the Prosecutor, decides to authorize the investigation.*

[180] CONST. art. VII, sec. 1.

[181] CONST. art. VII, sec. 17.

[182] People v. Nazario, G.R. No. L-44143, 31 August 1988,165 SCRA 186, 195.

Proponents of the view that article 5 fails the void for vagueness standard believe that the crimes specified in article 5, particularly aggression, are so vague that persons who may be convicted of these crimes will not have clear notice of the charge against them. The result of this anomaly is that those charged with the crime of aggression, genocide, crimes against humanity or war crimes, cannot fairly prepare his or her defense, since he or she does not know what he or she is accused of.

The other crimes apart from aggression that are enumerated in article 5 of the Rome Statute are likewise criticized for failing the void-for-vagueness test, in that the elements constituting these crimes have not yet been drawn by the States Parties.[183]

The charge that the crimes laid down in the Rome Statute deprive persons of their right to due process is serious in that this deprives an individual of rights guaranteed under his or her own constitution's bill of rights.

The problem faced by any government whose bill of rights is compromised by the Rome Statute's provisions on the rights available to the individual accused of crimes in article 5 is the fact that the Rome Statute, being incompatible with its constitution, can have no force and effect within its territory. In these cases, the State's judiciary has the legal right to annul or disregard provisions of the treaty if such violates the law of the land. For instance, in the United States, the Federal Supreme Court has repeatedly reaffirmed that "To allow a treaty to change the Constitution is to amend the Constitution in a manner that is not sanctioned by the amendment process [in the Constitution]."[184] In fact, the United States Supreme Court has made it impossible for federal governments to enter treaties relinquishing the constitutional rights of American citizens. [185]

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[183] Article 9, para. 1 of the Rome Statute provides that the "[e]lements of crimes [which] shall assist the Court in the interpretation and application of articles 6, 7, and 8...shall be adopted by a two-thirds majority of the members of the Assembly of States Parties."

[184] Dempsey, *supra* note 169.

[185] *Id.*

In the Philippines, the Supreme Court has the power to pass upon "[a]ll cases involving the constitutionality of a treaty, international or executive agreement or law."[186] In the event that the Rome Treaty is found by the Court to run over the right of Filipinos to due process, then the entire treaty may be adjudged unconstitutional, and any judgment rendered by the ICC will not be countenanced or recognized by the Supreme Court.

In sum, this chapter has exposed certain challenges posed by the ICC and the Rome Statute on Philippine sovereignty. The first set of challenges revolve around the possibility of the ICC interfering in the exercise of powers that properly belong to the Philippine government, thereby supplanting it in its supremacy. The second problem concerns the violation of the due process clause in the 1987 Constitution's Bill of Rights because of the alleged vagueness of the crimes enumerated in the Rome Statute.

IV. A JURISPRUDENTIAL JUSTIFICATION FOR THE RATIFICATION OF THE ROME STATUTE

The criticisms hurled against the ICC and Rome Statute magnify the challenges that globalization poses to the sovereignty of states. Foremost among these challenges is the preservation of a State's sovereignty in the emerging "borderless world."

The traditional notion of sovereignty has been described by the Philippine Supreme Court in the following words:

> To be sure, the sovereignty of our people is not a kabalistic principle whose dimensions are buried in mysticism...[S]overeignty is meant to be supreme, the just *summi imperu*, the absolute right to govern...An essential quality of sovereignty is legal omnipotence...This means that *the sovereign is legally omnipotent and absolute in relation to other legal institutions. It has the power to determine exclusively its legal competence. Its*

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[186] CONST. art. VIII, sec. 4, para. 2.

> *powers are original, not derivative. It is the sole judge of what it should do at any given time.* (Emphasis supplied)[187]

The essence of globalization, however, is the realization that each state's fate is intertwined with that of other states. Thus, states have to cooperate with each other in order that they may all mutually reach common goals. One such goal that is universally held by all countries of the world is the enforcement of human rights. To reach this goal, states must not seek to enforce these rights only within their territory. Increased linkages between nations increase the mobility of human rights violators who wish to escape punishment. The movement of populations across different state borders due to internal conflicts and wars have also made many groups susceptible to human rights abuses in countries that are not their own. These concerns have made the ICC a relevant international institution, one that promises to dispense justice, prosecute and punish the originators of the most heinous human rights violations whoever they are, wherever they may be found.

States must be ready for the challenges posed by globalization on their sovereignty. They cannot close their eyes to the pressing need for countries to cooperate with each other toward common goals such as human rights. Hence, it is imperative that states find ways by which they may meet the demands of globalization while protecting their sovereignty.

This paper argues that the Philippine Supreme Court has recognized the challenges posed by globalization in a number of cases, and has provided a set of criteria that determines whether the treaties and international agreements entered into by the government respect and enhance our sovereignty. The leading case in this area is the case of *Tañada v. Angara.*[188]

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[187] Frivaldo v. Comelec, G.R. No. 120295, 23 June 1996, 257 SCRA 727, 790-791.
[188] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18.

A. *A Criteria for the Protection of State Sovereignty in Philippine Jurisprudence*

1. Sovereignty, Globalization and the Supreme Court in *Tañada v. Angara*

a. The Facts and Issues of the Case

Wigberto Tañada, et. al. filed a case against Edgardo Angara and other senators who ratified the Agreement Establishing the World Trade Organization (hereinafter, WTO-GATT Agreement).[189] Apart from alleging that the WTO-GATT Agreement violated the Philippine Constitution, particularly the provisions which mandated the state to develop a self-reliant and independent national economy effectively controlled by Filipinos, to give preference to qualified Filipinos and promote the preferential use of Filipino labor, domestic materials and locally produced goods, Tañada took to task the fact that the WTO-GATT intruded, limited and impaired the constitutionally mandated powers of both the Supreme Court and the National Legislature.

Tañada's contention concerning the WTO's interference in the exercise of Philippine legislative power concerns a provision in the WTO-GATT Agreement which provides: "Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed agreements."[190]

Tañada alleged that this provision of the Agreement was "an undue limitation, restriction, and impairment of Philippine sovereignty, specifically the legislative power which section 2, article VI of the Constitution vests in the Congress of the Philippines."[191] He argues that the provision of the WTO-GATT Agreement prevented Congress from freely passing legislation that it may deem consistent with our national interest and general welfare, but which may not conform to the WTO Agreement. In particular, Tañada alleges that the above

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[189] The WTO-GATT Agreement was adopted on 15 April 1994 at Marrakesh Morocco, under the Uruguay Round on Multilateral Trade Negotiations. The Philippine Senate ratified the WTO-GATT Agreement on 14 December 1994. The Instrument of Ratification was signed by former President Fidel V. Ramos on 16 December 1994.

[190] WTO Agreement, article XVI, para. 4 (Miscellaneous Provisions), I Uruguay Round of Multilateral Trade Negotiations, at 146.

[191] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 44.

agreement prevents Congress from exercising its power to tax aliens who derive profit from the Philippines.[192]

With regard to the WTO-GATT's intrusion in the exercise of judicial power, Tañada alleged that article 34 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS), one of the multilateral agreements annexed to the WTO-GATT Agreement ratified by the Senate, intrudes upon the Supreme Court's power to promulgate rules concerning pleadings, practice and procedure. This power is provided for in article VIII, section 5 of the Constitution:

> The Supreme Court shall have the following powers:
>
> ...
>
> (5) *Promulgate rules concerning...pleading, practice and procedure in all courts*...Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase or modify substantive rights... (Emphasis supplied)[193]

Article 34 of the TRIPS requires WTO members to provide a rule of disputable presumption that a product shown to be identical to one produced with the use of a patented process shall be deemed to have been obtained by the (illegal) use of the said patent process, where such product is new, or where there is 'substantial likelihood' that the identical process was made with the use of the patented process, but the owner of the patent could not determine the exact process used in obtaining the identical product.[194]

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[192] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 65.

[193] CONST. art. VIII, sec. 5, para. 5.

[194] Article 34 of the TRIPS provides: Process Patents: Burden of Proof

> 1. For the purposes of civil proceedings in respect of the infringement of the rights of the owner...if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. Therefore, Members shall provide in at least one of the following circumstances, that any identical product when produced without the consent of the patent owner shall, in the absence of proof of the contrary, be deemed to have been obtained by the patented process:

In other words, Tañada alleged that the WTO's imposition of this disputable presumption on member states imposed a limitation on the Supreme Court's power to create the rules governing pleading and practice in Philippine courts.

b. The Supreme Court's Resolution of the Case

The Supreme Court disagreed with Tañada's allegation that the WTO-GATT Agreement unduly interfered in the Philippine government's exercise of sovereign powers. It reached this conclusion after recognizing the capacity of a State to voluntarily restrict its exercise of some of its powers in order to fulfill the demands imposed by the globalizing world: "While sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations."[195]

The Court pointed out that the Philippine Constitution itself recognizes the fact that the Philippines is a part of a community of nations. It notes that this is evident in the Incorporation Clause of the Constitution, which provides that "the Philippines adopts the generally accepted principles of international law as part of the law of the land and *adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations*." (Emphasis supplied)[196]

In recognizing its membership in the international community, the Philippines has voluntarily agreed to restrict its exercise of sovereignty: "By their

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a. if the product obtained by the patented process is new;
b. if there is substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used.

2. Any Member shall be free to provide that the burden of proof indicated in paragraph 1 shall be on the alleged infringer only if the condition referred to in subparagraph (a) is fulfilled or only if the condition referred to in subparagraph (b) is fulfilled.

3. In the adduction of proof to the contrary, the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account.

[195] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 66.

[196] CONST. art. II, sec. 2.

voluntary act, nations may surrender some aspects of their ... absolute rights."[197] The Court called this voluntary surrender of absolute rights the "principle of auto-limitation."[198]

The Supreme Court explained that the principle of auto-limitation is at work in every treaty entered into by the Philippines, all of which buttress the proposition that "the sovereignty of a state...cannot in fact and in reality be considered absolute."[199] Sovereignty is restricted by "(1) limitations imposed by the very nature of membership in the family of nations; and (2) limitations imposed by treaty stipulation."[200] In other words, sovereignty may be said to be limited by the *common goals*, which the family of nations must all work toward, and by the State that exercises the principle of auto-limitation, in order to reach this common goal together with other nations.

The Court explains that treaties

> ...[b]y their inherent nature...really limit or restrict the absoluteness of sovereignty. By their voluntary act, nations may surrender some aspects of their state power in exchange for greater benefits granted by, or derived from a convention or pact. After all, states, like individuals, live with coequals, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights.[201]

The Court pointed out that the Philippines has entered into numerous international covenants and has ratified several treaties, all of which restrict the exercise of Philippine sovereignty in countless ways. Among the treaties mentioned by the Court are the following:

(a) Bilateral convention with the United States regarding taxes on income, where the Philippines agreed, among others, to exempt from tax, income received in the Philippines by, among others, the Federal Reserve Bank of the United States, the

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[197] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 66.
[198] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 67.
[199] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 67.
[200] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 67.
[201] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 66.

Export/Import Bank of the United States, the Overseas Private Investment Corporation of the United States. Likewise, wages, salaries and similar remunerations paid by the United States to its citizens for labor and personal services performed by them as employees or officials of the United States are exempt from income tax by the Philippines;Bilateral agreement with Belgium, providing for the avoidance of double taxation with respect to taxes on income;

(b) Bilateral convention with the Kingdom of Sweden for the avoidance of double taxation;

(c) Bilateral convention with the French Republic for the avoidance of double taxation;

(d) Bilateral air transport agreement with Korea where the Philippines agreed to exempt from all customs duties, inspection fees and other duties or taxes, aircrafts of South Korea and the regular equipment, spare parts and supplies arriving with said aircrafts;

(e) Bilateral air service agreement with Japan, where the Philippines agreed to exempt from customs duties, excise taxes, inspection fees and other similar duties, taxes or charges, the fuel, lubricating oils, spare parts, regular equipment, and stores on board Japanese aircrafts while on Philippine soil;

(f) Bilateral air service agreement with Belgium where the Philippines granted Belgian air carriers the same privileges as those granted to Japanese and Korean air carriers under separate air service agreements;

(g) Bilateral notes with Israel for the abolition of transit and visitor visas where the Philippines exempted Israeli nationals from the requirement of obtaining transit or visitor visas for a sojourn in the Philippines not exceeding 59 days;

(h) Bilateral agreement with France exempting French nationals from the requirement of obtaining transit and visitor visas for a sojourn not exceeding 59 days;

(i) Multilateral Convention on Special Missions, where the Philippines agreed that the premises of Special Missions in the Philippines are inviolable and its agents can not enter said premises without consent of the Head of Mission concerned. Special Missions are also exempted from customs duties, taxes and related charges;

(j) Multilateral Convention on the Law of Treaties. In this convention, the Philippines agreed to be governed by the Vienna Convention on the Law of Treaties;

(k) Declaration of the President of the Philippines accepting compulsory jurisdiction of the International Court of Justice. The International Court of Justice has jurisdiction in all legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of international obligation.[202]

Of these the Court noted:

> In the foregoing treaties, the Philippines has effectively agreed to limit the exercise of its sovereign powers of taxation, eminent domain and police power. *The underlying consideration in this partial surrender of sovereignty is the reciprocal commitment of the other contracting states in granting the same privilege and immunities to the Philippines, its officials and its citizens.* The same reciprocity characterizes the Philippine commitments under WTO-GATT.[203]
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> The point is that, as shown by the foregoing treaties, a portion of sovereignty may be waived without violating the Constitution, based on the rationale that the Philippines "adopts the generally accepted

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[202] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 66.
[203] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 70.

> principles of international law as part of the law of the land and adheres to the policy of . . . cooperation and amity with all nations." [204]

Thus, the key principle in determining whether the surrender of sovereignty is constitutional and justifiable is *the existence of a reciprocal commitment on the part of other contracting states*. The existence of reciprocity precludes the possibility of an undue interference by other states in the affairs of the Philippines. This is because reciprocity ensures that all States Parties to an agreement are equally obliged to work *toward their common goal*; all are obliged to accord equal rights and privileges to other States Parties, their officials and citizens.

Furthermore, the Court stated that the alternative to the surrender of some part of a state's sovereignty justifies the choice of states to restrict the exercise of sovereignty in seeking to fulfill a common goal with other states:

> International treaties, whether relating to nuclear disarmament, human rights, the environment, the law of the sea, or trade, constrain domestic political sovereignty through the assumption of external obligations. But unless anarchy in international relations is preferred as an alternative, in most cases we accept that the benefits of the reciprocal obligations involved outweigh the costs associated with any loss of political sovereignty...[205]

In sum, therefore, the guiding principle behind the Court's refusal to grant Tañada's petition to declare the WTO-GATT Agreement unconstitutional on the ground that it unduly interfered in the exercise of national judicial and legislative power is this: A State exercising the principle of auto-limitation may voluntarily limit the exercise of some of its sovereign powers. If any "intrusion" into this State's sovereignty actually takes place, "reciprocity more than justifies the intrusion or alleged impairment of sovereignty."[206]

In the *Tañada v. Angara* case, the Supreme Court decided that the WTO-GATT Agreement obliged all States Parties to comply with the reciprocal obligations stated therein. *Reciprocity* is evident in the fact that the obligations

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[204] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 70.
[205] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 70.
[206] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 70.

imposed by the Agreement applied equally to all States Parties. Furthermore *all obligations contained therein were imposed for the attainment of a goal equally desired by all parties to the treaty*: a free, fair, and level playing field between and among nations.[207] Hence, in ratifying the WTO-GATT Agreement, the Senate validly exercised the principle of auto-limitation, and did not compromise the sovereignty of the Philippine State.

2. An analysis of the Court's decision in *Tañada v. Angara*

Using the abovementioned principle, the Supreme Court ruled that the WTO-GATT Agreement did not unduly impair the exercise of the national legislative power to tax. As shown in the preceding section, the Supreme Court enumerated a number of tax treaties entered into by the Philippines, all of which limited the exercise of the Legislature's power to tax. The common object desired by the Philippines and its treaty partners in these cases is the avoidance of international double taxation. To attain this objective, the Philippines and its treaty partners reciprocally obligated themselves to treat their nationals and the nationals of their treaty partners equally.

Using this same principle, the Court ruled that the WTO-GATT Agreement did not unduly impair the Judiciary's exercise of its power to promulgate rules concerning pleading, practice and procedure in all courts. A close examination of article 34 of the TRIPS shows that the object of this provision is to impose a duty on the part of alleged patent infringers to show that their products were produced without the use of a patented process.

The Supreme Court reveals that this provision shares the same objective governing the rules on evidence on the domestic level:

> Besides, there really is no problem in changing the rules of evidence, as the present law on the subject, Republic Act No. 165, otherwise known as the Patent Law, provides a similar presumption in cases of infringement of patented design or utility models, thus:

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[207] The Court took note of the existence of several provisions in the WTO-GATT agreement that gave preferential treatment to developing countries, in order that they may be able to compete with their more industrialized counterparts. *See*, Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 72.

> Sec. 60. Infringement of a design patent or of a patent for utility models shall consist in unauthorized copying of the patented design or utility model for the purpose of trade or industry in the article or product and in the making, using or selling of the article or product copying the patented design or utility model. *Identity or substantial identity with the patented design or utility model shall constitute evidence of copying.*[208]

That section 60 of the Patent Law existing at the time the case was decided shared the same objective as article 34 of the TRIPS emphasizes the common objective shared by the Philippines and other parties to the WTO-GATT Agreement. Both aimed to make it difficult for patent infringers to escape liability by providing that the maker of an object, which is identical or substantially identical with a patented design or utility model, shall have the burden of proving that the work was not copied from the patented design or model.

This common objective is met through the cooperation of all the States Parties to the WTO-GATT Agreement to which the TRIPS is annexed, all of whom reciprocally agree to use the rule on evidence provided for in article 34 of the TRIPS in their prosecution of patent infringement cases.

In discussing the constitutionality of article 34 of the TRIPS, the Supreme Court imposes another criteria apart from reciprocity and the obligation to work toward a shared goal:

> Suffice it to say that the reciprocity clause more than justifies such intrusion, if any actually exists. Besides, *article 34 does not contain an unreasonable burden, consistent as it is with due process* and the concept of adversarial dispute settlement inherent in our judicial system. (Emphasis supplied)[209]

Hence, in addition to the criteria of the presence of a common objective and reciprocity, the Supreme Court also employed the following criteria to resolve whether or not article 34 of the TRIPS constituted an undue intrusion into the

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[208] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 72. Republic Act No. 165 is now repealed by the Intellectual Property Code of the Philippines, Republic Act No. 8293 (1998).

[209] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 73.

Judiciary's power to promulgate rules of pleading, practice, and procedure in Philippine courts:

1. The reasonableness of the obligation imposed by the treaty or agreement; and

2. The consistency of the provisions of the treaty or agreement with due process.

When the presence of a common objective, reciprocity, reasonableness of the obligation imposed, and harmony between the provisions of the treaty or agreement with Philippine laws and procedure, particularly the Philippine's concern for due process, combine, then a State may be said to have exercised the principle of auto-limitation in a manner which does not unnecessarily impair its sovereignty.

3. *Reagan v. CIR, People v. Acierto* and *People v. Gozo*: Precursors of the criteria in *Tañada v. Angara*

When the Court's ruling in *Tañada v. Angara* was promulgated, the Court had already discussed the principle of auto-limitation in at least three other cases. In *Reagan v. CIR*,[210] the Court reiterates that the exercise of the principle of auto-limitation must begin with the consent of the State itself.

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. *It is susceptible of no limitation not imposed by itself.* Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of sovereignty to the same extent in that power which could impose such restrictions. *All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.* (Emphases supplied)[211]

It is not enough, therefore, that the presence of a common objective, reciprocity, reasonableness of the obligation imposed, and regard for due process

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[210] Reagan v. CIR, G.R. No. L-26379, 27 December 1969, 30 SCRA 968.
[211] Reagan v. CIR, G.R. No. L-26379, 27 December 1969, 30 SCRA 968, 979.

concur. It is also essential that the State entered into the international agreement or treaty freely.

On the other hand, the cases of *People v. Acierto*[212] and *People v. Gozo*[213] suggest that the coverage and objective of a treaty or international agreement is determinative to a certain degree, whether or not their provisions violate the sovereignty of a State Party.

In the case of *People v. Acierto,* the Supreme Court held that the mere existence of military or naval bases on Philippine territory does not necessarily translate into the limitation of the Philippines' power to govern its own territory:

> By the Agreement, it should be noted that the Philippine Government merely consents that the United States exercise jurisdiction in certain cases. The consent was given purely as a matter of comity, courtesy or expediency. The Philippine Government has not abdicated its sovereignty over the bases as part of Philippine territory or divested itself completely of jurisdiction over offenses committee therein. Under the terms of the treaty, the United States Government has prior or preferential, but not exclusive jurisdiction of such offenses. The Philippine Government retains not only jurisdictional rights not granted, but also all such ceded rights as the United States Military authorities for reasons of their own decline to make use of. The first proposition is implied from the fact of Philippine sovereignty over the bases; the second from the express provisions of the treaty. (Emphases supplied)[214]

That the RP-US Military Bases Agreement allows the Philippine Government to retain certain jurisdictional rights, and does not divest it of all its sovereign rights, strengthens the Court's decision upholding the validity of this Agreement.

The case of *People v. Gozo* reiterates the principle that the scope, coverage and objective of a treaty or international agreement plays an important role in determining whether the treaty or agreement unduly restricts State sovereignty:

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[212] 92 Phil. 534 (1953).
[213] G.R. No. L-36409, 26 October 1973, 53 SCRA 476.
[214] 92 Phil. 534, 542 (1953).

> Can there be anything clearer, therefore, than that only a turnabout, unwarranted and unjustified, from what is settled and orthodox law, can fend the slightest degree of plausibility to the contention of absence of administrative jurisdiction? If it were otherwise, what was aptly referred to by Justice Tuason [in *People v. Acierto*] "as a matter of comity, courtesy or expediency," becomes one of obeisance and submission. *If on a concern purely domestic in its implications, devoid of any connection with national security, the Military-Bases Agreement could be thus interpreted, then sovereignty indeed becomes a mockery and an illusion.* (Emphasis supplied)[215]

In other words, if the provision of a treaty or international agreement limits the exercise of State power in cases where what is involved is a matter of *purely domestic concern*, then the provision constitutes a violation of state sovereignty and must not be countenanced.

Bringing together the standards set forth by the Supreme Court in *Tañada v. Angara* with these clarificatory passages in the cases of *Reagan v. CIR*, *People v. Acierto and People v. Gozo*, the following criteria can be used to determine that a treaty or international agreement does not constitute an undue infringement of State sovereignty:

1. The treaty or international agreement is entered by the State exercising the principle of auto-limitation. The State freely consents to enter into the international agreement.

2. The State consents to be part of the treaty or international agreement because it seeks to attain an objective held in common with other states. This shared objective results from the fact that a particular State is part of the community or family of nations. Thus, it may be said that the State consents to be part of the treaty or international agreement for reasons of "comity, courtesy and expediency" on the international plane.

3. Since the object of the treaty or international agreement is the fulfillment of a common goal among nations, the subject matter and scope of the treaty or international agreement must be limited

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[215] G.R. No. L-36409, 26 October 1973, 53 SCRA 476, 485.

to matters that are not purely domestic concerns. A treaty or international agreement limiting the exercise of sovereign power concerning matters of purely domestic concern violates State sovereignty.

4. The scope of the treaty or international agreement must likewise be limited in that it does not absolutely restrict the State's exercise of sovereign functions; the State agrees to cede only a portion of its sovereignty in exchange for a common goal achieved through the States Parties performance of reciprocal obligations.

5. In order that the treaty or international agreement does not unduly intrude on State sovereignty, it must impose reciprocal obligations on all States Parties. According to *Tañada v. Angara*, reciprocity justifies the limitation imposed by the State on its sovereignty in the exercise of the principle of auto-limitation.

6. The obligation imposed by the treaty or international agreement should not be unreasonable, and must substantially comply with the due process requirement and adversarial judicial proceedings in Philippine courts.

B. *An Evaluation of the Rome Statute Using the Standards Set by Philippine Jurisprudence*

1. States Freely Consent to be Bound by the Obligations Imposed by the Rome Statute

As mentioned in an earlier chapter, states that participated in the drafting of the Rome Statute chose to create the ICC through a treaty in order that they may avoid the criticism hurled against the ICTY and ICTR which were both created by Security Council Resolutions in exercise of their emergency powers. Under the U.N. Charter, states are bound to respect and cooperate when the Security Council uses these powers. This manner of creating international criminal tribunals has been criticized for being inherently coercive because states may find their nationals convicted of international crimes whether or not they agree with the way in which the Security Council constituted the tribunal.

The creation of the ICC by way of a treaty only emphasizes the integral role played by state consent in the establishment of this international institution. Thus, should the Philippines decide to ratify the treaty, and assuming that the other criteria set forth in the *Tañada, Reagan, Acierto* and *Gozo* cases are met, then there would be no reason for attacking the ICC Statute on the ground that it compromises Philippine sovereignty.

The criterion of state consent is particularly relevant in resolving the criticism that the ICC unduly interferes with the exercise of national legislative power. As discussed in a previous chapter, this critique revolves around the belief that States Parties to the ICC Statute may use the latter's review clause to penalize acts that are currently not enumerated in article 5 of the ICC Statute. Those who hold this view argue that the review clause of the ICC Statute will enable States Parties to criminalize acts that are not considered crimes in other states, and which are not recognized as crimes by the general principles of international law.

This critique of the ICC Statute fails to consider that if the States Parties to the ICC Statute take advantage of the review clause to criminalize acts that are currently not enumerated under article 5, they will be exercising the principle of auto-limitation, in order that they may be able to cooperate with other states to reach a common goal.

An examination of the "review clause" in article 123 of the Rome Statute, as well as article 121, which provides for the process of proposing, and passing amendments to the Statute, states that the adoption of an amendment "at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached, shall require a two-thirds majority of the States Parties."[216]

The fact that two-thirds of the States Parties decide to criminalize a particular act and place it under the jurisdiction of the ICC may be deemed as evidence of *opinio juris sive necessitatis*, which, in turn, constitutes evidence of the existence of the customary international law governing the matter.[217] Since the

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[216] Rome Statute, *supra* note 102, at art. 121, para. 3.

[217] The elements of international custom as evidence of a general practice accepted as law are: (1) general practice, characterized by uniformity and consistency, and (2) *opinio juris sive necessitatis*, or recognition of that practice as legally binding. *See* Magallona II, *supra* note 54,

amendment of at least two-thirds of the States Parties to the Statute constitutes evidence of the existence of customary international law, then this amendment becomes part of Philippine law via the Incorporation Clause of the Philippine Constitution, even if the Philippines votes against the amendment passed by the two-thirds majority.

2. The Rome Statute Embodies the Shared Objective of Creating an Effective Mechanism for Enforcing International Human Rights Obligations

This paper has previously described the ICC as the international community's attempt to create an enforcement mechanism to enforce human rights recognized in several treaties and agreements. The Rome Statute punishes the crimes of genocide, crimes against humanity, war crimes, and aggression, which have been previously recognized in the following treaties: the Genocide Convention of 1948, the four Geneva Conventions of 1949, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, among others. It has also been noted in a previous chapter that the Philippines has expressed its recognition of these crimes through its ratification of the Convention of Genocide and the four Geneva Conventions of 1949. In addition, the Philippines accepts these general principles of international law as part of the law of the land by virtue of article II, section 2 of the Philippine Constitution, since these crimes have been widely accepted by the community of nations.

It is clear, therefore, that if the Philippines opts to ratify the Rome Statute, its ratification constitutes an expression of its adherence to the international community's shared goal of working for peace by punishing the perpetrators of the most serious human rights violations, as these are embodied in article 5 of the Rome Statute.

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at 11-12, 13-14. Magallona points out that article 38 of the Vienna Convention on the Law of Treaties recognizes the principle that "a rule set forth in a treaty" may become "binding upon a third State" as a customary rule of international law, recognized as such."

3. The Rome Statute involves matters of international, and not purely domestic, concern

The enforcement of human rights through the prosecution and punishment of the perpetrators of the most serious human rights violations requires the cooperation of as many states as possible. Not only do genocide, crimes against humanity, war crimes and aggression violate the inherent dignity of all human beings, regardless of race, color, creed or gender; more importantly, the fact that these crimes are directed against whole populations and during the most detrimental conditions imply that the perpetrators of such crimes hold power of such magnitude that only the concerted efforts of the rest of the world may put a stop to the horrors they commit.

Should the Philippines ratify the treaty and embrace provisions in the Rome Statute that are criticized for imposing restrictions on the exercise of national judicial, legislative and executive power, these restrictions must be interpreted as essential in order that the international community may effectively put an end to the carnage caused by the commission of crimes enumerated in article 5 of the Rome Statute. Thus, these limitations should not be read as impositions of a supra-national body unduly interfering in purely domestic concerns of a State.

Since these restrictions are voluntarily made by states that realize the need to address the international, and not purely domestic, concern of enforcing human rights, such restrictions should not be deemed as an infringement of State sovereignty.

4. The Rome Statute does not require the absolute surrender of the sovereign functions of government

This paper's discussion on the jurisdiction of the ICC shows the numerous limitations imposed by the Rome Statute on its jurisdiction. In particular, this paper's section on the preconditions to the exercise of the ICC's jurisdiction and its trigger mechanisms outlines the limited situations when the ICC may exercise jurisdiction over a particular case. The paper has also pointed out that article 13 of the Rome Statute adopts a restrictive approach in determining who may trigger the exercise of the Court's jurisdiction.

In addition to these restrictions, the built-in limitations found in the provisions of the Rome Statute define the four fundamental elements of ICC's competence. The *ratione loci* found in the second paragraph of article 25 of the Rome Statute limits the Court's jurisdiction in territories of States Parties, or states that are not parties to the State, but which "opt in" to the ICC's jurisdiction. The *ratione personae* found in article 5 of the Rome Statute provides that the ICC's personal jurisdiction extends only over natural persons who are accused of having committed a crime enumerated in article 5 of the Rome Statute. The *ratione temporis* found in article 11 of the Rome Statute reiterates the criminal law principle, *nullum crimen, nullum poena sine lege,* thus granting the Tribunal jurisdiction only with regard to crimes committed after the Rome Statute's entry into force. Finally, the *ratione materiae* found in article 5 of the ICC Statute limits the exercise of the Court's jurisdiction to the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.

Everything beyond the bounds of the many limitations imposed by the Rome Statute on the ICC's jurisdiction remains within the competency of the State. These limitations indicate that the cases in which the ICC exercises its jurisdiction constitute the exception, rather than the general rule. Furthermore, these limitations stress the point that only in cases wherein the most serious human rights violations are involved will the ICC be allowed to exercise its jurisdiction.

All these limitations were imposed in light of the principle of complementarity which provides that, as a general rule, the ICC cannot exercise its jurisdiction over cases where a state is exercising or has exercised its competency.[218] Furthermore, the *ne bis in idem* imposes a double jeopardy limitation on the ICC's exercise of jurisdiction over cases that have already been passed upon by domestic courts.[219] These principles emphasize the limited jurisdiction exercised by the ICC. Conversely, domestic courts are allowed free exercise of their jurisdiction over all other cases; whatever limitations or restrictions imposed on the courts of the Philippines, therefore, can in no way be considered absolute limitations on the power of Philippine courts to adjudicate cases.

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[218] Rome Statute, *supra* note 102, Preamble; art. 1; *See, also,* United Kingdom Discussion Paper, *supra* note 159.

[219] Rome Statute, *supra* note 102, at art. 20, para. 3.

In the same vein, whatever restrictions imposed on the Executive's power by Pre-Trial Chamber-sanctioned investigations by the ICC Prosecutor are not absolute limitations. Although article 18, paragraph 2 of the Rome Statute provides that the Pre-Trial Chamber may order the Prosecutor to investigate a case in spite of a State's request for a deferral of ICC's investigation on the ground that the State is conducting its own inquiry, the Rome Statute's provisions indicate that the Pre-Trial Chamber may do so on the basis of a State's unwillingness or inability to genuinely carry out its own investigation with respect to criminal acts which may constitute crimes referred to in article 5 of the Rome Statute.[220] The Rome Statute does not absolutely restrict the Executive's power to initiate and conduct investigations concerning all crimes, in all situations.

5. The Rome Statute imposes reciprocal obligations on all States Parties

In *Tañada v. Angara,* the Court identifies reciprocity as the key factor that justifies the State's limitation of its exercise of sovereignty: "...[T]he reciprocity clause more than justifies...[the] intrusion [into State sovereignty], if any actually exists."[221]

The criticism hurled against the ICC concerning its alleged impairment of the national judicial power may be checked by this criterion. The critique concerning ICC's alleged impairment of judicial power involves the charge that the Rome Statute allows the ICC to exercise a form of judicial review. What is involved here is an alleged interference in the exercise of the Judiciary's function to decide a case with finality.

Although it cannot be denied that the Rome Statute grants the ICC the power to effectively overturn the decisions of national tribunals because it allows the ICC to determine whether the national court was unwilling or unable to genuinely prosecute the case, the Statute provides a *uniform standard* that the ICC must apply in deciding whether a national court was "unwilling" or "unable" to genuinely prosecute a case. Article 17 of the Rome Statute provides:

> In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by

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[220] Rome Statute, *supra* note 102, at art. 18, para. 3.

[221] Tañada v. Angara, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 73.

> international law, whether one or more of the following exist, as applicable:
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> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
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> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[222]
>
> ...
>
> In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[223]

This uniform standard is applied by the ICC to all States Parties. All states that ratify the Statute reciprocally bind themselves to be bound by article 17 of the Rome Statute, in order that human rights may be enforced, and the commission of serious human rights violations may be put to an end through the punishment of their perpetrators.

6. The Rome Statute does not impose unreasonable standards

This criterion is likewise useful in arguing that the ICC's "interference" in the exercise of national judicial power is justified. Article 17 of the Rome Statute, which provides the criteria for determining whether a national court was unwilling

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[222] Rome Statute, *supra* note 102, at art. 17, para. 2.

[223] *Id.*, at art. 17, para. 2.

or unable to prosecute a crime falling under article 5, does not impose an unreasonable burden on national courts. In fact, article 17 acts as a remedial measure in cases where courts do not perform their ordinary function of adjudicating cases with justice. If at all, the burden that article 17 implicitly imposes on national courts is the obligation to willingly and competently try acts that constitute crimes under article 5 of the ICC Statute— a function which they ought to have performed in the first place.

7. The obligations imposed by the Rome Statute do not violate due process

The criticism that the Rome Statute violates due process revolves around the charge that the enumerated crimes in article 5 violate the "void for vagueness" test. Put differently, this criticism consists in the proposition that since the elements of the crimes enumerated in article 5 are not defined, persons accused of these crimes cannot prepare for their defense, since they have no clear idea about the crime for which they are charged.

The void for vagueness test has been explained by the Supreme Court in the following passage, which has been previously cited in an earlier chapter:

> As a rule, a statute or act may be said to be vague when it *lacks comprehensible standards* that men "of common intelligence must necessarily guess at its meaning and differ as to its application..." But *the act must be utterly vague on its face, that is to say, it cannot be clarified by either a saving clause or by construction.* (Emphases supplied) [224]

Statutes that are "vague on their face" for failing to provide a sufficient standard to guide the construction and interpretation of the statute must be distinguished from imprecisely or defectively phrased laws:

> ...[A] perfectly vague act, whose obscurity is evident on its face [must] be distinguished, however, from legislation in imprecise language, but which nonetheless specifies a standard though defectively phrased, in which case, it may be "saved" by proper construction.[225]

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[224] People v. Nazario, G.R. No. L-44143, 31 August 1988,165 SCRA 186, 195.
[225] People v. Nazario, G.R. No. L-44143, 31 August 1988,165 SCRA 186, 196.

Furthermore, the Court explained that statutes that fail the "void for vagueness" test must also be distinguished from statutes that are apparently ambiguous yet fairly applicable to certain types of activities. In the case of such statutes, the latter may not be challenged whenever directed against such activities. The Supreme Court cited the case of *Parker v. Levy*,[226] wherein the U.S. Supreme Court disallowed an army officer charge with an offense called "conduct unbecoming of an officer and a gentleman" from invoking the void for vagueness doctrine on the premise that *accepted military interpretation and practice had provided enough standards, and consequently, a fair notice* that his acts of urging his men not to go to Vietnam and calling the Special Forces trained to fight there "thieves and murderers" were impermissible.[227]

Given this discussion by the Philippine Supreme Court on the "void for vagueness" doctrine, it cannot be contended that the crimes enumerated in article 5 fail the "void for vagueness" test and thus impair the right to due process. On the one hand, genocide, crimes against humanity and war crimes have been defined in treaties and international agreements generally accepted by the community of nations, and, in particular, by the Philippines. The Philippines is party not only to the Genocide Convention, but also the four Geneva Conventions of 1949, which set forth the customary norms of international law concerning war crimes and crimes against humanity. In becoming party to these treaties and international agreements, the Philippines makes these agreements part of its national law. Furthermore, the widespread acceptance of the principles espoused by these treaties is evidence that such principles are part of international customary law which the Philippines accepts as "part of the law of the land" by virtue of the Incorporation Clause of the 1987 Constitution.

That the Philippines has accepted the definition of the crime of genocide and international customary law regarding war crimes and crimes against humanity through its ratification of the Genocide Treaty and the four Geneva Conventions of 1949, shows that there are ample standards that give fair notice to accused individuals regarding what constitutes genocide, war crimes, or crimes against humanity.

Neither can the critics of the ICC argue that the Rome Statute's failure to define the crime of aggression violates the due process requirement. The Rome

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[226] Parker v. Levy, 417 U.S. 733 (1974).

[227] People v. Nazario, G.R. No. L-44143, 31 August 1988,165 SCRA 186, 196.

Statute clearly provides that the Court shall not begin to exercise jurisdiction over the crime of aggression until a provision that defines the crime is adopted in accordance with the Statute's provisions on amendments to the Rome Treaty.[228] Until the crime of aggression is defined by a two-thirds majority vote among the States Parties to the Rome Statute, no person shall be prosecuted by the ICC for committing the crime of aggression.

In sum, this chapter has attempted to draw from the cases of *Tañada v. Angara, Reagan v. CIR, People v. Acierto and People v. Gozo* a criteria developed by the Philippine Supreme Court that helps determine whether the provisions of a particular treaty or international agreement do not infringe upon the exercise of state sovereignty. From these four cases, the following six standards were derived to ascertain when the limitations imposed by a treaty obligation did not impair state sovereignty:

1. The State freely consented to be bound to the obligation imposed by a particular treaty obligation;

2. The State bound itself to the treaty obligation in order to attain an objective held in common with other states;

3. The treaty obligation pertains to matters that are not purely domestic concerns;

4. The treaty does not absolutely restrict the State's exercise of its sovereign functions;

5. The treaty imposes reciprocal obligations on all States Parties; and

6. The treaty does not impose an unreasonable burden on the State, and complies with due process.

Based on these six standards, the limitations that the Rome Statute imposes on the national legislative, judicial, and executive powers of the Philippines cannot be said to constitute an undue restriction of the exercise of Philippine sovereignty.

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[228] Rome Statute, *supra* note 102, at art. 5, para. 2.

The first of these principles, state consent, meets the challenge of the claim that the ICC infringes upon the exercise of national legislative power. The argument that States Parties may use the review clause of the ICC Statute to criminalize acts that the Philippines does not penalize, thereby violating the principle of legislative supremacy of the Philippine Congress, loses its force in light of the existence of the Incorporation Clause of the Philippine Constitution. Since the Rome Statute provides that any amendment to the Statute must be effected by a two-thirds vote of the States Parties, it may be argued that the adoption of more than a majority of the States Parties is evidence of the existence of an international customary norm on the matter. Assuming that the two-thirds vote of the State Parties evinces international customary law, then the latter is, by way of the Incorporation Clause of the Philippine Constitution, part of Philippine law.

On the other hand, the contention that the ICC violates Philippine sovereignty for infringing upon the exercise of national, judicial, and executive power is weakened by the assertion in *Tañada v. Angara* that reciprocity justifies a State's act of limiting a portion of its sovereignty. Reciprocity is clearly the rule governing the obligations imposed by the Rome Statute.

Furthermore, this paper has shown that when the ICC decides whether or not a national tribunal has been "unwilling" or "unable" to genuinely prosecute a case, it does not impose an unreasonable burden on the national judicial body; rather, it implicitly requires the national court to be faithful to its duty of prosecuting acts that constitute international crimes.

Finally, this chapter concludes that there is no basis for the assertion that the Rome Statute violates the due process guarantee of the Philippine Constitution because of the alleged vagueness of the crimes enumerated in article 5 thereof. The paper points out that the Philippines has more than enough sufficient standards to determine what acts constitute genocide, crimes against humanity, and war crimes. These standards are found in treaties and international agreements that the Philippines had previously ratified.

The paper also pointed out that the "void for vagueness" doctrine is not violated by the fact that the Rome Statute does not yet define the crime of aggression. The Statute provides that the ICC shall obtain jurisdiction over this crime only after the States Parties adopt a definition of this crime.

CONCLUSION

It was the aim of this paper to find a basis in Philippine law that would justify the Philippines' ratification of the Rome Statute of the International Court.

The reason why this paper advocates the ratification of the Rome Statue can be gleaned from the fact that the community of nations has been moving away from the traditional notion that state sovereignty is absolutely supreme in all instances. The twentieth century was characterized by developments in science and technology which facilitated the development of the phenomena of globalization.

Political globalization, particularly the increasingly close cooperation between states with regard to the enforcement of human rights, has been an important concern of the community of nations, particularly after the Second World War. The realization that there are certain fundamental rights that are commonly shared and possessed by all human beings has made the enforcement of these rights a shared endeavor — one that has given birth to countless treaties and international agreements, some of which recognize particular acts as crimes against the community of human beings as a whole.

However, political globalization entails the reciprocal limitation of state sovereignty by the members of the community of nations. This demand of political globalization was considered in this paper's examination of the International Criminal Court established by the Rome Statute. The ICC, which was envisioned to be a mechanism to enforce human rights by punishing the perpetrators of the most serious human rights violations, shall necessarily entail some limitation of certain powers exercised by the national legislative, judicial and executive branches of government.

Fortunately, the Philippine Supreme Court recognizes the validity of a State's exercise of the principle of auto-limitation. In the cases of *People v. Acierto, Reagan v. CIR* and *People v. Gozo*, the Supreme Court ruled that a State may validly surrender some aspects of their state power in exchange for greater benefits granted by an international agreement or treaty. These cases, along with *Tañada v. Angara*, defined certain standards that must be fulfilled in order that the exercise of auto-limitation may be justified.

This paper employed the six standards derived from Philippine jurisprudence to provide a legal justification for the limitations that the Philippines will be required to make should it choose to ratify the Rome Statute. This justification is relevant not only because it allows the Philippines to fulfill both its constitutional mandate and international obligation to uphold, protect and promote human rights, but also because the standards used by the Supreme Court in the cases cited above may very well be the criteria with which the validity of future international agreements and treaties may be measured. The phenomena of globalization shall continue to pose challenges to state sovereignty. The standards employed by the Court in *Tañada* and other cases may enable the Philippines to safeguard its sovereignty, while allowing it to share and participate in the building of a more just and peaceful globalized world.

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