

## ISSUES AND PRINCIPLES OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

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The entry into force of the Rome Statute of the International Criminal Court on 1 July 2002 is by any measure a landmark event in criminal justice of the international community. It is the culmination point of the development in the rule of law dealing with the atrocities and barbarities perpetrated on humankind, from Nuremberg and Tokyo to former Yugoslavia, and Rwanda. The Rome Statute, in its preamble, records our collective memory that “during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.” It affirms by the establishment of the International Criminal Court “to put an end to impunity for the perpetrators of these crimes.”

From a general perspective, the establishment of the International Criminal Court is indeed a landmark development. But on the ground, the impact on, or the interaction of the Court with, national law presents policy dilemmas that many States are struggling with. There may be objections on the part of some states which may be avoided by them through appropriate reservations. This option is barred by the fact that the Rome Statute does not allow reservations. However, a thorough analysis of the Statute may disclose some way out of dilemmas. For example, under Article 12(1), a State Party accepts the jurisdiction of the Court with respect to the crimes within its jurisdiction. However, this is subject to the “transitional provision” in Article 124 that a State, on becoming a party to the Statute “may declare that for a period of seven years after the entry into force of this Statute for a State concerned, it does not accept the jurisdiction of the Court” with respect to war crime when a crime is alleged to have been committed by its nationals or on its territory. Of course, the seven year limitation has expired, but this serves to illustrate the flexibility in the application of the State. That flexibility even goes so far as to enable non-parties to have relations with the Court by which they may accept the jurisdiction of the Court by a declaration with respect to a particular crime, under Article 13(3) of the Statute.

In a more comprehensive respect, two general principles in the Rome Statute deserve notice, namely:

1. By the principle of complementarity under the Statute, national courts have the primacy over the ICC with respect to international crimes within its jurisdiction. In the tenth paragraph of the Statute, it is emphasized that “the International Criminal Court ... shall be complementary to national criminal jurisdiction,” and in Article 1 it is provided that it “shall be complementary to national criminal jurisdiction.” Accordingly, under its Article 17, the ICC may determine the case to be inadmissible where a case is being investigated or prosecuted by a State or it has been investigated by a State which has decided not to prosecute the person concerned.

2. The ICC limits its jurisdiction to “the most serious crimes of international concern,” as Article 1 of the Rome Statute provides, and Article 5(1) of the Statute prescribes that “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.” For the ICC to take jurisdiction over a case of “crimes against humanity,” it is required that the acts in question when committed must “be part of a widespread or systematic attack directed against any civilian population;” and in the case of “war crimes” under Article 8 of the Statute, when committed, the acts in question must “be part of a plan or policy or as part of a large-scale commission of such crime.” An alleged crime consisting of single acts, without such element, may not qualify as a crime against humanity or war crime. One other factor may work as an inhibition on the part of a state to become a party to the Rome Statute. More than 40 countries have agreed with the United States not to be a party to the Rome Statute or to associate with it. On the part of the United States, this is by way of implementing its law, the American Service Members’ Protection Act (ASPA), which prohibits the U.S. government from cooperating with the ICC and protects from ICC jurisdiction U.S. officials and military personnel. Unless it has the benefit of a waiver of the U.S. President, a State may avoid the consequences of Section 2007(a) of ASPA which provides: “No United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.”

But on this issue, there may be an expectation of a shift of policy on the part of the Obama administration, even as it may take time for the States concerned to disengage from their formal agreements with the United States government.

At any rate, there are now 110 States Parties to the Rome Statute: only 13 are listed from Asia and the Pacific, which include Cambodia, Timor Leste, Japan, and Republic of Korea. Signatories in Asia and the Pacific which have not ratified or acceded to the Statute include Bangladesh, Philippines, and Thailand. Twenty-three states in Asia and the Pacific which are non-signatories include Brunei Darussalam, China, India, Indonesia, DPR Laos, Malaysia, Myanmar, Singapore, and Vietnam.<sup>[1]</sup> Only one Asean member is a State Party to the Rome Statute, so far.

It is in the context of issues such as these, arising from the Rome Statute of the ICC, that I find instructive the Regional Consultation we are holding now.

On my part, the relevant initiative I have taken in regard to the accession of the Philippines to the Rome Statute has already become an official stand of the Senate of the Republic of the Philippines. But further work has to be done toward making the Philippines a State Party to the Rome State, committed as I am to contribute a share to the mainstream of the international criminal justice. #

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<sup>[1]</sup> <http://www.iccnw.org>(visited 3 March 2011).