



UvA-DARE (Digital Academic Repository)

Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia

Birkett, D.J.

DOI

[10.1093/chinesejil/jmz014](https://doi.org/10.1093/chinesejil/jmz014)

Publication date

2019

Document Version

Final published version

Published in

Chinese Journal of International Law

License

CC BY

[Link to publication](#)

Citation for published version (APA):

Birkett, D. J. (2019). Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia. *Chinese Journal of International Law*, 18(2), 353–392. <https://doi.org/10.1093/chinesejil/jmz014>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

UvA-DARE is a service provided by the library of the University of Amsterdam (<https://dare.uva.nl>)

Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia

Daley J. Birkett*

Abstract

The International Criminal Court relies on its State Parties to incorporate, or implement, its constituent instrument, the Rome Statute, into their domestic legal systems to enable its effective functioning. First, State Parties are obliged to give effect to their explicit obligation to cooperate with the Court under the Rome Statute. Second, although not required to do so, to avoid their national legal systems being found by the Court to be unable to investigate and/or prosecute the crimes under its jurisdiction in accordance with the principle of complementarity, they should also implement the definition and

* LL.B. (Durham University); LL.M. (Leiden University); Research Fellow, War Reparations Centre, Amsterdam Center for International Law, University of Amsterdam; Research Associate, Walther Schücking Institute for International Law, University of Kiel. Email: d.j.birkett@uva.nl. From March 2014 to November 2015, the author was based at the University of Nottingham Human Rights Law Centre, where he collaborated on the development of the Cooperation and Judicial Assistance Database (CJAD), funding for the creation of which was provided by the European Union and the Royal Norwegian Ministry of Foreign Affairs. This article is based on a paper given by the author at the 6th *Association Internationale de Droit Pénal* Symposium for Young Penalists, held at Kyoto University, Japan, on 22 August 2018. The author is grateful to Alejandro Chehtman, Lachezar Yanev, Megumi Ochi, and Yang Xie for critical discussion of the paper. The author also wishes to thank the anonymous peer reviewer for their feedback on an earlier draft of this article. This article was completed on 11 February 2019, and the websites cited herein were current as of this date.

prohibition of these offences in their national legal frameworks. This article appraises the status of the domestic implementation of the Rome Statute, both crimes and cooperation, in Asia. The article concludes that few Asian State Parties to the Rome Statute have incorporated the treaty's provisions into their domestic laws in a holistic manner, with the absence of cooperation legislation, enabling State Parties to assist the Court, particularly striking.

I. Introduction

1. For the International Criminal Court (ICC, Court) to be able to function effectively, its State Parties need to incorporate its constituent instrument, the Rome Statute of the International Criminal Court (Rome Statute, ICC Statute),¹ into their respective domestic legal orders—a process known as implementation. The implementation process serves two purposes. First, enacting national implementing legislation empowers State Parties to fulfil their obligation under the ICC Statute to “ensure that there are procedures available under their national law for all of the forms of cooperation” specified in Part IX thereof,² and, further, their general obligation to “cooperate fully with the Court in its investigation and prosecution of crimes” within its jurisdiction.³ The late Professor and Judge Antonio Cassese notably described the International Criminal Tribunal for the former Yugoslavia (ICTY) as “a giant without arms and legs [which] needs artificial limbs to walk and work. And these artificial limbs are state authorities”.⁴ This memorable analogy is equally, if not more, applicable to the ICC, which, like the ICTY, depends on State authorities to enable its effective functioning. For example, the ICC does not have a dedicated police force to identify and apprehend persons suspected of committing international crimes or to gather evidence. In addition, unlike the ICTY, the ICC is a court of last resort. In other words, by virtue of complementarity, the principle that governs the Court's relationship with national courts, the jurisdiction of the ICC is only triggered if the national courts of the relevant State are unwilling or unable to investigate or

1 Rome Statute of the International Criminal Court (Rome Statute), 2187 UNTS 90.

2 *Ibid.*, art. 88.

3 *Ibid.*, art. 86.

4 Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 *EJIL* (1998), 2, 13.

prosecute.⁵ Implementing the substantive law provisions of the Rome Statute consequently permits State Parties to exercise primary jurisdiction over ICC crimes, thereby fulfilling the principle of complementarity. In sum, therefore, for States to be able to adequately perform their dual role envisaged by the Rome Statute, they need to enact legislation implementing the Rome Statute, as regards both crimes and cooperation, in their national legal orders. Of the 123 State Parties to the ICC Statute at the time of writing,⁶ approximately 40% have yet to enact national implementing legislation. This absence is particularly marked in Asia.

2. The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court concluded with the adoption of the Rome Statute on 17 July 1998. Twenty years later, this article appraises the status of its domestic implementation in Asia. In so doing, the article emphasizes the need for States to guarantee that their implementing legislation not only incorporates the crimes listed in the ICC Statute into their national legal orders, giving effect to the principle of complementarity, but that it also enables the relevant State to “cooperate fully” with the Court. The article highlights the absence of “cooperation legislation” among Asian State Parties to the Rome Statute and concludes with a proposal to Asian State Parties to the ICC Statute to ensure that their respective legal frameworks allow them not only to investigate and prosecute international crimes themselves, but would also enable the Court to do so on their respective territories, should such a need arise. In order to be able to guarantee the latter, Asian ICC State Parties need, first and foremost, to give full effect to their obligations under the Rome Statute as regards cooperation with the Court.

3. The article is divided into three parts. First, after defining “Asia” for the purposes of the study, the article scrutinizes the lack of engagement by Asian States with the Rome Statute system since its adoption. Second, the article evaluates the extent to which Asian ICC State Parties have incorporated (elements of) the Rome Statute, both pertaining to the four crimes listed therein and cooperation, into their respective domestic legal orders. Third, the article concludes with some concrete recommendations for Asian State Parties to the ICC Statute. The article draws upon existing literature examining domestic

5 Rome Statute, above n.1, art. 17.

6 For an up-to-date list of State Parties to the Rome Statute, see ICC, The States Parties to the Rome Statute (https://asp.icc-cpi.int/en_menus/asp/states%20parties).

implementation of the Rome Statute in certain Asian ICC State Parties, namely Bangladesh,⁷ Cambodia,⁸ Japan,⁹ and the Republic of Korea,¹⁰ which have already received academic scrutiny. At the same time, the article intends to shed light upon the Rome Statute implementation process in other national jurisdictions subjected to a paucity of scholarly attention, whether because of their failure to implement the Rome Statute or for other reasons. Rather than examining the process in one particular Asian State, the article conducts an appraisal of national legislation implementing the Rome Statute across Asia as a whole.¹¹ Further, throughout the article, the focus rests on State Parties to the ICC Statute,¹² *i.e.* those States under an obligation to cooperate with the ICC and to ensure that their respective national legal frameworks enable them

7 Suzannah Linton, *Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation*, 21 *Criminal Law Forum* (2010), 191.

8 Simon M. Meisenberg, *Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court*, 5 *Asian JIL* (2015), 123.

9 Shuichi Furuya, *Domestic Implementation of the Rome Statute in Japan*, 22 *Seoul ILJ* (2015), 39; Jens Meierhenrich and Keiko Ko, *How Do States Join the International Criminal Court? The Implementation of the Rome Statute in Japan*, 7 *JICJ* (2009), 233.

10 LEE Keun-Gwan, *Domestic Implementation of the ICC Statute in Korea: A Critical Analysis*, 22 *Seoul ILJ* (2015), 57; Tae Hyun Choi and Sangkul Kim, *Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and An Overview of the South Korean Implementing Legislation of the ICC Statute*, 19 *Michigan State ILR* (2011), 589; Young Sok Kim, *The Korean Implementing Legislation on the ICC Statute*, 10 *Chinese JIL* (2011), 161. On the implementation of the crime of aggression, see CHOI Tae-hyun, *Ratification and Implementation of the Amendments on the Crime of Aggression under the ICC Statute in Korea*, 22 *Seoul ILJ* (2015), 7.

11 Cf. Hugo Relva, *The Implementation of the Rome Statute in Latin American States*, 16 *Leiden JIL* (2003), 331. To the best of the author's knowledge, there are no similar studies dedicated to the implementation of the Rome Statute in Asian (-Pacific) States at the time of writing.

12 The relationship between the ICC and certain Asian States not party to the Rome Statute has been explored elsewhere. See, for example, in respect of India, Usha Ramanathan, *India and the ICC*, 3 *JICJ* (2005), 627; in respect of Iran, Hiran Abtahi, *The Islamic Republic of Iran and the ICC*, 3 *JICJ* (2005), 635; and in respect of China, LU Jianping and WANG Zhixiang, *China's Attitude Towards the ICC*, 3 *JICJ* (2005), 608; Bing Bing Jia, *China and the International Criminal Court: The Current Situation*, 10 *Singapore YBIL* (2006), 87; Dan Zhu, *China, the International Criminal Court, and International Adjudication*, 61 *Netherlands ILR* (2014), 43. And in relation to the crime of aggression, see ZHU Dan, *China, the Crime of Aggression and the International Criminal Court*, 5 *Asian JIL* (2015), 94. For a recent study comparing the positions taken by India and China, see

to do so. This is not to say that States not party to the ICC Statute will not enact legislation allowing their own courts to try those suspected of committing international crimes¹³ or even to cooperate with the ICC. Rather, the focus of the present article is on those *obliged* to do the latter.

II. Asian Engagement with the Rome Statute System

4. The Asia-Pacific region is the most underrepresented group among State Parties to the ICC Statute. Following the accession of Palestine to the Rome Statute in January 2015, there are 19 ICC State Parties in the Asia-Pacific region, from a total of 53 States in the Asia-Pacific regional group.¹⁴ Further, on 17 March 2018, the Government of the Philippines notified the UN Secretary-General of its decision to withdraw from the Rome Statute which, pursuant to the procedure detailed in Article 127(1) thereof, “shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date”.¹⁵ As the notification from the Philippines specified no later date—on the contrary, it specified that “[t]he action shall take effect for the Philippines on 17 March 2019”—its withdrawal from Rome Statute will be effective on that date, unless a decision to the contrary is taken in the interim.¹⁶ This will leave the Asia-Pacific regional group with 18 State Parties to the ICC Statute.

5. When one divides the Asia-Pacific group into Asia and the Pacific region (or Oceania), respectively, the underrepresentation of Asian States becomes even more evident.¹⁷ The UN Statistics Division has adopted a list of

Suzannah Linton, *India and China Before, At, and After Rome*, 16 JICJ (2018), 265.

13 On which, see the analysis in respect of the Criminal Code of the Republic of Kazakhstan, a State not party to the Rome Statute, in Sergey Sayapin, *The General Principles of International Criminal Law in the Criminal Code of the Republic of Kazakhstan*, 9 Asian JIL (2018), 1.

14 See UN, *United Nations Regional Groups of Member States* (www.un.org/depts/DGACM/RegionalGroups). It is noted that neither Palestine nor the Cook Islands form part of the UN regional group, despite both being State Parties to the Rome Statute.

15 Rome Statute, above n.1, art. 127(1).

16 Government of the Republic of the Philippines, Reference: C.N.138.2018.TREATIES-XVIII.10 (Depositary Notification) (treaties.un.org/doc/Publication/CN/2018/CN.138.2018-Eng.pdf).

17 On the underrepresentation of and under-participation by Asian States in international institutions, and some reasons behind this state of affairs, see Simon

geographic regions, which are based on continental regions.¹⁸ According to this system, Asia can be divided into five sub-regions:

- (1) Central Asia, comprising five States;¹⁹
- (2) Eastern Asia, comprising five States and two Special Administrative Regions;²⁰
- (3) South-eastern Asia, comprising eleven States;²¹
- (4) Southern Asia, comprising nine States;²² and
- (5) Western Asia, comprising eighteen States.²³

6. Chesterman recognizes the difficulties in defining “Asia” partly as a result of its diversity in his article on Asia’s ambivalence about international law and institutions.²⁴ In his words:

Indeed, the very concept of “Asia” derives from a term used in Ancient Greece rather than any indigenous political or historic roots. Regional cohesion is further complicated by the need to accommodate the great power interests of China, India and Japan.²⁵ [Footnote omitted.]

7. For the purposes of this article, a State is considered “Asian” if on the geographical list used by the UN Statistics Division rather than among the members of the Asia-Pacific group. In other words, though Palestine appears on the former list, but not the latter, it will be viewed as an “Asian” State.

Chesterman, *Asia’s Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 *EJIL* (2017), 945.

- 18 UN, *Methodology: Standard Country or Area Codes for Statistical Use (M49)*, (<https://unstats.un.org/unsd/methodology/m49>). It is noted that the webpage includes the following disclaimer: “The assignment of countries or areas to specific groupings is for statistical convenience and does not imply any assumption regarding political or other affiliation of countries or territories by the United Nations.”
- 19 Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan.
- 20 China, Democratic People’s Republic of Korea, Japan, Mongolia, and Republic of Korea. China, Hong Kong Special Administrative Region and China, Macao Special Administrative Region are listed separately.
- 21 Brunei Darussalam, Cambodia, Indonesia, Lao People’s Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste, and Viet Nam.
- 22 Afghanistan, Bangladesh, Bhutan, India, Iran (Islamic Republic of), Maldives, Nepal, Pakistan, and Sri Lanka.
- 23 Armenia, Azerbaijan, Bahrain, Cyprus, Georgia, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Palestine, Syrian Arab Republic, Turkey, United Arab Emirates, and Yemen.
- 24 Simon Chesterman, above n.17.
- 25 *Ibid.*, 946.

Conversely, because Fiji, Nauru, Marshall Islands, Samoa, and Vanuatu are not identified as “Asian” according to the geographical list, they will not be regarded as “Asian” States for the purposes of this study. Such divisions are, though somewhat artificial, borne out of a desire to keep the subject-matter of this article manageable. It is also argued that other categorizations are equally artificial. As Chesterman observes, the UN Asia-Pacific group of States “rarely adopts common positions on issues and discusses only candidacies for international posts. Such sub-regional groupings that exist within Asia have tended to coalesce around narrowly shared national interests rather than a shared identity or aspirations”.²⁶ Geography therefore appears to be as suitable a criterion as any according to which to define Asia.²⁷

8. In terms of ratification or accession, Asian participation in the Rome Statute system can be depicted as follows when viewed using these five sub-regions:

Table 1.

Sub-region	Parties
Central Asia	1 (Tajikistan)
Eastern Asia	3 (Japan, Mongolia, Republic of Korea)
South-eastern Asia	3 (Cambodia, The Philippines, ²⁸ Timor-Leste)
Southern Asia	3 (Afghanistan, Bangladesh, Maldives)
Western Asia	3 (Cyprus, Jordan, Palestine)

9. In other words, 13 of the 48 (or fewer than 30% of) Asian States have ratified or acceded to the ICC Statute in the 20 years since it was concluded in Rome. This figure renders Asia the least represented group of State Parties to the Rome Statute.²⁹ Turning to ratification of the Kampala

26 Ibid., 946.

27 For the adoption of a geographical approach to defining the Asia-Pacific region in the context of discussing engagement with the Rome Statute system, albeit with different results from the present application, see Steven Freeland, *International Criminal Justice in the Asia-Pacific Region: The Role of the International Criminal Court Treaty Regime*, 11 JICJ (2013), 1029, 1031. Freeland’s geographical approach leads to the exclusion of Afghanistan, Cyprus, Jordan, Maldives, Mongolia, and Tajikistan.

28 The Philippines’ withdrawal from the Rome Statute will take effect on 17 March 2019. See Government of the Republic of the Philippines, above n.16.

29 By way of comparison, there are 33 African ICC State Parties (out of 56 members of the UN African Group of Member States), 18 Eastern European ICC State Parties (out of 23 members of the UN Eastern European Group of Member States,

amendments on the crime of aggression, Cyprus and Palestine are the only Asian ICC State Parties to have ratified the amendments of the 35 States to have done so in total.³⁰ Further, of the 13 ICC State Parties in Asia, only three: Cyprus, the Republic of Korea, and Palestine, have ratified the Agreement on the Privileges and Immunities of the International Criminal Court (APIC), which was adopted by the Assembly of States Parties—the Court’s management oversight and legislative body—in September 2002.³¹ Notwithstanding, Asian underrepresentation among the State Parties to the Rome Statute and the failure to ratify, or delay in ratifying, the Kampala amendments and the APIC does not mean that the 13 Asian ICC State Parties ought to have neglected to incorporate aspects of the Rome Statute regime into their respective domestic legal orders. It is to this national implementing legislation (or, where applicable, the lack thereof) that the present analysis now turns.

III. National Implementing Legislation in Asia

10. Asian States have not been immune from the (alleged) commission of mass atrocities within their territories. Indeed, at the time of writing, the ICC Office of the Prosecutor is investigating or examining the alleged commission of crimes under the Court’s jurisdiction in Afghanistan,³² Bangladesh/Myanmar,³³ Georgia,³⁴ Iraq/UK,³⁵ Palestine,³⁶ and the

28 Latin American and Caribbean ICC State Parties (out of 33 members of the UN Latin American and Caribbean Group of Member States), and 25 Western European and other ICC State Parties (out of 29 members of the UN Western European and Others Group of Member States).

30 See UN, Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court, (treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18).

31 See UN, Agreement on the Privileges and Immunities of the International Criminal Court (treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=xviii-13&chapter=18).

32 See ICC, Afghanistan (www.icc-cpi.int/afghanistan).

33 See ICC, Bangladesh/Myanmar (www.icc-cpi.int/rohingya-myanmar).

34 See ICC, Georgia (www.icc-cpi.int/georgia).

35 See ICC, Iraq/UK (www.icc-cpi.int/iraq).

36 See ICC, Palestine (www.icc-cpi.int/palestine).

Philippines.³⁷ This section scrutinizes the state of progress with respect to enacting national implementing legislation across the 13 Asian State Parties to the Rome Statute and considers how a more holistic implementation thereof can help the ICC achieve its purposes. Before turning to whether, and, if so, the extent to which, these States have incorporated the Rome Statute cooperation regime into their respective national legal frameworks, the article first considers how States have implemented the definition and prohibition of the four crimes over which the ICC can exercise jurisdiction, namely the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

III.A. Implementing the Rome Statute Crimes

11. ICC State Parties are not under an explicit obligation to implement the definition and prohibition of the offences listed therein. In other words, despite the appeal of doing so, not least to fulfil the principle of complementarity:

The decision to implement the crimes [sic] listed under Article 5 of the ICC Statute—genocide, crimes against humanity, war crimes, and aggression—remains at the discretion of the State. The same holds true with regard to defences and modes of responsibility[.]³⁸

12. This said, in order to avoid being found by the ICC to be unwilling or unable to investigate and/or prosecute crimes under its jurisdiction, certain States have sought to incorporate the offences into their national legal frameworks. The need to proscribe Rome Statute crimes at the domestic level is therefore clear: in order for national investigations and prosecutions to be able to take place, adequate legislation implementing the four crimes must be enacted.

III.A.i. The crime of genocide

13. A number of Asian States had already legislated to proscribe the crime of genocide in their national legal frameworks before they ratified or acceded to the Rome Statute. This can be explained by the fact that these States had already ratified or acceded to the Convention on the Prevention and

³⁷ See ICC, The Philippines (www.icc-cpi.int/philippines).

³⁸ Case Matrix Network, Implementing the Rome Statute of the International Criminal Court (2017) (www.legal-tools.org/doc/e05157/).

Punishment of the Crime of Genocide (Genocide Convention)³⁹ and had subsequently decided to incorporate elements thereof into their respective national laws. Of the 13 Asian State Parties to the Rome Statute that form the subject of the present article, 10 had ratified or acceded to the Genocide Convention before joining the ICC Statute system. The following table is illustrative in this respect, with the second column indicating the date of ratification (marked with “r”) or accession (marked with “a”) to the Genocide Convention, and the third column showing the date of ratification or accession to the Rome Statute:

Table 2.

State Party	Genocide Convention ⁴⁰	Rome Statute ⁴¹
Afghanistan	22 Mar 1956 a	10 Feb 2003 a
Bangladesh	5 Oct 1998 a	23 Mar 2010 r
Cambodia	14 Oct 1950 a	11 Apr 2002 r
Cyprus	29 Mar 1982 a	7 Mar 2002 r
Japan		17 Jul 2007 a
Jordan	3 Apr 1950 a	11 Apr 2002 r
Maldives	24 Apr 1984 a	21 Sep 2011 a
Mongolia	5 Jan 1967 a	11 Apr 2002 r
Palestine	2 Apr 2014 a	2 Jan 2015 a
The Philippines	7 Jul 1950 r	30 Aug 2011 r
Republic of Korea	14 Oct 1950 a	13 Nov 2002 r
Tajikistan	3 Nov 2015 a	5 May 2000 r
Timor-Leste		6 Sep 2002 a

14. Tajikistan thus constitutes an exception to the general rule, having acceded to the Genocide Convention after ratifying the ICC Statute. It is also noteworthy that Japan and Timor-Leste have not yet acceded to the Genocide Convention despite both having been State Parties to the ICC Statute for a number of years. In the case of Timor-Leste, this situation could result from it having gained independence on 20 May 2002, more than fifty years after the entry into force of the Genocide Convention. Regardless, neither Japan nor Timor-Leste could rely on having pre-existing national

39 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 78 UNTS 277.

40 See UN, Convention on the Prevention and Punishment of the Crime of Genocide, (treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4).

41 See UN, Rome Statute of the International Criminal Court (treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18).

legislation criminalizing genocide at the time they acceded to the Rome Statute from having already implemented (elements of) the Genocide Convention.

15. Not all 13 Asian ICC State Parties explicitly criminalize genocide in their national legal systems. Afghanistan, Japan, Jordan, Maldives, and Palestine possess no specific legislation proscribing the crime. This absence means that, should the courts in these State Parties wish to exercise jurisdiction over conduct that could constitute genocide, they are only able to do so by acting pursuant to “ordinary” domestic criminal provisions. In discussing Japan’s lack of dedicated legislation implementing the definition and prohibition of the crime of genocide in its national law, Meierhenrich and Ko express the following concern regarding this approach:

prosecuting genocide as “multiple homicide”—the strategy favored by the Government of Japan—is not commensurable with the purpose of the Rome Statute precisely because it would in such an instance be unable to communicate the fact that aside from a (typically sizable) number of individual victims, humanity is *also* under attack.⁴²

16. Other Asian ICC State Parties criminalize genocide in their respective domestic legal orders by incorporating the exact wording used in the Genocide Convention and ICC Statute or by expressly referring thereto. For example, Cypriot Law No. 59/1980, designed to implement the Genocide Convention into the domestic law of the Republic of Cyprus, criminalizes the “acts described in Article II of the [Genocide] Convention”.⁴³ Additionally, when amending its dedicated domestic legislation implementing the Rome Statute, Cyprus defined the crime of genocide as follows: “genocide’ means any of the acts specified in article 6 of the Rome Statute.”⁴⁴ Other Asian ICC State Parties to adopt largely similar wording to the definitions enumerated in the Genocide Convention and the ICC Statute in their national implementing

42 Jens Meierhenrich and Keiko Ko, above n.9, 248. Emphasis in original.

43 The Convention on the Prevention and Punishment of the Crime of Genocide Law of 1980 (1980), art. 4. On the incorporation of the crime of genocide into domestic law by reference beyond Asia, see William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2009), 406.

44 The Rome Statute for the Establishment of the International Criminal Court (Ratification) (Amendment) Law of 2006 (2006) (Cyprus Rome Statute Ratification Law), s. 2. The 2006 Law amended The Rome Statute for the Establishment of the International Criminal Court (Ratification) Law of 2002.

legislation are the Republic of Korea⁴⁵ and Tajikistan.⁴⁶ It is also noteworthy that Jordan, in Article 11 of its draft national implementing legislation, “reproduces *verbatim* the definition of the crime of genocide as stipulated in article 6 of the . . . Rome Statute”.⁴⁷

17. Olympia Bekou notes that, when implementing the definition and prohibition of the crime of genocide into their national legal orders, when States do not follow *verbatim* the definition in the Genocide Convention, they are over- or under-inclusive in terms of the protected groups and the prohibited acts.⁴⁸ This trend, which Bekou identifies based on a survey of States from Africa, Europe, and the Americas,⁴⁹ is also evident in several Asian State Parties to the Rome Statute. For example, as for being over-inclusive in its national implementing legislation, Bangladesh extends the definition of the groups protected by the Genocide Convention and Rome Statute (national, ethnical, racial, and religious groups) to include a further group, namely political groups.⁵⁰ The Philippines’ national implementing legislation goes even further, including, in addition to the four groups named in the Genocide Convention and ICC Statute, “social or any other similar stable and permanent group”.⁵¹ The inclusion of other stable and permanent groups reflects the vocabulary used by the Trial Chamber of the International Criminal

45 Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court (2007) (Korean ICC Act), art. 8. See also Young Sok Kim, above n.10, 167.

46 Criminal Code of the Republic of Tajikistan (1998), art. 398.

47 Ibrahim Aljazy, *The Implementation of International Criminal Law in Arab States: The Jordanian Experience*, in: Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (2011), 183, 192.

48 Olympia Bekou, *Crimes at Crossroads: Incorporating International Crimes at the National Level*, 10 JICJ (2002), 677, 680.

49 *Ibid.*, 680-83. Bekou refers to Bolivia, Paraguay, Nicaragua, Colombia, Costa Rica, Ethiopia, Ivory Coast, Lithuania, Panama, Poland, Switzerland, Latvia, Estonia, France, Burkina Faso, Mexico, Finland, and Spain (in addition to the United States, a State not party to the Rome Statute, but which criminalizes genocide).

50 The International Crimes (Tribunals) Act, 1973 (1973), s. 3(2)(c). The 1973 Act was amended by The International Crimes (Tribunals) (Amendment) Act, 2013 (2013). On the inclusion of political groups in national laws criminalizing genocide more widely, see William A. Schabas, above n.43, 406.

51 Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity (2003) (Philippine IHL Act), s. 5(a). Otherwise, the definition of genocide in the Philippines’ national implementing legislation largely reflects the wording of the Genocide Convention and Rome Statute.

Tribunal for Rwanda (ICTR) in *The Prosecutor v. Jean-Paul Akayesu*,⁵² which has received criticism for its reading of the wording of the Genocide Convention and the intention of its drafters.⁵³ As Bekou observes:

Extending the protection to groups that are vulnerable in a given state may be important for a particular jurisdiction, but it is equally important to examine how this is applied in practice, as there is always the risk of diluting the crime of genocide the prosecution of which is normally reserved for the most serious atrocities.⁵⁴

18. Turning to over-inclusiveness in terms of the prohibited acts, Timor-Leste criminalizes several forms of genocidal conduct beyond those included in the Genocide Convention and ICC Statute.⁵⁵ The acts that could constitute genocide, that is, if executed with the requisite specific intent,⁵⁶ in Timor-Leste's national implementing legislation are as follows:

- (a) Homicide or offence against the physical or mental integrity of members of the group;
- (b) By whatever means, acts that prevent members of the group from procreating or giving birth;
- (c) Rape, sexual enslavement, forced prostitution, forced pregnancy, forced sterilization or any other form of sexual violence of comparable seriousness;
- (d) Separation of members of the group into another group by violent means;

52 International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu*, Judgement, 2 September 1998, ICTR-96-4-T, para.516 (“the intention of the drafters of the Genocide Convention . . . according to the travaux préparatoires . . . was patently to ensure the protection of any stable and permanent group.”)

53 For a contemporary example, see Nina H.B. Jørgensen, *The Definition of Genocide: Joining the Dots in the Light of Recent Practice*, 1 International Criminal LR (2001), 285, 288, describing the reading by the ICTR as “an unjustifiably liberal interpretation both of the terms of the Convention, and the intention of the drafters which the Tribunal purported to be at pains to respect.”

54 Olympia Bekou, above n.48, 681-2.

55 Penal Code of the Democratic Republic of Timor-Leste (2009), art. 123.

56 Genocide Convention, above n.39, art. II: “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

- (e) Acts that prevent the group in a violent manner from settling or remaining in a geographic space that is, by tradition or historically, recognized as their own;
- (f) Subjection of the group to cruel, degrading or inhumane conditions of existence and treatment, which may cause its total or partial destruction;
- (g) Widespread confiscation or seizure of property owned by members of the group;
- (h) Prohibition of members of the group from carrying out certain trade, industrial or professional activities;
- (i) Spread of an epidemic that may cause the death of members of the group or offences to their physical integrity;
- (j) Prohibition, omission or hindrance by any means from providing members of the group with humanitarian assistance required to combat epidemic situations or severe food shortages[.]⁵⁷

19. On the one hand, the East Timorese national implementing legislation appears to expand on the conduct that can, if committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such, constitute the crime of genocide under the Rome Statute. On the other hand, subsections e) to j) of the East Timorese Criminal Code could be viewed as elaborating on Article 6(c) of the Rome Statute, which criminalizes “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”.⁵⁸ Either way, such overcriminalization ought not to risk a negative finding on the part of the Court should it make a complementarity assessment in the future.

20. The Cambodian Criminal Code also appears to contain a broader definition of genocide than that contained in the Genocide Convention and Rome Statute with respect to imposing measures intended to prevent births within the group.⁵⁹ Cambodia’s national implementing legislation proscribes “imposing *forceful* measures or *voluntary means* intended to prevent births

57 Penal Code of the Democratic Republic of Timor-Leste, above n.55, art. 123.

58 Rome Statute, above n.1, art. 6(c).

59 See Simon M. Meisenberg, above n.8, 127-8. On the *actus reus* of genocide by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, see also William A. Schabas, above n.43, 188-97.

within the group”.⁶⁰ Meisenberg accurately observes that this provision is unlikely to lead to practical consequences for any possible complementarity determination that the ICC might make in the future, rightly suggesting that “the requirements of this crime will hardly be met if the persons are informed and understand the consequences of the family planning programme”.⁶¹ In other words, measures intended to prevent births within a protected group cannot be imposed voluntarily, but, as implied by the term “imposed”, must be coercive.⁶²

21. In contrast, the definition of genocide in the Criminal Code of Mongolia is as follows:

302. Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such killing of members of the group; causing grave bodily injuries to members of the group; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part[.]⁶³

22. This approach therefore falls into the second category, being under-inclusive in terms of the genocidal acts enumerated in the Genocide Convention and the Rome Statute. Although the Mongolian Criminal Code largely follows the definition agreed in the Genocide Convention *verbatim*, it omits “causing serious . . . mental harm” to members of the protected groups in the list of genocidal acts.⁶⁴ From the perspective of international criminal law, to restrict the *actus reus* for genocide in this manner may trigger the jurisdiction of the ICC according to the principle of complementarity, by virtue of the inconsistency between domestic law and the Rome Statute. In other words, according to Kleffner, “when domestic law criminalizes a narrower range of conduct than the Statute . . . States risk relinquishing their

60 Criminal Code of the Kingdom of Cambodia (2012), art. 183(4) (emphasis added). For translations into English of provisions from the Criminal Code, the author uses Bunleng Cheung, *Criminal Code, Khmer-English Translation* (2011).

61 Simon M. Meisenberg, above n.8, 127-8.

62 *Ibid.*, 127.

63 Criminal Code of Mongolia (2002), art. 302.

64 *Ibid.* Cf. Rome Statute, above n.1, art. 6(b).

competence to investigate and prosecute, because the ICC may declare them to be ‘unable’ [to do so].⁶⁵

23. As for under-inclusiveness with respect to the specific intent required for genocide, it is significant that, in its national implementing legislation, Bangladesh uses the term “such as” instead of “as such”, the wording used in the Genocide Convention and the Rome Statute.⁶⁶ Though conceivably unintentional, the adoption of this wording by the Bangladeshi drafters could have practical consequences. According to Suzannah Linton:

The “as such” emphasises the prohibited targeting of protected groups, . . . a critical aspect of the concept of genocide. The ultimate target is the group, and individuals are targeted because they are members of the group. The “as such” underscores that. In Section 3(2)(c) of the International Crimes (Tribunals) Act As Amended, the turn to “such as” not just shifts the emphasis away from the targeting of the protected groups to the core crimes, but it also turns the Genocide Convention’s closed list of core crimes into a merely illustrative list.⁶⁷

24. This “watering down”, however inadvertent, of the definition of the crime of genocide could lead to the Court finding Bangladesh unable to investigate and prosecute the offence before its national courts, should the ICC be faced with making such an assessment in the future in accordance with the principle of complementarity.

III.A.ii. Crimes against humanity

25. There is no specific international convention akin to those addressing the crime of genocide and war crimes governing crimes against humanity.⁶⁸ As a result, the latter were not widely criminalized in the domestic legal

65 Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 JICJ (2003), 86, 101. See also Julio Bacio Terracino, *National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC*, 5 JICJ (2007), 421.

66 The International Crimes (Tribunals) Act, 1973, above n.50, s. 3(2)(c).

67 Suzannah Linton, above n.7, 245-6 (footnote omitted).

68 This lacuna may, however, soon be filled with the International Law Commission (ILC) deciding to add the topic of crimes against humanity to its work programme at its 66th session. See ILC, *Report on the Work of its sixty-sixth session (5 May to 6 June and 7 July to 8 August 2014)*, 265. See also, on the production of a draft convention to meet the need for treaty on crimes against humanity, Leila N. Sadat (ed.), *Forging a Convention for Crimes against Humanity* (2014).

frameworks of Asian States at the time the Rome Statute entered into force in July 2002. One exception is Bangladesh, whose national implementing legislation, The International Crimes (Tribunals) Act, 1973, criminalizes:

(a) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, imprisonment, abduction, confinement, torture, rape or other inhumane acts committed against any civilian population or persecutions on political, racial, ethnic or religious grounds, whether or not in violation of the domestic law of the country where perpetrated[.]⁶⁹

26. The definition adopted by the Bangladeshi drafters largely appears to reflect the wording of the Charter of the International Military Tribunal and Control Council Law No. 10, both of which adopted and entered into force in 1945.⁷⁰ The definition chosen by Bangladesh adds abduction and confinement to the prohibited conduct for crimes against humanity under its domestic law, neither of which appear in the 1945 instruments. The Bangladeshi definition also includes ethnic grounds among the list of grounds on which the crime against humanity of persecution can be founded, a category not included in the 1945 definitions thereof. It is certainly praiseworthy that Bangladesh has the capacity to investigate and prosecute certain crimes against humanity at the domestic level, as will be demonstrated below with regard to specific offences, its definition falls short of the conduct criminalized by the Rome Statute. Should Bangladeshi authorities and the ICC seek to simultaneously investigate or prosecute conduct within the jurisdiction of the latter, the Court could find Bangladesh “unable . . . to carry out the investigation or prosecution”,⁷¹ in determining whether the case is admissible under Article 17(1) of the Rome Statute, *i.e.* pursuant to the principle of complementarity.

27. Perhaps partly as a result of crimes against humanity not having been implemented into national legal orders prior to the entry into force of the ICC Statute, unlike as with genocide and war crimes, a number of Asian State Parties thereto do not explicitly criminalize crimes against humanity in their

69 The International Crimes (Tribunals) Act, 1973, above n.50, s. 3(2)(a).

70 Charter of the International Military Tribunal, 82 UNTS 279, art. 6(c); Control Council Law No. 10, 3 Official Gazette of the Control Council for Germany (1946), 50, art. II(1)(c). See also Suzannah Linton, above n.7, 231.

71 Rome Statute, above n.1, art. 17(1)(a).

respective domestic laws. These are Afghanistan, Japan, Jordan,⁷² Maldives, Mongolia, Palestine, and Tajikistan.

28. Turning to those Asian State Parties to the Rome Statute that have implemented the definition and prohibition of crimes against humanity in their national legal orders, as with implementing the definition and prohibition of the crime of genocide, certain States make explicit reference to the Rome Statute. For example, "... 'crime against humanity' means any of the acts specified in article 7 of the Rome Statute" according to the national implementing legislation enacted by the Republic of Cyprus in 2006.⁷³

29. Similar to the implementation of the definition and prohibition of the crime of genocide, under-inclusiveness in terms of grounds on which the crime against humanity of persecution, listed in Article 7(1)(h) of the Rome Statute,⁷⁴ may be committed can be viewed in the national implementing legislation enacted by certain Asian ICC State Parties. For example, Bangladesh restricts the offence to "persecutions on political, racial, ethnic or religious grounds",⁷⁵ omitting a number of other grounds contained in the Rome Statute, namely national grounds, gender grounds, and other grounds that are universally recognized as impermissible under international law. Likewise, Cambodia proscribes "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender grounds",⁷⁶ but omits the final category provided in the ICC Statute: other grounds that are universally recognized as impermissible under international law. As noted above with respect to under-inclusiveness in defining the crime of genocide in national legislation, restrictions in terms of the crime against humanity of persecution could lead the Court to find that Bangladesh and

72 Jordan does, however, possess draft national implementing legislation, which, except for its failure to include "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health", reflects the Rome Statute definition of crimes against humanity. See Ibrahim Aljazy, above n.47, 192.

73 Cyprus Rome Statute Ratification Law, above n.44, s. 2.

74 Rome Statute, above n.1, art. 7(1)(h) states: "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court").

75 The International Crimes (Tribunals) Act, 1973, above n.50, s. 3(2)(a).

76 Criminal Code of the Kingdom of Cambodia, above n.60, art. 188(8).

Cambodia are unable to try these offences at the national level, if a complementarity determination were to be made. In contrast, the Philippines' national implementing legislation prohibits "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, sexual orientation or other grounds that are universally recognized as impermissible under international law".⁷⁷ This approach is faithful to the definition in the Rome Statute,⁷⁸ while also explicitly recognizing sexual orientation as a ground on which the crime against humanity of persecution as a can be founded.⁷⁹ Other States adhere even more closely to the wording contained in the Rome Statute. For example, Timor-Leste's national implementing legislation defines the crime against humanity of persecution in the following terms:

... deprivation of the exercise of fundamental rights contrary to international law against a group or a collective entity due to politics, race, nationality, ethnicity, culture, religion, gender or for any other reason universally recognized as unacceptable under international law[.]⁸⁰

30. Similarly, the legislation adopted by the Republic of Korea to criminalize genocide, crimes against humanity and war crimes at the domestic level, as well as to give effect to the Rome Statute cooperation regime domestically, defines the crime against humanity of persecution as: "[d]epriving a member of a group or collectivity of his/her fundamental human rights or restricting his/her fundamental human rights on political, racial, national, ethnical, cultural, religious, gender or other grounds recognized as impermissible under international laws".⁸¹

77 Philippine IHL Act, above n.51, s. 6(h).

78 H. Harry L. Roque, Jr., *Combating Impunity: Legal Nuances of the Philippine IHL Act and the Philippine Ratification of the Rome Statute of the International Criminal Court*, 4 *Asia-Pacific YIHL* (2008-2011), 262, 265.

79 On the crime against humanity of persecution on gender grounds encompassing persecution based on sexual orientation, see, e.g., Valerie Oosterveld, *Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court*, 16 *International Feminist Journal of Politics* (2014), 563, 568-73.

80 Penal Code of the Democratic Republic of Timor-Leste, above n.55, art. 124(h).

81 Korean ICC Act, above n.45, art. 9(2)(7).

31. One notable omission in the national implementing legislation of most Asian ICC State Parties is the requirement under Article 7(2)(a) of the Rome Statute, namely that:

“Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack[.]

32. Of the 13 Asian State Parties to the ICC Statute, only the Republic of Korea⁸² and Cyprus⁸³ incorporate this “policy requirement” into their respective national implementing legislation. Another potential omission in the national implementing legislation enacted by some Asian State Parties to the Rome Statute might have been the residual Article 7(1)(k), *i.e.* the crime against humanity of “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.⁸⁴ Bekou observes: “it is foreseeable that states could take issue with its implementation owing to a potential conflict with the legality principle, which requires the strict definition of the crimes”.⁸⁵ This concern has been expressed in Asia. For example, Jordan has shown its apprehension with regard to the breadth of the definition of “other inhumane acts”. According to Ibrahim Aljazy, Article 12 of the 2008 draft Jordanian national implementing legislation:

reproduces the definition of crimes against humanity found in article 7(1)(a-j) of the . . . Rome Statute but omits the text of article 7(1)(k), namely “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical

82 Korean ICC Act, above n.45, art. 9(1): “. . . an extensive or systematic attack directed against any civilian population in connection with the policies of the State, organizations or institutions to commit such attack”. See also art. 18, which permits Korean courts to take the Elements of Crimes into account in accordance with art. 9 of the Rome Statute.

83 Cyprus Rome Statute Ratification Law, above n.44, s. 2, incorporating the requirement by reference. See also s. 5, which instructs Cypriot courts to take the Elements of Crimes into account in their interpretation and application of arts. 6, 7, and 8(2) of the Rome Statute.

84 Rome Statute, above n.1, art. 7(1)(k).

85 Olympia Bekou, above n.48, 684.

health'. This reflects concerns that the broad definition contained in article 7(1)(k) of the Rome Statute may prompt national judges to find certain conduct to constitute crimes against humanity contrary to the intention of the legislature.⁸⁶

33. Despite such consternation on the part of Jordan, such concerns have not been borne out in the practice of the Asian ICC State Parties to have implemented the definition and prohibition of crimes against humanity in their respective national laws.⁸⁷ Bangladesh,⁸⁸ Cambodia,⁸⁹ Cyprus,⁹⁰ the Philippines,⁹¹ the Republic of Korea,⁹² and Timor-Leste⁹³ all criminalize this residual, but no less significant, category of crimes against humanity in their national implementing legislation.

III.A.iii. War crimes

34. As with the crime of genocide, several States had proscribed war crimes in their respective domestic criminal laws before they ratified the ICC Statute.

This can be attributed to States' efforts to incorporate the four Geneva Conventions (1949) and their Additional Protocols I and II (1977) into their national legal orders.⁹⁴ All 13 Asian State Parties to the ICC Statute have also

86 Ibrahim Aljazy, above n.47, 192.

87 Olympia Bekou, above n.48, 684 reaches a similar conclusion with regard to non-Asian State Parties to the Rome Statute, making reference to the national implementing legislation of Belgium, Georgia, Malta, the Netherlands, New Zealand, Norway, Portugal, South Africa, Trinidad and Tobago, and the United Kingdom.

88 The International Crimes (Tribunals) Act, 1973, above n.50, s. 3(2)(a).

89 Criminal Code of the Kingdom of Cambodia, above n.60, art. 188(11).

90 Cyprus Rome Statute Ratification Law, above n.44, s. 2.

91 Philippine IHL Act, above n.51, s. 6(k).

92 Korean ICC Act, above n.45, art. 9(2)(9).

93 Penal Code of the Democratic Republic of Timor-Leste, above n.55, art. 124(k).

94 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3; Protocol Additional to

ratified the four Geneva Conventions (GC I-IV) as well as Additional Protocols I and II thereto (AP I and AP II, respectively). In addition, Cyprus,

Table 3.

State Party	GC I-IV ⁹⁵	AP I ⁹⁶	AP II ⁹⁷	AP III ⁹⁸
Afghanistan	26.09.1956	10.11.2009	10.11.2009	
Bangladesh	04.04.1972	08.09.1980	08.09.1980	
Cambodia	08.12.1958	14.01.1998	14.01.1998	
Cyprus	23.05.1962	01.06.1979	18.03.1996	27.11.2007
Japan	21.04.1953	31.08.2004	31.08.2004	
Jordan	29.05.1951	01.05.1979	01.05.1979	
Maldives	18.06.1991	03.09.1991	03.09.1991	
Mongolia	20.12.1958	06.12.1995	06.12.1995	
Palestine	02.04.2014	02.04.2014	04.01.2015	04.01.2015
The Philippines	06.10.1952	30.03.2012	11.12.1986	22.08.2006
Republic of Korea	16.08.1966	15.01.1982	15.01.1982	
Tajikistan	13.01.1993	13.01.1993	13.01.1993	
Timor-Leste	08.05.2003	12.04.2005	12.04.2005	29.07.2011

Palestine, the Philippines, and Timor-Leste have also ratified the third, and most recently agreed, Additional Protocol thereto (AP III). Asian ICC State Parties' respective dates of ratification of, or accession to, these international humanitarian law (IHL) instruments are shown in the following table:

35. However, despite such widespread ratification, it must be noted that Afghanistan, Maldives, and Palestine do not criminalize war crimes in their respective domestic legislation, though the latter has taken steps to address this situation by establishing a National Commission for the Implementation of

the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609. On the exercise of jurisdiction over serious violations of IHL in the domestic courts of the Philippines before the entry into force of its national implementing legislation, see H. Harry L. Roque, Jr., above n.78, 267-9.

95 Information on the ratification status of the four Geneva Conventions and their three Additional Protocols is available via the website of the International Committee of the Red Cross (ICRC). See ICRC, Geneva Conventions of 1949 and Additional Protocols, and their Commentaries, (ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp).

96 Ibid.

97 ICRC, above n.95.

98 Ibid.

IHL on 13 January 2016.⁹⁹ The Commission is responsible for, *inter alia*, reviewing existing legislation and submitting proposals for its development, including draft laws, for its harmonization with the provisions of IHL.¹⁰⁰

36. At the same time, because certain States had criminalized war crimes when ratifying the Geneva Conventions and their Additional Protocols, as with the incorporation the crime of genocide into domestic law, they adopted the definitions contained therein. This was again done by replicating their wording or by making direct references thereto. Mongolia follows the second method in its Criminal Code, which provides as follows, in relevant part:

Article 299. Conduct of war by prohibited means

299.1. Cruel treatment of the captives and civilians, displacement of the population, looting of the historical and cultural values in the occupied territory or use of the means of warfare prohibited by an international treaty to which Mongolia is a party shall be punishable by imprisonment for a term of more than 10 to 15 years.¹⁰¹

37. The “international treat[ies] to which Mongolia is a party” in this context include the Rome Statute¹⁰² as well as the four Geneva Conventions and their first two Additional Protocols.¹⁰³ Bangladesh adopts a similar approach by, in addition to proscribing a number of named war crimes,¹⁰⁴ prohibiting the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949”.¹⁰⁵ As for making an explicit reference to the ICC Statute, according to the national implementing legislation of the

99 See Palestine, Decree No. (2) for the Year 2016 on the Establishment of the Palestinian National Committee for International Humanitarian Law (2016) (muq-tafi.birzeit.edu/pg/getleg.asp?id=16770).

100 Ibid.

101 Criminal Code of Mongolia, above n.63, art. 299.

102 See Table 2.

103 See Table 3.

104 See The International Crimes (Tribunals) Act, 1973, above n.50, s. 3(2)(d), criminalizing “violation of 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 in the territory of Bangladesh; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages and detainees, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”.

105 The International Crimes (Tribunals) Act, 1973, above n.50, s. 3(2)(e).

Republic of Cyprus: “‘war crime’ means any of the acts specified in article 8.2 of the Rome Statute”.¹⁰⁶

38. As for Asian State Parties to the Rome Statute that have not implemented war crimes by reference to the Geneva Conventions or the constituent instrument of the Court, there are a number of offences that are contained in these instruments but which are omitted in States’ national implementing legislation. As Meisenberg notes, there are 72 war crimes provisions contained in the Rome Statute,¹⁰⁷ which can be sub-divided into eight grave breaches of the four Geneva Conventions and 64 war crimes that can be perpetrated in international armed conflicts (IACs) and non-international armed conflicts (NIACs).¹⁰⁸ Though the ICC Statute draws a distinction between the types of armed conflict for the purpose of defining the war crimes proscribed therein, this does not mean that States need necessarily do the same when implementing. Nonetheless, should they omit to implement the definition and prohibition of offences in their domestic laws, entirely or in relation to a particular form of armed conflict, that are criminalized in the ICC Statute, they leave themselves susceptible to a negative finding by the Court, should it have to make a determination of their “ability” to investigate and/or prosecute war crimes in line with the principle of complementarity. A number of notable and common aberrations from the war crimes definitions enumerated in the Rome Statute will now be examined in turn.

39. Grave breaches of the Geneva Conventions are the only Rome Statute crimes explicitly criminalized by Japan, with the other offences punishable as “ordinary” domestic crimes.¹⁰⁹ This approach can be partly explained by obstacles arising from Japan’s pacifist post-World War II Constitution, which restrained its capacity to investigate and prosecute war crimes at the domestic level.¹¹⁰ Following a series of legislative changes, Japan moved to criminalize

106 Cyprus Rome Statute Ratification Law, above n.44, s. 2.

107 Simon M. Meisenberg, above n.8, 129.

108 Simon M. Meisenberg, above n.8, 132.

109 See Shuichi Furuya, above n.9, 46. See also Jens Meierhenrich and Keiko Ko, above n.9, 256, who argue that such an approach “is not commensurable with the purpose of the Rome Statute because it disregards the important fact that the codification of international crimes – genocide, crimes against humanity, and war crimes – is, unlike the codification of domestic crimes, aimed at safeguarding not only the interests of individuals, but also the interests of the international community as a whole.”

110 See Jens Meierhenrich and Keiko Ko, above n.9, 238-41.

grave breaches of the Geneva Convention in 2004.¹¹¹ Specifically, the Japanese legislation proscribes war crimes against cultural property,¹¹² delays in the repatriation of prisoners of war,¹¹³ transferring parts of its own population into occupied territory,¹¹⁴ and preventing the departure of civilians from occupied territory.¹¹⁵ At the same time, the 2004 legislation also brought grave breaches of the Geneva Conventions into the remit of punishable offences in the Japanese Criminal Code.¹¹⁶ Despite this arguably momentous legislative step for Japan, the “ordinary” crimes approach leaves the Japanese authorities open to a negative finding in terms of their ability to investigate and/or prosecute crimes other than those explicitly listed in its legislation if ICC investigators were to simultaneously examine such offences.¹¹⁷

40. Turning from an Asian State Party to the Rome Statute that adopts a “minimalist”,¹¹⁸ or “thin”,¹¹⁹ approach to national implementing legislation to a State that adopts a “maximalist position”,¹²⁰ or a “thick” approach,¹²¹ *i.e.* the Republic of Korea, aberrations from the Rome Statute definition of war crimes can still be observed. For example, as shown by Tae Hyun Choi and Sangkul Kim, the war crimes of inhuman treatment in IACs,¹²² cruel treatment in NIACs,¹²³ biological experiments in IACs,¹²⁴ and ordering the displacement of the civilian population in NIACs¹²⁵ do not have equivalent

111 Law Concerning the Punishment of Grave Breaches of International Humanitarian Law (2005).

112 *Ibid.*, art. 3.

113 *Ibid.*, art. 4.

114 *Ibid.*, art. 5.

115 *Ibid.*, art. 6.

116 *Ibid.*, art. 7 and Annex, art. 3. See also Jens Meierhenrich and Keiko Ko, above n.9, 241-42.

117 See Shuichi Furuya, above n.9, 46.

118 *Ibid.*, at 41-42. See also Jens Meierhenrich and Keiko Ko, above n.9, 242-43; LEE Keun-Gwan, above n.10, 65.

119 LEE Keun-Gwan, above n.10, 64.

120 Jens Meierhenrich and Keiko Ko, above n.9, 242-43. See also Shuichi Furuya, above n.9, 41.

121 LEE Keun-Gwan, above n.10, 64.

122 Cf. Rome Statute, above n.1, art. 8(2)(a)(ii).

123 Cf. *ibid.*, art. 8(2)(c)(i).

124 Cf. *ibid.*, art. 8(2)(a)(ii).

125 Cf. *ibid.*, art. 8(2)(e)(viii).

provisions in Korea's national implementing legislation.¹²⁶ At the same time, with several provisions, the Korean national implementing legislation expands certain protections afforded under IACs in the Rome Statute to NIACs. For example, the war crimes of wilfully causing great suffering and deportation or transfer, and criminalized in IACs under the Rome Statute,¹²⁷ are also prohibited in NIACs under the Korean domestic implementing legislation.¹²⁸ Similarly, the war crime of passing sentences or the carrying out of executions without due process having been afforded to the convicted person, prohibited in NIACs under the ICC Statute,¹²⁹ is also proscribed in IACs in Korea's national implementing legislation.¹³⁰ Despite a few aberrations, Korea's overall approach to implementing the Rome Statute has rightly drawn praise for providing clarity. As Lee argues in relation to the Korean (and German) national implementing legislation:

By transposing Article 8(2) of the Rome Statute . . . in an idiosyncratic way, the drafters of the German and Korean acts also purported to enhance the domestic operability of the category of war crimes, in addition to increasing the overall specificity and clarity of the category of war crime. National judges are in general not familiar with international law . . . Interpretation and application of Article 8 of the Rome Statute that is very long and tortuous should pose a highly daunting challenge to them. Sub-dividing the sprawling category of war crimes as provided for in the Rome Statute into 5 sub-categories should lessen the complexity

126 Tae Hyun Choi and Sangkul Kim, above n.10, 610. Choi and Kim also argue that the passing of sentences or the carrying out of executions without due process having been afforded to the convicted person in NIACs, found in art. 8(2)(c)(iv) of the Rome Statute, is not reflected in Korea's implementing legislation. But see Korean ICC Act, above n.45, art. 10(3)(2): "Passing sentence upon any person protected pursuant to international laws on humanity or carrying out such sentence, without undergoing a fair and regular trial", which is prohibited under the Korean national implementing legislation in both IACs and NIACs.

127 See Rome Statute, above n.1, art. 8(2)(a)(iii) (wilfully causing great suffering) and arts. 8(2)(a)(vii) and 8(2)(b)(viii) (deportation or transfer).

128 Korean ICC Act, above n.45, art. 10(2)(2) (wilfully causing great suffering) and art. 10(3)(1) (deportation or transfer). See also Tae Hyun Choi and Sangkul Kim, above n.10, 610.

129 Rome Statute, above n.1, art. 8(2)(c)(iv).

130 Korean ICC Act, above n.45, art. 10(3)(2). Cf. Tae Hyun Choi and Sangkul Kim, above n.10, 610.

of the provision, thereby rendering it more manageable and operational to domestic judges.¹³¹

41. As with the drafters of Korea's national implementing legislation, the drafters of Timor-Leste's national war crimes provisions similarly sub-divided Article 8(2) of the ICC Statute into several categories,¹³² while also providing for the prohibition of many offences in both IACs and NIACs.¹³³ Additionally, in its Penal Code, Timor-Leste extends the Rome Statute offence of conscripting or enlisting children under the age of fifteen years into the national armed forces, or, in the case of NIACs, armed forces or groups, or using them to participate actively in hostilities,¹³⁴ to cover children under the age of eighteen.¹³⁵ Timor-Leste's Penal Code also prohibits a number of means of warfare beyond the scope of the war crimes listed in the Rome Statute, including the use of antipersonnel landmines,¹³⁶ chemical weapons,¹³⁷ incendiary weapons,¹³⁸ and laser weapons capable of causing blind-

131 LEE Keun-Gwan, above n.10, 70.

132 Penal Code of the Democratic Republic of Timor-Leste, above n.55, arts. 125-30. The sub-categories are as follows: 1. War crimes against individuals; 2. War crimes committed using prohibited methods of warfare; 3. War crimes committed using prohibited means of warfare; 4. War crimes against assets protected by insignia or distinctive emblems; 5. War crimes against property; and 6. War crimes against other rights.

133 *Ibid.* Cf. art. 125(3), restricting the following war crimes to IACs:

Any person who, within the context of an armed conflict of an international nature:

- (a) Transfers, directly or indirectly, as an occupying power, parts of its own civilian population into the territory it occupies, or transfers all or parts of the population of the occupied territory within or outside this territory;
- (b) Compels a prisoner of war or other protected person to serve in the armed forces of a hostile power;
- (c) Delays, after cessation of hostilities, and without a justified reason, repatriation of prisoners of war.

134 Rome Statute, above n.1, art. 8(2)(b)(xxvi) (for IACs) and art. 8(2)(e)(vii) (for NIACs).

135 Penal Code of the Democratic Republic of Timor-Leste, above n.55, art. 125(1)(e).

136 *Ibid.*, art. 127(2)(d).

137 *Ibid.*, art. 127(2)(e).

138 *Ibid.*, art. 127(2)(g).

ness in their victim(s).¹³⁹ In sum, therefore, despite some aberrations,¹⁴⁰ Timor-Leste implements the ICC Statute war crimes regime in a clear manner, capable of straightforward application by national judges. Lee's high praise for the Korean (and German) national implementing legislation can therefore be extended to the Penal Code of the Democratic Republic of Timor-Leste.

42. The Tajik Criminal Code also divides the war crimes its criminalizes into sub-categories and, without exception, legislates for the prohibition of all enumerated war crimes in IACs and NIACs,¹⁴¹ thereby providing protection beyond the ICC Statute regime with respect to the offences listed. Despite expanding protection with respect to certain offences, however, there are a number of discrepancies between the war crimes included in the Tajik Criminal Code and those listed in the ICC Statute. By way of example, the Tajik Criminal Code does not criminalize the Rome Statute war crimes of "rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting [in the case of IACs] a grave breach of the Geneva Conventions",¹⁴² or, in the case of NIACs, "also constituting a serious violation of article 3 common to the four Geneva Conventions".¹⁴³ Nor does Tajikistan prohibit the ICC Statute crime of conscripting or enlisting children under the age of fifteen years into, in the case of IACs the national armed forces, or, in the case of NIACs, armed forces or groups, or using them to participate actively in hostilities.¹⁴⁴ As noted with respect to the crime of genocide and crimes against humanity, this leaves Tajikistan susceptible to being deemed "unable" to investigate or prosecute these offences by the Court, should it make such a determination in accordance with the principle of complementarity in the event of an ICC investigation.

43. As for Cambodia and Jordan, both States have incorporated the ICC Statute war crimes scheme in their respective national legal orders to a large

139 *Ibid.*, art. 127(2)(h).

140 For example, *ibid.*, art. 125(1)(h) restricts the war crime of "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" in, art. 8(2)(a)(iv) of the Rome Statute to "property of high value".

141 Criminal Code of the Republic of Tajikistan, above n.46, arts 403 and 404.

142 Rome Statute, above n.1, art. 8(2)(b)(xxii).

143 *Ibid.*, art. 8(2)(e)(vi).

144 *Ibid.*, art. 8(2)(b)(xxvi) (for IACs) and art. 8(2)(e)(vii) (for NIACs).

extent. With regard to the former, Meisenberg identifies the decision taken by legislators not to distinguish between IACs and NIACs in the Cambodian Criminal Code.¹⁴⁵ This method therefore resembles the approach taken by Korea, Timor-Leste, and Tajikistan. At the same time, Meisenberg also singles out notable aberrations between the war crimes proscribed by Cambodia and those listed in the Rome Statute,¹⁴⁶ leading to the conclusion that “this raises concerns about the ability of the Cambodian judiciary to prosecute and punish certain war crimes and may thereby render it ‘unable to carry out its proceedings’ under Article 17(3) of the ICC Statute”.¹⁴⁷ A similar conclusion could equally apply to Jordan, which, though the Military Penal Code prohibits certain war crimes,¹⁴⁸ many offences listed in the ICC Statute have only been incorporated into Jordan’s draft national implementing legislation,¹⁴⁹ which, at the time of writing, is not yet in force, thereby leaving Jordan exposed to a negative finding in the event of an Article 17(3) determination by the Court. As demonstrated in this section, this risk is not unique to Jordan and Cambodia. The domestic legislation implementing the Rome Statute enacted by Japan, Korea, Tajikistan, and Timor-Leste all omit certain war crimes listed in Article 8(2).

III.A.iv. The crime of aggression

44. The ICC has only been able to exercise jurisdiction over the fourth crime listed in the Rome Statute, the crime of aggression, since 17 July 2018. A definition of the crime could not be agreed at the Diplomatic Conference which culminated in the adoption of the Rome Statute 20 years earlier on 17 July 1998 and the Court’s jurisdiction over aggression was therefore deferred until

145 Simon M. Meisenberg, above n.8, 129.

146 Ibid., 134.

147 Ibid., 135.

148 Ibrahim Aljazy, above n.47, 192 (“Articles 13-16 of the draft law also provide for a detailed description of war crimes. This includes war crimes against persons, attacks on properties, attacks on humanitarian operations and their emblems, and several crimes relating to the methods of combat, which apply to both international and non-international armed conflict in line with article 8 of the . . . Rome Statute. In addition to the provisions included in the draft law, the Jordanian Penal Military Code number 58 of 2006 also deals with war crimes. This includes article 41 of the Penal Military Code, which was inserted with a view to implementing the . . . Rome Statute, and sets out a list of acts that are considered war crimes if committed during armed conflicts.”)

149 Ibrahim Aljazy, above n.47, 192.

a later date.¹⁵⁰ A definition of aggression and the conditions for the exercise of jurisdiction over the crime by the Court were eventually agreed by delegates to the Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010. These were inserted into the Rome Statute as Article 8 *bis*,¹⁵¹ Article 15 *bis*,¹⁵² and Article 15 *ter*,¹⁵³ respectively.¹⁵⁴ After the threshold of 30 ratifications of the Kampala amendments, as required by Article 15 *bis* and Article 15 *ter*,¹⁵⁵ had been met, the Assembly of States Parties decided, on 14 December 2017, to activate the Court's jurisdiction over aggression as of 17 July 2018,¹⁵⁶ a symbolic date. It is consequently understandable that the crime of aggression as defined in Kampala does not feature in many States' national implementing legislation at the time of writing.¹⁵⁷ Asian State Parties to the ICC Statute are no exception to this

150 See Rome Statute, above n.1, former art. 5(2) ("The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.") This provision was deleted in accordance with Resolution RC/Res.6, adopted at the 13th plenary meeting of the Review Conference of the Rome Statute on 11 June 2010. See ICC Assembly of States Parties (ASP), Resolution RC/Res.6: The Crime of Aggression (2010), Annex I.

151 Rome Statute, above n.1, art. 8 *bis*

152 *Ibid.*, art. 15 *bis*.

153 *Ibid.*, art. 15 *ter*.

154 See The crime of aggression, above n.150, annex I.

155 Rome Statute, above n.1, art. 15 *bis*(2) and (3) and art. 15 *ter*(2) and (3) *verbatim*:

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

156 ASP, Resolution ICC-ASP/16/Res.5: Activation of the Jurisdiction of the Court over the Crime of Aggression (2017), para.1.

157 Young Sok Kim, a member of the Korean Government Task Force team responsible for drafting national implementing legislation for the Republic of Korea, opines as follows: "The Korean ICC Act does not deal with the crime of aggression even though the crime of aggression is a crime within the jurisdiction of the ICC. The reason is that, at the time of enacting the Act, there was no provision defining the crime of aggression and setting out the conditions under which the ICC exercises its

general trend. Afghanistan, Cambodia, Cyprus, Japan, Jordan, Maldives, Palestine, the Philippines, and the Republic of Korea possess no domestic legal provisions proscribing aggression.

45. Other Asian ICC State Parties do criminalize aggression, at least to a certain extent. For example, Bangladesh criminalizes the following: “Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances”.¹⁵⁸ This largely replicates the definition of crimes against peace adopted by the drafters of the Charter of the International Military Tribunal, save for the omission of “or participation in a common plan or conspiracy for the accomplishment of any of the foregoing” in The International Crimes (Tribunals) Act, 1973.¹⁵⁹ Linton proposes as follows: “[t]his omission may perhaps reflect the continental lawyer’s traditional distaste for this notion of criminality that is prevalent in the common law system, and the notion of ‘common plan’ which was very controversial at Nuremberg”.¹⁶⁰

46. Tajikistan criminalizes not only aggression, but also public appeals to aggressive war in its Criminal Code:

Article 395. Aggressive War

(1) Planning or preparation of an aggressive war is punishable by imprisonment for 12 to 20 years with confiscation of property.

(2) Unleashing or conducting an aggressive war is punishable by imprisonment for 15 to 20 years with the simultaneous confiscation of property or death penalty.

Article 396. Public Appeals To Unleashing an Aggressive War

jurisdiction over the crime. However, once such a provision on the crime of aggression is adopted, the Republic of Korea will be able to amend the Korean ICC Act to include the crime of aggression in accordance with the provision on the crime of aggression.” See Young Sok Kim, above n.10, 164 (footnote omitted).

158 The International Crimes (Tribunals) Act, 1973, above n.50, s. 3(2)(b).

159 Charter of the International Military Tribunal, above n.70, art. 6(a).

160 Suzannah Linton, above n.7, 240.

(1) Public appeals to unleashing an aggressive war is punishable by a fine of 500 to 1000 times the minimum monthly wage or imprisonment for a period of 2 to 5 years.

(2) The same actions committed using mass media or by persons who hold state positions of the Republic of Tajikistan are punishable by imprisonment for a period of 7 to 10 years with deprivation of the right to hold certain positions or be engaged in certain activities for up to 5 years.¹⁶¹

47. In a similar vein, Timor-Leste proscribes incitement to war in its national implementing legislation:

Article 134. Incitement to war

1. Any person who, by whatever means, publicly and repeatedly, incites hatred against a race, people or nation, with the intention to provoke war or prevent peaceful fellowship among different races, peoples or nations, is punishable with 2 to 8 years imprisonment.

2. Any person who induces or enlists Timorese or foreign nationals to, in the service of a foreign group or power, wage war against a State or overthrow the legitimate Government of another State through violent means, is punishable with 5 to 15 years imprisonment.¹⁶²

48. Mongolia also adopts a rudimentary definition of the crime of aggression in its Criminal Code, as follows:

Article 297. Stirring up of an armed conflict

297.1. Stirring up of an international or a local armed conflict shall be punishable by imprisonment for a term of more than 5 to 10 years.¹⁶³

49. Sergey Sayapin has expressed the opinion that “norms criminalising propaganda for war . . . reinforce the substantive prohibition of aggression, especially, at the levels of planning, preparation or initiation”.¹⁶⁴ The inclusion

161 Criminal Code of the Republic of Tajikistan, above n.46, arts. 395 and 396.

162 Penal Code of the Democratic Republic of Timor-Leste, above n.55, art. 134.

163 Criminal Code of Mongolia, above n.63, art. 297(1).

164 Sergey Sayapin, *The Compatibility of the Rome Statute’s Draft Definition of the Crime of Aggression with National Criminal Justice Systems*, 81 *Revue Internationale de Droit Pénal* (2010), 165, 185.

of such provisions in the national implementing legislation of Tajikistan and Timor-Leste is therefore welcome from this perspective. At the same time, at the time of writing, no Asian State Party to the Rome Statute criminalizes the crime of aggression as defined in Kampala, with few criminalizing the offence in any form. This leaves Asian ICC State Parties vulnerable to being found “unable” to investigate and/or prosecute the crime of aggression in the event of a future complementarity assessment.

III.B. Implementing the ICC Cooperation Regime

50. Article 86 of the ICC Statute contains the explicit, general duty to cooperate with the Court: “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court”.¹⁶⁵ The obligation to cooperate with the ICC in the Rome Statute is consequently limited to its State Parties. An exception to this rule arises where the Situation is referred to the ICC by the United Nations Security Council, acting pursuant to Article 13(b) of the ICC Statute.¹⁶⁶ States not parties to the Rome Statute can be therefore bound to cooperate with the Court by virtue of their obligations under the Charter of the United Nations.¹⁶⁷ In addition, Article 12(3) of the ICC Statute allows States not party thereto to recognize the exercise of jurisdiction by the ICC on an *ad hoc* basis by lodging a declaration with the Registrar. Côte d’Ivoire,¹⁶⁸

165 Rome Statute, above n.1, art. 86.

166 *Ibid.*, art. 13 (“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: . . . (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations”).

167 For the exercise of this power, see SC Res 1593, 31 March 2015, para 2: “Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully”; and SC Res 1970, 26 February 2011, para.5, which adopts the same wording as the 2005 resolution but for being targeted instead at “the Libyan authorities”.

168 See ICC, Prosecutor v. Laurent Koudou Gbagbo, Declaration Accepting the Jurisdiction of the International Criminal Court dated 18 April 2003, 6 September 2012, ICC-02/11-01/11-129-Anx16-tENG.

Ukraine,¹⁶⁹ and Palestine¹⁷⁰ have lodged declarations under this mechanism. In the event of such an *ad hoc* declaration, Article 12(3) of the Rome Statute states that: “[t]he accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9”.¹⁷¹ Further, Article 87(5)(a) of the ICC Statute provides that: “[t]he Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an *ad hoc* arrangement, an agreement with such State or any other appropriate basis”.¹⁷²

51. Turning to the forms of cooperation required from States subject to a duty to cooperate, Article 88 of the Rome Statute provides as follows: “State Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation” specified under Part IX.¹⁷³ State Parties are therefore obligated to guarantee that there are procedures available to enable them to cooperate with the Court. However, States are free to determine how to implement the cooperation provisions into their respective national laws. This is an obligation of result: provided that States provide for procedures to facilitate all the forms of cooperation required by the Rome Statute regime, it does not matter how they do so. Under Part IX of the ICC Statute, the obligation to cooperate extends to preserving and providing evidence, sharing information, securing the arrest and surrender of suspects for whom

169 Ukraine has lodged two declarations with the Court’s Registrar under art. 12(3) of the Rome Statute. See Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court on the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity, committed by senior officials of the state, which led to extremely grave consequences and mass murder of Ukrainian nationals during peaceful protests within the period 21 November 2013 - 22 February 2014, 25 February 2014 (<http://www.legal-tools.org/doc/1a65fa/>); Declaration of the Verkhovna Rada of Ukraine on the recognition of the jurisdiction of the International Criminal Court by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of terrorist organizations “DNR” and “LNR,” which led to extremely grave consequences and mass murder of Ukrainian nationals, 4 February 2015 (<http://www.legal-tools.org/doc/b53005/>).

170 Palestine has also submitted two *ad hoc* declarations in accordance with art. 12(3) of the Rome Statute. See Declaration Recognizing the Jurisdiction of the International Criminal Court, 21 January 2009 (<http://www.legal-tools.org/doc/d9b1c6/>) and Declaration Accepting the Jurisdiction of the International Criminal Court, 31 December 2014 (<http://www.legal-tools.org/doc/60aff8/>).

171 Rome Statute, above n.1, art. 12(3).

172 *Ibid.*, art. 87(5)(a).

173 *Ibid.*, art. 88.

arrest warrants have been issued, and protecting victims and witnesses to ICC proceedings.

52. As of the time of writing, Japan and the Republic of Korea are the only Asian ICC State Parties to have enacted specific domestic legislation to give effect to their obligations under Article 88 of the ICC Statute. Japan does so through dedicated legislation separate from its (limited) incorporation of Rome Statute crimes into its domestic legal order,¹⁷⁴ while Korea implements the cooperation regime in the same piece of legislation in which it incorporates international crimes into Korean law.¹⁷⁵ These two laws will now be compared.

53. Japan's national implementing legislation on cooperation is a single law that delineates the procedures according to which the Japanese authorities are permitted to discharge their duty to cooperate with the Court under the Rome Statute. Chapter II of the Japanese Act on Cooperation with the International Criminal Court, which incorporates Japan's duties under Part IX of the Rome Statute into Japanese law, is divided into a number of parts: Section 2 regulates the provision of evidence, documents, and witnesses;¹⁷⁶ Section 3 provides for the surrender and detention of accused persons;¹⁷⁷ and Section 4 tackles enforcement measures taken with a view to the imposition of a fine, forfeiture of assets, or order for reparations.¹⁷⁸ Notably, Chapter IV of the Act pertains to offences against the administration of justice.¹⁷⁹ Japan consequently follows a "thick" approach¹⁸⁰ with respect to the implementation of its obligation to provide for all of the forms of cooperation specified in the Rome Statute.

54. In contrast, the Republic of Korea adopts a "highly 'thin'" approach¹⁸¹ to implementing the Rome Statute cooperation regime, with only two provisions in its legislation intended to give effect to its obligations under Article 88 of the Rome Statute. Article 19 of the Korean ICC Act provides for the *mutatis mutandis* application of its national Extradition Act "with respect to

174 Act on Cooperation with the International Criminal Court (2007) (Japan Act on Cooperation with the ICC).

175 Korean ICC Act, above n.45.

176 Japan Act on Cooperation with the ICC, above n.174, arts. 6-18.

177 Japan Act on Cooperation with the ICC, above n.174, arts. 19-37.

178 Japan Act on Cooperation with the ICC, above n.174, arts. 38-48.

179 Japan Act on Cooperation with the ICC, above n.174, arts. 53-64.

180 LEE Keun-Gwan, above n.10, 75.

181 LEE Keun-Gwan, above n.10, 64.

the surrender of criminals”,¹⁸² while Article 20 of Korea’s national implementing legislation stipulates that “The Act on International Judicial Mutual Assistance in Criminal Matters shall apply *mutatis mutandis*” to cooperation requests emanating from the Court.¹⁸³ Both Articles provide that the Rome Statute shall prevail if either piece of legislation proves inconsistent with the Court’s constituent instrument. On one hand, such an approach might permit Korea to cooperate with the ICC to a limited extent, for example, with regard to the identification of persons or the location of items under Article 93(1)(a) of the Rome Statute, the service of (judicial) documents pursuant to Article 93(1)(d) thereof, or the execution of searches and seizures in accordance with Article 93(1)(h) of the same instrument.¹⁸⁴ On the other hand, this method can pose practical obstacles. For example, by failing to provide for procedures enabling the Prosecutor to execute requests directly on Korean territory without the presence of national authorities in accordance with Article 99(4) of the Rome Statute,¹⁸⁵ Korea is unable to allow for an important prosecutorial function required by the ICC Statute cooperation regime. Nor is Japan, having also chosen not to implement this provision in its legislation on cooperation. This can be contrasted with the approach followed by Germany, whose national implementing legislation the Korean team found to be “of great help” when drafting the law to incorporate the Rome Statute into the Korean legal order.¹⁸⁶ On a related note, Article 99(4)(b) provides that, “[w]here the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.”¹⁸⁷ This obligation is additional to the duty incumbent upon ICC State Parties to consult with the ICC more generally should problems arise when executing requests for cooperation under Article 97 of the Rome Statute.¹⁸⁸ This important procedure is more readily given

182 Korean ICC Act, above n.45, art. 19.

183 Korean ICC Act, above n.45, art. 20.

184 Rome Statute, above n.1, arts. 93(1)(a), 93(1)(d), and 93(1)(h). Cf. Act on International Judicial Mutual Assistance in Criminal Matters (1991), art. 5, titled “Scope of Mutual Assistance”.

185 Rome Statute, above n.1, art. 99(4).

186 Young Sok Kim, above n.10, 162. See also Law on Cooperation with the International Criminal Court (2002), art. 62, titled “Direct Action by the Court”.

187 Rome Statute, above n.1, art. 99(4)(b).

188 *Ibid.*, art. 97.

effect when incorporated into States' domestic frameworks, as can be seen in the Japanese Act on Cooperation with the International Criminal Court:

- (1) The Minister of Foreign Affairs shall consult with the ICC, as necessary, with regard to cooperation with the ICC.
- (2) When the Minister of Justice finds it necessary to consult with the ICC with regard to cooperation with the ICC, he/she shall request the Minister of Foreign Affairs to seek consultation under the provisions of the preceding paragraph.¹⁸⁹

55. Further, as Lee observes: “[a]side from . . . practical considerations, articulation of the implementing legislation in a meticulous way . . . expresses the given State’s willingness to faithfully implement the Statute and also provides moral support to the ICC.”¹⁹⁰ In sum, Korea’s legislation falls short of full implementation of the ICC Statute cooperation regime, but, it must be observed, goes much further than that of most other Asian ICC State Parties. Given the low number of draft or enacted pieces of cooperation legislation across Asia, it is hoped that the Japanese and Korean examples could serve as inspiration for other ICC State Parties in Asia in the course of their respective drafting processes and thereby contribute to improving the situation in the region as a whole.

56. Although the absence of legislation implementing Rome Statute cooperation procedures is not unique to Asia,¹⁹¹ its scarcity is particularly manifest in this region, with only two of Asia’s 13 State Parties to the ICC Statute giving effect to their clear obligation to cooperate. The capacity of the ICC to function effectively is wholly dependent on cooperation because the Court does not have an enforcement mechanism. The absence of cooperation legislation in a particular State hampers the ability of its national authorities to cooperate with the ICC, which, in turn, has a direct impact on the capacity of the ICC to enforce its decisions. Asian State Parties to the Rome Statute should therefore consider implementing Part IX thereof at their earliest convenience in order that the Court’s officials might have the legal authority to operate effectively in the region, if and when such a need arises in future proceedings.

189 Japan Act on Cooperation with the ICC, above n.174, art. 5.

190 LEE Keun-Gwan, above n.10, 76.

191 On the absence of legislation implementing ICC cooperation procedures in African State Parties to the Rome Statute, see Olympia Bekou and Sangeeta Shah, *Realising the Potential of the International Criminal Court: The African Experience*, 6 HRLR (2006), 499, 500.

IV. Concluding Remarks—The Way Ahead for Asia

57. Without enacting national implementing legislation, Asian State Parties to the Rome Statute have limited ability to investigate and prosecute core international crimes and to cooperate with the Court. At the same time, where a State's domestic criminal law fails to criminalize the full range of conduct proscribed under the ICC Statute, the Court might find the State in question "unable" to conduct investigations and prosecutions at the national level, consistent with the principle of complementarity. Further, where States do not provide for all forms of cooperation listed in Part IX of the Rome Statute, it restricts the capacity of ICC officials to operate on their territory. In contrast, where States implement the Rome Statute in a holistic manner, fully incorporating both crimes and cooperation procedures, not only can States be confident in investigating and prosecuting conduct at the national level without intervention from the ICC on the basis of complementarity, but they can also give effect to enforcement action required by the Court on their respective territories. This enables States to fulfil their unequivocal obligation to cooperate with the Court under Part IX of the Rome Statute. This article has demonstrated that very few Asian ICC State Parties have implemented the Rome Statute in such a manner, though aspects thereof have been incorporated into the respective national legal frameworks of several States that form the subject of the present study.

58. So, what can Asian State Parties to the Rome Statute do to remedy this situation? If they have the requisite political will and legislative capacity, which are not always assured, there are a number of tools available designed to help States in the process of drafting legislation pertaining to their duties under the Rome Statute. These include two databases: the National Implementing Legislation Database (NILD)¹⁹² and the Cooperation and Judicial Assistance Database (CJAD).¹⁹³ NILD forms one component of the ICC Legal Tools Database (LTD), whose express objective "is to include . . . every legal document—international or national—that a practitioner working on core international crimes cases might need."¹⁹⁴ Divided into several thematic

192 ICC, National Implementing Legislation Database (www.legal-tools.org/en/go-to-database/national-implementing-legislation-database/).

193 University of Nottingham Human Rights Law Centre, Cooperation and Judicial Assistance Database (<https://cjad.nottingham.ac.uk/en/>).

194 Legal Tools Database, Status of work on the Tools (www.legal-tools.org/en/status-of-work-on-the-tools/).

collections and hosted on the Court's official website, the LTD comprises more than 140,000 such documents at the time of writing.¹⁹⁵ As for the methodology behind NILD, Olympia Bekou writes as follows:

The National Implementing Legislation Database (NILD) contains a comprehensive catalogue of all official versions of national ICC implementing legislation, broken down to fine-grain decompositions ("spans"), which have been "tagged" with corresponding keywords selected from a list of approximately 800 purposely designed keywords. It also contains a list of key State attributes, which impart a broader picture of particular State choices. Finally, NILD includes legal analysis of those provisions that are of particular interest either because they are wider or narrower than the relevant ICC Statute provision, or because they introduce new concepts or notable aberrations.¹⁹⁶

59. Like NILD, CJAD is a database of national legislation implementing the Rome Statute, but with a focus on legislation enacted to enable the relevant State to cooperate with the ICC.¹⁹⁷ CJAD was established in response to a request by The Hague Working Group of the Bureau of the Assembly of States Parties.¹⁹⁸ As with NILD, legislation included in CJAD is broken down and labelled with approximately 250 keywords, thereby rendering it searchable.¹⁹⁹ In view of the fact that many State Parties to the Rome Statute outside of Asia possess national implementing legislation, these databases could constitute valuable tools to Asian ICC State Parties with a desire to implement, or in the process of implementing, the Rome Statute.

195 *Ibid.*

196 Olympia Bekou, Building Databases for the ICC Legal Tools Project: Data Structures and the National Implementing Legislation Database, in: Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer* (2011), 153, 156.

197 See Olympia Bekou, William E.M. Lowe and Daley J. Birkett, *Fostering Cooperation through Technology-Driven Tools*, in: Olympia Bekou and Daley J. Birkett (eds.), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (2016), 396, 399.

198 See ASP, Report of the Bureau on cooperation, ICC-ASP/11/28 (2012), para.10. See also Olympia Bekou, William E.M. Lowe and Daley J. Birkett, above n.197, 403.

199 See Olympia Bekou, William E.M. Lowe and Daley J. Birkett, above n.197, 410.

60. Although Asian States are underrepresented in terms of the Court's membership, a lack of ratifications of the ICC Statute need not be accompanied by a failure on the part of Asian ICC State Parties to implement the ICC Statute in their national legal orders. In the view of former ICC President, Judge SONG Sang-Hyun, "[t]here is no reason for Asian states to shy away from the ICC: the Rome Statute's potential for strengthening the rule of law and contributing to the prevention of atrocities is just as significant here as elsewhere on the globe."²⁰⁰ To enact implementing legislation, governing crimes and cooperation procedures, would constitute an important step towards realizing this potential in Asia.

200 SONG Sang-Hyun, *Preventive Potential of the International Criminal Court*, 3 *Asian JIL* (2013), 203, 212.