

# NATIONALIZED INTERNATIONAL CRIMINAL LAW: GENOCIDAL INTENT, COMMAND RESPONSIBILITY, AND AN OVERVIEW OF THE SOUTH KOREAN IMPLEMENTING LEGISLATION OF THE ICC STATUTE

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## INTRODUCTION

On December 21, 2007, South Korea (“Korea”) enacted the Act on the Punishment of Crimes under the Jurisdiction of the International Criminal Court (“the Act”).<sup>1</sup> Article 1 of the Act declares that the purposes of this legislation are to punish crimes under the Rome Statute (“ICC Statute” or “ICCSt.”) of the International Criminal Court (“ICC”)<sup>2</sup> in the territory of Korea and to set the procedure for cooperation between the ICC and Korea. The Act is considered an important development in Korean criminal law primarily in the following two respects: i) core international crimes (i.e. genocide, crimes against humanity, and war crimes) have now been incorporated into the Korean legal order through its own legislation; and ii) the theory of universal jurisdiction has been introduced and clearly codified in Korean domestic law. Given the monist approach taken by the Korean Constitution in terms of the process of incorporating international law into Korean domestic law, one might say that the Act is not necessary. Yet, taking into account the requirement of the principle of legality in the area of criminal law, the decision to legislate the Act should be welcomed and might be a reference point for other countries adopting the monist approach.

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1. Gookjehyongsa jaepanso gwanhal beomje eu chobol dunge gwanhan beobryul [Act on the Punishment of Crimes Under the Jurisdiction of the International Criminal Court], Act. No. 8719, Dec. 21, 2007 (S. Kor.) [hereinafter Act]. It must be noted that since there is no official translation of the Act from Korean into English, the relevant provisions of the Act in English herein are the authors’ own translations.

2. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

At first glance the Act—which includes only twenty articles—looks quite simple and succinct. In particular, the decision to apply *mutatis mutandis* existing domestic law for the purpose of cooperation and legal assistance between Korea and the ICC renders the relevant section in the Act overly simple. With regard to the substantive law, the peculiar wording of “with the aim of destroying” (as opposed to the usual expression, “with intent to destroy”) employed in the Act for ‘genocidal intent’ drew the authors’ attention. We also recognized complicated—if not confusing—codification of the relevant provisions concerning the command and superior responsibility. The authors will discuss all of these features below in detail. The reader might take note at the outset that the authors spent quite a large portion of this article on the examination of the unique wording employed by the Act concerning genocidal intent and its legal ramification, specifically in view of the recent scholarly discussions taking place on the issue.

In Part I, the authors will explore the important substantive law issues spotted in the Act. In addition to the section on genocidal intent, the provisions relating to crimes against humanity, war crimes, and command and superior responsibility will be examined. As for command and superior responsibility, the authors will recommend significant revision of the relevant provisions. On the other hand, though the Act does not contain any provisions pertaining to modes of liability, the authors will discuss the modes of liability under the Korean Penal Code that will be applied *mutatis mutandis* to the crimes prescribed in the Act; we will pay special attention to the liability of co-perpetration and the functional control theory thereof as adopted by the Korean Constitutional Court. Part II of this article addresses the process of incorporation and execution of international treaties in Korea. On the basis of general description of the relevant procedure, the specific features of the ICC Statute that allowed the Act to be submitted as a *lex specialis* to the Korean Penal Code will be dealt with. In Part III, the jurisdictional bases provided in the Act will be discussed, with particular focus on the theory of universal jurisdiction newly introduced into the Korean legal order *via* the Act. Part IV will demonstrate the *mutatis mutandis* application regime chosen by the drafters of the Act for the purpose of cooperation and legal assistance between Korea and the ICC. Furthermore, the pros and the cons of this arrangement will be discussed.

## I. SUBSTANTIVE LAW

Before the Act was entered into force on December 21, 2007, the core international crimes under the ICC Statute had not existed within the scope of domestic criminal law of South Korea (with the exception of war crimes provided in the relevant treaties ratified by South Korea; examples of these treaties include the Geneva Conventions of 1949 and the Additional

Protocols of 1977 etc). Key features of substantive law as provided in the Act are as follows:

Article 5: Responsibility of commanders or other superiors;

Article 8: Genocide;

Article 9: Crimes against humanity;

Article 10: War crimes against persons;

Article 11: War crimes against property and other rights;

Article 12: War crimes against humanitarian operations and emblems;

Article 13: War crimes concerning prohibited methods of warfare;

Article 14: War crimes concerning prohibited weapons of warfare;

Article 15: Offence of negligence violating the duty of commanders and other superiors;

Article 16: Offences against the administration of justice.

Regarding genocide, crimes against humanity, and war crimes, the Act not only provides definitions of the crimes but also applicable penalties for each offence or each group of offences. Generally speaking, when a victim has “died as a result of an act referred to in the relevant provision,” the person is to be sentenced to capital punishment—life—imprisonment or imprisonment of not less than seven years.<sup>3</sup> It reflects the theory of consequence-based aggravation of penalties adopted by the Korean Penal Code. For this purpose, it should be noted that Article 15(2) of the code requires foreseeability in relation to the serious result, like consequence of death. With respect for attempts—as provided in Article 25(3)(f) of the ICC Statute—we can find the equivalent provisions in Article 8 through Article 14 respectively.

A. Genocide: “With the Aim of Destroying” Instead of “With Intent to Destroy”

Article 8 of the Act—which provides for the crime of genocide—is consistent with the corresponding provision (Article 6) of the ICC Statute and generally verbatim in language. There is, however, unique wording

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3. Act, *supra* note 1, arts. 8(1), 8(3), 9(1), 9(4), 10(1), 10(6), 12(2), 13(2).

employed by the Act concerning genocidal intent. This feature and its potential implications will be explored in detail below.

### 1. *The Concept of Aim—Crimes under the Korean Penal Code*

It is noteworthy that the Act uses a different wording than the ICC Statute regarding special intent (*dolus specialis*), specific intent, or genocidal intent of genocide. That is, instead of using the phrase “with intent to destroy” (Article 6 ICCSt.), Article 8(1) of the Act employs the wording “with the aim of destroying.” Is there any significant difference between these two wordings? The validity and value of the new wording “with the aim of destroying” deserve our closer scrutiny.

The phrase “with the aim of” is not new in the context of Korean criminal law. There are a number of offences under the Korean Penal Code (“Code”) where the phrase “with the aim of” is provided—such as the crime of causing internal disturbance (Article 87 of the Code),<sup>4</sup> the crime of organizing a criminal group (Article 114 of the Code), and the crime of forging currency (Article 207 of the Code). The common legal feature of these offences is that they constitute the respective crime *only if* a relevant conduct is committed with a certain aim, in other words “*with the aim of* violating the national territory or disturb[ing] the constitutional order” (crime of causing internal disturbance), “*with the aim of* criminal activities” (crime of organizing a criminal group) and “*with the aim of* using [the forged currency]” (crime of forging currency).

As the definition of the crime specifically requires a showing of the existence of an “aim,” the offences under the Korean Penal Code stipulated with the phrase “with the aim of” have been generally referred to as an aim-crime. The so-called aim-crime also includes a few offences for which the phrase “with the aim of” is not explicitly provided in the relevant provisions of the Korean Penal Code. A typical example is larceny (Article 329 of the Code) which requires an “intent to exclude the owner, and to use or dispose of another person’s property in accordance with its economical usage.”<sup>5</sup> Korean scholars are generally of the view that the essential characteristics of the aim-crime are: i) “aim” is a mental element; ii) “aim” is distinguished from the general mental element of “intent” in that it does not correspond to any material element(s) of the crime; iii) the object of “aim” (e.g., use of forged currency) exists beyond the material elements of the crime; and thus iv) the realization of the object of “aim” (e.g., actually using forged currency) is not required to be proven.<sup>6</sup> In this respect, the aim-crime under

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4. Hyongbeob [Korean Penal Code], Act No. 293, art. 87 (Sept. 18, 1953) (S. Kor.) [hereinafter Korean Penal Code].

5. Supreme Court [S. Ct.], 91Do3149, Sept. 8, 1992 (S. Kor.).

6. IL-SU KIM & BO-HACK SUH, CRIMINAL LAW: THE GENERAL PART 234–35 (2006); WOONG YIM, CRIMINAL LAW: THE GENERAL PART 106 (2005).

the Korean Penal Code seems to fall into the category of the common law concept of specific intent offences. In explaining the specific intent offences, Joshua Dressler takes the examples of larceny (taking away the personal property of another “with the intent to permanently deprive the other person of his property”) and burglary (entering the dwelling of another in the night–time “with intent to commit a felony”).<sup>7</sup> Here, both the “intent to permanently deprive the other person of his property” and the “intent to commit a felony” can be viewed as something equivalent to the mental element of “aim” under Korean criminal law.<sup>8</sup>

It is important to note that the mental element of “aim” under Korean criminal law does not correspond to any material elements of “conduct,” “consequence,” or “circumstance” and/or whatever material elements the relevant criminal provision contains.<sup>9</sup> Furthermore, the mental element of “aim” seems to fulfill its function without requiring a corresponding material element at all. In other words, the *object* of “aim” (e.g., using forged currency) should *not* be regarded as a material element, and especially not as a “consequence” or “result.” Accordingly, the “violation of the national territory” (Article 87), “disturbing the constitutional order” (Article 87), “performing criminal activities” (Article 114), or “using forged currency” (Article 207) should not be considered as a separate material element, but instead as an *ingredient* of the mental element of “aim.” Whether the ingredient of “aim” becomes materialized is legally irrelevant and has nothing to do with the constitution of the crime. Severance between the mental element of “aim” and the physical realization thereof seems to be the key in understanding the legal nature of the aim–crime under the Korean Penal Code. In sum, it is considered that i) the mental element of “aim” required to be proven by the definition of the aim–crime is *only directed at*

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7. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 137–38 (5th ed. 2009).

8. In this respect, the genocide provision in the United States Code that employs the wording of “with the specific intent to destroy” seems to signify the same understanding of the nature of genocidal intent as that of the Act. See 18 U.S.C. § 1091 (2006). On the other hand, it should be noted that the conceptual scope of the “specific intent” offence in the common law is broader than that of the aim–crime under the Korean law. That is because the former includes another sub–category of the offences where the definition of the crime “provides that the actor must be aware of a statutory attendant circumstance” (e.g., “receiving stolen property with knowledge that it is stolen”). In this definition, the *mens rea* (knowledge) is required to correspond to *actus reus* (circumstance), which is not the case with aim–crimes under Korean criminal law. See DRESSLER, *supra* note 7, at 137–38.

9. In this respect, the mental element of “aim” in the Korean criminal law context seems to be equivalent to Paul Robinson’s concept of “future–conduct intention” in that “[a] requirement of a future conduct intention . . . by definition has no corresponding objective element but rather exists on its own . . .” See Paul Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994). In another text, Robinson clarifies that the concept of “future–conduct intention” is equivalent to “specific intent” in the common law. See Paul Robinson, *Should the Criminal Law Abandon the Actus Reus–Mens Rea Distinction?*, in ACTION AND VALUE IN CRIMINAL LAW 187, 205 n. 63 (Stephen Shute, John Gardner, & Jeremy Horder eds., 2003).

“some future act or . . . some further consequence . . . beyond the conduct or result that constitutes the *actus reus* of the offense,”<sup>10</sup> and ii) the realization of the “aim” is not required to be proven as they are not *actus reus* for the offence.

## 2. *Mental Elements of the Crime of Genocide under the Korean Implementing Legislation*

The phrase “with the aim of destroying” as a statutory expression of genocidal intent will give a strong impression to the Korean judges that the crime of genocide falls into the category of aim-crime under Korean criminal law. The authors are of the opinion that this categorization is correct and consistent with the true nature of genocidal intent for the reasons articulated below.

### a. Conceptual Distinction between “Intent” and “Aim”

On the basis of the understanding of aim-crime under the Korean Penal Code explained above, identifying the exact legal nature of the mental elements of genocide in the Korean legal context would help clarify the true implication of the wording of “with the aim of destroying.” Before embarking on a specific examination of the concept of genocidal intent, it is necessary to explore the conceptual distinction between “intent” and “aim.” In this regard, an observation made by Kwang-Joo Rim, a Korean criminal law professor, deserves our attention. He seems to suggest two parameters of the distinction between “intent” and “aim”—the direct and full control test and concurrence test.<sup>11</sup>

Based on Rim’s explanation, a definition of “intent” might be advanced in which “intent” is a person’s willful state of mind that *is directly and fully controlling* a conduct *at the time of* the conduct. One cannot, however, through his or her will, directly and fully control all the conducts to be engaged in by other people. The only object of the person’s direct and full control through his or her will can be his or her own conduct. Thus, “intent” is directed at the person’s own conduct only, not at the conduct to be engaged in by other people. Essentially, an intent that I harboured yesterday or will harbour tomorrow does not have any meaning in the sense of criminal law if my conduct is not accompanied by the intent *at the time of* the conduct.

On the other hand, “aim” is not a state of mind that is directly and fully controlling an object in the sense that this state of mind is directed at an object *in the future*. With regard to the object of “aim,” Rim opines that

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10. DRESSLER, *supra* note 7, at 138.

11. Kwang-Joo Rim, *Hyongbeob E Itseoso Mokjok Eu Gaenyum Gwa Yoohyong [The Concept and Types of Aim in Criminal Law]*, 21 HANYANG L. REV. 45, 47–49 (2004).

everything that can be portrayed in a person's mind can be an object of "aim." Thus, the person's own conduct can also be an object of "aim" if it is supposed to happen *in the future*. Likewise, the concept of "aim" has a *capacity* to encompass other people's conduct, which was not the case with the concept of "intent" as just explained. This disparity in terms of the *capacity* of the concepts of "aim" and "intent" is crucial for the subsequent discussion on genocidal intent.

The distinction between "intent" and "aim" might be summarized as follows: "intent" is a willful state of mind directed at a person's own directly and fully controllable conduct at the time of the conduct, and "aim" is a willful state of mind directed at an object in the future regardless of whether the object is directly and fully controllable or not. Consequently, one can only have an "aim" (but not "intent") *vis-à-vis* i) other people's conduct, or ii) a consequence that requires the involvement of other people for it to be realized. Yet, "intent" does not have a capacity to cover these two items.

At this juncture, it is illuminative to see what George Fletcher states on the meaning of "intent":

It accounts for one of the basic principles of criminal responsibility: the required *union* of act and intent. If [yesterday] I ha[d] the intent to steal a specific book, and [today] I walk away with the book by mistake, I do not steal it. I must have the intent to steal *at the very moment* that I walk away with the book. Or recall the scene from the film *Nine to Five*: A secretary wishes to kill her boss. While preparing him a cup of coffee she mistakenly (not accidentally!) puts a substance in the coffee that turns out to be poison. She may have a background plan and even an unconscious intention to kill him, but she does not intentionally poison him. What counts is not the preliminary or the background or subconscious intention of the actor, but the *adverbial question*: Did the actor intentionally deprive the owner of possession of the book or intentionally induce him to drink poison? (emphasis added).<sup>12</sup>

Given the phrases "at the very moment" and "adverbial question," Fletcher is obviously of the same view as Rim that the intent must exist at the time of conduct, backing the concurrence test. The state of mind

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12. GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 121 (1998). *See also* MICHAEL BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON* 16 (1999) ("My intention will not merely influence my conduct, it will control it. . . . Intentions are, whereas ordinary desires are not, conduct-controlling pro-attitudes. Ordinary desires, in contrast, are merely *potential influencers* of action. The volitional dimension of the commitment involved in future-directed intention derives from the fact that intentions are conduct controllers. If my future-directed intention manages to survive until the time of action, and I see that that time has arrived and nothing interferes, it will control my action then. As a conduct-controlling pro-attitude my intention involves a special commitment to action that ordinary desires do not."). It should be kept in mind that Bratman's "future-directed intention" is not a legal notion. Instead, it is a philosophical concept.

indicated by the adverb “intentionally” always exists at the very moment when a conduct signified by a verb is engaged in. Furthermore, the factual examples in this passage are considered to support the validity of the direct and full control test—both the person who took the book and the secretary who poisoned her boss clearly did not have control over what happened—they engaged in a conduct and/or caused a consequence *by mistake*.

b. Two Mental Elements of Genocide—But, no “Double Intent” Anymore

It has been generally thought that the crime of genocide requires two separate types of intent—the intent for the underlying conduct and genocidal intent to destroy a group.<sup>13</sup> In the context of Korean criminal law, “instigation”<sup>14</sup> is commonly said to require “double intent”—first, “intent to instigate” (i.e., intent to create a will to commit a crime in another person’s mind) and second, “intent to realize the crime through another person.”<sup>15</sup> In this respect, Rim observes that, although “instigation” indeed has two separate mental elements, they are not “double intent” but one “intent” and one “aim.”<sup>16</sup> If we apply Rim’s criteria of distinction between “intent” and “aim” to the case of “instigation,” i) “the instigator’s own conduct of instigation”—which is directly and fully controllable by the instigator (direct and full control test) at the time of instigating (concurrency test)—is in no doubt an object of his own intent, and ii) “the realization of the crime through another person”—which is not directly and fully controllable by the instigator (direct and full control test) and is something to happen in the future (concurrency test)—cannot be an object of “intent,” but can only be an object of “aim.” Therefore, it seems sound to argue that “instigation” has two mental elements of “intent” and “aim,” not “intent” and “intent.” In this regard, Rim further takes the examples of the “offence of criminal preparation,”<sup>17</sup> “offence of conspiracy,”<sup>18</sup> and “attempt”<sup>19</sup> in respect of

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13. See, e.g., Int’l Comm’n of Inquiry on Darfur, established pursuant to resolution 1564 (2004), Report to the United Nations Secretary-General, ¶ 491 (Jan. 25, 2005), [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf), [hereinafter Darfur Report] (stating that “the subjective element or *mens rea* [of genocide] is twofold: (a) the criminal intent required for the underlying offence (killing, causing serious bodily or mental harm, etc.) and, (b) ‘the intent to destroy, in whole or in part’ the group as such.”).

14. Korean Penal Code, *supra* note 4, art. 31(1).

15. KIM & SUH, *supra* note 6, at 640; YIM, *supra* note 6, at 446.

16. Rim, *supra* note 11, at 49.

17. *Id.* “Intent” directed at the conduct of preparation, and “aim” directed at the realization of a crime.

18. *Id.* “Intent” directed at the conspiracy, and “aim” directed at the realization of the crime. The term “conspiracy” is a translation of the Korean word “Eum-mo” as provided in Article 28 of the Korean Penal Code, which provides, “[w]hen a conspiracy or preparatory conduct for a crime has not reached the commencement of the execution of the crime, the person shall not be punished, except as otherwise provided by statute.” Though relevant case

which the mental element of “aim” has been mistakenly labeled “intent” by many Korean scholars.

If we analyze the *mens rea* structure of the crime of genocide, it indeed requires two mental elements—intent for the underlying conduct to which Article 30 of the ICC Statute applies, and genocidal intent directed at the destruction of a group. As to the former, when a person consciously engages in one of the underlying conducts provided in Article 6(a)–(e) of the ICC Statute, we can safely state that he or she is in possession of “intent” *vis-à-vis* the conduct (unless he or she suffers from physical malfunctioning etc). That is, the intent exists at the time of the conduct (concurrency test) and the person has direct and full control over his or her conduct (direct and full control test). On the other hand, with regard to genocidal intent, the “destruction” is a *future* effect or further consequence envisaged in a person’s mind (concurrency test). Furthermore, the realization of the “destruction” requires the involvement of other people as confirmed by the drafters of the Elements of Crimes when they stipulated the phrase “a manifest pattern of similar conduct,”<sup>20</sup> and other people’s conducts are not directly and fully controllable (direct and full control test). Thus, genocidal intent fails both the concurrency test and the direct and full control test and, consequently, cannot be labeled “intent.” As recognized by some members of the International Law Commission when they recommended replacing the wording “acts committed with intent to destroy” with “acts committed *with the aim of* destroying” or “acts manifestly *aimed at* destroying” for the Article on genocide in the Draft Code of Crimes against the Peace and Security of Mankind, genocidal intent should be classified as “aim,” not as “intent” “to avoid any ambiguity on this important element of the crime.”<sup>21</sup>

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law in Korea is quite scarce, one might say that the concept of “conspiracy” in Article 28 of the Code is i) similar to the conspiracy doctrine of the common law in that it is a substantive offence, and ii) distinct from the conspiracy doctrine of the common law in that it does not require the element of “overt act.” Note that, under Article 28, the rule is not punishing conspiracy. Punishing conspiracy is an exception. For a general overview of the relevant theories and case law concerning Article 28 of the Code, see Jong-Ryul Lee & Deok-In Lee, *Hyong Sa Beob Sang Ye Bi Eum—mo Je E Daehan Je Gumto [A Review on Criminal Offence of Conspiracy, Inchoate Crime: Abolition of Offence of Conspiracy and Modification of Inchoate Crime]*, 49 Dong-A U. L. Rev. 137–170 (2010); Jung Hwan Han, *Yebi Eum—mo Je Eu Sung Rip Yo Gun, Jeok Yong Gi Joon [Die Verabredung und Vorbereitung der Straftat]*, 633 Kor. Lawyers Ass’n J. 141–171 (2009).

19. *Id.* “Intent” directed at the initiation of the conduct, and “aim” directed at the completion of the crime.

20. Report of the Preparatory Comm’n for the Int’l Criminal Court, Finalized Draft Text of the Elements of Crimes, art. 6, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter Elements of Crimes] (describing the objective contextual element of genocide as “conduct [which] took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.”).

21. May 2–July 21, 1995, ¶ 79, U.N. Doc. A/50/10; GAOR, 50th Sess., Supp. No. 10 (2005) (“It was suggested that the Drafting Committee might consider using a formulation

### 3. *Difficulties Stemming from the Wording of “With Intent to Destroy”*

As of May 2010, the authors are not aware of any other national implementing legislation of the ICC Statute that employs the wording of “with the aim of destroying” for the purpose of providing genocidal intent.<sup>22</sup> The Act’s unique selection of this wording seems to be a progressive development in the area of the law on genocide. To date, the discussion on “specific intent,” “special intent (*dolus specialis*),” or “genocidal intent” has been considered difficult and complex, particularly in view of the unique—and at the same time common—feature of the core international crimes that involves the participation of “many people.” Except for the highly exceptional situation envisaged by the second part of the contextual element of the crime of genocide provided in the Elements of Crimes (“conduct that could itself effect such destruction”),<sup>23</sup> is it possible for many Rwandan Hutu people who pursued their Tutsi neighbours to universally have the “special intent” to destroy? It seems thus far that the term “special intent” has been understood by many scholars, lawyers, and international judges as more of a stronger intent than a general intent (particularly in terms of the volitional aspect of intent). A noteworthy example of such understanding is the term “aggravated criminal intention” that appears in the Darfur Report, explaining the concept of genocidal intent.<sup>24</sup> The usage of the term “aggravated criminal intention” in the United States,<sup>25</sup> the employment of

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such as ‘acts committed with the aim of’ or ‘acts manifestly aimed at destroying’ to avoid any ambiguity on this important element of the crime.”)

22. Most national implementing legislation of the ICC Statute uses the wording “with intent to destroy.” See, e.g., Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, § 4(3) (Can.), available at <http://laws.justice.gc.ca/PDF/Statute/C/C-45.9.pdf>; Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ch. 5, sched. 1, pt. 1 (S. Afr.), available at <http://www.info.gov.za/gazette/acts/2002/a27-02.pdf>; *International Criminal Court (Consequential Amendments) Act 2002*, divs. 268.3–268.7 (Austl.), available at [http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/DE14FDCCC9AB239BCA2574100007FC95/\\$file/0422002.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/DE14FDCCC9AB239BCA2574100007FC95/$file/0422002.pdf). It is however noteworthy that, to the authors’ knowledge, the only legislation that employs a similar wording as the Korean legislation is the Criminal Code of Georgia (Apr. 28, 2006. No. 2937). Article 407 of the Georgian Criminal Code uses the phrase, “*in order to realize an agreed plan of complete or partial destroying.*” (emphasis added). The authors are grateful to Georgian lawyer Mr. Ilia Utmelidze of the Norwegian Center for Human Rights for providing us with the translation of this provision and sharing his observations.

23. Elements of Crimes, *supra* note 20, art. 6.

24. Darfur Report, *supra* note 13, ¶ 491.

25. The term “aggravated criminal intent” seems to find its origin in the American legal system in which the term has been used to show an added culpability of a person who did not comply with a “judicial or administrative warning” or a “special law in the form of a formal order, injunction or decree” specifically given to him or her by a judicial or governmental authority. See *United States v. Linville*, 10 F.3d 630, 633 (9th Cir. 1993); *United States v. Kubick*, 199 F.3d 1051, 1062 (9th Cir. 1999); *United States v. Shaddock*,

the wordings of “consciously desired,”<sup>26</sup> and the additional cognitive component of knowledge (“know that . . . would destroy”) all indicate the enhanced culpability level of “special intent.” The Darfur Report states:

[A]n aggravated criminal intention or *dolus specialis* . . . implies that the perpetrator *consciously desired* the prohibited acts he committed to result in the destruction, in whole or in part, of the group as such, and *knew* that his acts would destroy in whole or in part, the group as such (emphasis added).<sup>27</sup>

In the same vein, Kai Ambos says:

In the civil law tradition, specific intent corresponds to *dolus directus* of first degree, i.e. it emphasizes the volitive element of the *dolus*. It has been said that an offence with a specific intent requires performance of the *actus reus* in association with an intent or purpose that goes beyond the mere performance of the act. In other words it consists of an aggravated criminal intent that must exist in addition to the criminal intent accompanying the underlying offence.<sup>28</sup>

The same line of understanding can also be found in the jurisprudence of the *ad hoc* tribunals. In its first genocide conviction, the International Criminal Tribunal for Rwanda (“ICTR”) Trial Chamber in *Akayesu* repeatedly uses the word “clear” in explaining the genocidal intent—for example, “clearly seeks to produce,” “clear intent to cause,” and “clear intent to destroy.”<sup>29</sup> The subsequent case law of the ICTR and the

112 F.3d 523, 529 (1st Cir. 1997); *United States v. Gunderson*, 55 F.3d 1328, 1333 (7th Cir. 1995).

26. MODEL PENAL CODE § 2.02(2)(a) (1962) (defining four levels of culpability: purposely, knowingly, recklessly and negligently. Regarding “purposely” that includes the strongest volitional element, the code uses the phrase “the defendant’s conscious object.”). It should also be noted that MODEL PENAL CODE § 1.13(12) states, “‘intentionally’ or ‘with intent’ means ‘purposely.’”

27. Darfur Report, *supra* note 13, ¶ 491.

28. Kai Ambos, *Commentary: Genocidal Intent*, in 8 ANNOTATED LEGAL CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 423, 424 (André Klip & Göran Sluiter eds., 2005).

29. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 498 (Sept. 2, 1998) (“Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator *clearly* seeks to produce the act charged.”) (emphasis added); *Id.* ¶ 518 (“Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the *clear* intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.”) (emphasis added); *Id.* ¶ 520 (“With regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the *clear* intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.”) (emphasis added). *See also*

International Criminal Tribunal for the Former Yugoslavia (“ICTY”) Appeals Chamber in *Kristić* have followed the same interpretative approach—generally referred to as purpose-based approach to genocidal intent (as opposed to knowledge-based approach).<sup>30</sup> According to this purpose-based approach, the genocidal intent indicates a state of mind that “consciously desires” a destruction of a group (not just “desire”), and clearly intends the destruction of a group (not just “intend”). It is considered, however, that there are some difficulties involving this interpretative approach to genocidal intent.

First, the purpose-based approach tends to contradict the reality of genocidal crime—base in which “many people” participate. That is, it is hard to imagine a situation where such a strong level of intent would be shared by all of those participants covering i) the masterminds at the highest

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Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 59 (Dec. 6, 1999), available at <http://www.unhcr.org/refworld/docid/48abd5880.html>. As to the *Akayesu* Trial Chamber’s opinion that the concept of “special intent” is well-known to the continental legal tradition, see a negative response from Claus Kreß:

This statement quite considerably underestimates the complexity of the matter. Neither the ‘Roman-continental systems’ nor the legal family of the common law can be relied upon for a clear cut and uniform concept of *dolus specialis* (‘dol special’, ‘special intent’, ‘Absicht’/‘erweiterter Vorsatz’, ‘dolo específico’, ‘oogmerk op’, ‘amesos dolos/skopos’ etc.) as meaning aim, goal, purpose or desire. It is thus highly improbable whether a valid comparative law argument could be developed in support of the assertion put forward in *Akayesu*. But apart from this, the definition of genocide does not use any of those terms, but simply the word ‘intent’ which leaves the necessary room to have due regard to genocide’s specific interplay between individual and collective acts.

Claus Kreß, *The Crime of Genocide under International Law*, 6 INT’L CRIM. L. REV. 461, 494 (2006).

30. For discussion on the “purpose-based approach” and the “knowledge-based approach” to genocidal intent, see Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259 (1999); Claus Kreß, *The Darfur Report and Genocidal Intent*, 3 J. INT’L CRIM. JUST. 562, 565 (2005) [hereinafter Kreß, *Darfur Report and Genocidal Intent*]; Kreß, *supra* note 29, at 492; Hans Vest, *A Structure-Based Concept of Genocidal Intent*, 5 J. INT’L CRIM. JUST. 781, 786 (2007); Claus Kreß, *The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the Al Bashir Case*, 7 J. INT’L CRIM. JUST. 297, 304–06 (2009); WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 242 (2009). The following summary made by William Schabas on the two approaches is short and clear: “Adoption of a ‘purpose-based’ approach, which dwells on intent, results in a focus on individual offenders and their own personal motives. A ‘knowledge-based’ approach, on the other hand, directs the inquiry towards the plan or policy of a State or similar group, and highlights the collective dimension of the crime of genocide.” *Id.* For a thorough study of the ICTY jurisprudence on genocidal intent, see Cécile Tournaye, *Genocidal Intent before the ICTY*, 52 INT’L AND COMP. L. Q. 447 (2003).

organizational structure of power; ii) mid-level commanders who passed the instructions/orders; and iii) direct-perpetrators who physically carry out the campaign.<sup>31</sup> In this respect, Claus Kreß explains, “[t]he fundamental problem of the purpose-based approach thus consists in the combination of an *actus reus* list formulated from the perspective of the subordinate level with what is typically a leadership standard of *mens rea*.”<sup>32</sup>

Second, the purpose-based approach is likely to entice scholars and practitioners to build a causal connection between the underlying conducts of genocide as provided in paragraphs (a) to (e) of Article 6 of the ICC Statute and the notion of “destruction” (apparently treating the “destruction” as a material element of “consequence”) as implied by the following text:<sup>33</sup>

At the low end of recklessness, continental jurists speak of *dolus eventualis*, a level of knowledge that must surely be insufficient to constitute the crime of genocide . . . A commander accused of committing genocide by ‘inflicting on the group conditions of life calculated to bring about its physical destruction’, and who was responsible for imposing a restricted diet or ordering a forced march, might argue that he or she had no knowledge that *destruction* of the group would indeed be the *consequence*. An approach to the knowledge requirement that considers recklessness about the *consequence of an act* to be equivalent to full knowledge provides an answer to such an argument (emphasis added).<sup>34</sup>

In this text, the notion of “destruction” appears to be regarded as a material element (in particular, as a “consequence”). In order to appraise this approach, it is necessary to first determine the precise legal identity of the notion of “destruction” in the context of the law on genocide. In this respect, the wording of “with the aim of destroying” in the Act and the legal nature of the aim-crime under the Korean Penal Code indicate that the drafters of the legislation considered the notion of “destruction” to be just an *ingredient* of the mental element of “aim to destroy,” and not as a separate material element. Thus, it is expected that Korean judges probably would not require the showing of the realization of “destruction” for the constitution of the crime of genocide, as the “destruction” *per se* is not *actus reus*. This understanding of the legal identity of “destruction” being just an ingredient of genocidal intent also holds true in international jurisdictions as evidenced by the ICTY Trial Chamber in *Krajisnik* when it described

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31. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmed Al Bashir, 49 n. 154 (Mar. 4, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf>.

32. Kreß, *supra* note 29, at 496.

33. It is generally understood that there are three kinds of *actus reus* under the ICC law: “conduct,” “consequence,” and “circumstance.” See ICC Statute, *supra* note 2, art. 30. See also Elements of Crimes, *supra* note 20, General Introduction ¶¶ 2, 7.

34. SCHABAS, *supra* note 30, at 260.

“[d]estruction as a component of the *mens rea* of genocide.”<sup>35</sup> The scholarly hesitation to directly link genocidal intent to the notion of “destruction,” probably due to advertent or inadvertent realization of the true identity of the “destruction” (i.e., not *actus reus*), is implied in the expressions such as “intent to *further* the destruction of the group,”<sup>36</sup> “specific intent *with respect to overall consequence* of the prohibited act,”<sup>37</sup> and “the goal or manifest effect of the campaign was the destruction.”<sup>38</sup> In sum, the notion of “destruction” is not *actus reus* of “consequence” of the underlying conducts, and is not therefore required to be materialized.<sup>39</sup> Instead, the genocidal *mens rea* is required to be *directed at* or *oriented towards* the “destruction” alone. The “destruction” can only be some effect or further consequence *beyond* the underlying conduct and/or result thereof that *fully* constitutes the *actus reus* of the crime of genocide.

In conclusion, the mental element of “aim to destroy” does not attend the “destruction” as its corresponding material element. The “aim to destroy” is only *directed at* the “destruction.” The “aim to destroy” contains “destruction” only as its conceptual component. The “aim to destroy” stands alone as a legal requirement reflecting a state of mind of a person who is involved in the crime of genocide. From the viewpoint of substantive law, the “destruction” exists only in the abstract. When the case law of the *ad hoc* tribunals discussed the destruction of the “substantial part” of a group in defining the term “in part,” it did not talk about the material element of “consequence.” Instead, what the jurisprudence discussed was the legal requirement of genocidal intent being *directed at* the destruction of a substantial part of a group. The realization of the destruction of the substantial part of the group in the real world can be significant as a matter of evidence.<sup>40</sup> It has, however, nothing to do with the constitution of the crime of genocide as a matter of substantive law.<sup>41</sup>

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35. Prosecutor v. Krajisnik, Case No. IT-00-39-T, Judgment, ¶ 854 (Sept. 27, 2006). The term “*mens rea* of genocide” in this paragraph should be understood as the special intent of genocide, not as *mens rea* of an underlying conduct of genocide. It should be noted that there is a seemingly divergent view expressed by the *Krajisnik* Trial Chamber when it states, “[t]he acts *must destroy*, or tend to destroy, a substantial part of the group, and the intent must be that that part of the group exists no more.” *Id.* ¶ 866 (emphasis added). The wording of “must destroy” that indicates a different identity of “destruction” being an *actus reus* (“consequence”) is regrettable as it only causes confusion without serving any other purposes.

36. Ambos, *supra* note 28, at 424.

37. Rep. of the Int’l Law Comm’n, 48th sess., May 6–July 26, 1996, ¶ 44, U.N. Doc. A/51/10; GAOR, 51st Sess., Supp. No. 10 (1996).

38. Greenawalt, *supra* note 30, at 2288.

39. See also Ambos, *supra* note 28, at 424 (expressing the same view when he stated “it is irrelevant for the completion of the crime whether the perpetrator is . . . successful in destroying the group. . . . He or she needs only intend to achieve this consequence or result.”).

40. See Prosecutor v. Nindabahizi, Case No. ICTR-2001-71-I, Judgment, ¶ 454 (Jul. 15, 2004), *available at*

The substantive legal examination of a genocidal crime–base should be done in a three step process—first, at the level of underlying conducts concerning both *actus reus* and *mens rea*; second, at the level of the contextual circumstance of “a manifest pattern of similar conduct” concerning *actus reus* (and *mens rea* on a case by case basis);<sup>42</sup> and third, at the level of genocidal intent concerning *mens rea* only. Article 30 of the ICC Statute is applicable to the first level (and the second level on a case by case basis) *only*,<sup>43</sup> not to the third level. That is to say, in addition to the fact that genocidal intent itself is generally considered as being outside the general mental element scheme under Article 30,<sup>44</sup> there is no material element that can ever be affected by an Article 30 mental element at the stage of legal consideration *vis-à-vis* the genocidal intent at the third level.

The peculiar legal feature of the absence of any material element at the third level also casts doubts on some of the definitions of genocidal intent advanced by some scholars in line with the knowledge–based approach, for example:

The question of whether the individual perpetrator must foresee the occurrence of the overall *destructive result* as a substantial certainty also arises if the knowledge–based approach to individual genocidal intent is adhered to. It is one thing to know that the collective goal to destroy exists and another thing to foresee the goal’s realization as a substantial certainty. As mentioned above, the views of the proponents of the knowledge-based approach differ: while Vest requires foresight as a substantial certainty, Gil Gil holds that *dolus eventualis* should suffice. If one considers the complex nature and context of the systemic act, it is submitted that Gil Gil’s view is more realistic if the definition of genocide is to be applied at all. How this view relates to the ‘awareness that [a

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<http://www.unhcr.org/refworld/category,LEGAL,ICTR,CASELAW,,48abd5150,0.html> (“The actual destruction of a substantial part of the group is not a required material element of the offence, but may assist in determining whether the accused intended to bring about that result.”).

41. *See id.*

42. Elements of Crimes provides that *mens rea* regarding this material element of “circumstance,” if any, “will need to be decided by the Court on a case–by–case basis.” *See* Elements of Crimes, *supra* note 20, intro. to art. 6.

43. If the ICC judges acknowledged *mens rea* regarding the contextual circumstance of “manifest pattern of similar conduct” on a case–by–case basis, then Article 30 will also apply thereto. *See* ICC Statute, *supra* note 2, art. 30.

44. In other words, genocidal intent falls into the mental element category of “otherwise provided” in Article 30 of the ICC Statute. *See* Gerhard Werle & Florian Jessberger, *Unless Otherwise Provided: Article 30 of the ICC Statute and the Mental Element of Crimes Under International Criminal Law*, 3 J. INT’L CRIM. JUST. 35, 48–49 (2005) (“Numerous provisions of the ICC Statute include additional subjective requirements that, unlike ‘intent and knowledge’ under Article 30 ICCSt., do not necessarily refer to a material element of the crime, such as conduct, consequence or circumstance. The most important example concerns the ‘intent to destroy’ element of genocide pursuant to Article 6 ICCSt.”).

consequence] will occur in the ordinary course of events' within the meaning of Article 30(2)(a) ICCSt. is a matter that cannot be pursued here any further. In conclusion, it is suggested that the individual perpetrator must act with *dolus eventualis* regarding the eventual *destructive result*. We would thus propose, for the typical case of genocide, that individual genocidal intent requires (a) knowledge of a collective attack directed to the destruction at least part of a protected group, and (b) *dolus eventualis* as regards the occurrence of such destruction (emphasis added).<sup>45</sup>

In this context, since there is no material element—especially the “consequence”—to be affected by genocidal intent at the third level, it is doubtful whether there is any room for *dolus eventualis* or “foresight as a substantial certainty” to intervene and play a role as a sub-requirement of the genocidal intent. This is because the discussion of the applicability of *dolus eventualis* or “foresight as a substantial certainty” presumes that the “destruction” is a material element (“consequence”) corresponding thereto. In other words, if we take this approach, the realization of the “destruction” would become a key factor to distinguish the “attempt” of the crime of genocide and the “completion” thereof, which cannot survive a simple scrutiny of case law and scholarly works.<sup>46</sup> That is, an “attempted destruction” is sufficient for the conviction of the “completion” of the crime of genocide.<sup>47</sup> Since the “destruction” is only an ingredient of a mental element (i.e., genocidal intent), the text cited above appears to mistakenly try attaching a mental element (i.e., *dolus eventualis* or “foresight as a substantial certainty”) to another mental element (i.e., destruction).

In this respect, the definition of genocidal intent (based on the knowledge-based approach), as originally suggested by Greenawalt, may be considered more consistent with at least the distinct feature of the absence of any material element at the third level.<sup>48</sup> The legal identity of the concept

45. Krefß, *Darfur Report and Genocidal Intent*, *supra* note 30, at 577.

46. GERHARD WERLE ET AL., *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 205 (2005) (“promote the misunderstanding that the total or partial destruction of the group . . . is necessary for genocide”).

47. The notions of “attempted destruction” and “attempt of the crime of genocide” are distinct to each other. See *Prosecutor v. Gacumbtsi*, Case No. ICTR 2001–64–T, Judgment, ¶ 253 (Jun. 17, 2004), available at <http://www.unictl.org/Portals/0/Case/English/Gacumbtsi/Decision/040617-judgement.pdf> (“There is no numeric threshold of victims necessary to establish genocide, even though the relative proportionate scale of the actual or *attempted destruction* of a group, by any act listed in Article 2 of the Statute, is strong evidence to prove the necessary intent to destroy a group in whole or in part.”) (emphasis added) (citations omitted). It is considered that the “attempt of the crime of genocide” should be discussed only in connection with the material elements (“conduct” and/or “consequence”) of the underlying acts provided in Article 6(a)–(e) ICCSt, not with genocidal intent.

48. Greenawalt suggests a knowledge-based definition. Greenawalt, *supra* note 30, at 2288. (“In cases where a perpetrator is otherwise liable for a genocidal act, the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a

of “destruction” as being a component of *mens rea* (i.e., genocidal intent) seems more compatible with the terms “manifest effect”<sup>49</sup> or “destructive effect”<sup>50</sup> used by Greenawalt than other expressions like “destructive result.” The term “knowledge-based interpretation” proposed by Greenawalt might be paraphrased as “knowledge (of the further effect)-based interpretation,” *not* “knowledge (of the result)-based interpretation.”

#### 4. From “Genocidal Intent” to “Genocidal Plan”: Objectification of the Concept of “Genocidal Intent”

To the extent that, within the knowledge-based approach, an emphasis is placed on the “destruction” as being *only a further effect* (as opposed to a “result” or “consequence”) of a genocidal campaign, the adoption of the wording “with the aim of destroying” in the Act is congruent with the knowledge-based approach. Emphasizing the need to distinguish between a “collective intent” and an “individual intent,” Claus Kreß explains the crux of the knowledge-based approach as follows:

The collective intent [as opposed to individual intent] can best be defined as the goal or the objective behind a concerted campaign to destroy, in whole or in part, a protected group. Such goal or objective may well have originated from the desire of one or more individual directors but it will then acquire an *impersonal, objective existence* (most usefully referred to as the “overall genocidal plan”) . . . Yet it is not such a desire of an individual that hallmarks genocide as the horrible crime it is. It is the dimension of the *collective genocidal goal* that every individual participant takes the conscious decision to further (emphasis added).<sup>51</sup>

Our experience in the Twentieth Century tells us that the crime of genocide is, together with crimes against humanity and war crimes, committed by “many people.” The contextual elements of “widespread or systematic attack,” “state or organizational policy,” and “the existence of

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campaign targeting members of a protected group and knew that the goal or *manifest effect* of the campaign was the destruction of the group in whole or in part.”) (emphasis added).

49. *Id.*

50. *Id.* at 2291 (suggesting that “culpability [can be] based on knowledge of destructive effect”).

51. Kreß, *supra* note 29, at 495–97 (citing Prosecutor v. Krstić, Case No. IT-98–33–T, Judgment, ¶ 549 (Aug. 2, 2001) (“As a preliminary, the Chamber emphasizes the need to distinguish between the individual intent of the accused and the intent involved in the conception and commission of the crime. The gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration. Although the motive of each participant may differ, the objective of the criminal enterprise remains the same. In such cases of joint participation, the intent to destroy, in whole or in part, a group as such *must be discernible in the criminal act itself*, apart from the intent of particular perpetrators.”)).

armed conflict” all require a circumstance of a legally meaningful scale. And the factual bottom line of that “circumstance of a legally meaningful scale” seems to be the involvement of “many people.” As mentioned above, encountering the word with rather strong volitional connotation—that is, “*intent* (to destroy)”—this factual feature of the involvement of “many people” has made the discussion of “genocidal intent” difficult and confusing especially when one follows the purpose-based approach. Challenging the purpose-based approach, the knowledge-based approach highlights that a perpetrator’s knowledge of the collective plan to destroy a group is the key element of genocidal intent. In this way, the concept of genocidal intent has been objectified towards the “impersonal [and] objective existence” of “overall genocidal plan” advertently (mostly by scholars through the introduction of the knowledge-based approach) and inadvertently (mostly by international judges “through the evidentiary backdoor”).<sup>52</sup> For the notion of genocidal intent under the knowledge-based approach, the proposition put forth by David Luban stands firm—“without a plan there is no intention.”<sup>53</sup>

##### 5. *Significance of the New Wording Adopted by the Korean Implementing Legislation*

The concepts of “aim” (in the wording of “with the aim of destroying”) and “plan” (in the term “overall genocidal plan”) share the same definitional feature of being directed at an object that perceptually exists *in the future*. As examined above in Part I (A)(2)(a), this definitional feature cannot be shared by the notion of “intent” as it must be directed at an object that conceptually exists *at that very moment* of the conduct. For this reason, “genocidal intent” that is legally required to be directed to a *future* effect of

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52. Krefß, *Darfur Report and Genocidal Intent*, *supra* note 30, at 571–72.

53. David Luban, *Calling Genocide by Its Rightful Name: Lemkin’s Word, Darfur, and the UN Report*, 7 *CHI. J. INT’L L.* 303, 312 (2006). See also Michael Bratman, *Moore of Intention and Volition*, 142 *U. PA. L. REV.* 1705, 1708–09 (1994) (“I believe that future-directed intentions play a central, coordinating role in our psychology, both individual and social, and that it is an error to ignore them in theorizing about intelligent agency. In particular, we are *planning agents*. We frequently settle in advance on partial plans for the future, and these plans then guide and structure later planning and action. We do not only reason about what to do now, but frequently try to decide now what to do at some later time, and then figure out what to do in the interim given our decision about that later time . . . . Our planning capacities—capacities at the heart of our ability to achieve complex forms of organization, both individual and social—mark off a distinctive species of intelligent agency. *Planning is the key to intention*: future-directed intentions are typically elements of partial plans.”) (second emphasis added). It deserves our attention that Bratman makes a distinction between “plans as abstract structures (plan)” and “plans as mental states (having a plan).” He clarifies that the term “plan” for the usage in his literature falls into the latter, i.e., “mental states involving an appropriate sort of commitment to action: I have a plan to A only if it is true of me that I plan to A. Plans, so understood, are intentions writ large.” See Bratman, *supra* note 12, at 28–29.

the “destruction of a group” cannot be conceptually captured by the concept of “intent.” In this sense, the term “genocidal intent” is itself linguistically flawed, and has become a false friend, just like “expérience” in French means “experiment,” not “experience.”<sup>54</sup>

In this connection, the wording “with the aim of destroying” in Article 8 of the Act seems to correctly reflect the legal and factual reality surrounding the false friend “genocidal intent,” and makes it clear that the notion of the “destruction of a group” is an ingredient of *mens rea*. This observation is also considered consonant with the Lemkin’s purpose:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated *plan* of different actions *aiming at* the destruction of essential foundations of the life of national groups, with the *aim* of annihilating the groups themselves (emphasis added).<sup>55</sup>

## B. Crimes Against Humanity

Article 9 of the Act provides each of the eleven types of acts referred to in Article 7(1) of the ICC Statute with regard to the contextual element of a widespread or systematic attack directed against a civilian population pursuant to a State or organizational policy. Concerning the possible penalties, Article 9(1) stipulates that in case of murder, the perpetrator should be punished by capital punishment, life-imprisonment, or imprisonment of no less than seven years. For all other acts, Article 9(2) provides life-imprisonment or imprisonment of no less than five years. It should also be noted that—in a case where a victim died as a result of any types of acts other than murder—Article 9(4) provides that the perpetrator is to be punished by the same range of sentences as provided in Article 9(1) (murder).

In terms of substantive law, there is only one aspect the authors wish to discuss. As to the crime against humanity of extermination, the definition thereof in the Act is quite different from that of the ICC law. First of all, it must be noted that the Act does not provide the title word “extermination.” Instead, it only stipulates the definition in an explanatory phrase. Article 7(2)(b) of the ICC Statute provides, “‘*Extermination*’ includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.” The wording of Article 9(2)(1) of the Act is the exact translation of Article 7(2)(b) of the ICC Statute except for the fact that it omits the phrase “[e]xtermination includes.” The ramification of this

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54. Luban, *supra* note 53, at 303–07.

55. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION: ANALYSIS OF GOVERNMENT: PROPOSALS FOR REDRESS 79 (1944).

omission is quite significant. That is, this omission has transformed the legal nature of the crime against humanity of extermination from a “result crime” (requiring the material element of “consequence”—i.e., one or more person’s death) to a “conduct crime” (being completed by the material element of “conduct” only—i.e., “infliction”). In other words, the basic conduct type of the crime of extermination (“killing”)<sup>56</sup> is missing, let alone the “mass killing”<sup>57</sup> requirement. Although the Elements of Crimes can be consulted for the interpretation and application of the crimes provided in the Act,<sup>58</sup> a relevant revision is recommended to ensure the principle of legality.

### C. War Crimes

The Act spells out war crimes in five separate provisions: Article 10 (war crimes against persons); Article 11 (war crimes against property and other rights); Article 12 (war crimes against humanitarian operations and emblems); Article 13 (war crimes concerning prohibited methods of warfare); and Article 14 (war crimes concerning prohibited weapons of warfare). The most distinctive feature of the war crimes provisions in the Act is that the scope of applicability of quite a number of offences only applicable to international armed conflict under the ICC Statute has been expanded to non-international armed conflict. This is considered to be a positive development made by the Act in that it would broaden the range of protection under international humanitarian law under the Korean jurisdiction. On the other hand—as a negative side of the war crimes provisions in the Act—the authors might point out that the phrase “a person who is protected under international humanitarian law” frequently used in the war crimes provisions sometimes unnecessarily limits the ambit of protection *vis-à-vis* the offences that originally do not require such a qualification for them to be constituted as a war crime under the ICC Statute. We will discuss the relevant provisions below.

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56. Elements of Crimes, *supra* note 20, art. 7(1)(b)1. The following clarification from the ICTR Appeals Chamber well explains the basic conduct type of “killing”: “Murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity; each involves killing within the context of a widespread or systematic attack against the civilian population, and the only element that distinguishes these offences is the requirement of the offence of extermination that the killings occur on a mass scale.” See *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR–96–10–A and ICTR–96–17–A, Judgment, ¶ 542 (Dec. 13, 2004), available at <http://www.unhcr.org/refworld/publisher,ICTR,,,48abd5a610,0.html>. See also *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR–95–1–T, Judgment, ¶ 142 (May 21, 1999) (“The Chamber agrees that the difference between murder and extermination is the scale; extermination can be said to be murder on a massive scale.”).

57. Elements of Crimes, *supra* note 20, art. 7(1)(b)2.

58. Act, *supra* note 1, art. 18.

### 1. Article 10: War Crimes against Persons

The Act contains quite comprehensive provisions of war crimes against persons. Considering the list of war crimes against persons of the ICC Statute, it appears that the war crimes of “inhuman treatment” (Article 8(2)(a)(ii) ICCSt.), “cruel treatment” (Article 8(2)(c)(i) ICCSt.), “biological experiment” (Article 8(2)(a)(ii) ICCSt.), “sentencing or execution without due process” (Article 8(2)(c)(iv) ICCSt.), and “ordering the displacement of civilians” (Article 8(2)(e)(viii) ICCSt.) are the offences omitted in the Act. Among these offences, it is especially regrettable that inhuman treatment under Article 8(2)(a)(ii) and cruel treatment under Article 8(2)(c)(i) are excluded in the Act, given that i) both of them are treated as independent offences possessing distinct elements from other offences provided in the Articles 8(2)(a)(ii) and 8(2)(c)(i) respectively, and ii) they could have been a sort of catch-all provision to be invoked when an alleged torture incident fails to satisfy the “prohibited purpose” element.<sup>59</sup> One might also point out the significance of the offence of “ordering the displacement of civilians” not being provided in the Act, particularly in view of the recent pattern of attacks against a civilian population in non-international armed conflicts—in other words, like “ethnic cleansing.” Moreover, by providing the conduct-type of “ordering,” this offence is directly targeting the high-ranking government or military officials who are most likely to be pursued by national jurisdictions implementing the ICC Statute.

Comparing Article 10 of the Act with Article 8 of the ICC Statute, there are two offences under Article 10 where the scope of protection has been stretched to non-international armed conflict. Namely, Article 10(2)2 and Article 10(3)1 respectively provide that the offences of “wilfully causing great suffering, or serious injury to body or health”<sup>60</sup> and “deportation or transfer”<sup>61</sup> is applicable to non-international armed conflict. To the contrary, Article 10(2)3 concerning sexual offences—including rape—seems to restrict the scope of application as it provides, “[c]onduct that makes a person who is protected under international humanitarian law to be an object of rape, enforced prostitution, sexual slavery, forced pregnancy or enforced sterilization.”<sup>62</sup> This additional requirement that the alleged victim be “protected under international humanitarian law” in order for the constitution of the sexual offences under Article 10(2)3 does not exist in

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59. The only “materially distinct element” in between the war crime of torture and inhuman (or cruel) treatment is the “prohibited purpose” element of torture. That is, for the war crime of torture, the Elements of Crimes requires, “[t]he perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kin.” Elements of Crimes, *supra* note 20, art. 8(2)(a)(ii)–1.

60. ICC Statute, *supra* note 2, art. 8(2)(a)(iii).

61. *Id.* arts. 8(2)(a)(vii), 8(2)(b)(viii).

62. Authors’ translation from the original text in Korean.

Article 8 of the ICC Statute. That is to say, the war crimes of sexual offences in the ICC Statute are provided under the sub-paragraphs (b) and (e) of the ICC Statute's Article 8(2) and, for these sub-paragraphs, there are no such limitations in terms of victims' status like "*against persons . . . protected under the provisions the relevant Geneva Convention*" (Article 8(2)(a) ICCSt.) or "*against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause*" (Article 8(2)(c) ICCSt.). The scope of potential victims of the crimes under Article 8(2)(a) and (c) of the ICC Statute as circumscribed by these two phrases (respectively for international armed conflict and non-international armed conflict) is almost the same with that of the phrase "a person who is protected under international humanitarian law" as defined in Article 2.7 of the Act. It is considered that Article 10(2)3 prescribing sexual offences conflicts with the ICC Statute to the extent that this provision is interpreted in a way that a conduct can constitute a relevant crime *only if* it is committed against a person protected under international humanitarian law. The same holds true for the crime of medical and scientific experiments provided in Article 10(3)3 of the Act with the same restriction of "a person who is protected under international humanitarian law" because the corresponding provisions in the ICC Statute are provided in the sub-paragraphs (b) and (e) of Article 8.

## 2. Other War Crimes Provisions

There are three additional provisions of war crimes—Article 12 ("war crimes against humanitarian operations and emblems"); Article 13 ("war crimes of using prohibited methods of warfare"); and Article 14 ("war crimes of using prohibited weapons"). For this part of the Act, there are some features to be noted.

First, the following offences only applicable to international armed conflict in the ICC Statute are also applicable to non-international armed conflict under the relevant provisions in Article 12, 13 and 14: the "war crime of improper use of a flag of a truce, etc." as provided in Article 8(2)(b)(vii) ICCSt.;<sup>63</sup> the "war crime of excessive incidental death, injury or damage" as provided in Article 8(2)(b)(iv) ICCSt.,<sup>64</sup> the "war crime of using protected persons as [a] shield" as provided in Article 8(2)(b)(xxiii) ICCSt.,<sup>65</sup> the "war crime of starvation as a method of warfare" as provided in Article 8(2)(b)(xxv) ICCSt.,<sup>66</sup> the "war crime of employing poison or

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63. Act, *supra* note 1, art. 12(2).

64. *Id.* arts. 13(1)3, 13(3).

65. *Id.* art. 13(1)4.

66. *Id.* art. 13(1)5.

poisoned weapons” as provided in Article 8(2)(b)(xvii) ICCSt.;<sup>67</sup> and the “war crime of employing prohibited bullets” as provided in Article 8(2)(b)(xix).<sup>68</sup> At this juncture, it is notable that, with respect to these last two items of prohibited weapons, the delegations at the ICC Review Conference in 2010 also agreed to extend the scope of protection to non-international armed conflict.<sup>69</sup>

Second, the offence of “employing gases, liquids, materials and devices” (Articles 8(2)(b)(xviii) ICCSt.) and the offence of employing means of warfare “of a nature to cause superfluous injury or unnecessary suffering” (Article 8(2)(xx) ICCSt.) are not provided in the Act. Instead, quite significantly, the use of biological or chemical weapons is provided as an offence applicable to both international and non-international armed conflict in the Act’s Article 14(1)2, which provides for the penalty of life-imprisonment or imprisonment of no less than five years. In this connection, another legislative implementation of an international treaty into South Korean law must also be noted. That is, the Korean implementing legislation of the Biological Weapons Convention and the Chemical Weapons Convention,<sup>70</sup> which prohibits the development, production, stockpiling, and use of biological and chemical weapons.<sup>71</sup> It deserves our attention that this legislation also has a set of penal provisions that criminalizes, *inter alia*, the conduct of developing, producing, stockpiling, or using biological or chemical weapons with the penalty of life-imprisonment or imprisonment of no less than five years.<sup>72</sup> A person who aids or instigates the said conduct is also to receive the same penalty.<sup>73</sup> It is interesting to see that the domestic crime of developing, producing, stockpiling or using biological or chemical weapons is to be punished with the same penalty as the offence of the use of biological or chemical weapons as provided in Article 14(1)2 of the Act. As to the omitted offence concerning the weapons of a nature to cause unnecessary suffering and indiscriminate effect as provided in the ICC Statute’s Article 8(2)(b)(xx), it is recommended that the Act include this offence sooner or later. Although this provision of the ICC Statute has not been entered into force, its expected effect to cover the weapons of mass destruction should be valued.<sup>74</sup>

67. *Id.* art. 14(1)1.

68. *Id.* art. 14(1)3.

69. See Rome Statute Review Conference Res. RC/Res.5 (June 16, 2010), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.5-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf).

70. Hwahak saengmool moogi eu gumji mit tukjeong whahak moojil saengmool jakyoungjae dung eu chaejo soochulip gyujae dung e gwanhan beobryul [Act on the Prohibition of Biological and Chemical Weapons], Act. No. 5162, Aug. 16, 1996, amended by Act. No. 9932, Jan. 18, 2010 (S. Kor.).

71. *Id.* art. 4-2.

72. *Id.* art. 25(1).

73. *Id.*

74. WERLE, *supra* note 46, at 374.

#### D. Modes of Liability

The Act does not have any provisions for modes of liability. It is, therefore, necessary to apply the relevant provisions under the Korean Penal Code for the actual prosecution of the crimes newly introduced by the Act. In the Code, applicable modes of liability are prescribed under Section 3. The Section provides four kinds of modes of liability as follows: co-perpetration,<sup>75</sup> instigation,<sup>76</sup> aiding and abetting,<sup>77</sup> and indirect perpetration.<sup>78</sup> Thus, one might say that the modes of liability under Article

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75. Korean Penal Code, *supra* note 4, art. 30 (“When two or more persons have jointly committed a crime, each of them shall be punished as a principal for the crime committed.”).

76. *Id.* art. 31:

##### Article 31 (Instigation)

(1) A person who instigated another person to commit a crime shall be punished by the same sentence as the one who executed the crime.

(2) When the person who was instigated consented to the execution of a crime and did not commence the execution thereof, the penalty for conspiracy or preparation shall apply *mutatis mutandis* to the instigator and the instigated person.

(3) Even when the instigated person did not consent to the execution of a crime, the preceding paragraph shall apply to the instigator.

77. *Id.* art. 32:

##### Article 32 (Accessory)

(1) Those who aided and abetted another person’s commission of a crime shall be punished as accessory.

(2) The sentence of accessory shall be mitigated to less than that of the principals.

78. *Id.* art. 34:

##### Article 34 (Indirect perpetration; Aggravation of punishment for particular instigation or aiding and abetting).

(1) A person who have the result of a criminal conduct caused by instigating or aiding and abetting another person who is not punishable for such conduct or is punishable for negligence, shall be punished pursuant to the provision for instigation or aiding and abetting.

(2) A person who causes the result envisaged in the preceding paragraph by instigating or aiding and abetting another person who is under his command or supervision, shall be punished by increasing up to one half of the maximum term or maximum amount of penalty provided for the principal in the case of instigation, and with the penalty provided for the principal in the case of aiding and abetting.

28(3) of the ICC Statute are mostly covered by Section 3 of the Korean Penal Code, except for the common purpose liability in Article 28(3)(d) of the ICC Statute. The direct and public incitement to commit genocide is also applicable in Korea, as Article 8 of the Act has a specific provision thereof in paragraph 4.

With regard to the issue of modes of liability, for the past fifteen years we have seen enduring efforts of international criminal courts to label the high ranking officials most responsible for heinous crimes as a principal, not as an accessory. The doctrine of “joint criminal enterprise” invented by the *Tadić* Appeals Chamber,<sup>79</sup> and the functional control theory introduced by the *Stakić* Trial Chamber<sup>80</sup>—which was subsequently adopted by the ICC Pre-Trial Chamber in *Lubanga*,<sup>81</sup> are the examples of such efforts made by international judges targeting those high up behind the crime scene who are holding ultimate control. Is there any corresponding mode of liability under Korean criminal law?

The so-called “conspiracy co-perpetration” under Korean criminal law seems to be closest to the co-perpetration liabilities from international courts. The concept of “conspiracy co-perpetration” generally expresses that a person who only participated in the planning stage, but not in the execution of criminal conduct, can also be a co-perpetrator.<sup>82</sup> This form of criminal participation has introduced by judicial decisions (not by legislation)—especially for the purpose of punishing the masterminds of organized crimes who are usually away from the actual crime scene. As the “joint criminal enterprise” theory—which is heavily based on the common law concept of “conspiracy”—has been criticized from the perspective of

79. Prosecutor v. *Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 185-236 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), available at <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

80. Prosecutor v. *Stakić*, Case No. IT-97-24-A, Judgment, ¶¶ 431-442 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22 2006), available at <http://www.unhcr.org/refworld/country,,ICTY,,HRV,4562d8b62,47fdb550,0.html>. The initiative of the *Stakić* Trial Chamber to introduce the “functional control” theory under the title of “co-perpetratorship” was blocked by the Appeals Chamber that reaffirmed the validity of the doctrine of “joint criminal enterprise.” See also Prosecutor v. *Stakić*, ¶¶ 58-63. For more about the “functional control” or “joint control” theory, see Héctor Olásolo & Ana Pérez Cepeda, *The Notion of Control of the Crime and its Application by the ICTY in the Stakić Case*, 4 INT'L CRIM. L. REV. 475 (2004); Héctor Olásolo, *Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgment*, 7 INT'L CRIM. L. REV. 143 (2007).

81. Prosecutor v. *Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 322-367 (Jan. 29, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF> [hereinafter *Lubanga Charges Decision*]. See also Gerhard Werle, *Individual Criminal Responsibility in Article 25 ICC Statute*, 5 J. INT'L CRIM. JUST. 953, 961-63 (2007).

82. KIM & SUH, *supra* note 6, at 600; JONG-DAE BAE, CRIMINAL LAW: THE GENERAL PART 578 (2008); YIM, *supra* note 6, at 411.

the principle of legality, the “conspiracy co-perpetration” theory is also generally disapproved by Korean scholars for the reasons that this theory: i) is against the principle of legality as the co-perpetration provision of the Korean Penal Code requires a “fact of co-execution;”<sup>83</sup> ii) will culminate in a denial of the distinction between “principal” and “accessory” through the groundless extension of the concept of “co-perpetration;”<sup>84</sup> iii) will cause judicial idleness through sweeping classification of “co-perpetration” against the clear distinction between “co-perpetration” on one side and “instigation”/“aiding and abetting” on the other under the Korean Penal Code;<sup>85</sup> and iv) will invalidate the burden of proof imposed on the prosecution who does not need to prove the substance of co-perpetratorship of each participant in a conspiracy.<sup>86</sup> For these reasons, Korean scholars disapprove the concept of conspiracy co-perpetration and instead suggest a solution on the basis of the functional control theory that originated from Germany. What they strongly propose is that the high ranking officials or masterminds of organized crimes who did not directly participate in the conduct of a crime can still be punished as a co-perpetrator on the grounds of their “essential contribution” or “essential control” *vis-à-vis* the criminal conduct. At this juncture, it is interesting to note how the relevant discussion in Korea is similar to that in the ICC.

Until recently the stance of the Korean Supreme Court had been firm on the issue of “conspiracy co-perpetration.” It seems, however, the Court has started to move toward the functional control theory. The following statement by the Court is illuminative:

The co-perpetration under article 30 [of the Korean Penal Code] is to be constituted through the mental element of common purpose and the material element of execution of a crime through the functional control based on the [mental element of] common purpose. A conspirator who did not share any part of a criminal conduct and thereby did not perform any conduct can still be culpable as a ‘conspiracy co-perpetrator’, as the case may be. [‘Conspiracy co-perpetration is to be acknowledged] only when [the court] is satisfied that there exists a functional control through essential contribution to the crime in view of the totality of [the facts such as] the status and role assumed by the conspirator, and the extent of [his or her] domination and power to control *vis-à-vis* the progress of the crime (emphasis added).<sup>87</sup>

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83. YIM, *supra* note 6, at 414.

84. BAE, *supra* note 82, at 582; YIM, *supra* note 6, at 415.

85. BAE, *supra* note 82, at 582; YIM, *supra* note 6, at 415.

86. BAE, *supra* note 82, at 582.

87. *See, e.g.*, Supreme Court [S. Ct.], 2008Do7312, Jan. 28, 2010 (S. Kor.); Supreme Court [S. Ct.], 2009Do2994, June 23, 2009 (S. Kor.); Supreme Court [S. Ct.], 2008Do6551, Feb. 12, 2009 (S. Kor.); Supreme Court [S. Ct.], 2007Do6075, Nov. 15, 2007 (S. Kor.); Supreme Court [S. Ct.], 2007Do235, Apr. 26, 2007 (S. Kor.). The term “functional control”

Given the striking similarity between the wording employed in this decision and that of the ICC in *Lubanga*—particularly with respect to the terms “functional (or joint) control” and “essential contribution”<sup>88</sup>—it is considered that the jurisprudential basis for holding masterminds of mass atrocities accountable as a principal under the mode of liability of “co-perpetration” based on the functional control theory is being prepared in Korea.

#### E. Command and Superior Responsibility

Articles 5 and 15 of the Act provide as follows:

##### Article 5 (Responsibility of commanders and other superiors)

A military commander (including any person who is actually exercising the authority as a military commander. Hereafter, the same applies) or superior of a group or organization (including any person who is actually exercising the authority of superior. Hereafter, the same applies.) shall be punished with the penalties as provided for in each relevant provision, apart from punishing the perpetrators, if he or she did not take an appropriate measure needed to prevent subordinates under his or her effective command and control from committing genocide or other crimes even though he or she knew that the forces were committing or about to commit such crimes.

##### Article 15 (offences violating the duty of commanders and other superiors)

(1) Any person who, as a military commander or superior of a group or institution, through his or her idleness or dereliction of duty, failed to prevent or repress the commission of genocide or other crimes committed by subordinates under his or her effective command and control shall be punished with imprisonment of not more than 7 years.

(2) Any person who commits the conduct provided in paragraph (1) by negligence shall be punished with imprisonment of not more than 5 years.

(3) Any person, as a military commander or superior of a group or institution, who did not report the subordinates under his or her effective command and control who committed genocide or other crimes to an

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in the context of co-perpetration appears in a decision of the Seoul High Court already in 1988. See Seoul High Court [Seoul High Ct.], 88No938, June 10, 1988 (S. Kor.). Yet, the substantive discussion of “functional control” in conjunction with the notion of “essential contribution” can be found in case law since 2007. For more details, see Ho Jin Choi, *Gi Nung Jeok Haengwi Jibae Wa Gongmo Gongdong Jeongbum [Functional Control and Conspiracy Co-Perpetration]*, 32 KYUNGPOOK NAT'L. U. L. J. 631, 631–55 (2010).

88. *Lubanga Charges Decision*, ¶¶ 322–367.

investigative authority shall be punished with imprisonment not more than 5 years.

As noted above, there are two provisions in the Act relating to the command and superior responsibility (command responsibility): Article 5 and Article 15. The legal nature of both Articles 5 and 15 is “omission.” For the purpose of this section’s discussion, it would be helpful at the outset to note that, under Korean criminal law, there are two categories of “omission” classified on the basis of the relevant mental element: “omission by intent” and “omission by negligence.” Since the way criminal responsibilities of commander/superior are provided in Articles 5 and 15 of the Act are a bit complicated—if not confusing—the authors consider it appropriate to summarize here the major conclusions to be reached through the legal analysis in this section on command responsibility:

- Whereas Article 5 should be viewed as providing a mode of liability, Article 15 prescribes substantive offences.
- Article 5 provides for command responsibility in the traditional sense. It should be noted, however, that the Koreanized doctrine of command responsibility as provided in Article 5 includes the limb of the “failure to prevent” *only* (but not “failure to punish”), and the mental element of “knowledge” *only* (but not “should have known” or “consciously disregard”). The legal nature of Article 5 is “omission by intent” in “failing to prevent.”
- Article 15 should be regarded as a provision *outside* the scope of the Koreanized command responsibility as provided in Article 5. Instead, Article 15 titled “offences violating the duty of commanders and other superiors” prescribes three kinds of separate and independent substantive offences as follows: i) offence of “omission by intent” in “failing to prevent” (Article 15(1)); ii) offence of “omission by negligence” in “failing to prevent” (Article 15(2)); and iii) offence of (seemingly) both “omission by intent” and “omission by negligence” in “failing to *report*” (Article 15(3));
- Though the wording is slightly different from each other, Article 5 and Article 15(1) are the same—sharing the same key elements. The common legal nature of both provisions is “omission by intent” in “failing to prevent.” Despite this essentially identical nature, it is difficult to understand the conspicuous disparity in terms of the penalty provided in each provision. It is recommended that Article 15(1) should be deleted.
- In view of its close relationship with the crimes committed by subordinate, it is difficult to consider Article 15(2) (“omission by negligence” in “failing to prevent”) as a separate substantive offence. Thus, it should remain as a mode of liability, and be relocated to Article 5.

- Thus, Article 15(3) of “failing to report” type command responsibility should stay under Article 15 as the only separate substantive offence.

The legal reasoning through which these conclusions have been drawn will be articulated below.

1. *Article 5: “Failure to Prevent” as a Mode of Liability*

Article 5, “Responsibility of commanders and other superiors,” a verbatim repetition of that of Article 28 of the ICC Statute, represents the doctrine of command responsibility in the traditional sense. There are some features distinctive to Article 5 of the Act *vis-à-vis* the doctrine under Article 28 of the ICC Statute.

First, as to *mens rea*, by eliminating the second leg of mental elements in Article 28, (i.e., “should have known” and “consciously disregarded information”) Article 5 of the Act leaves no room for negligence-based superior responsibility to intervene. Consequently, in the Korean criminal law context where there are two categories of omission classified on the basis of *mens rea*, (i.e., “omission by intent” and “omission by negligence”), the command responsibility under Article 5 has no other option but to fall into the former. Put differently, what Article 5 of the Act requires is that a commander/superior *intentionally* fails to prevent the crimes by subordinates despite his knowledge thereof. This requirement is similar to that of the ICTR Appeals Chamber in *Bagilishema* in that a commander or superior is to be held responsible under the doctrine of command responsibility “either by *deliberately* failing to perform [his duty] or by *culpably or willfully disregarding* [it].”<sup>89</sup> The second unique feature of command responsibility under the Act is that Article 5 prescribes only the “failure to prevent”-type command responsibility. On the other hand, as will be discussed below, the “failure to punish”-type is provided in Article 15(3) as a separate substantive offence. Thirdly, we should pay attention to the provision concerning the penalty in Article 5, as it indicates an important legal characteristic of the command responsibility under the Act. It provides that a commander/superior “. . . shall be punished with the

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89. Prosecutor v. Bagilishema, Case No. ICTR 95-1A-A, Judgment, ¶ 35 (July 3, 2002) (emphasis added) (“References to ‘negligence’ in the context of superior responsibility are likely to lead to confusion of thought, as the Judgement of the Trial Chamber in the present case illustrates. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or willfully disregarding them.”). This view was later expressly endorsed by the ICTY Appeals Chamber in the *Blaskić* case. See Prosecutor v. Blaskić, Case No. IT-95-14-A, Judgment, ¶ 63 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004), available at <http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf>.

penalties as provided for in each relevant provision.” This rather severe penalty provision is consistent with the fact that only the *intent*-based command and superior responsibility is included in Article 5.

Yet, this severe penalty provision is contradictory to a line of jurisprudence of the *ad hoc* tribunals that regards the command responsibility as a *sui generis* offence for dereliction of duty, rather than a mode of liability in relation to the crimes of subordinates.<sup>90</sup> If one follows this *sui generis* approach, the commander/superior is very likely to receive a more lenient sentence because the doctrine is viewed as a separate offence independent of or conceptually remote from the crimes committed by subordinates on the ground.<sup>91</sup> In this understanding of the legal nature of the doctrine, the command responsibility is no longer a mode of liability in which one must take into account the nature and severity of the crimes in weighing the responsibility of the accused, but a separate criminal offence. Thus, the severe penalty provided in Article 5 signifies that the drafters of the Act were of the view that Article 5 command responsibility should be treated as a form of criminal participation in a commission of the crimes of subordinates, and consequently the gravity of the crime together with the degree of participation of the commander/superior should be taken into account in determining overall culpability.

This wording on penalty in Article 5 of the Act would also remind Korean lawyers of the similar provision in Article 31 of the Korean Penal Code that states, “[a] person who instigate[s] . . . shall be punished with the same penalty as the perpetrator.” In this context, Article 34(2) of the Code should also be noted as providing that, “a person who . . . aids or abets

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90. Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, ¶ 2076 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) [hereinafter Hadžihasanović Judgment], available at [http://www.icty.org/x/cases/hadzhasanovic\\_kubura/tjug/en/had-jugd060315e.pdf](http://www.icty.org/x/cases/hadzhasanovic_kubura/tjug/en/had-jugd060315e.pdf). The ruling in another ICTY case offers a compromise between the extreme of command responsibility being a “separate offence independent of the crime” and the opposite extreme where command responsibility is the “mode of liability for the crime.” See Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶ 54 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005), available at <http://www.icty.org/x/cases/halilovic/tjug/en/tcj051116e.pdf> (“The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed.”).

91. Hadžihasanović Judgment, Case No. IT-01-47-T, 2076 (“The concept of command responsibility in this regard is exceptional in law in that it allows for a superior to be found guilty of a crime even if he had no part whatsoever in its commission (absence of an *actus reus*), and even if he never intended to commit the crime (absence of *mens rea*). Accordingly, the Chamber finds that the *sui generis* nature of command responsibility under Article 7(3) [command responsibility] of the Statute may justify the fact that the sentencing scale applied to those Accused convicted solely on the basis of Article 7(1) [individual responsibility] of the Statute, or cumulatively under Article 7(1) and 7(3), is not applied to those convicted solely under Article 7(3), in cases where nothing would allow that responsibility to be assimilated or linked to individual responsibility under Article 7(1).”).

another person under his or her command and control [to commit a crime] . . . shall be punished with the same penalty as the perpetrator.” Considering these domestic criminal law provisions, we can say that the Act attaches a commander/superior under Article 5 a similar or the same culpability as a person who “instigates another person” or “aids or abets another person under his or her command and control” to commit a crime.

## 2. Article 15(1) and (2): “Failure to Prevent” as Substantive Offences

Article 15 is provided under the heading of the “offences violating the duty of commanders and other superiors,” which suggests that Article 15 is not about modes of liability, but independent substantive offences. This is further supported by the location of Article 15 under Part 2 titled, “Punishment of the Crimes under the Jurisdiction of the ICC”, and between Article 14 (war crime) and Article 16 (offences against the administration of justice).

The conduct criminalized by Article 15(1) and (2) is “omission,” more specifically “failure to prevent.” As analyzed above, this feature is also common to the Koreanized doctrine of command responsibility under Article 5 of the Act. Article 5, Article 15(1) and Article 15(2) are all talking about “failure to prevent.”

It is obvious that Article 5 and Article 15(2) are different in that the “omission by negligence” in “failing to prevent” excluded from Article 5’s version of command responsibility is now provided in Article 15(2). What about Article 5 and Article 15(1)? Are they different from each other? In order to answer this question, we will consider three key features: i) the underlying conduct-type; ii) the relevant mental element; and iii) the essential nature of the omission.

First, as just mentioned, both of Article 5 and Article 15(1) clearly provide that they are targeting the omission in terms of “failure to prevent” the crimes by subordinates. In this respect, there is no difference between Article 5 and Article 15(1).

Second, as to *mens rea*, our analysis should start with Article 15(2), which states, “[a]ny person who commits the conduct provided in paragraph (1) *by negligence*.” This phrase is the typical way to provide “offences by negligence” in Korean criminal law. Although there is no mental element explicitly provided in Article 15(1), for Korean lawyers it is not difficult to deduce from this phrase in Article 15(2) that the hidden mental element in Article 15(1) is “intent” because an “offence by negligence” in Korean criminal law is a *lex specialis vis-à-vis* the underlying “offence by intent.”<sup>92</sup>

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92. “Conduct performed without conceiving the requisite facts that constitute the elements of crimes due to negligence in paying ordinary attention shall be subject to

Furthermore, the penalty prescribed in Article 15(1), which is more severe than that of Article 15(2), also suggests that the mental element accompanying Article 15(1) is intent, be it *dolus directus* of the first degree or *dolus eventualis*.<sup>93</sup> Thus, it seems safe for us to conclude that, whereas Article 15(2) provides “omission by negligence,” Article 15(1) prescribes “omission by intent.” In this respect, Article 5 and Article 15(1) are of the same legal nature (i.e., “omission by intent”). No difference again.

Third and finally, with regard to the issue of “essential nature of omission,” we can find the relevant phrase “through his or her idleness or dereliction of duty” in Article 15(1). Although there is no equivalent wording in Article 5, this element should be regarded as being implicitly provided in Article 5 as well. That is because this phrase represents the fundamental nature of the concept of omission that forms the very grounds of culpability under Article 5. Accordingly, Article 5 and Article 15 share the same feature of “through his or her idleness or dereliction of duty.” No difference again. In conclusion, Article 5 and Article 15 share the same key legal features, and it is difficult to think of a reason for keeping them apart. The authors therefore recommend that Article 15(1) be deleted. We also advise that Article 15(2) be relocated under Article 5. As to Article 15(2), given the close relationship amounting to causation between the commander/superior’s “failure to prevent” and the crimes committed by subordinates, it is incorrect to view that Article 15(2) is a separate offence as currently provided. Article 15(2) should remain as a mode of liability and migrate to Article 5.

### 3. Article 15(3): “Failure to Punish” as a Substantive Offence

As briefly mentioned above, given the title of Article 15 (“offences violating the duty of commanders and other superiors”), and its location in between Article 14 (war crimes) and Article 16 (offences against the administration of justice), it seems the drafters considered Article 15 a separate offence to be invoked as an independent criminal charge in the same way as other substantive offences under the classifications of genocide, crimes against humanity, and war crimes. It is considered that, of the two limbs of the doctrine of command responsibility, (i.e., the “failure to prevent”-type and the “failure to punish”-type), this treatment as an independent criminal offence is appropriate only for the “failure to punish”-type. That is because with regard to this type, there is a very remote relationship between the commander/superior’s omission and the crime

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punishment only if there is a special criminal provision to that effect.” Korean Penal Code, *supra* note 4, art. 14 (unofficial translation by the authors).

93. The Korean jurisprudence recognizes all three types of intent, i.e., “*dolus directus* of the first degree,” “*dolus directus* of the second degree,” and “*dolus eventualis*.”

committed by his or her subordinates.<sup>94</sup> Put differently, the absence of a causal relationship between the “omission to punish or report”<sup>95</sup> and the crime already committed by subordinates *in the past* appears to significantly undermine the validity of the wording “[a commander/superior] shall be criminally responsible *for crimes . . . committed . . . as a result of* [his or her omission to punish or report]” as provided in article 28(a) and (b) of the ICC Statute. It is not difficult to recognize causation or a possibility thereof between a commander/superior’s “omission to prevent” and the crimes committed by subordinates.<sup>96</sup> As to the “omission to punish or report,” however, it should not be the crime already committed by the subordinates for which the commander/superior is to be blamed and found culpable, but his or her own conduct (i.e., omission to punish or report). Thus, the crimes committed by subordinates cannot be the ontological source of the “failure to punish”-type responsibility. Imagine a situation where a commander took office after the crime had been committed.<sup>97</sup> This type of command responsibility, therefore, cannot help but to find new legal grounds on which to stand “like an isolated tree alone on the battlefield,” other than the crimes already committed by subordinates.<sup>98</sup> In this sense, Article 15(3) of the Act properly supplies what the “failure to punish”-type responsibility needs by classifying it as a separate and independent offence, and stipulates it as such in a separate provision. Although the requisite *mens rea* is not expressly provided in Article 15(3) (and accordingly it is difficult at the moment to precisely identify it), this separate stipulation away from Article 5 would also help distinguish the distinct nature of knowledge requirement for the

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94. Stefan Trechsel, *Command Responsibility as a Separate Offense*, 3 BERKELEY J. INT’L L. PUBLICIST 26, 31–32 (2009).

95. Or, more precisely, omission to “take all necessary and reasonable measures within his or her power . . . to submit the matter to the competent authorities for investigation and prosecution.” See ICC Statute, *supra* note 2, arts. 28(a)(ii), 28(b)(iii).

96. In this respect, note that the jurisprudence of the ICTY, in general, does not require causation between the “omission to prevent” and the crimes committed by subordinates. In this connection, the Trial Chamber in *Orić* states, “[a]s concerns objective causality, however, it is well established case law of the Tribunal that it is not an element of superior criminal responsibility to prove that without the superior’s *failure to prevent*, the crimes of his subordinates would not have been committed. *This is so for good reasons.* First, with regard to the superior’s *failure to punish*, it would make no sense to require a causal link between an offence committed by a subordinate and the subsequent failure of a superior to punish the perpetrator of that same offence . . .” See Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 338 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006), available at <http://www.icty.org/x/cases/oric/tjug/en/ori-jud060630e.pdf>. It seems at least this portion of reasoning quoted herein is not plausible because it is using a feature of the “failure to punish”-type in supporting a proposition on the “failure to prevent”-type. Given the wording of Article 28 ICC Statute that strongly indicates the causation (i.e., “as a result of”), it will be interesting to see the future development of the relevant jurisprudence at the ICC.

97. Trechsel, *supra* note 94, at 26–27.

98. *Id.* at 31.

“failure to punish”-type from that of “failure to prevent”-type as explained by the Trial Chamber in *Halilović*:

The failure to punish and the failure to prevent are not only legally distinct, but are factually distinct in terms of the type of knowledge that is involved in each basis of superior responsibility. Failure to prevent presumes *prior* knowledge (“knew or had reason to know”) that crimes were being, or were about to be, committed, while failure to punish presumes *subsequent* knowledge (“knew or had reason to know”) that crimes had already been committed (emphasis added).<sup>99</sup>

## II. IMPLEMENTATION OF INTERNATIONAL TREATIES IN KOREA

### A. The Status of International Treaties in the Domestic Legal System of Korea

Under the Korean legal system in particular, in terms of the hierarchy of the Constitution (highest level), acts (second highest level), and decrees or ordinances (third highest level), international treaties can be given one of the two statuses: as being either at the same level as “acts” that hierarchically rank immediately beneath the Constitution, or at the same level as “decrees or ordinances” that hierarchically rank immediately beneath the “acts.” Although some are of the view that the deciding factor here is whether there has been an involvement of the Korean National Assembly in the form of consent to ratification performed by the President of Korea,<sup>100</sup> this view reflects only a part of the truth as will be explained below.

Article 6(1) of the Korean Constitution provides, “[t]reaties duly concluded and promulgated under the Constitution . . . shall have the same

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99. Prosecutor v. Halilović, Case No. IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, ¶ 32 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004), available at <http://www.icty.org/x/cases/halilovic/tdec/en/041217.htm>. This ruling is useful in clarifying the disjunctive nature of the two types of responsibilities under the doctrine of command and superior responsibility. See *id.* ¶ 33 (“The disjunctive nature of the bases of superior responsibility, combined with the distinguishing factor of the type of knowledge involved for each basis, means that an accused can be convicted on the basis of one omission even if the other is not proved. For example, if the Prosecution proves that the Accused knew that his subordinates had committed crimes in Uzdol, then if all the other elements of the crime are established, the Accused may be convicted based on his failure to punish those crimes, even if he had no prior knowledge and therefore lacked the ability to prevent their commission. If, however, the Prosecution proves that the Accused knew that his subordinates were going to commit crimes in Uzdol, then if all the other elements of the crime are established, the Accused may be convicted based on his failure to prevent those crimes, even if he were no longer their superior after the crimes and therefore lacked the ability to punish their commission.”).

100. See *infra* note 101.

effect as the domestic laws of the Republic of Korea.”<sup>101</sup> As to the relationship between international treaties and domestic laws, Korea adopts the theory of monism<sup>102</sup>—i.e., the “theory of incorporation.” This theory means that international treaties have been regarded as forming part of Korea’s legal framework and have been given the force of law in that they do not require any process of legislative transformation thereof.<sup>103</sup> International treaties, therefore, are incorporated into the domestic legal order of Korea without requiring a separate legislative action, and at the same time take effect as domestic law. Under the Korean constitutional structure, therefore, the procedure of *consent* to ratification governed by the National Assembly seems to be rather a part of its political control over the Executive’s act of concluding international treaties. In a monist country like Korea, the process of promulgation itself does not play the function of transforming a treaty into a domestic law as was the case in the states adopting the theory of dualism.<sup>104</sup> The promulgation stage is just a part of national legislative procedure and has nothing to do with the procedure of forming international treaties at the international level.<sup>105</sup>

The Korean Constitutional Court and the Supreme Court have repeatedly stated that the term “domestic laws” in Article 6(1) of the Constitution indicates “acts” that are located at the second highest position just below the Constitution in the hierarchy of laws in Korea. The Korean Constitutional Court held with regard to the “Treaty Concerning Fishing Between Korea and Japan” that “domestically, this treaty, as a treaty duly concluded and promulgated under the Constitution, has the same effect as ‘acts.’”<sup>106</sup> The Korean Supreme Court also granted the same effect as “acts” to “the

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101. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 6(1) (S. Kor.) (“Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.”).

102. For detailed analysis of the monism–dualism debate, see Andrezej Wasilkowski, *Monism and Dualism at Present*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRYSZTOF SKUBISZEWSKI*, (Jerzy Makarczyk ed., 1996); Karl Josef Partsch, *International Law and Municipal Law*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1183–1202 (1999).

103. See KAYE HOLLOWAY, *MODERN TRENDS IN TREATY LAW: CONSTITUTIONAL LAW, RESERVATIONS AND THE THREE MODES OF LEGISLATION* 241 (1967).

104. See CONSTANTIN ECONOMIDES, *THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW* 12–15 (1993) (discussing the standing of international treaties in domestic law).

105. The Promulgation is a formal act needed for a treaty to have legal force within Korea or to be incorporated into Korean law. However, the treaty is not transformed into Korean law. See YUJI IWASAWA, *INTERNATIONAL LAW HUMAN RIGHTS AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW* 25, n. 47 (1998).

106. Constitutional Court [Const. Ct.], 99Hun–Ma139, at 142, 156, & 160, Mar. 21, 2001 (S. Kor.); See also Constitutional Court [Const. Ct.], 2000Hun–Ba20, Sept. 27, 2001 (S. Kor.).

Warsaw Convention on International Carriage by Air.”<sup>107</sup> On the other hand, as briefly alluded to above, the majority view amongst scholars and a decision of the Seoul High Court<sup>108</sup> are of the opinion that only those treaties which the National Assembly’s consent to ratification is required as a part of its process to conclude are to be given the same status and effect as “acts.” They also argue that, so-called “executive agreements”—in other words the treaties concluded by the Executive without any involvement of the Legislature—have the status and effect at the same level as “decrees or ordinances” immediately beneath the level of “acts.” Article 60(1) of the Korean Constitution<sup>109</sup> lists the treaties of important nature that require the National Assembly’s consent to ratification—a mandatory condition for their conclusion.<sup>110</sup> There seems to be no dispute over the domestic status of the treaties that already went through the process of the Assembly’s consent to ratification—i.e., the status at the same level as “acts”—since it is the National Assembly that is in possession of the power to legislate “acts.” On the other hand, it seems problematic to sweepingly classify the treaties concluded without the Assembly’s consent as being equivalent to “decrees or ordinances” considering the fact that there are important treaties actually being concluded without the National Assembly’s involvement in Korea. That is because in Korea the decision about whether a treaty is of a nature to require the consent of the Assembly is at the Executive’s discretion, mainly the Ministry of Foreign Affairs and Trade.

Given the jurisprudence of the Korean Constitutional Court and the Supreme Court, one might say that both Courts are taking a positive approach towards the domestic application of international law. For

107. Constitutional Court [Const. Ct.], 82Da-Ka1372, July 27, 1986 (S. Kor.). The Court held that the Warsaw Convention has the domestic status of *lex specialis* to the Korean Civil Code: “The Warsaw Convention as amended by the Hague Protocol takes the same effect as domestic acts, and in terms of the legal issues concerning international carriage by air, it is *lex specialis* to the [Korean] Civil Code that is *lex generalis*.” *Id.*

108. The Seoul High Court stated, on an extradition case, that a treaty that requires the National Assembly’s consent to ratification takes the same effect as “acts,” and that a treaty that does not require the consent takes the same effect as “decrees or ordinances.” See Seoul High Court [Seoul High Ct.], 2006Do1, July 27, 2006 (S. Kor.). BOK-HYEON NAM, *INTERNATIONAL TREATIES AND CONSTITUTIONAL TRIALS* 387 (2007).

109. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 60(1) (“The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade, and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; and treaties related to legislative matters.”).

110. The wording of Article 60(1) of the Korean Constitution clearly suggests that the National Assembly’s right to consent should be confined to those listed in that Article. The purpose of Article 60(1) is to allow the National Assembly, by way of exception, to control the President’s right to conclude treaties. It seems therefore that the list in this Article should be regarded as exhaustive. Chin-Sok Chung, *Legislative Consent to the Conclusion and Ratification of Treaties: Korean Perspectives*, in *INTERNATIONAL LAW IN KOREAN PERSPECTIVE* 56 (Choong-Hyun Paik ed., 2004).

example, they are of the view that aggravated punishment on the basis of a treaty provision is possible in Korea. That is, the Korean Constitutional Court is of the view that, regarding the term “acts” in Article 13(1) of the Constitution that provides, “[n]o citizen shall be prosecuted for a conduct which does not constitute a crime under [a relevant] *act* in force at the time it was committed,” the Courts held that the term “act” includes international treaties concluded by Korea.<sup>111</sup>

Since the ICC Statute has been consented to by the National Assembly for ratification, it forms part of the Korean domestic legal order and has the force of law as “acts” in Korea.

### B. Direct Applicability of International Treaties in Korea

For the discussion in this section, we need to distinguish the concept of “incorporation” and “application.” When Article 6(1) of the Korean Constitution states, “shall have the same effect as the domestic laws,” it talks about the “incorporation” of international treaties into national law. In this context, “incorporation” signifies only the *possibility* to be applied domestically. It does not, therefore, automatically mean that all the treaties are being executed and are directly applicable. In other words, the proposition that a specific treaty “has the same effect as the domestic laws” does not necessarily mean that the treaty or its provision(s) create the rights and obligations directly invoked in domestic courts. In the middle of the concepts of “incorporation” and “application,” we can find a place for the “implementing legislation.” Whether a treaty is directly applicable without implementing legislation should be decided in view of the nature of the treaty itself and the provisions thereof.<sup>112</sup> In this context, it should be noted that traditionally national jurisdictions have enjoyed broad discretion in determining how to incorporate and apply international law in their domestic legal order.<sup>113</sup>

The issue of direct applicability of international treaties is closely related to the question of whether a treaty is self-executing.<sup>114</sup> The distinction between “self-executing treaty” and “non-self-executing treaty” has been developed from the case law of the United States,<sup>115</sup> and such distinction has

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111. Constitutional Court [Const. Ct.], 97Hun-Ba65, Nov. 26, 1998 (S. Kor.).

112. Constitutional Court [Const. Ct.], 2000Hun-Ba20, Sept. 27, 2001 (S. Kor.) (“Since the relevant provision is pertaining to the issue of jurisdictional immunity, it is *of the nature that is directly applicable* in Korea.”) (emphasis added).

113. YAMAMOTO SHOJI, INTERNATIONAL LAW 142 (Pae Keun Park trans., Korean Association of International Law of the Sea) (1999).

114. There are three concepts with respect to the application of international law in domestic legal systems. Terms like “direct application,” “domestic validity,” and “self-executing” are used in different ways. WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 6 (2006).

115. Albert Bleckman, *Self-Executing Treaty Provisions*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 374 (2000).

not been adopted in Korea. Within the Korean legal system there are no criteria to classify international treaties on the basis of their distinct nature.

The notion of “self-executing treaty” under American law means a treaty that is normatively concrete enough to be directly executed. On the contrary, “non-self-executing treaty” is understood as a treaty that creates only abstract rights and obligations to the parties. Thus, it is generally said that, for its actual implementation, the treaty requires new domestic legislation for that purpose. In short, the question of whether a treaty is of self-executing nature is only relevant to the concept of “execution,” but not directly to the issue of “incorporation.” The label “non-self-executing” has been attached to the treaties that require further implementing actions or that are not appropriate for immediate judicial enforcement.<sup>116</sup>

In Korea, if a treaty is of a “non-self-executing” nature and thereby lacks direct applicability, further steps to create concrete rights and obligations must be taken.<sup>117</sup> Such steps include not only legislative actions but administrative and judicial measures. Yet in principle, in a monist country like Korea, even if a duly ratified and promulgated treaty is deficient in direct applicability, it is still in itself a valid domestic law and remains effective as a source of law.

### C. Necessity for Overcoming Incompatibility between the ICC Statute and Korean Law

Although the ICC Statute has been incorporated into the Korean domestic legal order and has the same legal force as “acts,” there are provisions in the Statute which are difficult to directly execute in Korea.<sup>118</sup> Korean criminal law, on the other hand, also has provisions incompatible with the ICC Statute. For some features of the ICC Statute, Korean criminal law lacks normative infrastructure for their direct application in Korea. For some others, there were discrepancies. Thus, in view of these difficulties, it was decided to enact an implementing legislation of the ICC Statute as a *lex specialis* to the Korean Penal Code.<sup>119</sup>

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116. Lori Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515, 516 (1991).

117. Recently, a growing number of international treaties in Korea accompany implementing legislation. Most of the treaties on economic and trade issues, such as the Free Trade Agreements (FTAs) or Bilateral Investment Agreements (BITs), have been recently growing in numbers in Korea. These directly or indirectly require implementing legislation.

118. There are several ways to overcome these difficulties. First, domestic law should be amended before the Korean government enters into the treaty. Secondly, if there is no domestic law giving effect to the treaty, the Korean government usually attempts to enact laws to give effect to the treaty. Thirdly, even if a treaty is capable of regulating the matter directly, a special law is sometimes enacted, rephrasing the text of the treaty and adding some new provisions. See IWASAWA, *supra* note 105, at 27.

119. Some countries that consider themselves as having a domestic criminal law and the relevant proceedings to cover crimes under the ICC Statute only enact specific legislation

As a result, the Act has been prepared in which there are sections on, *inter alia*, the general principles of criminal law, definitions and elements of core international crimes, applicable penalties, and command and superior responsibility. Through this implementing legislation, Korean criminal law has set up a domestic penal system sufficient for prosecution and punishment of the core international crimes. Furthermore, for the purpose of reinforcing the cooperation mechanism between Korea and the ICC—though it employed a simple way to prescribe it—the legislation also contains provisions on cooperation including the issues of surrender and legal assistance.

In terms of the definitions and elements of the crimes under the jurisdiction of the ICC and their scope of penalties, Korean criminal law scholars felt an urgent need to have a set of domestic criminal law provisions thereof for the purpose of fully meeting the principle of legality, in spite of the international customary law origin of those crimes. This approach was also supported to facilitate the future domestic criminal proceedings pursuant to the principle of complementarity as enshrined in Articles 1 and 17 as well as paragraph 10 of the Preamble of the ICC Statute.<sup>120</sup> In addition to the core international crimes, the implementing legislation provides the elements and penalties of “the offences against the administration of justice” of the ICC reflecting Article 70 of the ICC Statute. Though the legislation does not provide the basis for jurisdiction with regard to these offences, it seems these offences apply when committed in Korea or by Korean nationals outside Korea.

The Act also introduced some features of general principles under Part 3 of the ICC Statute that have not been provided in the Korean Penal Code, including universal jurisdiction,<sup>121</sup> non-exclusion of criminal responsibility for conduct pursuant to superior orders,<sup>122</sup> command and superior responsibility,<sup>123</sup> and non-applicability of statute of limitations.<sup>124</sup> Conversely, the feature of conditional prosecution or punishment under the

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on the cooperation and judicial assistance issues. Japan would be an example. Japan enacted a domestic implementation act on cooperation with the ICC on April 27, 2007.

120. For details of this principle, see FLORIAN RAZESBERGER, *THE INTERNATIONAL CRIMINAL COURT: THE PRINCIPLE OF COMPLEMENTARITY* (2006); JO STIGEN, *RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY* (2008); *COMPLEMENTARY VIEWS ON COMPLEMENTARITY: PROCEEDINGS OF THE INTERNATIONAL ROUNDTABLE ON THE COMPLEMENTARY NATURE OF THE INTERNATIONAL CRIMINAL COURT*, AMSTERDAM, 25–26 JUNE 2004 (Jann K. Kleffner & Gerben Kor, eds., 2006).

121. Act, *supra* note 1, art. 3(5).

122. *Id.* art. 4.

123. *Id.* art. 5.

124. *Id.* art. 6.

Korean Penal Code concerning some crimes has been excluded for the crimes provided in the Act.<sup>125</sup>

### III. BASIS FOR CRIMINAL JURISDICTION

#### A. Incorporation of a Traditional Basis for Criminal Jurisdiction

As mentioned above, the ICC Statute adopts the principle of complementarity and proclaims that its jurisdiction is complementary to national criminal jurisdictions. For the execution of its primary jurisdiction on the core international crimes, Article 3 of the Act articulates the scope of the Act's criminal jurisdiction providing the jurisdictional basis traditionally recognized under international law. Except for Article 3(5) which reflects the theory of universal jurisdiction, the normative origin of every other jurisdictional basis provided in Article 3 stems from the jurisdictional framework of the Korean Penal Code.<sup>126</sup> The traditional basis for criminal jurisdiction all require a nexus between the exercise of "power to enforce law" and "the protection of its people or territory."<sup>127</sup> In this respect, Article 3(1) of the Act provides for the principle of territoriality that is the basic jurisdictional base to regulate any crimes committed within the Korean territory, regardless of the nationality of a perpetrator or victim.<sup>128</sup> Second, as an extension of the territoriality principle, the Act is also applicable to a foreigner who commits a crime under the Act in a vessel or aircraft of the Republic of Korea outside the territory thereof.<sup>129</sup> Third, the Act also adopts the principle of active personality in Article 3(2). Under this principle, any Korean national who commits a crime provided in the Act outside the territory of Korea is subject to punishment.<sup>130</sup> Of course, actual execution of criminal jurisdiction under the Act in this case would only be possible when the perpetrator is present in Korea. Fourth, the Act prescribes the principle of the passive personality that allows the prosecution of a foreigner who

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125. *Id.* art. 17. For example, in relation to the crime of rape, the prosecutors cannot indict a suspect without complaint or motion from the victim or other persons entitled by law; as regards the offence of assault, whilst the prosecutors has discretionary power to indict a suspect, the suspect is not subject to punishment if the victim expresses that punishment is against his or her will.

126. Korean Penal Code, *supra* note 4, arts. 2–6.

127. Ann-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 168, 171–72 (Stephen Macedo ed., 2006).

128. Act, *supra* note 1, art. 3(1) ("This Act shall apply to any Korean national or foreigner who commits a crime under this Act within the territory of the Republic of Korea.") (corresponding to the Korean Penal Code, *supra* note 4, art. 2).

129. Act, *supra* note 1, art. 3(3) (corresponding to the Korean Penal Code, *supra* note 4, art. 4).

130. Act, *supra* note 1, art. 3(2) (corresponding to the Korean Penal Code, *supra* note 4, art. 3).

commits a crime under the Act against the Republic of Korea or any of its people outside the territory of Korea.<sup>131</sup> The Act, however, does not introduce the protective principle, probably because it is hard to imagine a situation where a crime under the Act committed outside the territory of Korea infringes on vital political or economic interests or the national security of Korea.<sup>132</sup> Even when such situations happen, the execution of universal jurisdiction explained below will cover the lacuna of the protective principle.

### B. Article 3(5): Reception of Universal Jurisdiction

Though the Korean Penal Code has not had a provision on universal jurisdiction, the Act accepts the idea by providing, “this Act shall apply to any foreigner who commits a crime such as genocide [etc.] outside the territory of the Republic of Korea and stays in the territory thereof.”<sup>133</sup> That is, Korea has introduced and explicitly prescribed for the first time in its history the principle of universal jurisdiction for the purpose of strict adherence to the principle of legality.<sup>134</sup>

Universal jurisdiction is usually exercised without any traditional nexus either to nationality or territory. This jurisdictional base, therefore, allows a state to prosecute any perpetrator regardless of his or her nationality or the place where the crime was committed, which is called “absolute universal jurisdiction.”<sup>135</sup> Yet, exercising absolute universal jurisdiction is likely to cause a risk of unjustifiable intervention into another state’s internal affairs, and as a consequence, a reason for diplomatic frictions. To avoid this undesirable situation, many countries impose some restrictions on the exercise of universal jurisdiction. In this respect, the most commonly used method is to actually require the traditional link to nationality or territory,<sup>136</sup>

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131. Act, *supra* note 1, art. 3(4) (corresponding to the Korean Penal Code, *supra* note 4, art. 6).

132. The implementing legislation of Canada also does not provide the protective principle. See Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, §§ 6, 8 (Can.), available at <http://laws.justice.gc.ca/PDF/Statute/C/C-45.9.pdf>.

133. Act, *supra* note 1, art. 3(5).

134. Theoretically speaking, since customary international law is to be incorporated into the Korean legal order and to have the same legal force as domestic laws, the Korean courts can exercise universal jurisdiction that has been recognized under customary international law directly without any national legislation. In spite of this theoretical possibility, however, clear prescription of the jurisdictional base for exercising universal jurisdiction in domestic legislation would be in stricter conformity with the principle of legality. For this reason, the Princeton Principle also emphasizes the need for adoption of national legislation of universal jurisdiction. See Slaughter, *supra* note 127, at 24.

135. Payam Akhavan, *Whither National Courts? The Rome Statute’s Missing Half?*, 8 J. INT’L CRIM. JUST. 1245, 1252 (2010).

136. Reydams argues that it would be erosion to the very concept of “jurisdiction” if a state exercises jurisdiction over a case in respect of which the state lacks any objective or

which is referred to as “conditional universal jurisdiction.”<sup>137</sup> On the basis of this theory, the Act requires a territorial nexus in that Korea can exercise the universal jurisdiction only where a suspect of foreign nationality who committed a crime outside the territory of Korea is present in its territory.<sup>138</sup>

The ICC Statute does not include any provision that enforces State Parties to exercise universal jurisdiction. One might think that Article 3(5) of the Act adopting universal jurisdiction is based on a treaty given that i) the Preamble of the ICC Statute connotes universal jurisdiction<sup>139</sup> and ii) many countries’ implementing legislations accept the idea. It is considered, however, that Article 3(5) should be regarded as an extension of customary international law from which the idea of universal jurisdiction under the customary international law reflected in the ICC Statute and national implementing legislations thereof originated.

### C. Article 3(5): Meaning of the “Presence” Requirement

The requirement to be subsequently present in the territory of Korea under the Act’s Article 3(5) does not mean that the person must have an address or residence in Korea. This “presence” requirement is also relevant to the “enforcement jurisdiction” (*compétence d’exécution* or jurisdiction to enforce rules) because, if the jurisdiction under Article 3(5) is constituted, investigative agencies also initiate their investigation over the suspect. The “presence” requirement also eases the investigative burden of law enforcement agencies in Korea. On the other hand, a commentator envisages a situation where, due to the “presence” requirement, all the proceedings against a suspect should halt when a suspect escapes across the Korean border upon the initiation of an investigation.<sup>140</sup> He would further opine that, in this case, extradition requests might not be feasible. Yet, it is doubtful whether this kind of strict interpretation of the “presence” requirement serves the purpose of the Act to implement the ICC Statute.

It is true that in some cases domestic law enforcement agencies might be reluctant to investigate or prosecute as the crimes provided in the Act are likely to be of a political nature. In this context, the “presence” requirement might be abused by the agencies—for example, after receiving communication the agencies can just wait until the suspect leaves the

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legal link to the perpetrator or the offence. See LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 224 (2003).

137. Many legal systems do not permit trials *in absentia*; the presence of the accused on the territory is then a condition for the exercise of jurisdiction. See Akhavan, *supra* note 135, at 1252.

138. See Reydams, *supra* note 136, at 224.

139. ICC Statute, *supra* note 2, pmb., ¶¶ 3, 4, 6.

140. IN-KYU LIM, SENIOR ADVISOR, JUDICIAL COMM. OF THE NAT’L ASSEMBLY, *REPORT ON THE ACT ON THE PUNISHMENT OF CRIMES UNDER THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT* 23 (2007).

country.<sup>141</sup> Thus, an overly strict interpretation of this requirement might significantly undermine the applicability of Article 3(5) of the Act. Conversely, such interpretation can also excessively restrict the investigative power of the law enforcement agencies when they are willing to investigate and prosecute. The authors are of the view that the “presence” requirement should be regarded as only being relevant to the timing of initiation of investigation. Accordingly, the investigation can continue even when the suspect escapes across the border.<sup>142</sup> If enough evidence is collected, extradition requests should also be permitted.

In addition, universal jurisdiction under Article 3(5) of the Act needs to be exercised supplementary to the jurisdiction of the suspect or victim’s nationality and that of the state in which the relevant crime was committed.<sup>143</sup> In this way, Korea might avoid unnecessary friction over the exercise of universal jurisdiction.

#### IV. COOPERATION WITH THE ICC

##### A. Adoption of the Scheme of *Mutatis Mutandis* Application

Article 86 of the ICC Statute provides the general cooperation obligation of State Parties, and Article 88 imposes an obligation on the State Parties to “ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under” Part 9 of the ICC Statute. Accordingly, the Act contains a section on international cooperation and legal assistance. In this respect, the Act took an approach to include the relevant provisions within a single Act instead of preparing a separate Act on the cooperation issues, as is the case with a number of other countries.

In the process of drafting the Act, drafters initially stipulated detailed provisions on the important aspects of Part 9 of the ICC Statute, including those under Part 10 thereof concerning enforcement. At the review stage, however, given that existing domestic law covers most of the features under Parts 9 and 10, the drafters decided to apply *mutatis mutandis*—the two pre-existing legislations of the “Extradition Act” and the “International Mutual Legal Assistance in Criminal Matters Act.” In case of a discrepancy between either of these two Acts and the ICC Statute, Articles 19(1) and

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141. HUMAN RIGHTS WATCH, UNIVERSAL JURISDICTION IN EUROPE: THE STATE OF THE ART (2006) 67–68, available at <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf>.

142. This kind of universal jurisdiction permits Korean national authorities to commence criminal investigations when Korean authorities are seized with information concerning an alleged criminal offence. Korean prosecution services may exercise criminal jurisdiction over the offence without requiring that the alleged offender first be present, even temporarily, in Korean territory. See Akhavan, *supra* note 135, at 1252.

143. Slaughter, *supra* note 127, at 23; Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT’L CRIM. JUST. 589, 593–95 (2003).

20(1) of the Act grant primacy to the provisions of the ICC Statute. Furthermore, as explained above, since the ICC Statute has already been incorporated into the Korean national legal order, the provisions under Part 9 are considered to be directly applicable in Korea. Taking into account this legal mechanism, the authors think that most features of Part 9 of the ICC Statute are to be executed in Korea on the caveat that there is still some room for challenges on the basis of legal uncertainty originating from the inherent nature of the *mutatis mutandis* application scheme.

### B. *Mutatis Mutandis* Application of the Extradition Act

Article 19(1) of the Act provides that, concerning surrender of a person to the ICC, the Extradition Act of Korea shall be applied *mutatis mutandis* with the proviso that, in a case where a provision in the ICC Statute provides differently than that of the “Extradition Act” the former prevails. For this *mutatis mutandis* application, Article 19(2) replaces the term “the requesting state” in the “Extradition Act” with the ICC, and “the extradition treaty” with the ICC Statute. Through this legislative method, most of the obligations related to “surrender to the ICC” can be performed.

Yet, as prescribed in Article 102 of the ICC Statute, the concept of “surrender” has a different definition than that of “extradition.”<sup>144</sup> Moreover, the object of the application of the “rule of speciality” as provided in Article 101 of the ICC Statute is not a “crime” but a “conduct” or a “course of conduct,” which is not the case with “extradition.” Other features only applicable to “surrender to the ICC” are: i) exclusion of the traditional grounds to decline extradition requests such as the “political offence exception” and the “practice of non-extradition of nationals”; ii) non-applicability of the “double criminality” clause; and iii) non-applicability of the statute of limitations. Accordingly, when the “Extradition Act” is actually applied *mutatis mutandis*, these aspects peculiar to “surrender to the ICC” should be borne in mind so as not to hamper the compliance with the relevant cooperation requests from the ICC.

Particularly, matters related to the “political offence exception” and the “practice of non-extradition of nationals” are likely to cause difficulties as they are not explicitly provided for in the ICC Statute. Namely, since there is no relevant provision in the ICC Statute, there is no room for the clause stipulating the primacy of the provisions of the ICC Statute over those of the “Extradition Act” as provided in Article 19(1) to be applied. As a consequence, the “political offence exception” and the “practice of non-

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144. ICC Statute, *supra* note 2, art. 102(a)–(b) (“For the purposes of this Statute: ‘surrender’ means the delivering up of a person by a State to the Court, pursuant to this Statute. ‘[E]xtradition’ means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.”).

extradition of nationals,” as provided in the “Extradition Act,” might prevail over “surrender to the ICC.”

At this point, we might explore further these two aspects in the context of the “Extradition Act” of Korea. The “practice of non–extradition of nationals” is provided in Article 9(1) of the “Extradition Act.” However, it should be noted that it is not an absolute prohibition on the extradition of Korean nationals, as the provision employs the wording of “*may* not transfer.” In a case involving Korean nationals, therefore, the “Extradition Act” proclaims that the Korean government has discretion over whether it will surrender the person to the ICC, which is contradictory to the mandatory compliance regime as provided in Article 89(1) of the ICC Statute. On the contrary, the “political offence exception,” as prescribed in Article 8(1) of the “Extradition Act,” states that the Korean government “*shall* not transfer” when “the offence is of a political nature” or “the offence is related to an offence of a political nature.” The wordings employed here seem to allow quite a broad scope of application of this provision, encompassing *related* offences that are not of a political nature *per se*. Consequently, everything seems to be dependent on the Korean government’s interpretation of “the political nature of an offence” or of “whether an offence is *related to* an offence of a political nature.” In this context, Articles 8(1)2 and 8(1)3 of the “Extradition Act” must be noted as a proviso to the “political offence exception.” Article 8(1)2 states that, if an extradition request is relevant to a political offence in respect of which a multi–lateral treaty obliges Korea to prosecute or to extradite a suspect (*aut dedere aut judicare*), Korea *may* transfer the suspect. It seems this provision might provide legitimate grounds for Korea to surrender a suspect to the ICC even when the relevant offence is of a political nature as the ICC Statute is a “multi–lateral treaty” that obligates Korea to surrender a person pursuant to Article 89(1) of the Statute. Moreover, another provision—Article 8(1)3—appears to grant additional legal grounds to Korea to surrender a person to the ICC when it provides that, if the relevant offence violates, threatens, or risks life or body of *many* people, the Korean government, again *may* transfer the person. Given that the crimes under the ICC Statute generally involve many victims, Article 8(1)3 of the “Extradition Act” can also be invoked for the purpose of surrendering a person who allegedly committed a political crime. It is considered that this “political offence exception” should be addressed seriously as all the crimes provided in the ICC Statute are—to a varying extent—of a political nature. In short, as examined thus far, although there is a normative possibility embedded in the Extradition Act for “surrender to the ICC” despite the “political offence exception” and the “practice of non–extradition of nationals,” it still remains as a discretionary mechanism heavily dependent on the relevant interpretation and decision of the Korean government. In order to eliminate this normative uncertainty, it is recommended to

introduce a mandatory scheme *vis-à-vis* the cooperation requests from the ICC concerning offences of political nature and Korean nationals.

With regard to the *mutatis mutandis* application of the “Extradition Act,” another important aspect draws our attention—matters regarding Article 98(1) of the ICC Statute. This provision entitles a State to refuse a request for surrender or assistance from the ICC on the basis of “State immunity” or “diplomatic immunity.” In this respect, some are of the opinion that these kinds of immunity under international law are only applicable to officials of non-State Parties to the ICC Statute.<sup>145</sup> In other words, the head of State, high ranking officials, and diplomats of State Parties are not entitled to enjoy immunities under Article 98(1). It is noteworthy that some State Parties have incorporated this idea in their implementing legislations of the ICC Statute. For instance, the International Criminal Court Act 2001 of the United Kingdom provides that “any State or diplomatic immunity attaching to a person by reason of a connection with *a state party* to the ICC Statute, does not prevent” the arrest in the U.K. and surrender to the ICC.<sup>146</sup> It demonstrates a legal interpretation of the interaction between Article 27 and Article 98(1) through which Article 98(1) is viewed as permitting a State Party to arrest and surrender—in its own territory upon the request from the ICC—an official of another State Party.

There are varying views as to the question of with whom the power to decide the applicability of State immunity or diplomatic immunity under Article 98(1) of the ICC Statute should be vested. In this regard, while the implementing legislations of Canada and New Zealand give this authority to the ICC, those of Australia and Switzerland keep this power domestically (in Australia, the Attorney-General decides; in Switzerland, it is the Federal Council).<sup>147</sup> It appears that these decisions bind domestic courts.

Although the issue of granting immunity under Article 98(1) has rarely been addressed by implementing legislations of the ICC Statute, it would be appropriate for the Act to add relevant provisions dealing with the question of whether immunity under Article 98(1) is allowed in connection with Article 27, and—if yes—who should be vested with the power to decide on

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145. Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 422 (2004).

146. International Criminal Court Act 2001, c. 17, § 23(1) (Eng.), available at <http://www.legislation.gov.uk/ukpga/2001/17/contents>. See also International Crimes and International Criminal Court Act 2000, § 31(1), (N.Z.), available at <http://www.legislation.govt.nz/act/public/2000/0026/latest/DLM63091.html>.

147. *International Criminal Court Act 2002* s. 2 (Austl.); FF 2000 (Swiss Federal Law of 22 June 2001, on Cooperation with the International Criminal Court), 2748 arts. 4(d), 6(1), translated in EUR. CONSULT. ASS., THE IMPLICATIONS FOR COUNCIL OF EUROPE MEMBER STATES OF THE RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2001), [http://www.nottingham.ac.uk/shared/shared\\_hrlcicju/Switzerland/Federal\\_Law\\_on\\_Co-Operation\\_with\\_the\\_International\\_Criminal\\_Court.pdf](http://www.nottingham.ac.uk/shared/shared_hrlcicju/Switzerland/Federal_Law_on_Co-Operation_with_the_International_Criminal_Court.pdf).

the matter. This clarification would help prevent diplomatic frictions on the issue of immunity.

C. *Mutatis Mutandis* Application of the International Mutual Legal Assistance in Criminal Matters Act

Article 20(1) of the Act provides that, on the issues of mutual legal assistance between the ICC and Korea, the “International Mutual Legal Assistance in Criminal Matters Act” (“Legal Assistance Act”) shall be applied *mutatis mutandis* with the proviso that, in a case where a provision in the ICC Statute provides differently than that of the “Legal Assistance Act,” the former prevails. For this *mutatis mutandis* application, Article 20(2) replaces the term “foreign state” in the “Legal Assistance Act” with “the ICC,” and “the assistance treaty” with “the ICC Statute.”

Regarding the mutual legal assistance, there are discrepancies between Korean domestic law and the ICC Statute. Article 93(4) of the ICC Statute specifies that a State Party is entitled to decline a request for assistance from the ICC only if the request concerns the production of documents or disclosure of evidence which relates to the State’s national security. Article 6 of the Legal Assistance Act, however, lists additional grounds to refuse assistance requests in addition to “national security.” The same situation—as explained above in relation to the “Extradition Act”—also happens here. That is, since the list in Article 6 contains items that are *not provided* in the ICC Statute, the clause providing the primacy of the ICC Statute over the “Legal Assistance Act” on the matters of discrepancy (prescribed in Article 20(1) of the Act) is not applicable. It is therefore possible that Korea may still refuse to provide assistance to the ICC on the basis of Article 6 of the “Legal Assistance Act.” It is recommended that this aspect be clarified through revision of the Act.

D. Absence of Provisions on Other Cooperation

For the purpose of close cooperation, it is considered that a specific governmental agency in charge of communications with the ICC and execution of cooperation requests needs to be designated. This arrangement would also prevent confusion and friction among the Korean governmental bodies.

In addition, taking into account implementing legislation of South Africa that allows the ICC to sit in its territory, subject to specified procedures,<sup>148</sup> the Act might include a provision permitting the ICC to hold trials in Korea if need be. Although this arrangement is not a necessary matter to be

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148. Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ch. 1(3)(e)(iii) (S. Afr.), available at <http://www.info.gov.za/gazette/acts/2002/a27-02.pdf>.

provided in the Act, it would help enable the ICC to have normative grounds to sit in the territory of Korea.

In terms of cooperation with the ICC, it is regrettable to see that the Act adopted a legislative method that is too concise to ensure the comprehensive cooperation between ICC and Korea. Faced with this reality, it is strongly suggested that, where there is discrepancy between the ICC Statute and domestic law, Korea perform the obligations as a State Party in a way that is consistent with the object and purpose of the ICC Statute.

#### CONCLUSION

The egregious crimes under the ICC Statute are not at all new to the Korean people. The history of Korea in the Twentieth Century is dotted with heinous events under Japanese colonization and the Korean War. In that sense, Korea shares—to a significant extent—the unfortunate experiences of mankind in this Century. Even today, there are concentration camps in North Korea where serious violations of human rights are allegedly being committed on a daily basis. In this connection, we now witness a large-scale civil movement in South Korea aimed at bringing senior members of the North Korean Regime before the ICC. Nobody can anticipate to what extent the Korean courts will encounter actual cases to which the Act is applicable. Depending on the political development surrounding the Korean Peninsula, it might also be the case that the provisions in the Act are to be invoked by many Korean lawyers in the courtroom. Now, the rules have been laid out.

