Customary International Law and the Addition of New War Crimes to the Statute of the ICC

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In addition to the activation of the International Criminal Court's jurisdiction over the crime of aggression (see previous post), the recently concluded Assembly of States Parties (ASP) to the Statute of the ICC, also adopted three amendments adding to the list of war crimes within the jurisdiction of the Court. These new war crimes relate to the use of prohibited weapons in international as well as non-international armed conflicts. However, in the lead-up to the ASP there was controversy regarding the wisdom and even the legality of adding to the list of war crimes. One of the concerns was that there would be fragmentation of the Rome Statute system with different crimes applicable in differing situations to different individuals. This is because under the amendment procedure to the Rome Statute (Art. 121(5)) these new crimes would not apply to nationals of, or conduct on the territory of, non-ratifying states parties. Another concern was that the new crimes (or at least some of them) are, in the view of some states, not criminalised under customary international law and thus not suitable for addition for inclusion in the ICC Statute. It is this latter issue that I focus on this post, though as I will explain later, the issue overlaps with the question of fragmentation of the Rome Statute regime. In this post, I discuss the implications of criminalising conduct under the ICC Statute which do not amount to customary international law crimes. I take no position on whether the crimes that have been added are, or are not, crimes under customary international law (though I think few would doubt that the use of biological weapons is such a customary international crime), but explain why this is an important question that states are right to pay attention to.

The new war crimes to be inserted into the Rome Statute are as follows (see Resolution ICC-ASP/16/Res.4):

> - Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production [to be inserted as Art. 8(2)(b)xxvii) and Art. 8(2)(e)(xvi)]
> - Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays [to be inserted as Art. 8(2)(b)(xxviii) and Art. 8(2((e)(xvii)];
> - Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices [to be inserted as article 8(2)(b)(xxix) and Art. 8(2)(e)(xviii)].

The proposal to add these new war crimes to the Rome Statute was made by Belgium, and builds upon the amendments to Art. 8 made at the Kampala Review Conference, by which certain weapons already prohibited in international armed conflicts were also criminalized in non-international armed conflicts. However, although the newly added war crimes mirror prohibitions which already exist for states in relevant treaties, these Belgian proposals proved to be more controversial than those with regard to Kampala war crimes amendments. Discussions in the Working Group on Amendments, preceding the ASP, suggested that there was a division of views with regard to the adoption of these amendments. In addition to the 3 amendments adopted by the ASP, Belgian had also proposed the criminalization under the Rome Statute of "using anti-personnel mines" (see the Report of the Working Group on Amendment (15 Nov. 2017) submitted to the ASP). That proposal did not generate enough support and was dropped at the ASP in New York (see Addendum 1, of 13 Dec. 2017, to the Report of the Working Group on Amendments).

As indicated, some of the controversy regarding the addition of these crimes related to whether the use of the weapons in question had already been criminalised under customary international law. The Report of the Working Group on Amendment (15 Nov. 2017) sets out the division of views between states as follows:

> 13. In the course of the discussion, widespread support was expressed for the proposed amendments. Some delegations cautioned against the inclusion in the Statute of the proposed crimes. A few delegations were not convinced by the proponent's argument that the proposed crimes could be seen as reflective of customary international law. A few delegations also argued that the existence of a criminal prohibition under customary international law was a prerequisite or at least a key factor for the inclusion of war crimes in the Rome Statute….
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> 14. In response, it was maintained that the amendments could be said to codify crimes under customary international law, all the while acknowledging that States could have a different position on the matter. It was also argued that neither the Rome Statute nor subsequent amendment practice indicated that amendments had to reflect crimes under customary international law. It was further argued that article 8 already included crimes not prohibited under customary international law at the time of their inclusion in the Rome Statute, such as the recruitment of children and attacks against peacekeepers…."

As a result of the absence of general agreement that the proposed crimes were all crimes under existing customary international law, the draft resolution presented to the Working Group, and that ultimately adopted by ASP, did not include a reference to customary international law (see para. 12 of the Report of the Working Group).

Are Existing Crimes Under the ICC Statute Crimes under Customary International Law?

The lack of consensus as to the customary law status of the new war crimes stands in contrast to Resolution RC/Res.5 of the Kampala Review Conference which added to the list of war crimes in non-international armed conflicts. In that resolution, the Review Conference "consider[ed] that the crimes . . . are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law".

Contrary to the view expressed in para. 14 of the Report above, the drafters of the Rome Statute were careful to try to restrict the jurisdiction granted to the Court at that time to crimes that were already deemed to be criminalised under customary international law. The general tenor of the Statute adopted at Rome was, if anything, to be under-inclusive of customary international law crimes, rather than over-inclusive (See Chapter 7 of Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP, 2014). The drafters even failed to include crimes that the International Criminal Tribunal for the former Yugoslavia (ICTY) had declared, before the Rome Conference, to be customary. For example the list of war crimes in non-international armed conflicts in Art. 8 did not include a number of crimes that the ICTY had been declared to be customary in the famous *Tadic Jurisdiction Appeal* of 1995, with the use of the weapons later added in Kampala and the crime of intentionally attacking civilian objects when committed in non-international armed conflicts left out of the Statute adopted in Rome.

The two specific examples given in para. 14 of crimes which in 1998 were not prohibited by customary international law are not in the final analysis strong examples of the Rome Statute going beyond customary international law. At any rate, states did not consider at the time that they were going beyond customary international law. The criminalization of attacks against peacekeepers under Art. 8(2)(b)(iii) & (e)(iii) only applies "as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict". This means that attack against peacekeepers are only war crimes under the Rome Statute where those peacekeepers have the status of civilians. This shows that this crime is not really a new or indeed a separate crime but rather a specified sub-set of the customary international crime of intentionally attacking civilians. Although the view was expressed in Rome, by the United States, that the recruitment of child soldiers was not prohibited by customary international law, Grover points out that "a majority of delegations . . . strongly supported its inclusion, considering it to be reflective of customary international law" (p. 284). Moreover, the Special Court for Sierra Leone has held (by majority in *Prosecutor in Norman,* Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004) that this crime had attained customary status at least by 1996 (with the minority holding that it was the decision in Rome which transformed the crime into customary international law).

Do Crimes Under the ICC Statute Have to Be Crimes Under Customary International Law?

To be clear there is nothing in the ICC Statute that requires that the crimes which are prosecuted by that Court be crimes under existing customary international law. States adopted a different model to that in the ICTY Statute in setting out the crimes subject to the jurisdiction of the ICC. The ICC Statute seeks to set out in detail those crimes that are subject to the jurisdiction of the Court so that the Court, unlike the ICTY with respect to violations of the laws and customs of war (under Art. 3 of its Statute), does not have to rely on formulation of those crimes under customary international law. The fact that, in general, the Statute of the ICC and amendments do not apply retrospectively, but only upon ratification of the Statute by the relevant state (Arts 11 & 121(5)) also means that individuals will, in most cases, not be in a position to complain the conduct was not criminalised under customary international law since they will be deemed to have notice that the conduct was criminal under international law. Moreover, as I argued in my chapter on "Sources of International Criminal Law" in the *Oxford Companion on International Criminal Justice* (OUP, 2009): "there seems to be no reason why international tribunals may not apply treaties which create crimes that have not yet been accepted under customary international law" (pp. 48-49), a view that was accepted by the ICTY Appeals Chamber in the *Tadic Jurisdiction Appeal, (*Oct. 1995, para. 143).

Problems with Including Crimes That are Not Crimes Under Customary International Law

However, problems do arise under the ICC Statute where conduct which is not already criminal under customary international law is made subject to ICC jurisdiction. First, it should be recalled that the Court will not only have jurisdiction in cases where a state has ratified the Statute. In general, there are two situations where the Court may exercise jurisdiction in the absence of ratification by a relevant state. These are (i) situations referred to the Court by UN Security Council under Art. 13(b) and (ii) situations where a non-party state has accepted the jurisdiction of the ICC under Art. 12(3) as has been done by a number of states since 2002. In these situations, questions will arise as to whether the Court can exercise jurisdiction over crimes that are not customary international law crimes because the Court's jurisdiction over the crimes in question will, in all probability, have been conferred retrospectively (i.e. in relation to conduct that occurred before the Council referral or the acceptance of ICC jurisdiction by the non-party state). In such a situation, where the crime is not one that at the time of commission existed under customary international law, the accused person will legitimately be able to argue that to apply the treaty prohibition to him or her would be to violate the principle of legality (*nullum crimen sine lege*). That principle is contained in Art. 22(1) of the Statute which provides that: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." However, it may be asked what it means to say that the conduct at the time it takes place was not a crime within the jurisdiction of the Court. In the situation under contemplation, the conduct would be listed in the ICC Statute but would not in the territory in question have been within

the jurisdiction of the Court at the time when the conduct took place. Arguably, under Art. 22(1) the Court should find that it would not have jurisdiction over the crime in the case of a retrospective Security Council referral or Art. 12(3) acceptance by a non-party state even if the Court would have jurisdiction over that crime in cases arising from acts of a national of a state party that has accepted the amendment. Even if Art. 22(1) is not to be interpreted in the way just suggested, questions will then arise as to whether the effect of Art. 21 (3) which provides that, "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights", is that the amendments should not be applied where they violate the principle of legality as an internationally recognized human rights. I discuss this question in the aforementioned chapter on "Sources of International Criminal Law" and so does Marko in his articles on "Is the Rome Statute Binding on Individuals? (And Why We Should Care)" (2011 JICJ) and "Aggression and Legality: Custom in Kampala ((2012) 10 JICJ 165), both of which you can find here.

In the discussion above, I leave aside the tricky question whether the Court would have jurisdiction, in the case of a Security Council referral, over crimes committed by nationals of, or on the territory of, states parties that do not accept the war crimes amendments given the wording of Art. 121(5) of the Rome Statute. In my view, it should not be easily assumed that that the second sentence of Art. 121(5) does not apply, in principle, to Security Council referrals. I also leave aside discussion of the second preambular paragraph of the ASP Resolution adopting the war crimes amendments, which seeks to extend the principle contained in the second sentence of Art. 121(5) to non-states parties. The legal effect of this language is contentious (see Kevin Jon Heller's post of today). However, given that text it may be asked whether these amendments would apply to crimes committed by nationals of, or on the territory of, non-party states either in the case of Security Council referrals or in the case of Article 12(3) acceptances.

A second problem that would, potentially, arise in cases where amendments to the ICC Statute includes crimes that are not crimes under customary international law is whether officials of non-parties to the Statute (or indeed state parties that do not accept the amendment) are subject to the jurisdiction of the Court for such crimes, or at least subject to arrest by other states. The problem arises because ordinarily officials of states are immune from the jurisdiction of other states, including jurisdiction from arrest with regard to acts done in the exercise of official capacity – immunity *ratione materiae.* This immunity extends beyond the immunity *ratione personae* that is enjoyed by serving heads of state, heads of government and foreign ministers as it applies to all those who engage in official acts. There is a good argument (see this article by Sangeeta Shah and me) that this immunity ratione materiae does not apply to crimes under international law – an argument recently endorsed by the International Law Commission in Draft Art. 7 on the Immunity of Officials from Foreign Criminal Jurisdiction adopted in 2017. This lack of immunity would mean that under Art. 98 of the ICC Statute, states party to the ICC Statute have to comply with requests by the ICC for arrest of such officials, since they would not be violating

immunity belonging to foreign states by so doing. However, where the crimes are not crimes under customary international law there remains under customary international law from the jurisdiction of other states. Also, in my view, since states parties do not have jurisdiction over those officials from other states, they do not have competence to delegate this jurisdiction to the ICC. Thus, in cases where there is immunity under customary international law, the official of the state would have good reason to complain about ICC jurisdiction (see also here).

However, though officials of state parties (including members of armed forces) would retain immunity in cases of crimes not criminalised by customary international law, the potential problems that would arise are ameliorated by Article 121(5) which excludes ICC jurisdiction over amendments with respect to nationals of, or acts on the territory, of states parties that do not accept the ICC amendments. This means that officials of those states (to the extent that they are nationals of those states) are exempt from those crimes. The problems are further ameliorated by the provision of the recent ASP Resolution by which the ASP "confirms its understanding that in respect to this amendment the same principle [under Art. 121(5)] that applies in respect of a State Party which has not accepted this amendment applies also in respect of States that are not parties to the Statute". Although this text, which was also included in the Kampala war crimes amendment, has been the subject of some criticism since it states a principle that is not to be found in the Statute, the provision helps in avoiding problems that would arise with regard to official act immunity (immunity *ratione materiae*) arising from official acts of non-party states.

In conclusion, this post suggests that states have good reason to consider carefully whether to include within the jurisdiction of the ICC Statute crimes that are not already criminalised under customary international law. Adding such crimes creates complications, but as shown above those problems may be resolved. However, they are resolved at the cost of creating fragmentation in the jurisdiction of the ICC over persons. This may be a price worth paying in order to develop international criminal law. Despite Art. 10 of the Statute making clear that the ICC Statute shall not be interpreted as prejudicing the development of other rules of international law, an argument that a crime has developed into customary international law faces an uphill battle (see the *Schabas Commentary on the Rome Statute* (OUP, 2nd ed.), pp. 336-7). Thus, including such a crime within the ICC Statute may be regarded not only as criminalization by treaty but also as a step in the direction of criminalization under customary international law.