Why it is special? Rome Statute & War Crimes Provisions in Other Treaties

"*The establishment of the International Criminal Court is a major success in setting up a system of international criminal justice*"[1]. "The Court is a monster"[2]. These are only two of commentaries given after the adoption of the Statute of the International Criminal Court. They make evident how the evaluation of this extraordinary event can differ depending on the perspective of the commentator. Someone who has participated in advancing the process for the establishment of the International Criminal Court, or has succeeded as a negotiator in Rome, will be willing to perceive the establishment of the Court as such as a major step forward. Those with positions of responsibility in armies around the world looking at the test from the perspective of the implementation of intentional humanitarian law in combat might come to different conclusions and, moreover, university professors skillful enough to find even a minor flaw in legal text might be even more critical towards the result, in particular if – as in most cases – they have not been able to contribute to the text of the Statute personally.

For the benefit of a thorough evaluation of the International Criminal Court Statute it is essential to outline the approach taken. Evidently, for the overall evaluation of the International Criminal Court, all legal, political, political, humanitarian and organizational aspects have to be taken into account. The historical development of international criminal law and the socio-political setting of the community of states at the beginning of the Rome-Conference are, for example, important features. Nevertheless, any evaluation must start with a legal analysis of the text of the Statute. Such an analysis must be based less on implicit or explicit expectations of the states, which participated in the developing process or their political evaluation after the conclusion of the treaty. It should rather focus on the wording of the text and the objectives and aims explicitly or implicitly

stated in the Statute. One can do justice to the text and the overall result, only if the starting point of the analysis is what the States have laid down in the Statute reflecting the consensus established.

Three aspects are worth mentioning regarding the objectives explicitly spelled out in the preamble of the Statute. First of all, it is clear from the preamble text that the Court should deal not with all crimes, but only with the most *"serious crimes of concern to the international community"*. Secondly, the States wanted the Court to be created with a twofold objective regarding its jurisdiction. Jurisdiction is not only provided *to "put an end to impunity for the perpetrators of serious crimes"*, but also to "*prevent*" the committing of such crimes in the future. The combination of both punishment and prevention is an evidence of the broad perspective of the drafters of the International Criminal Court Statute, which gives the Court even broader jurisdiction than those of the statutes of the ICTY and the ICTR.

Furthermore, as a third objective manifested in the preamble, the advancement of the relationship between the jurisdiction of the International Criminal Court and national criminal jurisdiction must be assessed. Looking at the preamble from a textual point of view, one and easily argue that, already in the preamble, the preference of the States participating in the Rome Conference to use national jurisdiction for the prosecution of international crimes is highlighted. The wording and style of the text with which the complementary nature of the jurisdiction of the International Criminal Court is articulated underlines the reliance on national jurisdiction of the States represented in Rome as an effective means for the punishment and prevention of the most serious crimes of concern to the international community, rather than giving preference to the jurisdiction of concern to international community does not only relate to measures at the national level. The reference to international cooperation in the second half of this sentence of the perambulator paragraph demonstrates the strong belief of the State parties to the Statute in considering the Statute as being at least one of the effective "means" of prosecuting international crimes.

One would obviously fall short of a thorough analysis if one finishes the analysis with the general statements made in the preamble. To be able to judge the potential effectiveness the International Criminal Court it is essential to take into account on a second layer some additional criteria, which is not so clearly defined in the preamble. Despite the undeniably extraordinary effect of the International Criminal Court Statute on the development and state of international criminal law since the application of the statutes of the tribunals in Nuremberg and Tokyo, the Rome Court is "competing" with already existing treaties defining jurisdiction for international crimes such as the statutes of the Hague and Arusha tribunals. The specific relationship between the rules established with the International Criminal Court Statute and the already existing rules of international criminal law and international humanitarian law is a decisive criterion in judging the effectiveness of the Court. The effectiveness would be particularly limited if the rules established by the Statute of the International Criminal Curt are in contradiction of the member States, or if the rules laid down in the Statute do not contribute to the establishment of a homogeneous system of international criminal justice[3].

The latter aspect is of major importance not only with regard to gaining political support for the ratification of the statute. States will need guidance in how far their existing systems of criminal prosecution must be adapted in the future to the requirements of implementing the Statute of the International Criminal Court. Moreover, actual cases before national courts might be influenced by what has been regarded as the statement of the will of 120 States in defining crimes, jurisdiction, and co-operation and complementarily in international criminal justice.

War Crimes according to the Statute and other War Crimes Provisions

Regarding the question of a homogeneous system of international criminal justice, Article 8 of the International Criminal Court Statute regarding war crimes is of major interest due to its content and complexity. First of all, the list of crimes defined with regard to number and particularities goes beyond what has yet been codified, either in treaty law

or in the statutes of the existing tribunals as violations of the law and customs applicable in international armed conflict. Article 8 repeats, first of all, the complete list of the 'grave breaches provisions' of the Geneva Conventions. However, it then establishes a long list of war crimes for which jurisdiction should be given. In addition, Article 8 includes a list of violations of the laws and customs of war applicable to non-international armed conflicts.

The matrix that can be used in analyzing the list of Article 8 has four different categories. First of all, it is important to decide whether the qualitative criteria used to describe the jurisdiction of the International Criminal Court in the first sentence of Article 8 para. 1 limits in one way or other the scope of jurisdiction. Secondly, it might be useful to identify which of the crimes already contained in treaty provisions are not included in Article 8. The third category is dealing with the question of to what extent the definitions of Articles 8 differ from the definitions used in already existing treaty provisions, and which difficulties one might therefore face in interpreting and applying the rules of Article 8. Finally, a closer look is needed at some of those elements of Article 8 that include crimes not yet listed in other documents.

Aspects of Jurisdiction and Limitation

The first question is whether the introductory sentence of Article 8 the Statute only describes the jurisdictional character of the Statute's provisions or whether the provisions also have a penal law content. The wording, using the terms "shall have jurisdiction", indicates only a jurisdictional character of the specific elements of the list in Article d8 of the Statute. In favour of a simply jurisdictional understanding of Article 8 one can indeed refer to Article 17 on issues of admissibility. This Article, to which I will also refer back to later, describes the function of the International Criminal Court based on national law systems which would allow the exercising of criminal jurisdiction on a case. To exercise such national jurisdiction would mean to have a definition of a crime already available in the national laws. Tying together the jurisdiction of national courts, including a definition of the crimes, with the jurisdiction of the Court would allow us

to understand Article 8 of the Statute as only having a jurisdictional character.

On the other hand, the reference in Article 22 of the Statute to the *nullum crimen sine lege rule* should be taken into account. Article 22 para 2 refers, for example, to the definition of a crime which "*shall be strictly construed and shall not be extended by analogy*". This paragraph would have only limited meaning if Article 8 were to be regarded as including only the jurisdictional aspect and not also the criminal law aspect. Commentators have already concluded from the existence of Article 22 para.1 and Article 22 para.3, that the list in Article 8 is not only of a jurisdictional nature but that it also comprises a criminal law content[4].

More decisive are considerations taking into account the situations foreseen as providing jurisdiction for the International Criminal Court? The Court's jurisdiction is not only in cases in which national courts have been unwilling or unable to undertake proceedings against a perpetrator. Article 13 para. (b) grants jurisdiction to the International Criminal Court in case in which a "situation" is referred to the prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. It includes the need to have available definition of crimes in such cases. The court could refer either to definitions of war crimes already accepted as customary law, or it could use Article 8 of the Statute – a natural and logical step. This situation as foreseen in the Statute, supports the understanding of the Statute's rules as also having a criminal law content. Nevertheless, such result cannot be applied without difficulties. The list in Article 8 of the Statute includes definitions of several war crimes not all rooted in international customary law. A possible argument could be that such rules are emerging in customary law. Does this mean that in cases in which the Security Council refers a situation to the prosecutor, the Court would only be able to partially apply the list in Article 8? This question is of particular importance for non-international armed conflicts, in which States on whose territory an armed conflict is taking place are not parties to the International Criminal Court Statute. The States negotiating in Rome seem to have accepted in such a case an "extra-treaty" effect of Article 8 of the Statute. With regard to the exercise of jurisdiction in the case of referral to the

prosecutor by the Security Council, these specific elements of Article 8 must be analyzed and it must be decided whether they reflect well established rules of law. Only then would the prosecution of persons responsible for crimes listed in Article 8 are consistent with the fundamental principle of criminal law *nullum crimen sine lege*.

A second question emanating from the wording of the first sentence of Article 8 relates to its possible restricting effect for the jurisdiction of the Court. It has been argued that the Court only has jurisdiction when the crimes in question were committed as "part of a plan or policy or as a part of a large-scale commission". Indeed this second part of the introductory sentence of Article 8 might create confusion taking into account the first sentence in the first paragraph of Article 7 on the definition of crimes against humanity. Article 7 defines crimes against humanity as limited to those acts that are "committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

Following the proposal of the International Law Commission in the Code of Crimes against the Peace and Security of Mankind, the Statute's Article 7 does not allow the prosecution of single acts which are not part of a "widespread or systematic attack". Article 8 on war crimes highlights, by using the term "in particular", the jurisdiction of the court for war crimes committed under specific circumstances. According to Article 8 para. 1 lit. B the Court has jurisdiction not only with regard to the acts listed, but also to other "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law". The jurisdiction is not limited to acts being committed as part of a plan or policy or as a part of a large-scale action. Fenrick rightly points out "plan, policy and scale are not elements of war crimes".

Despite the result of this analysis, one has to take into account that the Court can still determine that a case is inadmissible. This decision is not only dependent on the inability or unwillingness of States. If the case is not of "sufficient gravity" the Court might decide not to proceed with further actions as is stated in Article 17, para 1 (d). The

Court has to develop certain criteria to be able to decide whether a case is inadmissible because it lacks "Sufficient gravity". One can question, based on the wording of Article 17, to which characteristics of a case the term "gravity" relates. Is it the nature of the crime, which is important, the number of victims or the nature of the rule applicable? Would grave breaches according to the Geneva Conventions always is of certain gravity? Would cases like the "Essen-Lynching Case"[5] in which four prisoners of war were killed when after capture were forced to march through the city they had just attack from the air be admissible? These and other questions might come up quite soon after the establishment of the Court if member states of the Stature are inactive or unwilling to try war criminals.

Variances between Art 8 and other already existing definitions of war crimes

a) General aspects of variances

Looking at the list of grave breaches Article 8 para.2 (a) and serious violations of the law and customs in Article 8 para 2b one has to, first of all, acknowledge, that the order of the list is somewhat confusing. Crimes, which one would assume, belong to the Geneva law, though either technically not listed as grave breaches of the Geneva Conventions or with a different wording but the same core content, do appear under paragraph Art 8 para (2) b as violations of the laws and customs of war[6]. Subjecting persons who are in the power of the adverse party to physical mutilation and medical or scientific experiments of any kind according to Art.8 para 2b (x) belong to the group of such rules as well as Art.8 para 2b (xv) which refers to compelling the nationals of the hostile party to take part in the operations of war directed against their own country.

There might be difficulties in future cases before national courts regarding obligations to prosecute under the Geneva Conventions and under a potential implementation law, which transforms Art.8 of the statute word by word into national law language. If one accepts only the grave breaches provisions of the Geneva Conventions providing for mandatory jurisdiction than the categorization of the crimes mentioned above as "other serious violation" under Art.8 of

the statute might give national courts the opportunity to deny mandatory jurisdiction for these crimes. Such effect would not be in line with the approach taken the Geneva Diplomatic Conference developing the protection of the individual against mutilation and by curs having applied the prohibition to compel civilians to take part in the operations of war undertaken by the hostile party against their own countries.

A more serious problem results from the difference regarding reservations concerning Additional Protocol I and the Rome Stature. While states have reserved their rights regarding different articles of Additional Protocol I the Rome Statute acceding to Art. 120 do not allow for reservations. If reservations of states are addressed at national courts must apply war crimes provisions of Additional Protocol I the questions must be asked which standard if conformed with exact or similar wording of both treaties but different additional declarations of the parties. Ireland for example has made a declaration concerning Art. 11 of Additional Protocol I which also is relevant for the understanding of Art. 8 para. (2) b x. According to the declaration of May 19, 1999 it is lawful under the Irish declaration for the purposes of the of investigation and breach of the Geneva Convention of 1949 of the Protocols Additional to the Geneva Conventions of 1949 to take samples of blood, tissue, saliva or other bodily fluids for DNA comparisons from a person who is detained interned or otherwise deprived of liberty as a result of a situation referred to in Article 1 of Additional Protocol, in accordance with Irish Law and normal Irish medical practice, standards and ethics. In which way other parties of Additional Protocol I not having responded to the Irish declaration might interpret the requirement of the accordance with national law is one question. More relevant for the topic to be discussed here is the question whether the declaration has created a different standard of crimes under Additional Protocol I compared to the Rome Statue Art 8 Para (2)bx?

One might argue that the actions referred to in the Irish Declaration are neither medical nor scientific experiments or would they seriously endanger the life of a person in the power of a party to the conflict and thus not fulfil the criteria of Art 8 para (2)bx. On the other hand are all medical acts which o not serve a therapeutic purpose[7] open to abuse and by nature dangerous for the health of the person interned

if it does not agree to such treatment. It must be taken into account that the rules of procedure of the ICTY allow for medical examination of the accused. The establishment of the rules of procedure for the Rome Court will show in what way one can support a homogeneous interoperation of the two different rules.

b) Works or installations containing dangerous forces

Of real importance is the difference between the crimes listed under Article 82 para (b) of the Statute and the list provided in Articles 85 of Additional Protocol I on the repression of breaches of this Protocol, which includes three grave breaches of the Protocol which are not mentioned explicitly or implicitly in Article 8. The first rule missing is the prohibition of an attack against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive loss of live, injury to civilians or damage to civilian objects, as defined in Articles 57 para. 2 (a) (iii) of additional protocol 1. 1977 the inclusion of this rule in Article 85 had been welcomed by the Diplomatic Conference as a major improvement to protect the civilian population against the effects of hostilities. Even in cases where the installation are military objectives according to Article 56 of Protocol I attacks are prohibited under certain circumstances. This is one of the reasons why the drafters of the Additional protocol I inserted into Article 85 as a grave breach the launching of attacks against such installations if the attack is likely to cause excessive loss of live etc.

It may have been overlooked by the Rome Conference that the rule dealing with attacks against civilian objects in Article 8 para 2b(ii) does not cover all the cases of attacks against works or installations containing dangerous forces, thus leaving these objects without the criminal law protection with had been foreseen in 1977 in Geneva developing Additional Protocol!

c) Attacks on non-defended localities and demilitarized zones

Comparing the wording of Article 8 of the Statute with Article 85 of the Additional Protocol I, one has to recognize

that another important rule is also missing with regard to attacks on non-defended localities and demilitarized zones. One might get the impression that the situation of attacks on non-defended localities and demilitarized zones is covered by Article 8 para 2b(v) which relates to attacks or bombardments on towns, villages, dwellings or buildings which are undefended and which are not military objectives. Indeed, to be "undefended" is one of the preconditions of a non-defended locality under Article 59 of the Additional Protocol I. Still, as there is no definition of what an undefended town, village etc. Is in Article 8 of the Statute, a difference between the two rules only exists if the term 'undefended' included all the criteria mentioned in Article 59 of Additional Protocol 1. Nevertheless, the second option of Article 85 para 3(d) not to attack demilitarized zones does appear in Article 8 of the Statute at all.

d) Unjustifiable delay in the repatriation of Prisoners of War

A third and probably the most important omission left in Article 8 of the International Criminal Court Statute relates to the unjustifiable delay in the repatriation of prisoners of war or civilians. Under Article 85 para 4b of the Additional Protocol I this is a grave breach of the Protocol. One could argue that the drafters of the International Criminal Court Statute deliberately avoided dealing with the repatriation question. On the other hand the obligation to repatriate is one of the main obligations to be fulfilled by parities to an armed conflict as soon as the hostilities have ended. States that are to be bound both by the Rome Statute and the Additional Protocol I will have to decide how to deal not only with this discrepancy between the two treaty texts. But they must also make clear for themselves whether the repatriation rule of the third and fourth Geneva Convention and the criminal law aspect of them in the Additional Protocol I is still of important for them. Taking into account the practice of states since World War II, the International Criminal Court might not face many cases on unjustifiable delay in the repatriation of prisoners of war but might have to deal with the unjustifiable delay of repatriation of civilians.

Differences in the definition of war crimes

a) Principle of proportionality

The third chapter of the matrix relates to differences between already existing war crimes provision and the definitions included Article 8 of the Statute. The first real difference can be unidentified in Article 8 par. 2b (iv) concerning attacks with unproportional results. A similar rule is included in Article 85 the Additional Protocol I para 3(b).

Both rules refer to the principle of proportionality in deciding whether a certain attack must be criminalized. But there is a major difference in the description of the proportionality principle. While in the Additional Protocol I (Article 85 and 57) a distinction is made between the damage and the concrete and direct military advantage anticipated, Article 8 of the Statute adds two qualitative criteria to the definition used in Article 57 of Additional Protocol I. According to Article 8 a war crime only exists if the damage in "clearly excessive". Furthermore, only the concrete and direct "overall military advantage" can be taken into account on the other side of the equation. The two terms added to the 1977 definition of proportionality do reflect the debate about the Additional Protocols in 1977. Interpretative declarations and reservations made by State parties to the Additional Protocol referred in particular to the qualification of the military advantage anticipated. Still, it cannot be assumed that the rules of the Additional Protocol I on the proportionality principle includes the criteria of "overall" military advantage[8].

Despite the fact that the application of the proportionality principle in practice will in any event create problems, the utility of Article 8-para.2b (iv) must be questioned. If the overall military advantage is one part of the equation, the question is who in an armed conflict is able to decide what the concrete and direct overall military advantage is and what it is based on. The literature, in particular publications on air warfare, give practical examples showing the limited application of a rule which qualifies the military advantage by referring to the overall advantage.

Submit is correct in this regard stating "This seemingly straightforward principle often proves difficult to apply in practice". The dilemma lies in the extent of nexus required between the object to be attacked and the military operation. In others word, the subjectivity inherent in the terms "effective" and "definite" invites disparate interpretation. No ordinary solder or even officer will be able to judge the overall military advantage. Article 8, in this respect, will therefore probably only be relevant for generals and officers on a very high level and will limit the usefulness of the rule in the Statute[9].

b) Undefended cities

A second paragraph of Article 8-para.2b (v) also needs careful analysis. The rule on attacking or bombarding undefended cities makes the application of the rule dependent on the qualification of the objects not being military objectives. Here, the drafters of the Statute went too far in what in other parts of the Statute worked well, in identifying the protective status of persons and objects. As an example, attacks on peace-keeping personnel are only crimes under the Statute of the Court if the personnel is entitled to the protection given to civilians under the international law of armed conflict, which means that they are not directly taking part in hostilities (Article 8 para.2b (iii).

The problem we have with the rule on attacks on undefended towns and villages is that a town or a village as such can never be a military objective, as indicated by the wording of this paragraph. One of the major advantages of the Additional Protocol I is the prohibition of attacks or bombardments which treat as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects (Article 51 Para 5(b). This rule clearly prohibits under the circumstances described the so-called area bombardment. It is a consequence of the debates about the lawfulness of area bombardment after the Second World War and the Vietnam War.

The rule in Article 8 para 2b(v) indicates a factual situation in, and a legal evaluation of, a town, which

unfortunately refers back to the times of unlimited air warfare. As Article 8 of the Statute does not and cannot contain a definition of a military objective, one has to refer back to Article 52 of the Additional Protocol 1, which today is justifiable regarded as stating customary law. Article 52 in connection with Article 51 para 5(b) of the Additional Protocol 1 clearly shows that there is no reference that made to a town being a military objective. International practice therefore, one might not be able to prove that such a situation existed. Still, one could see the wording of this paragraph as giving a false indication of what status a town can have in an armed conflict.

c) Employing poison or poisoned weapons

There are also other additional remarkable differences between already existing definitions of war crimes or drafts finalized recently and the working of Article 8 of the Statute. Employing Poison or poisoned weapons is a war crime under the Statute's Article 8 para 2b(xvii), even if their use is not calculated to cause unnecessary suffering. The latter qualification is used in the ICTY Statute and the International Law Commission's Draft Code of Crimes against Peace and the Security of Mankind of July 5, 1996. The ICTY Statute has been regarded as being based on customary law. Despite the efforts of the ICRC and others to provide a correct interoperation of the term, it cannot be ruled out that the term calculated will be used in the future as a qualifying factor[10].

With regard to the definition in the Rome statute, it is questionable, for example, whether specific ammunition used in the Gulf war to attack tanks would fall under the definition of the Statute's Article 8 para. 2b (xvii). To be effective, such explosives contain depleted uranium. This poisonous material is in this case not calculated to cause unnecessary suffering of the soldiers in the tanks, but to penetrate the tank's armor. Whereas under the applicable customary law before national courts, the use of such weapons might not be regarded as war crime, under the Rime Statute it might qualify as a criminal act.

The difference in the specific qualifying elements of the rule might create specific problems with regard to the

jurisdiction of the Court. If a national court dealing with a case in which the use of such or similar weapons must be discussed is not able to exercise its jurisdiction due to the customary law character of the rule as described, the jurisdiction of the court is in question. Is the national court being barred by the rule as discussed unable or unwilling to exercise jurisdiction according at Article 17 of the Stature of the Court? Misinterpretations can be avoided only if the customary law character of the rule in question develops in the direction of the rule as laid down in the Statute of the Court.

d) Cultural property

Another paragraph in Article 8 causes similar difficulties. Para. 2 b (ix) of Article 8 deals with attacks on buildings dedicated to religions education, art, science or charitable purposes and other objects differently from the already existing rule in Article 85 of the Additional Protocol I. Under the Additional Protocol I, an attack on a recognized historical monument, works of art or places of worship is only a war crime under three specific conditions. First of all, the result caused by the attack must be an extensive destruction of the object and secondly there should be no evidence of violation of Article 53 sub- paragraph (b) by the adversary. Finally, works of art and places of worship should not have been located in the immediate proximity of military objectives. None of these three criteria are mentioned in the Article 8 para 2b(ix) of the Rome Statute.

One might have guessed that the qualification used "provided that they are not military objectives" will replace the criteria mentioned in the Additional Protocol I. but this is not the case. Article 53 is first of all referring to the use of such objects in support of the military effort. This conception is much broader than the conception of what a military objective is. Under Additional Protocol I an attack against, for example, historical monuments are not a war crime of the adversary has used the object in support of the military effort. As long as this support does to convert the historical monument into a military objective, under the Rome Statute the attack would be a war crime. The Second Protocol to 1954 Cultural Property Convention adopted after the

establishment of the Rome Statute follows the wording of the Art. 8 para 2b(ix) of the Rome Statute with one interesting difference: A precondition for the waiver to respect cultural property is that by its function the object has been made into account the overlap regarding objects which can be brought under all articles mentioned there are now three different rules, the exact content of which must be identified[11].

e) Improper use of emblems.

A second puzzling difference relates to the rule on the improper use of a flag of truth and in particular the improper use of the distinctive emblems of the Geneva Conventions according to Article 8 para 2b(vii) of the Rome Statute. Article 85 para 3f of the Additional Protocol I refers to the perfidious use of the distinctive emblems. The definition of the perfidious use in Article 37 of Additional Protocol I include actions such as killing, injuring or capturing of an adversary by resort to perfidy[12].

Article 8 para 2b(vii) in contrast refers to making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury. First of all, the term "capture" does not appear in the Rome Statute, which means that the perfidious use of the emblems capturing an adversary can be a war crime under the Additional Protocol I but not under the Rome Statute.

Moreover, it is not clear what the term "improper use" in Article 8 para 2b(vii) means. It is clear from the drafting history of the Additional Protocol I as well as of the Rome Statute that the term "improper use" is much broader than the term "perfidious use". It is not necessary here to decide what "improper use" means in detail as it is at least clear that the paragraph of the Rome Statute is in one respect (capture) more limited than Article 85 of the Additional Protocol I, and in another respect (improper use) is broader than the Additional Protocol I. In addition to this, the reference to death or serious personal injury is not qualified at all. This means that any death or serious personal injury of

"a" person can be regarded as fulfilling the criteria under this paragraph of the Rome Statute.

Codified and new crimes

The fourth category, which is important to look at in evaluating the Rome Statute, is the category of codified and new war crimes. One of the general problems related to this list is already mentioned above, but should again here be highlighted here: The problem of the application of these rules in cases in which a situation has been referred to the Court by the Security Council and the states in question (where the conflict is taking place or nationals of a conflicting party are regarded as war criminals). International this cases the customary law character of the rule in question is decisive. For both cases, including the use of the complementary mechanism of the International Criminal Court, the rules must be clear and applicable.

a) Chemical weapons

A rule which belong to the first category of rules, of which the exact customary law character is doubtful, is Article 8 para 2(xviii) on employing asphyxiation, poisonous or other gases and all analogy liquids, material or device. Such a rule has neither been included in the ICTY Stature nor in the International Law Commission's draft Code of Crimes, though the prohibition, laid down in the paragraph, refers back to Hague Declaration II of 1899 concerning asphyxiating gases and the Geneva Gas-Protocol of 1925 on the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare. It is well known from the debate about both the 1899 Declaration as well as of the Geneva Gas Protocol of 1925 that the terms use in both treaties leave open many questions as to whether, for example, tear-gas or herbicides fall under the prohibition of the two conventions. Even after the adoption of the 1993 so called Paris Chemical Weapons Convention the exact content of the Rules is dependent on the highly technical descriptions of the prohibited substances[13]. As there is no reference to the 1993 Paris Chemical Weapons convention, one can hardly speak of a very precise criminal

law prohibition in Article 8 para 2b(xviii). Indeed, it is quite questionable whether there really exists, besides what has been agreed in the 1993 Chemical Weapons Convention, a joint understanding of what is covered by the terms used in Article 8 para. 2 (xviii) of the Rome statute.

b) Damages to the Environment

A similar concern may be raised with regard to attacks, which cause widespread, long-term and server damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated (Article 8 para. 2b (iv)). Despite the fact that such a rule (thought slightly differently phrased) had been included in the ILC Draft Code, it is far from clear what widespread, long-term and severe damage to the natural environments is. The most recent example of an attacks had had effects on the environment are the destruction of the Pancevo chemical plant close to Belgrade by NATO- planes during the Kosovo War in 1999. It is easy to understand which difficulties there are to equate the damage caused with the military advantage gained. One can therefore hardly follow Tomuschat who has positively commented on the less restrictive wording of Article 8 para. 2b (iv) compared to the ILC Draft. The Rome version of the rule is difficult to be regarded as a criminal law rule, which should be clear and easy to understand for all which need to obey it in the heat of a battle.

The explanation given above of the meaning of the "overall" military advantage adds to the uncertainty connected to this phrase. It will have a rather limited practical effect simply due to uncertainty about its content. Moreover, the phrase used does not really reflect state practice since 1991. Several states have in commenting on damages to the environment since the Gulf War in 1990/1991 used the principle of proportionality as the decisive criterion to judge unlawful damages to the environment[14]. The Court of Justice too referred back to the principle of proportionality, but also mentioned the principle of necessity in its Advisory Opinion on the use and the threat of use of unclear weapons. The content of the rule thus has to be regarded as establishing a higher threshold that of Additional Protocol I, that might be the reason why states have accepted a war

crime related to the protection of the environment at all in the Rome Statute. As Fenrick has pointed out "prosecutors will probably reluctant to prosecute unless the proportionality requirement was clearly breached.

c) Presence of civilians and immunity

A third new rule is related to the utilization if the presence of a civilian or other protected person to render certain points, area or military forces immune form military operations. This paragraph seems to be somewhat misconstrued. According to the wording of Article 8 para 2b(xxiii) immunity would mean a total and absolute prohibition of attack. But neither can a military objective be immune to attack if civilians are either within such an objective or close to it, nor are any specific restrictions on the attack created by the presence of civilians or other protected persons[15]. What humanitarian law provides for such cases is the applications of specific limitations on methods and means of warfare with indiscriminate effects[16], the application of the proportionality principle and specific precautionary measures[17]. These rules are unrelated to the proximity of the civilians or other protected persons to certain areas.

There are also serious doubts whether this criminal law rules in Article 8 para. 2 b (xxiii) is based on a normative proposition in humanitarian law. Article 58 of the Additional Protocol I is vague in referring to an obligation of the parties to the conflict to endeavor "to the maximum extent feasible" to remove the civilian population, individual civilians objects under their control from the vicinity of the military objectives. States have been very reluctant to accept more precise rule because in practice, in practice, in particularly in armed conflicts between states with a large population, the subjective intent, which is necessary to prove the violation of the rule, is difficult to verify. On the other hand as it has been made clear during the Kosovo-War in 1999, when many civilians were shielding military objectives e.g. bridges during the first days of the air warfare against cities in the Former Yugoslavia, that the importance of such a rule for the implementation of the principle of distinction is widely accepted.

d) Willfully impeding relief supplies

One other ambiguous difference relates to Article 8 para 2b(xxv). Willfully impeding relief supplies as provided for under the Geneva Conventions is a war crime under the Rome Statute. It is difficult to understand why the relief supplies, which are provided for in the Additional Protocol; I am not being referred to explicitly in this paragraph. According to the Additional Protocol I Article 69 i.e. to provide shelter supplies, is an element of relief supplies according to the Additional Protocol I. In 1977 when the Additional Protocol was adopted it was felt to be essential to specify additional relief items as falling under Art. 69 of Additional Protocol. I In some emergencies specific forms of shelter are more important than food or medicine.

To impede the delivery of food and medicine is a crime under the Statute of the Court. To impede the delivery of relief supplies as mentioned in the Additional Protocol I would in contrast only qualify as a war crime under the Statute, if the term "under the Geneva Conventions" in Article 8 para. (xxv) is interpreted including the Additional Protocol references to shelter etc. Cottier i.e. does not mention that problem[18]. Only when taking into account the state practice of the last decade with regard to delivery of relief items one can safely conclude that the term are relief items under the Geneva Conventions and the Additional Protocol is identical. In so far the rule in Article 8 para. 2b (xxv) is a contribution to the clarification of customary international law.

Transitional provision

The transitional provision formula in Article 124 of the Statute must be seen not only with regard to its effect on Article 8. More important is to look it in the context of Article 7 and 8. Realistically, the limitation in Article will not allow for prosecution of certain crimes committed by in individuals or groups not fulfilling the criteria set out in Article 7 para I. There are crimes which by nature are crimes against humanity and attack the same time grave breaches of the Geneva Conventions such as murder, torture, sexual

violence and other committed in an armed conflict situation. A state option out according to Article 124 ensures that as long as the overlapping violations of Articles 7 and 8 have not occurred as a "part of widespread or systematic attack", only the national courts will have jurisdiction. International such a case one can hardly speck of effective international criminal justice. There might be an other aggravating factor related to the transitional provision formula. States now being able to prosecute persons based on universal jurisdiction might feel compelled to be more restrictive in prosecuting non-nationals for international crimes unrelated to their territory of the International Criminal Court has virtually no jurisdiction over certain crimes in cases where the formula of Article 124 is used.

Conclusion

It has been made clear in the above analysis that there exist a discrepancy between certain elements of Article 8 of the Statute of the International Criminal Court, and already existing law regarding war crimes. The question is in how far this discrepancy affects the prosecution of war criminals after the International Criminal Court has been finally established. Looking the objectives of the Statute's provision one has to acknowledge the limited effects of the differences analyzed on the jurisdiction of the International Criminal Court. Jurisdiction might be given or is non-existent for the Court in the cases highlighted.

One the other hand it is also clear in which way the member states of the Statute and, for example the Additional Protocol I of 1977 are influenced. They must finally implement the Statute of the International Criminal Court, and then, they must decide in which way they will deal with the different obligations they are required to fulfil according to treaty and customary law[19]. The legislation of the member states implementing the statute must recognize the already existing obligations and not later implicitly the universal jurisdiction which is provided for by the rules, for example, of the Additional Protocol I. It would be a fatal effect in the Statute of the International Criminal Court, which is aimed advancing international criminal justice would lead to a fading away of universal jurisdiction for those crimes which

were newly established in 1977 the Diplomatic Conference. Such a result would be a disservice to all efforts attack developing a homogeneous system of international criminal justice.

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Notes and References:

[1] C. Tomuschat, Das Staut Von Rom fur den Internationalen Strafgerichtshof, Die Friedenswarte, Band 73, Heft 3, 1998, p. 347

[2] US Senator Jesse Helms in an interview on the ICC in "*Focus*" 10 August 1998, p. 209

[3] Concerning the aspect of stability see L. Sunga, *The Emerging System Of International Criminal Law*, 1997, p. 332.

[4] See L. Calfisch, *Theory of International Law at the Threshold of the 21st Century*, 1998, p. 883.

[5] UN War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. 1, pp. 88-92

[6] The War Crimes under Additional Protocol I of 1977 are in Article 85 explicitly specified as Grave Breaches of the Protocol.

[7] See A. Zimmermann op. cit.

[8] See the Declaration made by UK in Ratifying the Additional Protocol.

[9] T. Meron, *War Crimes Law for the Twenty First Century*, supra note 15, p. 333

[10] ICRC Commentary, *Definition of War Crimes*, NY, 14 February 1997

[11] T. Desch Der Schutz von Kulturgut bei bewaffneten Knoflikten nach der Konvention von 1954.

[12] M. Bothe, in M. Bothe/ K. J. Partsch/ W. Solf supra note 31, p. 515.

[13] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, International Legal Materials May 1993, p. 800.

[14] The San Remo Manual on International Law applicable to Armed Conflicts at Sea refers in Part III, see L. Doswald-Beck, Cambridge 1995, p.15.

[15] See B. Fenricj in O. Triffterer (ed.) supra note9, p. 253.

[16] Article 51 Para.4 of Addl Protocol I.

[17] Article 57 of Addl. Protocol I.

[18] M. Cottier, supra note 9, p. 256.

[19] M. A Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes, *Military Law Review* 1996, p.2.