Charging War Crimes: Policy & Prognosis from a Military Perspective

Michael A. Newton
Vanderbilt University - Law School

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Abstract

This chapter highlights the import of the war crimes provisions found in Article 8 of the Rome Statute and describes the correlative considerations related to charging practices for the maturing institution. It discusses the subtleties of the Rome Statute structure insofar as they facilitate a harmonious balance between the prerogatives of responsible military commanders and the vitally important role of the Court in prosecuting perpetrators of war crimes. The text of Article 8 should not be understood either as a rejection of prior practice or an evisceration of the core precepts that were widely accepted prior to 1998. When properly understood and applied in light of the Elements of Crimes, the Court’s charging decisions with respect to the war crimes found in Article 8 ought to reflect the paradox that its operative provisions are at once revolutionary yet broadly reflective of the actual practice of warfare. Even as Article 8 embodied notable new refinements, the Rome Statute made such sweeping legal advances against a backdrop of pragmatic military practice. The logical conclusion is that the carefully constructed Statute will have been effectively abandoned if the Court habitually overrides the permissible discretion of domestic officials by displacing the proper authority of responsible military commanders based on its own preferences or the expediency of political considerations. To be more precise, judicially superimposed preferences would effectively amend the Rome Statute contrary to the intentions of the States Parties. The text of Article 8 in essence baked in a complex commingling of lex lata hard law and established state practice, as informed by the much more diffuse expectations and assessments of expert practitioners. Section 2 of this chapter examines the explicitly permissive aspects of the laws and customs of war, while Section 3 details the conformity of the Rome Statute and its constituent Elements of Crimes with that basic framework. Section 4 builds on these foundational principles to identify some of the most important consequences of the design of the Rome Statute. The chapter concludes with a series of specific recommendations that should guide prosecutorial discretion in charging decisions as well as the range of judicial decision-making. To wit, Section 4 of this chapter explains how the Court should 1) recognize the principle of the jurisdictional floor for war crimes charging that is embedded in the Rome Statute, 2) understand the implications of the Status of Forces agreements widely employed in international military operations, and 3) respect and reinforce the rationale behind the principles embedded in Article 28.