Theorizing International Criminal Law Reform

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Theorizing criminal law without reforming it seems empty; reforming criminal law without theorizing it seems blind. That much seems true of all criminal law, both national and international. Yet there is an important difference between the two. Reforming national criminal law without theorizing it is *inadvisable*; reforming international criminal law without theorizing it is *impossible*. Let me explain.

When we theorize about national criminal law reform, we typically ask *what* should be reformed and *why*. Offense definitions? Affirmative defenses? Procedural protections? Evidentiary standards? Sentencing guidelines? For the sake of retribution? Deterrence? Positive general prevention?

In contrast, we seldom theorize about *who* should reform national criminal law, or *how*. We mostly take for granted that legislatures should reform national criminal law by enacting, amending, or repealing statutes. Occasionally, we theorize about *when* reform *should* occur. Before, during, or after progressive changes in social norms? But we seldom theorize about when reform *can* occur. We mostly take for granted that reform *can* occur whenever legislatures see fit.

Of course, when we theorize about *inter*national criminal law reform, we also mostly ask *what* should be reformed and *why*. Should it be a war crime to kill civilians recklessly or negligently, or only intentionally or knowingly? Should crimes against humanity require a State or organizational policy, or should spontaneous but widespread violence count as well? Should the crime of genocide protect only national, 'ethnical', racial, or religious groups, or should this crime protect other groups just the same? Should international criminal law seek to give those most responsible for international crimes their just deserts, to deter future crimes, or to disseminate and thereby reinforce international norms?

These questions—*what* should be reformed and *why*—are extremely interesting and vitally important. However, these questions are not theoretically fundamental. The questions of *how* international criminal law should be reformed, *when*, and *by whom* come closer to theoretical bedrock. For example, should international tribunals seek to reform international criminal law, by means of purposive interpretation of treaty or custom, or would this risk retroactive application of new legal norms to past conduct?

The deeper questions are how international criminal law *can* be reformed, when, and by whom. Was international criminal law reformed by the bold proclamations of the International Military Tribunal at Nuremberg, or by the progressive rulings of the International Criminal Tribunal for the former Yugoslavia (ICTY)? Or did reform only occur later, through the subsequent acceptance of those decisions by States? Did the Rome Statute of the International Criminal Court reform international criminal law for all States, or only for States parties?

To ask these questions is to ask, somewhat obliquely, the most fundamental question of all: What is the nature of international criminal law? Broadly, is international criminal law the product of treaty, custom, or some combination of the two? Derivatively, can we reform international criminal law by adopting or amending treaties, by generating new customary law, or both? What are the costs and benefits of these two approaches to

international criminal law and its reform? What are their implications for those principles of legality that theorists of national criminal law typically take for granted?

My self-appointed task in this short paper will be to frame these questions as best I can, rather than attempt to answer them. The theory of international criminal law remains a young field, and there is much work to do. Here, as elsewhere, we must divide our intellectual labor, so that we collectively address both the urgent and the important questions we face. While most of us devote most of our time and energy to asking *what* to reform and *why*, some of us should devote some of our time and energy to asking *what it is* that we are reforming, so we can better understand *how* to reform, *when*, and by *whom*.

Treaty and Custom

So, is international criminal law the product of treaty, custom, or some combination of the two? To the extent that international criminal law is the product of treaty, it can be reformed only by adopting, amending, or terminating a treaty (how); it can be reformed at a clear and determinate moment in time, say upon the treaty's entry into force (when); and it can be reformed by States parties to the treaty (who). Presumptively, the treaty will only bind States parties and their nationals. International criminal tribunals will have the limited role of applying the terms of the treaty to conduct that takes place after its entry into force.

In contrast, to the extent that international criminal law is the product of custom, it can be reformed only through the emergence of a new general practice among States, accepted as law (how); the moment of reform will seldom be either clear or determinate (when); and it can be reformed by States acting independently of one another (who). Customary law presumptively binds all States, except perhaps those States that persistently object to an emerging customary rule from its inception. International criminal tribunals will have the difficult task of determining when a given customary rule crystallized, lest they retroactively apply it to earlier conduct.

The Nuremberg Tribunal, the ICTY, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of Cambodia, all claimed to punish crimes under customary international law. This is unsurprising, since the treaties that established these tribunals were adopted after the acts punished. If those acts were not crimes under customary international law at the time they were committed, then they were not crimes under international law at all. As we shall see, while the Rome Statute of the International Criminal Court applies prospectively to acts subsequent to its adoption, it may be applied to retroactively to acts that were not subject to the Court's jurisdiction at the time of their commission. For this reason, and others, it remains unclear whether the Rome Statute creates new crimes through treaty or recognizes existing crimes under custom.

Unfortunately, the nature of customary law raises difficult theoretical questions that have escaped resolution for centuries. On the 'traditional' view, a putative rule may crystallize into customary law only when supported by extensive and virtually uniform state practice (*usus*) accompanied by acceptance as law (*opinio juris*). On the 'modern' view, a putative rule with a strong moral or logical basis may crystallize into customary law despite relatively little supporting State practice. Since, on this modern view, the

existence of a legal rule may depend on its moral merits, international criminal tribunals must exercise moral judgment in reaching legal decisions. Accordingly, the process and prospects of reforming international criminal law look quite different from the modern view than from the traditional view.

Put another way, the *rule of recognition* regarding customary international law remains deeply contested, leaving the corresponding *rule of change* unclear. Thankfully, national criminal law is mostly insulated from such foundational theoretical questions. International criminal law is not so lucky. Reforming international criminal law may require reforming the rule of recognition, which in turn requires theorizing about the foundations of law itself. Accordingly, questions of general jurisprudence—including the dreaded inclusive/exclusive legal positivism debate—may bear quite directly on the process by which international criminal law is both formed and reformed.

When States and scholars disagree over the content of the rule of recognition—in this case the criteria for customary law—what is the nature of that disagreement? Are they disagreeing over how to interpret an existing social convention? Or are they disagreeing over which possible rule should be embraced as a social convention? Are they offering competing interpretations of a shared practice of identifying customary law? Or are they seeking to create a shared practice where no truly shared practice exists? If moral considerations figure directly in the rule of recognition, does this undermine the concept of law as grounded in social fact, or the function of law in making a difference to practical reasoning and shared planning? Without progress on these jurisprudential questions, the path to substantive reform will remain obscured.

Of course, if even *some* State practice accepted as law is required to generate customary law, then efforts to reform customary international criminal law will run head-first into the so-called 'paradox of custom'. Roughly, if a rule of customary law exists only if some number of States act pursuant to that rule out of a sense of legal obligation or entitlement, then how exactly do new rules of customary law emerge? Presumably, some State must go first. Does that State mistakenly think that other States have acted pursuant to the rule out of a sense of legal obligation or entitlement? Or does that State mistakenly think that a rule of customary law can exist without any supporting State practice? Or must that State lie, and claim to accept the rule as legally authoritative when the State knows perfectly well that it is not? Must States seeking to reform customary law fake it until they make it?

The paradox of custom raises special problems in the criminal context. Suppose that at time *t* no State has ever criminally prosecuted anyone for conscripting child soldiers while claiming to act under international criminal law. How is a rule of customary international law criminalizing the conscription of child solders supposed to emerge? Again, presumably, some State must go first, either mistakenly or disingenuously. In either case, that first defendant will be prosecuted under a rule of customary international law that does not yet exist.

Things are not much better when we consider the position of an international tribunal charged with applying customary international law to the defendants before it. To create a new rule of customary law, the tribunal would have to convict a defendant under the desired rule and hope that States follow its lead, or at least subsequently accept the desired rule as law. Arguably, this is exactly what the Nuremberg Tribunal achieved with respect to the crime of aggression, and what the ICTY achieved with respect to war

crimes in internal armed conflict.[1] Still, this does not seem like a sustainable model for international criminal law reform going forward.

Indeed, one promising solution to the paradox of custom faces unique problems created by the criminal context. On this view, a new rule of customary law can be generated by some amount of State practice accepted not as law but as a practical or moral necessity.[2] Hence the phrase *opinio juris sive necessitates*. In many contexts, this proposed solution seems to work quite nicely. If a State refrains from some method of warfare because it believes that a legal rule prohibiting that method of warfare does not yet exist but is morally necessary, then more power to it. But if a State wants to criminally prosecute an individual for certain conduct because it believes that a legal rule prohibiting that conduct does not yet exist but is morally necessary, then that seems incompatible with the legality principle. After all, *nullem crimen sine lege* means 'no crime without a law', not 'no crime without a law or the moral necessity for a law'.

Finally, is there an important difference between the *nature* of customary law and the *adjudication* of cases arising under (purported) customary law? Is it possible that, while the *existence* of customary law is simply a matter of social fact, the *identification* of customary law by judges should reflect the moral merits of a purported customary rule? For example, the ICTY Trial Chamber boldly asserted that

> principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.[3]

Even if such a moralized theory of adjudication is defensible in non-criminal contexts (say, before the International Court of Justice), is it appropriate in the criminal context (say, before the ICTY)?

Theoretical Ambivalence in the Rome Statute

In these ways, and others, international criminal law reform will look very different depending on how we theorize about the nature of international criminal law. Indeed, while one *should not* reform national criminal without theorizing it, one *cannot* reform international criminal without theorizing it. Presumably, treaties only create those rights and duties that their parties intend to create. Similarly, State practice only creates those rights and duties that practicing States accept as law. The theory on which States proceed will determine the law they create.

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[1] See, eg, Michael Scharf, Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments (2013).

[2] See, eg, John Tasioulas, Opinio Juris and the Genesis of Custom: A Solution to the 'Paradox', 26 Austl. Y.B. Int'l L. 199 (2007); Custom, Jus Cogens, and Human Rights, in *Custom's Future: International Law in a Changing World* (Curtis A. Bradley ed., forthcoming).

[3] Prosecutor v Kupreškić (Judgment) IT- 95- 16- T (January 14, 2000), para 527.

Accordingly, if half the States parties to the Rome Statute of the International Criminal Court intended to create new treaty crimes, while the other half intended to codify or crystallize existing or emerging customary law, then it is possible that they collectively failed to accomplish either task.[4] By failing to theorize international criminal law, they may have failed to reform it.

In some contexts, "incompletely theorized agreements" may be acceptable or even desirable. However, in the context of criminal law, problems abound. Suppose that the Rome Statute creates treaty crimes for its parties and their nationals. Now suppose that the UN Security Council refers a situation to the Court involving a State that is not a party to the Statute. Or suppose that a State that is not a party accepts the Court's jurisdiction over a situation arising on its territory or involving its nationals. In either case, the acts in question, or many of them, have already occurred, at a time at which the Statute could not have prohibited those acts because the Statute did not apply in the State's territory or to its nationals. To punish those acts, which did not violate the Statute at the time they were committed, would therefore violate the *nullum crimen sine lege* principle.[5]

Alternatively, suppose that the Statute merely gives the Court jurisdiction over certain international crimes under customary law. Then it seems that, in every case, the Court would have to establish that the acts charged were criminal under customary law at the time they were committed. This task may prove quite difficult, at least under the traditional view of customary law. For example, article 8(2)(b)(iii) gives the Court jurisdiction over a war crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission. Yet, at the time the Statute entered into force, there was no state practice of prosecuting this war crime under international law as opposed to national law.

Now, on a modern view, the ratification or accession of the Rome Statute itself by 124 States might be evidence of extensive and virtually uniform *opinio juris*, that is, acceptance of the listed crimes as legally binding. Perhaps such general acceptance as law can counterbalance scant state practice on a 'sliding scale' approach.[6] Or perhaps the humanitarian aim of international criminal law means that less state practice is required to crystallize custom. Of course, we would want to know whether the 69 States who have not ratified or acceded to the Rome Statute accept the listed crimes as legally valid. But leave that to one side for now.

Here is a harder case. Article 8*bis* describes the crime of aggression as

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

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[4] By "treaty crimes" I mean to refer to international crimes created by treaty, not to domestic crimes whose domestic criminalization is required by treaty (e.g., by the so-called suppression conventions). Readers will have to tell me if the contraction is worth the potential confusion.

[5] Marko Milanovic, *Is the Rome Statute Binding on Individuals? (And Why We Should Care)*, J Int Criminal Justice (2010) 9 (1): 25-52.

[6] Frederic L. Kirgis, Custom on a Sliding Scale, 81 Am. J. Int'l L. 146 (1987).

It then defines "act of aggression" as

> the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Of course, there is no state practice of criminally prosecuting anyone for directing the use of armed force in manifest violation of the UN Charter. No State or international tribunal has prosecuted anyone for aggression since Nuremberg; the defendants at Nuremberg were prosecuted for waging a *war* of aggression, not simply for *using armed force*; and neither the UN nor its Charter existed when the aggression took place. Moreover, only 32 States have ratified article 8*bis*, which is hardly strong evidence of general acceptance of its provisions as law.

Now, it is possible to view article 8*bis* as defining a new treaty crime. Ordinarily, the Court will have jurisdiction over acts of aggression only when *both* the aggressor state and the victim state are parties to the Statute *and* the aggressor State has not previously declared that it does not accept the Court's jurisdiction under article 8*bis*. Assuming that these States intend to impose legal obligations on their leaders, no legality problem would seem to arise if their leaders subsequently violate these legal obligations.

However, in principle, the UN Security Council could give the Court jurisdiction over acts of aggression committed by any State and against any State. In these cases, it seems that the criminal prohibition in article 8*bis* would be applied retroactively, to acts of aggression by States that are not parties to the Statute or that previously declared their intent not to impose the relevant legal obligations on their nationals. In these cases, a criminal prohibition would be applied to individuals who were not subject to that criminal prohibition at the time of their actions.[7]

Is retroactivity a problem in this context? If the Assembly of States Parties approves the exercise of jurisdiction under article 8*bis*, would that not put political and military leaders around the world "on notice" that they may face prosecution under its provisions, if so decided by the UN Security Council? And are not the constituent acts of aggression—murder, battery, arson—clearly crimes under national criminal law, not to mention grave moral wrongs?

Yes, but this hardly solves the problem. The principle *nullum crimen sine lege* indeed forbids punishment without fair notice, as well as punishment for conduct that was not criminal at all when it was committed. However, the principle "no punishment without *a* law" does not mean that *any* prior law will do. On the contrary, the principle means that a defendant may not be punished unless he or she violated *the very same* criminal prohibition under which he or she is to be punished. The nullem crimen principle is truly a principle of *legality*, not merely a guarantee of fair notice. So, if the leaders of non-parties are not subject to the criminal prohibition contained in article 8*bis*—as they would not be if the article is theorized strictly as a treaty crime—then their subsequent prosecution under that article would violate the *nullum crimen sine lege* principle.

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[7] Marko Milanovic, Aggression and Legality: Custom in Kampala 10 Journal of International Criminal Justice 165–87 (2012).

For its part, the Rome Statute itself says, in article 22,

> 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 [subject matter] jurisdiction of the Court.

Accordingly, the Court may not punish a defendant unless the criminal prohibitions identified in the Statute applied to that defendant, as a matter of either treaty or custom, at the time they acted. How this restriction will be applied in the context of Security Council referral of an act of aggression remains to be seen.

Lenity and Responsibility

As we have seen, theorizing international criminal reform often requires revisiting fundamental questions about the principle(s) of legality. Customary law reform necessarily flouts the *lex scripta* principle, and at the very least contingently (perhaps necessarily) threatens the *lex praevia* principle. Treaty law reform—most notably, reform of the Rome Statute—necessarily satisfies the *lex scripta* principle but, at least with respect to referrals by the Security Council and non-States Parties, raises serious questions under the the *lex praevia* principle.

What of the *lex stricta* principle? Presumably, theorizing international criminal law reform should include theorizing how reformed international criminal law should be interpreted. Alternatively, theorists should consider the propriety of attempting to reform international criminal law through progressive interpretation.

In one bracing passage, the ICTY Trial Chamber took the view that courts should interpret war crimes in light of the "principles of humanity" and the "dictates of public conscience"

> any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 [of Additional Protocol I to the 1949 Geneva Conventions] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.[8]

In contrast, the Rome Statute says

> The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

Perhaps international *humanitarian* law (the law of armed conflict) should be construed broadly to protect civilians while international *criminal* law (including war crimes)

[8] Kupreskic, para 524.

should be construed narrowly to protect defendants. There is a bit of a tension here, since war crimes just are serious violations of the law of armed conflict. The primary rules, so to speak, are the same, while the secondary rules differ. But perhaps this tension dissolves when we switch from the passive to the active voice. Perhaps *combatants* should construe the law of armed conflict broadly to protect civilians while *courts* should construe war crimes narrowly to protect defendants.

In any event, I want to raise a different issue. The Rome Statute requires strict construal of *the definition of a crime*. Should the *lex stricta* principle extend to the interpretation of affirmative defenses, such as insanity, intoxication, self-defense, duress, or superior orders that are not manifestly unlawful? Should these defenses be construed broadly, to benefit the accused? Or should these be construed narrowly, as they are limited exceptions to general prohibitions?

In its very first trial, the ICTY considered the case of Dražen Erdemović, who killed (by his own estimate) 7o men and boys after being ordered to do so and threatened that, if he refused, he would be killed along with them. The judges agreed that a defense of duress existed in customary international law, but they disagreed over its scope. Did the defense extend to cases of intentionally killing civilians *who would be killed by others* if the defendant refused? Three judges thought not, two thought so. Interestingly, none of the judges argued that the law was ambiguous, and that they ought to resolve that ambiguity in favor of the defendant.[9]

For its part, the Rome Statute provides that the Court must not hold a person criminally responsible if

> [t]he conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.[10]

Did Erdemović intend to cause a greater harm than the one he sought to avoid? Did he intend to cause 70 deaths and avoid one (his own)? Or did he intend to cause 70 deaths and avoid 71 (the 70 plus himself)? Should we resolve that ambiguity in his favor?

Interestingly, the Rome Statute allows the Court to consider, *at trial*, affirmative defenses not listed in the Rome Statute itself. Apparently, the *lex praeivia* principle does not prohibit the Court from recognizing affirmative defenses long after the conduct concerned. On this view, *lex praevia* is not so much a formal principle of legality but a substantive principle grounded in (or in the same considerations as) the general principle of *in dubio pro reo*.

Does this tell us anything about applying the *lex stricta* principle to affirmative defenses? Not necessarily. If the *lex stricta* principle is about fair notice, then, since defendants are not expected to act in reliance on affirmative defenses, defendants should not be disappointed if those affirmative defenses are construed narrowly. On the other

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[9] Judge Cassesse, dissenting, invoked *in dubio pro reo* to argue for looking to the national criminal law of Yugoslavia, which allowed for a duress defenses to any crime.

[10] Rome Statute, art. 31(1)(d).

hand, if the *lex stricta* principle is about leniency, mercy, or aversion to the risk of punishing the innocent (or punishing the guilty more than they deserve), then courts should resolve doubts in favor of the accused and broadly construe affirmative defenses.

What about 'modes of liability', that is, bases of criminal responsibility, such as joint and indirect perpetration; aiding, abetting, and assisting; contributing to a group acting with a common purpose; command responsibility; or, to the extent that it exists in customary law, participation in a joint criminal enterprise? Arguably, the progressive development and interpretation of modes of liability is the central problem of contemporary international criminal law, since modes of liability link individual defendants with the collective action that forms the background of war crimes (armed conflict), crimes against humanity (widespread or systematic attack), and every real instance of genocide (a manifest pattern of similar conduct directed against the same group). Accordingly, the applicability of *lex stricta* to this process of reform seems like a pressing theoretical question.

For example, does a person commit a crime "jointly with another" under article 25(3)(a) of the Rome Statute only if she has been assigned "essential tasks . . . and who, consequently, ha[s] the power to frustrate the commission of the crime by not performing" those tasks?[11] Or is it sufficient that she performs a role in a common plan? Should the Court favor the 'control theory' of joint perpetration in part because it is narrower than the 'common plan' theory? Should it matter that the Court will apply its answers to these questions retroactively, to past conduct by the defendants before them?

Now consider the following problem. Suppose that A helps B to kill C. B kills C "with intent to destroy, in whole or in part, [C's] national, ethnical, racial or religious group, as such" and is therefore guilty of genocide.[12] However, A does not share B's genocidal intent, but instead wants C dead for other reasons (such as personal animus or financial gain). Is A also guilty of genocide? Under the Rome Statute, a person is criminally responsible for a crime if, "[f]or the purpose of facilitating the commission of *such a crime*, aids, abets or otherwise assists in its commission or its attempted commission."[13] Does "such a crime" refer only to the material elements of a crime, or also to its mental elements? A's criminal responsibility depends on the answer. Assuming this is a "case of ambiguity," should the Court interpret this mode of liability in favor of the accused?

Conclusion

In this short paper, I hope to have shown that theorizing international criminal law reform requires sustained engagement with foundational jurisprudential questions about the very nature of law—particularly customary law—and adjudication, as well as formal principles of legality. Although we should continue to theorize about what reforms to make and why, we should devote more energy than we have so far to theorizing about how to effect these reforms, when, and by whose hand. Otherwise, we may find ourselves with a clear destination but no way to reach it.

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[11] *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, 01/ 04- 01/ 06, Pre- Trial Chamber, January 29, 2007, para 347.

[12] Rome Statute, art. 8.

[13] Rome Statute, art. 25(3)(c).