Article 10

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Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

General Remarks:

Article 10 has no heading that would enlighten the purpose of the provision or clarify its content. When draft Article Y – eventually adopted as Article 10 – was suggested, it was namely envisaged that the provision could be a sub-paragraph to Article 5 (enumerating the crimes within the jurisdiction of the Court) and as such it would not have needed a heading.[1] The formulation "for purposes other than this Statute", however, gives forth that the provision was adopted to affect the status given to Part 2 of the Statute outside the ICC context. According to Sadat, the desire was to ensure that "the codification of [...] international criminal law in the ICC Statute would not negatively impact either the existing customary international framework or the development of new customary law".[2] Draft Article Y hence made the ICC negotiations easier by emphasizing that the goal of the negotiations was to adopt crime definitions for the purpose of ICC proceedings only and not to influence international law more generally. Article 10 is thus an article that postulates the "existence of two [...] regimes or corpora of international criminal law",[3] that is, an ICC regime and a customary international law regime.

While there is general agreement that the pivotal function of draft Article Y was to preserve existing international law in situations where the ICC Statute fell short of it (most notably in relation to war crimes), there

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1 Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2, 14 April 1998, p. 20 (https://www.legal-tools.org/doc/fb8414/); see further Otto Triffterer and Alexander Heinze, "Article 10", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 645–646 (https://www.legal-tools.org/doc/040751/).

2 Leila Nadya Sadat, "Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute", in *DePaul Law Review*, 2000, vol. 49, pp. 910–911 (https://www.legal-tools.org/doc/4cacef/).

3 Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", in *European Journal of International Law,* 1999, vol. 10, no. 1, p. 157 (https://www.legal-tools.org/doc/8087d2/).

are different opinions about the extent to which the goal also was to prevent other types of legal changes. In this regard, Sadat has held that "the framers apparently intended that only the restrictive portions of the definitions of the crimes would remain locked within the ICC structure, not more progressive elements" (Sadat, 2000, p. 918). Bennouna, on his part, has argued that the aim of Article 10 was not only to "protect the position of the countries favouring a broader definition of war crimes", but also to hinder "unease among those adhering to a more restrictive definition of crimes against humanity".[4] Bennouna's interpretation finds support in the fact that the provision does not only address existing rules of international law, but also applies to developing rules. Sadat's, on the other hand, in that the Article only refers to limiting or prejudicing interpretation.[5] While the drafters' intention with the provision is open to debate, Sadat's interpretation is more functional in that it entails that international criminal law is not unnecessarily fragmented. To preserve the unity of international criminal law is important in that the ICC may have jurisdiction over individuals based on Security Council referrals of situations (Article 13) in which cases it is problematic if the ICC law departs from customary international law.[6] It should also be noted that when amendments to the ICC Statute were adopted in 2010, including a definition of the crime of aggression, an understanding was attached to the amendment in which it was reaffirmed that the crime of aggression also can be prosecuted in relation to situations referred by the Security Council. At the same time, however, Article 10 is mentioned in relation to domestic jurisdiction over the crime of aggression, and it is emphasized that the ICC definition of the crime has been accepted "for the purpose of [..., the] Statute only".[7] As such, the understanding sends a conflicting message about the customary law relevance of ICC law and

4 Mohamed Bennouna, "The Statute's Rules on Crimes and Existing or Developing International Law", in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2nd. ed., Oxford University Press, 2002, p. 1102 (https://www.legal-tools.org/doc/01addc/).

5 Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*, Transnational Publishers, Ardsley, 2002, p. 269 (https://www.legal-tools.org/doc/3b71e2/).

6 See further Marko Milanović, "Is the Rome Statute Binding on Individuals? (And Why We Should Care)", in *Journal of International Criminal Justice*, 2011, vol. 9, no. 1, pp. 25 ff. (https://www.legal-tools.org/doc/384f0e/); and Sadat, 2002, pp. 262 and 269–271.

7 ICC ASP, The Crime of Aggression, 11 June 2010, Resolution RC/Res.6, Annex III (https://www.legal-tools.org/doc/0d027b/).

does not really answer how Article 10 should be interpreted. In a 2018 Pre-Trial Chamber decision regarding jurisdiction in relation to crimes originating from Myanmar, the Pre-Trial Chamber observed that: "under particular circumstances, the Statute may have an effect on States not Party to the Statute, consistent with principles of international law".[8] This decision, on its part, gives forth that the Rome Statute may have ICC-external effects.

The fact that the Article's primary addressees are actors outside the Court makes it necessary to ask to what extent such actors are bound to follow provisions in the ICC Statute. It is, for sure, possible to have treaty provisions explaining the drafters' intentions and to try to influence interpretations (see also Articles 22(3), 25(4) and 80). This being said, the behaviour of States in connection to the negotiation and ratification of international treaties plays a central role when State practice and *opinio juris* are assessed in connection to customary international law. As such, the participation of numerous States in the ICC negotiations and their subsequent ratification of the Rome Statute is something that cannot be completely ignored when the content of customary international law is considered (see for example Bennouna, 2002, p. 1106). The same also applies to State behaviour in treaty amendment procedures. From this perspective, it is not surprising that the case law of many international and regional courts contains references to Part 2 of the ICC Statute.[9] In the *Furundžija* case, a Trial Chamber of the ICTY explicitly commented upon the legal relevance of Article 10 and found that:

> [The ICC Statute] was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998. In many areas the Statute may be regarded as indicative of the legal views, i.e. opinio juris of a great number of States. Notwithstanding Article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not "limited" or "prejudiced" by the Statute's provisions, resort may be had cum grano salis to these provisions to help elucidate customary international law. De-

[8] ICC, Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18, 6 September 2018, paras. 44–45 (https://www.legal-tools.org/doc/73aeb4/).

[9] For such references, see William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, p. 336 (https://www.legal-tools.org/doc/b7432e/).

> pending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.[10]

The case law of the various international and regional courts has made Schabas submit that "Article 10 appears to be largely ignored by the very bodies to whom it is directed, namely specialized tribunals engaged in the interpretation of international law" (Schabas, 2016, pp. 336–337).

As Article 10 of the ICC Statute primarily is directed to actors outside the Court, it is rarely mentioned in the case law of the ICC. In the *Al Bashir* case, the majority of the Pre-Trial Chamber, however, found that the Article "becomes meaningful insofar as it provides that the definition of the crimes in the Statute and the Elements of Crimes shall not be interpreted 'as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.'"[11] What the judges exactly meant by this reference to Article 10 is not evident. Schabas, however, interprets the pronouncement to mean that the judges held that Article 10 supported their claim that it was not necessary to take into consideration customary international law when interpreting the ICC provision on genocide.[12] Furthermore, Article 10 has been mentioned in a dissenting opinion by Judge Kaul, where he found that Article 10 "reinforces the assumption that the drafters of the Statute may have deliberately deviated from customary rules".[13] As noted above, Article 10 indeed envisages a fragmented international criminal law.

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10 ICTY, *Prosecutor v. Furundžija*, Trial Chamber, Judgement, 10 December 1998, IT-95-17/1-T, para. 227 (https://www.legal-tools.org/doc/e6081b/). See also Robert Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", in *Journal of Conflict and Security Law*, 2006, vol. 11, no. 2, p. 251 (https://www.legal-tools.org/doc/1c8b0e/).

11 ICC, *Prosecutor v. Al Bashir*, Pre-Trial Chamber I, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 127 (https://legal-tools.org/doc/e26cf4/).

12 William A. Schabas, *An Introduction to the International Criminal Court*, 6th. ed., Cambridge University Press, 2020, p. 85 (https://www.legal-tools.org/doc/e9fb2f/).

13 ICC, *Situation in the Republic of Kenya*, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Judgment, Dissenting Opinion of Judge Kaul, 31 March 2010, ICC-01/09-19, para. 32 (https://www.legal-tools.org/doc/338a6f/).

Finally, it should be noted that Article 10 limits its applicability to "this Part" referring to Part 2 of the ICC Statute containing provisions on jurisdiction, admissibility and applicable law. The international crimes definitions are placed in Part 2, but, for example, the provisions on individual criminal responsibility and grounds for excluding criminal responsibility are situated elsewhere (in Part 3). This gives rise to the question of to what extent the implications of the Rome Statute on the existing or developing rules of international law are different in other parts of the Statute. In this regard, Triffterer and Heinze have argued that the legal principle enshrined in Article 10 is applicable to the whole Statute. They base their argument on the drafting process of the provision:

> by its drafting process it may be assumed that a limiting or prejudicing interpretation of all Articles outside Part 2, adopted as a compromise or those describing a status quo, should equally not bar the interpretation of "existing or developing rules of international law for purposes other than this Statute". This applies for instance, to Article 25 [on individual criminal responsibility] (Triffterer and Heinze, 2016, p. 650; see also pp. 655–656).

While a detailed analysis of the relationship between customary international law and the ICC Statute lies beyond the scope of this commentary, the following should be noted: Firstly, Part 3 of the ICC Statute contains a provision similar to Article 10, namely Article 22(3), which stipulates that the *nullum crimen sine lege* provision shall not affect the characterization of any conduct as criminal under international law independently of the Statute.[14] Secondly, when it comes to the modes of responsibility and grounds for excluding criminal responsibility, it is generally accepted that customary international law and ICC law do not always concur. For example, in connection to commission responsibility, the ICC has not adopted the joint criminal enterprise doctrine of the *ad hoc* tribunals[15] and the ICTY, on its part, has found that co-perpetratorship responsibility *à la* ICC Article

[14] On the relationship between Article 10 and 22(3), see Bruce Broomhall, "Article 22, Nullum Crimen Sine Lege", in Triffterer and Ambos (eds.), 2008, pp. 962–963 (https://www.legal-tools.org/doc/040751/), and Susan Lamb, "Nullum Crimen, Nulla Poena Sine Lege", in Cassese, Gaeta and Jones (eds.), 2002, p. 754.

[15] ICC, *Prosecutor v. Lubanga*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803, paras. 329, 335 and 338 (https://www.legal-tools.org/doc/b7ac4f/).

25(3)(a) "does not have support in customary international law".[16] As, however, the *ad hoc* international criminal tribunals primarily addressed atrocities that had occurred before the adoption of the ICC Statute, these tribunals have not had any reason to in detail consider to what extent, if any, the State Practice in connection to the adoption and ratification of the Rome Statute, or its amendment procedures, have changed customary international law.

Cross-references:

Articles 21(3) and 22(3).

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5. Susan Lamb, "Nullum Crimen, Nulla Poena Sine Lege", in Cassese, Gaeta and Jones (eds.), 2002, pp. 733–766.
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7. Leila Nadya Sadat, "Custom, Codification and Some Thoughts about the Relationship between the Two: Article 10 of the ICC Statute", in

[16] ICTY, *Prosecutor v. Stakić*, Appeals Chamber, Judgment, 22 March 2006, IT-97-24-A, paras. 59 and 62 (https://www.legal-tools.org/doc/09f75f/).

DePaul Law Review, 2000, vol. 49, pp. 909–923 (https://www.legal-tools.org/doc/4cacef/).

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11. Otto Triffterer and Alexander Heinze, "Article 10", in Triffterer and Ambos (eds.), 2016, pp. 949–966.

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