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CUSTOM, CODIFICATION AND SOME THOUGHTS ABOUT THE RELATIONSHIP BETWEEN THE TWO: ARTICLE 10 OF THE ICC STATUTE

*Leila Nadya Sadat**

I. INTRODUCTION

When the international criminal court project was resurrected in 1989,¹ international criminal law was in a state of disarray. The Nuremberg and Tokyo trials notwithstanding, there was little law and even fewer mechanisms to enforce the three “core” crimes deemed most heinous of all at Nuremberg: crimes against humanity, war crimes, and crimes against peace.² Although one subset of crimes against humanity found its way into the 1948 Convention on the Prevention and Punishment of Genocide,³ and the 1949 Geneva Conventions substantially expanded the normative content of international humanitarian law, crimes against humanity remained uncoded,⁴ the definition of aggression stalled at the stage of a General Assembly Resolution,⁵ and even the laws of war, about which there was arguably the greatest degree of consensus, remained largely uncoded and susceptible to varying interpretations at the international level.⁶ The

* Formerly Wexler. Professor of Law, Washington University in St. Louis, and Chair of the International Law Association (American Branch) Committee on the Permanent International Criminal Court. It seemed fitting to use this essay honoring Professor M. Cherif Bassiouni, who chaired the Drafting Committee at the Diplomatic Conference, to express some thoughts about article 10. I am indebted to him for his support as well as his extraordinary leadership in this area of the law. I would also like to thank Andrew C. Ruben for countless hours of assistance and support on this and other projects.

1. See Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 683 (1996).

2. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter IMT Charter].

3. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

4. Professor Bassiouni and others called for the drafting of a Convention to define crimes against humanity. See M. Cherif Bassiouni, “Crimes Against Humanity”: *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994). The project never bore fruit, however.

5. See *Definition of Aggression*, G.A. Res. 3314 (xxix) (Dec. 14, 1974).

6. An example is the principle of proportionality and military necessity. Although there was general agreement on the principle, the specific content of the norm was less certain. See, e.g., Cmdr. Charles A. Allen, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality*.

establishment of the two ad hoc tribunals for the Former Yugoslavia and Rwanda ultimately reaffirmed the principles of international criminal justice, but failed to advance the definitions of the crimes much beyond the cursory language of the Tokyo and Nuremberg Charters.

This unsatisfactory situation was universally decried, and many hoped that through the establishment of a permanent international criminal court, the normative content of international criminal law would be substantially advanced. Indeed, the prospect of drafting a Statute for the International Criminal Court ("ICC") presented a unique opportunity to codify, advance, and refine the existing law.⁷ At the very least, an advantage of codifying the law would be that State practice arguably inconsistent with the normative principles of customary law would not comprise evidence that the custom was no longer accepted, but would, instead, constitute a breach of the norm.⁸ As the drafting of the ICC treaty proceeded, however, the disadvantages of codification also became clear. Indeed, it began to seem that there might be a fundamental incompatibility between the political agendas of States and the process of codifying, in a progressive manner, the customary international law of war and crimes against humanity. Thus, the codification process was fated to produce a text that represented a set of political compromises, rather than a new set of progressive norms criminalizing behavior on a broad scale. To put it another way, if the criminal law in the ICC Statute was seen as a net in which to catch the war criminals of the world, it contained some very large holes through which some major criminals might escape the Court's reach.⁹

Seemingly to insure that the codification of some international criminal law in the ICC Statute would not negatively impact either the

tionality and Necessity, 86 AM. SOC'Y INT'L L. & PROC. 39, 39-40 (1992) (remarks of Prof. Oscar Schachter).

7. Pursuant to article 13 of the U.N. Charter, the General Assembly can "initiate studies . . . encouraging the progressive development of international law and its codification; . . ." U.N. CHARTER art. 13.

8. One of the most articulate and thorough treatments of the interaction between treaty law, state practice, and custom can be found in the *Nicaragua* case before the International Court of Justice. See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. U.S.*) (Merits), 1986 I.C.J. 14.

9. As Otto Triffterer notes, there was little agreement during the drafting process as to whether a codification of international law "should merely declare and systematize existing rules or also include 'progressive development' [of international law]" as the United Nations Charter and Statute of the International Law Commission contemplate. Otto Triffterer, *Article 10*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 316 (Otto Triffterer ed., 1999).

existing customary international framework or the development of new customary law, Professor M. Cherif Bassiouni introduced a unique provision during the negotiations on the ICC. This proposal eventually became article 10 of the Court's Statute, and provides: "[n]othing in this Part of the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."¹⁰

Article 10's apparent intent is to preserve the role of customary international law as an independent source of international criminal law outside the Rome Statute, and some have argued that article 10 simply expresses already accepted principles of international law.¹¹ Indeed, from this viewpoint article 10 merely restates the obvious by emphasizing the linkage between the prescriptive norms of the Statute and the adjudicative mechanism established to apply them. Yet there is more to article 10 than meets the eye. First, it raises many fascinating questions about the relationship between the codified multilateral treaty provisions inside the ICC Statute ("Rome law") and the uncoded norms of customary international law outside the Statute. Second, its application may become problematic when considered in light of the ICC's jurisdictional mechanisms, which, as I have noted elsewhere,¹² permit the Security Council to apply Rome law to all the human beings in the world, whether or not their State is a party to the Statute. If it is correct that the prescriptive norms of the Statute are universal in application, it appears paradoxical that article 10 of the Statute expressly attempts to deny them the status of custom, at least insofar as they might restrict existing or developing rules of customary international law, which would also bind all States. May the interna-

10. *Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, at art. 10, U.N. Doc. A/CONF.183.9 (1998) [hereinafter *1998 Rome Statute*].

In addition, the Statute provides that each crime is defined only "[f]or the purpose of this Statute." *1998 Rome Statute*, *supra* at art. 6 (genocide), art. 7(1) (crimes against humanity), and art. 8(2) (war crimes). This restricting language parallels the text of the Statutes of the ICTY, S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993), and the ICTR, S.C. Res. 955, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/955 (1993), as well as the International Military Tribunal's Charter at Nuremberg, which also defined the crimes only for purposes of application by the particular courts constituted at the same time. Article 6 of the Charter, however, was less clear in this regard. See IMT Charter, *supra* note 2. These provisions of the Treaty taken together suggest that the Statute, to quote the International Military Tribunal at Nuremberg, is both the "expression of international law existing at the time of its creation" and, at the same time, "a contribution to international law." *Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 216 (1947).

11. See Triffterer, *supra* note 9, at 317.

12. See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 406-07, 412 (2000).

tional community of States have it both ways, asserting on the one hand universal "laws" made by treaty, and on the other hand a different universal "law" established by custom?

Having law inside and outside the Statute that differ from each other seems troubling, at least at first. It disturbs our settled ideas about the unitary nature of international law, raises the specter of individuals being subject to multiple, overlapping and arguably conflicting legal obligations, and disrupts our theories about how international law is made. But as a practical matter, the nature and substance of the law that is being applied is inseparable from the jurisdiction applying it. The question is what entity is applying the law, to whom, and for what purpose?

This essay proposes only an initial treatment of these questions. After briefly surveying article 10's origins in Part II, Part III explores the theory behind article 10 as well as its likely operation in practice. Ultimately, it appears that having law inside the ICC Statute differ from law outside the Statute is both inevitable and logical, for countries may decide to advance the substance of the laws of war and humanity beyond the collection of compromises codified in the Rome Statute. Customary international law is both the product and the source of this evolution—indeed, article 10 underscores the framers' wish to preserve the role of custom in the development of normative standards of conduct in the area of international criminal justice.

II. HISTORICAL GENESIS

Three years after the General Assembly requested the International Law Commission (the "Commission" or "ILC") to resume work on the ICC, a Working Group of the Commission issued a report outlining the general bases upon which, in its opinion, the establishment of the international criminal court could proceed. With respect to the definition of crimes and the jurisdiction of the Court, the Working Group assumed that the customary international law and treaties on the subject would be incorporated by reference into the ICC Statute, rather than codified therein.¹³ A complex regime of State consent accompanied the definitional articles, but it is noteworthy that neither article 22 nor article 26 of the 1993 draft statute, which outlined the two strands of the Court's proposed jurisdiction,¹⁴ attempted to define

13. See *Report of the Working Group on a draft statute for an international criminal court, in Report of the International Law Commission on the work of its forty-fifth session*, U.N. GAOR, 48th Sess., Supp. No. 10, at 106-07, U.N. Doc. A/48/10 (1993).

14. The initial draft produced by a Working Group of the Commission in 1993 laid out two strands of jurisdiction. The first, found in article 22 of the proposed draft, included treaties that

the crimes over which the Court would ultimately have jurisdiction. Rather, the Working Group was apparently content to leave the matter to the Court itself. The Commission, in turn, although substantially simplifying the jurisdictional regime proposed by the Working Group, essentially accepted as unchanged its basic approach to the crimes in the Statute. That is, article 20 of the 1994 draft approved by the International Law Commission¹⁵ simply listed, rather than defined, the crimes within the jurisdiction of the Court. In the words of the Commission:

The Statute is primarily an adjectival and procedural instrument. It is not its function to define new crimes. Nor is it the function of the Statute authoritatively to codify crimes under general international law. With respect to certain of these crimes, this is the purpose of the Draft Code of Crimes against the Peace and Security of Mankind, although the Draft Code is not intended to deal with all crimes under general international law. To do so would require a substantial legislative effort. Accordingly the Commission has listed the four crimes without further specification¹⁶

The Commission's reluctance to engage in the drafting of an international criminal code as part of the ICC's establishment was understandable. To begin with, the Commission had already produced several versions of its Draft Code of Crimes, none of which had met with a great deal of success, largely due to the political controversies surrounding many of the definitions it had proposed.¹⁷ No doubt the Commission was concerned that the ICC project would be shelved if the substantive law became an issue of contention. In addition, the jurisdiction *ratione materiae* of the Court as originally conceived in the

themselves defined the crimes to be included in the Statute. The second was incorporated into article 26 of the Statute covering crimes not defined by treaty but found in customary international law (such as aggression or crimes against humanity) and drug-related crimes. *See id.* at 109-10.

15. *Draft Statute for an International Criminal Court, in Report of the International Law Commission on the work of its forty-sixth session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994).

16. *Id.* at 71-72.

17. In the Thirteenth Report on the Draft Code, Doudou Thiam, the Special Rapporteur, noted that the draft articles "met with a varied reception [from Governments] . . ." *Thirteenth Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. GAOR, 50th Sess., at 5, U.N. Doc. A/CN.4/466 (1995). Indeed, in an admirable display of candor, the *Rapporteur* noted that the draft articles on the threat of aggression, on intervention, on colonial domination and on willful and severe damage to the environment had been so severely criticized that the Commission should "beat a retreat" therefrom. *See id.* The draft produced by the Commission in 1996 was a great deal shorter than the earlier versions, but was also met with a mixed response. *See generally* Rosemary Rayfuse, *The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L.F. 43 (1997).

1994 draft was a great deal broader than the Statute that ultimately emerged from Rome, and included many treaty crimes and the crime of aggression, as well as the three core crimes. Until some of the difficult political decisions were made as to which crimes would be included in the Statute, it was arguably inefficient to attempt extensive definitions.¹⁸

Academics as well as politicians did not, as a general rule, accept the ILC's decision not to define the crimes in the proposed Statute.¹⁹ Many felt that prosecutions in the proposed Court would run afoul of the *nullum crimen, nullum poena, sine lege* principle if crimes were not sufficiently defined in advance. Moreover, governments faced with the prospect of a world criminal court with prospective jurisdiction over a set of international crimes (as yet to be determined) committed anywhere in the world (assuming the preconditions for jurisdiction and admissibility were met) were wary of entering into a treaty that did not sufficiently set out, *ex ante*, which crimes were within the Court's purview. Thus, when the Commission's draft was taken up by the *Ad Hoc* Committee established by the General Assembly to consider it,²⁰ it was generally agreed that the crimes within the Court's jurisdiction would have to be defined in the Statute rather than simply enumerated therein.²¹ The *Ad Hoc* Committee's report was

18. As others have noted, while the ILC draft was in many respects criticable, "the ILC's perseverance and ingenuity in developing [a] limited mandate . . . into the 1994 Draft Statute . . . merits high praise." M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 17 (1998) [hereinafter BASSIOUNI, *DOCUMENTARY HISTORY*].

19. See Leila Sadat Wexler, *First Committee Report on Jurisdiction, Definition of Crimes and Complementarity*, 13 *NOUVELLES ÉTUDES PÉNALES* 163, 166-67 (1997); see also Jordan J. Paust, *Nullum Crimen and Related Claims*, 13 *NOUVELLES ÉTUDES PÉNALES* 275 (1997).

20. The ILC Draft Statute was submitted to the General Assembly, which set up an *ad hoc* committee (The *Ad Hoc* Committee for the Establishment of an International Criminal Court) to consider the proposal and make a report. G.A. Res. 49/53, 49th Sess., U.N. Doc A/Res/49/53 (Dec. 1, 1994). By establishing an *Ad Hoc* Committee and charging it with the task of considering the substantive law the Court would ultimately apply, the General Assembly effectively decoupled the ILC Draft Statute for an international criminal court from the Commission's Draft Code of Crimes. See BASSIOUNI, *DOCUMENTARY HISTORY*, *supra* note 18, at 17-18.

21. See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, at para. 57, U.N. Doc. A/50.22 (1995). The *Ad Hoc* Committee proposed several methods to define the crimes. One possibility was to track the ILC's initial approach by referring to or incorporating the provisions of relevant treaties. Another involved elaborating definitions for the crimes using the Nuremberg Charter and the Statutes of the two *ad hoc* Tribunals. Finally, the Committee suggested that those drafting the Court's Statute might use the ILC's Draft Code of Crimes as a starting point, and finalize it "as a matter of priority in order to avoid delays in the establishment of the court." *Id.* The *Ad Hoc* Committee noted three reasons for defining the crimes in the Court's Statute: respect for the principle of legality, the need to avoid ambiguity, and to ensure full respect for the rights of the accused. See *id.*

presented to the General Assembly, which established a Preparatory Committee (“PrepCom”) open to all members of the United Nations as well as members of specialized agencies, which was charged with “preparing a widely acceptable consolidated text of a convention for an international criminal court”²²

As I and others have noted elsewhere, the Preparatory Committee struggled enormously with the task of defining the crimes. Many of the problems were of a drafting or technical nature—others were political. As government delegates debated the content of particular provisions, sharp differences as to both content and interpretation surfaced. Indeed, by 1997 the PrepCom had produced an unwieldy compilation of government proposals, affectionately dubbed the “telephone book,”²³ many of which, if adopted, would have substantially narrowed the definitions of crimes beyond what was thought to be the existing customary international law norm. This was true with respect to the definition of crimes against humanity. It was also true of the war crimes provisions. As Roger Clark, who represented the government of Samoa during the negotiations, has noted with regard to the “mind-boggling array” of proposals²⁴ on the per se illegality of weapons of a nature to cause superfluous injury or unnecessary suffering, or which are inherently indiscriminate,²⁵ some of the proposals represented major retreats from the existing law. A similar phenomenon was seen in attempts to introduce into the *chapeau* of the war crimes provisions language that would have brought war crimes within the jurisdiction of the Court “only when committed as part of a plan or policy or as part of a large-scale commission of such crimes,”²⁶ effectively importing an element from crimes against humanity into the

22. U.N. GAOR 50/46, 50th Sess., at 2, U.N. Doc. A/Res/50/46 (1995).

23. M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443, 444 n.7 (1999).

24. See Roger S. Clark, *The Rome Statute of the International Criminal Court and Weapons of a Nature to cause Superfluous Injury or Unnecessary Suffering, or which are Inherently Indiscriminate*, in INTERNATIONAL HUMANITARIAN LAW: ORIGINS, CHALLENGES AND PROSPECTS (John Carey & R. John Pritchard eds., 2000) (on file with author).

25. See Hague Convention (IV) Respecting the Law and Customs of War on Land, Oct. 18, 1907, Annex, art. 23(e), 36 Stat. 2277 (prohibiting the employment of “arms, projectiles, or material calculated to cause unnecessary suffering”).

26. *Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December, Annex I: Report of the Working Group on Definitions and Elements of Crimes, Option I*, U.N. Doc. No. A/AC.249/1997/L.9/Rev.1 (Dec. 18, 1997) [hereinafter *Preparatory Committee Decisions December 1997*].

war crimes area as an attempt to further limit the Court's proposed jurisdiction.²⁷

The concern arose that the treaty making process might, rather than advance the cause of international justice, actually serve to produce definitions of crimes that would be "lowest common denominator" definitions far more restrictive than those generally believed to be part of customary international law or found in the statutes of the two ad hoc tribunals. Indeed, this is largely what occurred in Rome. Although many provisions of the text on war crimes and crimes against humanity reflect existing law, and a few others advance it (specifically, the gender-related crime provisions which did not have parallels in earlier texts, the commitment to criminalizing atrocities committed in internal, as well as international armed conflict as war crimes), many provisions of the Rome Statute restrict the existing law. Although space does not permit a full treatment of the issue here, the Rome Statute, while still more expansive than some delegations would have liked, did not attempt a progressive codification of the elements of crimes against humanity, war crimes, or genocide (the delegates ultimately refusing to extend the definition to protect groups on the basis of social or political affiliations, as some had proposed they do).²⁸ The most dramatic example of this is perhaps the exclusion of nuclear, chemical, and biological weapons from the list of those weapons whose use is criminal *per se*—an exclusion brought about by the political necessity of achieving consensus between nuclear and non-nuclear weapons states, as well as large and poor states.

To respond, at least in part, to the growing concern about the effect the codification process was having on the normative content of the laws of war and humanity, on December 8, 1997, Professor M. Cherif Bassiouni, representing the government of Egypt, took the floor during the war crimes discussions to propose the inclusion of a new article "Y,"²⁹ the text of which was as follows:

Without prejudice to the application of the provisions of this Statute, nothing in this part of the Statute shall be interpreted as limit-

27. As Professor Clark notes, a number of countries, all NATO members, met in 1997 prior to the December PrepCom and produced another version of the weapons proposals that used options, rather than brackets, to suggest that no text was "preferred." Some of the options, however, if adopted, would have substantially narrowed the Court's jurisdiction. See Clark, *supra* note 24, at 3.

28. See Sadat & Carden, *supra* note 12. For a considerably more optimistic view of the substantive law of the Statute, see Roy S. Lee, *The Rome Conference and its Contributions to International Law*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 30-31 (Roy S. Lee ed., 1999).

29. See author's personal notes. The author was present at the Preparatory Committee meeting that day.

ing or prejudicing in any way existing or developing rules of international law.³⁰

Article Y was included in the consolidated text presented to the Diplomatic Conference at Rome. It was originally left open whether it would be in article 5 (on crimes within the jurisdiction of the Court), or inserted as a separate article in the Statute.³¹ The latter option was preferred by the drafters, and it was ultimately included in the Statute as article 10,³² meaning that it applies to all the crimes defined in the Statute.³³ As far as this writer can determine it is wholly original. A survey of recently concluded multilateral treaties reveals no parallels to article 10, and it had no precursors either in earlier drafts of the ICC Statute or in the Statutes of the two ad hoc tribunals.³⁴

III. LAW "INSIDE" AND LAW "OUTSIDE" THE ROME STATUTE

A. *The Theory Behind Article 10*

The framers of the Rome Treaty apparently intended their creation to be "law" only in cases involving application of the Court's jurisdiction. That is, even though the prescriptive norms of the Statute apply to the entire world in cases referred to the Court by the Security Council,³⁵ the clear import of the text is that the substantive criminal law definitions of the Statute, insofar as their import might be restrictive, is to have no influence on customary international law outside the Statute.

At the same time, it is hornbook law that a rule of customary international law is established by two factors: the existence of widespread State practice, generally accepted by States as law, or, as the International Court of Justice held in the *North Sea Continental Shelf Cases*, a practice accepted by States out of a sense of legal obligation.³⁶ As every international lawyer knows, one of the best ways to establish State practice is to point to the provisions of widely-accepted multilat-

30. *Preparatory Committee Decisions December 1997*, *supra* note 26, at art. Y.

31. Article Y was included at the tail end of the section on war crimes in the *Zutphen Intersessional Draft Statute*.

32. *See 1998 Rome Statute*, *supra* note 10, at Annex II.

33. By its terms, article 10 applies to "this Part," meaning Part II of the Statute. Part II includes articles 5 through 21 of the Statute, and is entitled "jurisdiction, admissibility and applicable law." Thus, article 10 applies not only to the definitions of crimes, but the jurisdictional rules of the Court. This essay limits its consideration of article 10 to the substantive law of the Statute.

34. As Professor Triffterer has written in his commentary on this article, the article has no title, and was the only article of the Statute included without a heading. *See Triffterer, supra* note 9, at 315.

35. *See Sadat & Carden, supra* note 12.

36. *See North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 44.

eral treaties.³⁷ Thus, had article Y not been included in the Rome Statute, one surely could have argued that much of the substantive criminal law in the Statute was essentially a codification of the customary international law outside the Statute.

In addition, article 10 speaks only of nothing in the Statute "limiting or prejudicing" existing or developing rules of international law. Thus, the framers apparently intended that only the restrictive portions of the definitions of crimes would remain locked within the ICC structure, not more progressive elements. In other words, to the extent that the Statute makes a progressive contribution to international humanitarian law, the framers intended for that law to apply to all. A good example would be the provisions of article 8 criminalizing war crimes committed in non-international armed conflict. During the Diplomatic Conference, some countries, China in particular, repeatedly argued that these provisions should be deleted.³⁸ Their inclusion, though, was supported by most other delegations, including the United States. Certainly article 10 was not intended to provide China with a basis upon which to argue that the internal armed conflict provisions were not now (if they were not already) agreed-upon norms of customary international law.

Finally, the Statute itself contemplates that the Court will use customary international law outside the ICC Statute in its decisions. Article 21, on applicable law, permits the Court to apply "where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict."³⁹ The resort to international law outside the Statute is permitted only to supplement the terms of the Statute itself, not to supplant them;⁴⁰ presumably then, the framers were contemplating the use of international law as a gap filler, but explicitly acknowledging the importance of maintaining a body of international humanitarian law that could exist alongside the Rome Statute.

A solution to this apparent contradiction, which would suggest that article 10's theoretical basis is weak, may lie in a deeper understanding of the nature of the law made in Rome by the Diplomatic Conference. The theory on which the Security Council's power permits it to apply Rome law to all the human beings in the world rests not just

37. For a fine treatment of the subject, see generally Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988); Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71 (1996).

38. See author's personal notes.

39. 1998 Rome Statute, *supra* note 10, at art. 21(1)(b).

40. See *id.*

upon its Chapter VII powers, but also upon the fact that the law of the Statute consists of *jus cogens* crimes, non-derogable provisions of international law over which each State has universal jurisdiction (to adjudicate). Because any State would have jurisdiction to try the perpetrator of such a crime, the establishment of an international criminal court with power to try defendants accused of committing *jus cogens* crimes is seen as an extension of the theory of State universal jurisdiction. But, as I have written elsewhere, this theory, even if it explains the adjudicative jurisdiction of the ICC, does not properly explain the Court's prescriptive jurisdiction. Here it appears that the Rome Conference functioned in a quasi-legislative manner, and prescribed international norms of universal application.⁴¹ Thus, the adoption of the ICC Statute was revolutionary in that it transformed jurisdictional principles concerning "which State" may exercise its authority over particular cases into norms establishing the circumstances under which the international community may prescribe rules of international criminal law and may punish those who breach those rules.

If we accept the Rome Statute as international universal *legislation*, article 10 becomes merely the expression of a legislative intent not to, in United States parlance, "preempt the field." This leaves to the common law (lawmakers other than the ICC) and to States the task of further developing the law outside the Statute. Moreover, the legislation properly acts as a floor, not a ceiling: all States (or at least all citizens of all States, since the Statute imposes *individual* criminal responsibility) have to obey The Law—codes of conduct that the framers themselves have deemed to be unbounded by geography and applicable to all the citizens of the world.⁴²

The Diplomatic Conference, as I argue elsewhere, effected an uneasy revolution in the sub-structure of international law: a step towards bringing it from an "underdeveloped" legal system in which the sources of law are hard to find and even more difficult to apply, to a "developed" legal system in which rule-makers adopt rules of conduct that are universally binding, and even, in somewhat limited fashion, enforceable.⁴³ Article 10, which has no parallels in any other multilateral treaty, supports this view of the paradigm-shift effected by the Rome Conference. It tells us that not only did the Conference appear to function as a quasi-legislative body when viewed objectively by outside observers, but the behavior of at least some of the participants

41. See Sadat & Carden, *supra* note 12.

42. Of course, in cases referred by States or the ICC Prosecutor *proprio motu*, the Court will not have jurisdiction *to adjudicate* unless the State consent regime is complied with. See *id.*

43. Cf. Weisburd, *supra* note 37, at 2.

suggest that they subjectively believed that they were indeed legislating, and legislating not just rules of conduct, but dictating the relationship those rules would have with sources of law outside the Treaty being adopted.

B. Article 10's Likely Practical Effects

Article 10 reinforces our view that the Rome Conference was qualitatively and quantitatively different from standard international law-making. Yet, the paradigm shift was both largely unacknowledged and incremental in nature. The addition of the ICC to the constellation of bodies which can enforce (and create) norms of international criminal law was not accompanied by amendments to other political and judicial institutions or legal norms. The ICC was not adopted as an amendment to the United Nations Charter and its establishment leaves the statute of the International Court of Justice ("ICJ") intact. Finally, national systems of criminal justice are unaffected by the Court's creation. Thus, in considering article 10's effect on customary international law, it is useful to consider how other bodies will tend to view Rome law, particularly courts other than the ICC.

Surely neither in theory nor in practice are courts other than the ICC bound to the provisions of the Statute. Thus, to the extent that the Statute is widely ratified, even the inclusion of article 10 cannot foreclose arguments that customary international law now includes the Statute's definitions. Indeed, Trial Chamber II of the ICTY recently noted in *Prosecutor v. Furundzija* that

notwithstanding article 10 of the Statute, . . . resort may be had . . . to these provisions [of the Rome Statute] to help elucidate customary international law. Depending 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.⁴⁴

The same approach could be taken by national courts looking to the ICC Statute for guidance, either in application of national legislation adopted as part of the process of ratifying and implementing the Treaty of Rome, or in interpreting pre-Rome statutes criminalizing genocide, crimes against humanity, or war crimes. Indeed, at least three different judicial bodies might have occasion to consider Rome law:

44. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, para. 227 (Trial Chamber II, Dec.10, 1998). *Furundzija*'s holding was confirmed by the ICTY Appeals Chamber in the *Tadic* Judgment. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 223 (Appeals Chamber, July 15, 1999).

national courts, the two ad hoc tribunals, and the International Court of Justice. Each is discussed below, in turn.

National Courts. Because the International Criminal Court Statute operates on the principle of complementarity, and is only to have jurisdiction over the “most serious crimes of concern to the international community as a whole,”⁴⁵ even once the Statute has been ratified by sixty countries and comes into force, national courts will remain the principle vehicles for international criminal law enforcement. Indeed, the ICC is not an extension of national criminal justice systems; instead, the Court will exercise jurisdiction only where “national legal systems are unwilling or unable genuinely to proceed.”⁴⁶ Thus, national courts retain their autonomy and sovereignty; the ICC in no way supplants them. This formal separation, however, between national and international systems of criminal justice as a matter of prescriptive and adjudicative jurisdiction does not prevent informal relationships from arising between the two legal orders. In fact, it seems clear that in order for States to be able to avail themselves of the complementarity principle to avoid (or to supplement) prosecutions in the ICC, countries ratifying the Rome Statute are likely to enact universal jurisdiction legislation tracking the substantive criminal law in the Statute, laws that can then be used to prosecute war criminals and criminals against humanity whether or not the Rome Statute applies.

As I have suggested elsewhere,⁴⁷ these laws need not be identical to Rome law. In fact, many aspects of the substantive law in the Rome Statute which are jurisdictional in character have no place (or a lesser place) in national laws, for the prudential and political concerns that are of issue in creating an *international* system of criminal justice would have less or no force in adopting national laws. To take one example, national legislation on genocide could incriminate the intent to destroy, in whole or in part, not just the few groups now included in the Genocide Convention, but political and social groups as well. Although one might argue that States may not exercise universal jurisdiction over the crime of genocide if they define genocide more broadly than the current treaty law and custom would allow, to forbid them from doing so could undermine the principle upon which the

45. 1998 Rome Statute, *supra* note 10, at preamble, art. 1.

46. See Bruce Broomhall, *The International Criminal Court: Overview, and Cooperation with States*, 13*quater* NOUVELLES ÉTUDES PÉNALES 45, 47 (1999).

47. Leila Nadya Sadat, *L'influence réciproque des juridictions nationales et internationales sur la poursuite et la punition de génocide* (work in progress).

complementarity principle is based, which is that States and not the ICC remain the primary enforcers of international criminal law.⁴⁸ If enough States had similar legislation, that legislation would be evidence of State practice that could give rise to a new custom. Although the ICC could not apply the new custom, the States or the ICJ certainly could. It would therefore seem that the substantive law in the Rome Statute provides a floor, but not a ceiling, for criminalizing offenses against the laws of war and humanity.

The two ad hoc tribunals. Similarly, the two current ad hoc tribunals have their own Statutes which differ in some measure from Rome law. Those entities are already borrowing from the ICC Statute because their own Statutes are quite sketchy as to the elements of crimes; but there is no doubt that they could take different views on interpreting texts similar to those found in the ICC Statute that would also be indicative of trends in customary international law “outside” the Rome Statute.⁴⁹

The International Court of Justice. Finally, the International Court of Justice will still have an important residual role to play in the development and articulation of rules of customary international law. Whether or not the ICC is seized in a particular case with regard to individual criminal liability, civil liability between States may exist in cases not covered (or covered) by the Rome Statute. That is, uses of force that fall short of the definition of war crimes in the Statute might nonetheless be violations of article 2(4) of the United Nations Charter, and justiciable as a matter of State responsibility rather than individual criminal liability. To the extent that the ICJ’s jurisprudence supplements, rather than contradicts, the ICC Statute, ICJ cases will be an important source of law for the Court pursuant to article 21 of the Statute, as well as evidence of customary international law “outside” the Statute.

48. Given how weak the ICC’s enforcement mechanisms are, it would also cripple the enforcement of international criminal law to deny States the right to prosecute offenders for crimes not covered by the ICC Statute. It would be perverse indeed to hold that the ICC Statute, in codifying the crimes within its reach, now prevents States from reaching out with universal jurisdiction legislation to prosecute additional offenses.

49. The one option that would seem to be covered by the Statute is the establishment of new ad hoc tribunals by the Security Council after the ICC Statute enters into force. It would seem odd to permit the Security Council to provide a newly constituted ad hoc tribunal with law that differs from ICC law, particularly as the ICC Statute would apply to the situation assuming the Council wished to refer the case to the Court. On the other hand, one could imagine crimes not now within the jurisdiction of the Court that would be justiciable by an ad hoc tribunal—the crime of aggression, for example.

IV. CONCLUSION

Article 10 is both innovative and politically astute. This Essay argues that its theoretical basis, purpose, and ultimate effect is best understood if one views the Rome Diplomatic Conference as a quietly revolutionary, quasi-legislative event that produced a criminal code for the world. The framers recognized the political compromises they were obliged to make in creating this code of minimum conduct, and they therefore expressly decided, *ex ante*, to set out the relationship of Rome law to non-Rome law. That this is perfectly acceptable as a matter of theory seems apparent, even if it is bold. But because the revolution wrought by Rome was achieved *sotto voce*, without an explicit or even implicit recognition by the surrounding infrastructures of the international and domestic legal orders, article 10's effect as a practical matter is likely to be quite limited. Nonetheless, because national law and customary international law, as shown above, will continue to establish rules of conduct in the areas of war crimes and crimes against humanity, article 10 retains tremendous importance not as a rule of decision but as a principle of interpretation. It is an explicit acknowledgment that the Statute establishes *minimum* rules of conduct and that others (and the Court itself) must read it that way at all times. In this way, article 10 stands as a testament to the idealism that propelled the governments and peoples of the world to come to Rome to construct a uniform criminal code for the world—idealism that was tempered by the political reality of difficult diplomatic negotiations. It also suggests that the ICC Statute marked the beginning, rather than the end, of constructing a tight net in which to catch the war criminals of the world, and an encouragement from the framers to carry on the work. As they themselves seem to have acknowledged, an effective system of international criminal justice, like Rome itself, isn't built in a day.

