Annex B

The International Criminal Court

Elements of Crimes and Rules of Procedure and Evidence

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CHAPTER 11

OFFENCES AND MISCONDUCT AGAINST THE COURT

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I. INTRODUCTION

Offences against the administration of justice and sanctions for misconduct before the Court are matters dealt with respectively in articles 70 and 71 of the Rome Statute. Pursuant to article 70, the Court will have jurisdiction over such offences as giving false or forged testimony or evidence, and corruptly influencing a witness or official of the Court. In the event of conviction, the Court may impose a term of imprisonment and/or a fine. These powers are intended to strengthen credibility of evidence and testimonies presented before the Court and, in turn, of its administration of justice.

A short background on the development of these provisions may be useful for an understanding the issues involved in drafting the rules for implementing these articles.[1]

The 1994 Draft Statute prepared by the International Law Commission (ILC)[2] included, in the article dealing with evidence, a paragraph requiring States Parties to extend their laws of perjury to cover evidence given before the international criminal court by their nationals, and to cooperate with the international court in investigating and, where appropriate, prosecuting any case of suspected perjury. Thus, the Draft Statute did not include a provision making it an offence to give false testimony before the Court. The ILC thought that prosecution for perjury should instead be brought before the appropriate national court and suggested that since in the systems of some States the accused was not required to take an oath before testifying, it would be a matter for the Rules to take into account such situations.[3]

At the August 1996 session of the Preparatory Committee, a proposal was made to the effect that the Court should deal with offences against the administration of

1. A fuller commentary on article 70 is given by one of the main drafters, Kenneth Harris (United States), *in Commentary on the Rome Statute of the International Criminal Court—Observer's Notes, Article by Article* 917–923 (Otto Triffterer ed., 1999). Article 71 is also commented on in the same volume by Otto Triffterer, at 924–935.

2. The 1994 ILC Report, art. 44, para. 2, at 120–121.

3. *Id.*

justice.[4] In addition, provisions concerning misconduct and contempt of court were discussed and some detailed proposals were also made by delegations.[5]

No substantive discussions on these proposals took place until the December meeting of the Preparatory Committee in 1997, when a single provision was developed.[6] It envisaged that the Court should have jurisdiction over such offences, but there was no time to agree on the exact terms of the article. The report of that session stated that the listed offences should be further defined in the Statute and that the issue was linked to proposals on protection of information regarding national defense and national security. Procedures for dealing with these offences should be elaborated in the Rules. The Zutphen Draft Statute of January 1998 highlighted the Court's distinct jurisdiction over such offences as different from that of the Court over the "core crimes" under article 5.[7]

In its final report, the Preparatory Committee submitted a draft article (article 70), whereby the Court would have jurisdiction over some specified "offences or acts against the integrity of the Court."[8] The article also covered what may be called "contempt of court," but this term was not used. A more neutral term "misconduct" was used instead. Some options remained in the list of offences and the difference between these offences and the "core crimes" was pointed out in a note to the article. It was agreed that the penalties should be specified in the Statute itself, while all other procedural provisions would be dealt with in the Rules. It was also recognized that further work on these provisions was needed.

At the Rome Conference, negotiations on these provisions took place in informal consultations and the text was divided into two separate articles: article 70 on offences against the administration of justice and article 71 on sanctions for misconduct before the Court. The Working Group on Procedural Matters had to deal with many sensitive and technical issues and could allot only very little time to this particular issue. Subsequently, the report of the Working Group included a note in its report concerning remaining issues to be dealt with in the Rules:

> The Rules of Procedure and Evidence will need to include provisions governing such issues as general principles of criminal law, procedures for investigating, prosecuting, and enforcing sentences with respect to, such crimes.[9]

4. Report of the Preparatory Committee on the Establishment of an International Criminal Court, GAOR, 51st Session, Supp. No. 22 (A/51/22), Vol. I, at 60; and Vol. II, at 210–213.

5. *Id.*

6. Decisions taken by the Preparatory Committee at its session held from 1–12 December 1997, A/AC.249/1997/L.9/Rev.1 (18 December 1997), art. 44 *bis*, at 31–32.

7. Report of the Inter-Sessional Meeting from 19–30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13 (4 February 1998), comments on art. 5, at 17; and art. 63, at 119.

8. 1998 Preparatory Committee Report, Add. I, art. 70, at 111.

9. A/CONF.183/C.1/WGPM/L.2/Add.7 (13 July 1998), at 3 (footnote 2 attached to art. 70).

During the first meeting of the Preparatory Commission, no rules to underpin the two articles were proposed.[10] Such rules were first discussed at the inter-sessional meeting of experts held in Siracusa in June 1999. The results of the Siracusa meeting appeared in the Coordinator's discussion paper, which formed the basis for further negotiations.[11] Following formal and informal discussions in the Working Group on Rules of Procedure and Evidence, a revised version of the discussion paper appeared,[12] which was taken up for a final reading at the fifth session of the Commission in June 2000.[13]

II. THE INTER-SESSIONAL MEETING IN SIRACUSA

Draft proposals by France and Italy served as a basis for the discussions by experts in Siracusa. Draft rules prepared by a working group of the American Bar Association were also considered.[14]

The French draft proposals relating to article 70 were detailed and covered such matters as general principles, period of limitation, rules on fines, where fines in cases of bribery were treated differently, a simplified procedure built upon the pre-trial and trial proceedings of the Statute, and state cooperation. In respect of article 71, the French draft elaborated upon "misconduct," and suggested rules for proceedings and applicable sanctions. Where offences under article 70 and misconduct under article 71 concurred, preference would be given to proceedings under article 70.

The main Italian idea was to provide further definitions to the offences listed in article 70, paragraph 1. During the debate among the experts, many were reluctant to elaborate the offences any further, and as a result no additional definitions were included in the texts produced from that meeting.[15]

The draft by the working group of the American Bar Association provided procedures for dealing with offences under article 70. The idea was that such cases should be referred to the Prosecutor for investigation and prosecution and then should proceed through the standard pre-trial, trial and appellate proceedings set forth in the Statute and the Rules. With respect to misconduct, the Association's draft was largely based upon rule 77 of the Rules of Procedure and Evidence of the ICTY. The draft

10. The comprehensive Australian proposal on Draft Rules of Procedure and Evidence only indicated that provisions underpinning arts. 70 and 71 would need to be elaborated upon, PCNICC/1999/DP.1 (26 January 1999), at 61. This was also the case in the French General outline of the Rules of Procedure and Evidence, PCNICC/1999/DP.2 (1 February 1999), Part 4.

11. PCNICC/1999/WGRPE/RT.5 (1 July 1999), Rules 6.26–6.40.

12. PCNICC/1999/WGRPE/RT.5/Rev.1 (11 August 1999), Rules 6.32–6.42.

13. PCNICC/2000/WGRPE(6)/RT.10 (23 June 2000), Rules 6.32–6.42.

14. For similar proposals, see Rules 107 and 108 *in Draft Rules of Procedure and Evidence for the International Criminal Court, Prepared by a Working Group of the American Bar Association, Section of International Law and Practice*, 10 February 1999.

15. *See further*, section III B, *infra*.

proposal included, *inter alia*, a further specification of what was labeled "contempt of court."[16]

An issue not addressed by any of the draft proposals was the broader question of the relationship between the Court's jurisdiction over offences against the administration of justice and the jurisdiction of States Parties in that regard.[17] The question was highlighted by the future host State, the Netherlands. But it could not be resolved by the experts.

III. OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE UNDER ARTICLE 70

A. Placing Article 70 in Its Context

Rule 163: Application of the Statute and the Rules

1. Unless otherwise provided in sub-rules 2 and 3, rule 162 and rules 164 to 169, the Statute and the Rules shall apply *mutatis mutandis* to the Court's investigation, prosecution and punishment of offences defined in article 70.

2. The provisions of Part 2, and any rules thereunder, shall not apply, with the exception of article 21.

3. The provisions of Part 10, and any rules thereunder, shall not apply, with the exception of articles 103, 107, 109 and 111.

As the Final Report of the Preparatory Committee had pointed out, article 70 should not be considered in isolation; the question was how it should relate to other provisions of the Statute.[18] The method developed by the experts in Siracusa was to work on the assumption that all provisions of the Statute were also applicable to the offences under article 70, unless excluded or modified in the Rules. This principle was established in a separate rule, now rule 163, on the application of the Statute and the Rules, which underwent only minor amendments in the Preparatory Commission.[19]

16. In spite of the differences, the emerging case law of the ICTY and ICTR will most certainly be taken into account by the future Court,. For ICTY decisions, see for example, the Appeals Chamber's decision in *Tadić*, Judgement on allegations of contempt of court against prior counsel Milan Vujin, 31 January 2000 (found in contempt of court and fined 15,000 Dutch Guilders); *see also* the Trial Chamber's decision in *Simić et al.*, Judgement in contempt case against Milan Simić and his counsel Branislav Avramović, 30 June 2000 (acquitted).

17. *See infra* III.C.

18. The *Nota Bene* to art. 70 in the Final Report of the Preparatory Committee, *supra* note 8, at 111, reads: "It is not contemplated that all the provisions of the Statute and Rules, whether substantive or procedural, regarding the Court's exercise of jurisdiction over Article 5 crimes would apply equally to these offences. Further work to clarify this issue will be essential. Moreover, similar thought must be given to States parties' obligation to surrender persons charged with these offences, especially when the State Party is pursuing prosecution itself."

19. Compare Rule 6.27, *supra* note 11, and Rule 6.33, sub-rule 1, in PCNICC/ 2000/WGRPE/ L.10 (27 June 2000). At the second session of the Preparatory Commission, it was decided to revisit all the rules relating to art. 70 when the rest of the Rules had been discussed and, thus, the impact of the method used could be evaluated. *See* footnote 10, *supra* note 11. However, at that review, conducted at the fifth session of the Commission, the basic technique was retained.

Another basic assumption that had an impact on article 70 was that the Rules could not impose on States Parties any additional requirements which were not already contained in the Statute. This was a further argument in favour of connecting article 70 to other relevant provisions of the Statute which already established obligations for the State Parties.

However, some general exceptions from this basic principle were found to be necessary. In Siracusa, the experts first thought of excluding completely the application of Parts 7 (penalties), 9 (international cooperation and judicial assistance), and 10 (enforcement), but they then reached the conclusion that this would not be appropriate. Consequently, with some modifications and exceptions, these Parts could also be applicable for the purpose of article 70.

It was clear to most delegates that Part 2 in general had no application to article 70 offences. The French draft, however, proposed the idea of applying the principle of complementarity to article 70 offences and that gave rise to some debate. Recalling the provisions in article 70, paragraph 1, and what had been stated in the Preparatory Committee and during the Rome Conference, the idea of confining the Court's powers in this respect to a complementarity regime was rejected. The issue was not brought up again in the Preparatory Commission.

A general exclusion of the provisions of Part 2 was thus drafted with the exception of article 21, applicable law, which was considered to be applicable to article 70 offences. This provision remained unchanged throughout the deliberations in the Preparatory Commission.[20] In addition, special provisions were drafted for the *ne bis in idem* principle.[21]

B. Further Definition of the Offences?

In the Preparatory Commission, Italy returned to its idea, presented earlier in Siracusa, and proposed five draft rules further defining the offences listed in article 70, paragraph 1.[22] The draft rules were presented and discussed briefly, although not in substance, in the Working Group. The debate focused mainly on whether a further elaboration of the definitions was within the mandate of the Commission, i.e., whether such definitions constituted "principles" in the meaning of article 70, paragraph 2, and, if so, whether additional definitions should be dealt with as procedures or as elements of crimes. The Italian proposal gained limited support and many delegations spoke against any attempts to further define the offences. Although it was agreed that further reflection should be given to the issue, the question was not raised again in the Preparatory Commission.

20. Compare Rule 6.28, *supra* note 11; and Rule 6.33, sub-rule 2, in PCNICC/2000/WGRPE/ L.10, *supra* note 19.

21. *See further* section III.E, *infra*.

22. PCNICC/1999/WGRPE/DP.17 (26 July 1999).

C. Jurisdiction

Rule 162: Exercise of jurisdiction

1. Before deciding whether to exercise jurisdiction, the Court may consult with States Parties that may have jurisdiction over the offence.

2. In making a decision whether or not to exercise jurisdiction, the Court may consider, in particular:

(a) The availability and effectiveness of prosecution in a State Party;

(b) The seriousness of an offence;

(c) The possible joinder of charges under article 70 with charges under articles 5 to 8;

(d) The need to expedite proceedings;

(e) Links with an ongoing investigation or a trial before the Court; and

(f) Evidentiary considerations.

3. The Court shall give favourable consideration to a request from the host State for a waiver of the power of the Court to exercise jurisdiction in cases where the host State considers such a waiver to be of particular importance.

4. If the Court decides not to exercise its jurisdiction, it may request a State Party to exercise jurisdiction pursuant to article 70, paragraph 4.

The most difficult issue raised in drafting rules for article 70 was the question of which court—the ICC or a national court of a State Party—should exercise jurisdiction over offences against the administration of justice. This was due to the fact that the Statute does not clearly settle the relationship between the jurisdiction of the Court and that of the States Parties. It was only after the Siracusa meeting that a clear understanding began to emerge that the principle of complementarity as set forth in the Statute would not apply.[23]

The language versions of article 70, paragraph 4 (b), regarding the Court's request to a State Party to deal with the matter, gave rise to different interpretations. According to one interpretation, the Court would choose whether to handle the matter itself or, "whenever it deems it proper," request a State to do so, thus implying that the Court would have the primary right to exercise jurisdiction over the offences. To give the Court the primary right (although this was not clear from the text) was the intent behind the English version of the text and this language was the one used for the drafting and informal discussions at the Rome Conference. On the contrary, in other language versions, according to delegates, the interpretation was that the State would decide whether to submit the case for investigation "whenever it deems it proper."

In the Preparatory Commission, the Netherlands submitted a proposal seeking to clarify the Court's primary right to exercise jurisdiction but providing at the same

23. On the exclusion of Part 2 from application to offenses under art. 70, see section III.A, *supra*.

time a waiver of this right upon a request from the territorial or custodial State.[24] The proposal gained support, but was also criticized. Among others, Poland raised concerns regarding the unqualified primacy of the Court as provided for in the proposal. Instead, Poland proposed a set of criteria for the Court to consider when deciding whether to exercise jurisdiction.[25] A long debate in the Working Group followed, and a number of delegations concluded that the host state might need to be treated differently since the offences under article 70 were more likely to occur in that State than in other States. It was also pointed out that more than one State might have jurisdiction over a particular offence and, thus, that complex cases of concurrent jurisdiction could occur.

The conclusion of the debate was that both proposals had gained strong support and that efforts should be made to merge them. It was, however, recognized that to establish a clear-cut rule of general application regarding the relationship between the Court's jurisdiction and national jurisdiction would be difficult, in light of the different interpretations given to article 70. As a way to move forward, it was suggested that a special rule be created in relation to the host state as well as a general rule along the lines proposed by Poland. The general rule would provide some parameters to guide the Court's decision and, hence, predictability as to the Court's exercise of its jurisdiction. This was used as the objective for merging the two proposals.[26] In line with a Japanese proposal made during the debate, the text would provide that if the Court decided not to exercise its jurisdiction it may request a State Party to exercise its jurisdiction. The merged proposal also incorporated an additional provision giving the Court the option of consulting with States Parties that might have jurisdiction before deciding whether to exercise jurisdiction. The result was placed in the revised version of the Coordinator's discussion paper.[27]

In the fifth session of the Preparatory Commission, the rule was re-drafted and re-organized during the informal consultations. The major amendment was the deletion of references to the Court's "primary" power to exercise jurisdiction in relation to the host state. The intention was not to change the substance of the provision, but to avoid misinterpretations regarding the Court's powers that might be the result if the reference to "primary power" was only made in relation to the host state.[28]

The outcome of the negotiations is that the uncertainty stemming from the conflicting interpretations of the different language versions of the Statute has not been clearly removed. However, Rule 162 now provides for some predictability and, in

24. PCNICC/1999/WGRPE/DP.27 (30 July 1999).

25. PCNICC/1999/WGRPE/DP.29 (2 August 1999).

26. The proposal submitted by the Netherlands and Poland, PCNICC/1999/WGRPE/DP.31 (3 August 1999), also incorporated Rule 6.34, concerning referrals of the case to a State Party. *supra* note 11.

27. Rule 6.32, *supra* note 12.

28. Rule 6.32, *supra* note 13.

addition, one may argue that it does support the interpretation that the Court has primary power to exercise jurisdiction over the offences in article 70.

D. Periods of Limitation

Rule 164: Periods of limitation

1. If the Court exercises jurisdiction in accordance with rule 162, it shall apply the periods of limitation set forth in this rule.

2. Offences defined in article 70 shall be subject to a period of limitation of five years from the date on which the offence was committed, provided that during this period no investigation or prosecution has been initiated. The period of limitation shall be interrupted, if an investigation or prosecution has been initiated during this period, either before the Court or by a State Party with jurisdiction over the case pursuant to article 70, paragraph 4 (a).

3. Enforcement of sanctions imposed with respect to offences defined in article 70 shall be subject to a period of limitation of 10 years from the date on which the sanction has become final. The period of limitation shall be interrupted with the detention of the convicted person or while the person concerned is outside the territory of the States Parties.

In its draft proposal at the Siracusa meeting, France introduced the idea that offences under article 70 should be subject to periods of limitation, unlike the core crimes under the Statute which are not subject to statutory limitation (art. 29).[29] The deliberate distinction in the Statute between the term "offences" in article 70 and the term "crimes" in respect of the "core crimes" in article 5 was noted. In general, the proposal was received favorably by the participating experts.[30]

The debate that followed highlighted two main issues. The first issue was whether national laws on periods of limitations should apply or whether they should be set forth in the Rules. Several options were considered. Since article 70 envisages a dual regime where both the Court and a state may investigate and prosecute an offence, it was argued that national laws on periods of limitation should be applied. This was the first option and the applicable law would then be the law of the State on whose territory the offence was committed or the law of the State of which the person concerned was a national. On the other hand, such a scheme would be very complicated and different periods of limitation would be applicable in different cases. The other option was to set out one or more periods of limitation in the Rules. However, adopting the latter option would raise various issues that would have to be considered: fixed time limits or otherwise, method of calculation, exceptions and interruption.

The second issue was whether there should be one or more periods of limitation. Some argued that one period would be sufficient and that it would run from the date when the offence was committed, which might or might not be interrupted. Others argued that, in conformity with their own legal systems, different periods of limitation should be provided for, one for the offences (i.e., for criminal responsibility and thus for prosecution), and one for imposing sanctions.

29. The term "statute of limitation" was used until the Mont Tremblant draft where the term "period of limitation" was introduced. *See* PCNICC/2000/WGRPE/INF/1 (24 May 2000).

30. Only an expert from Amnesty International opposed the inclusion of any periods of limitations.

The discussion paper prepared by the Coordinator included only the principle of statute of limitation; the different options were set out in a footnote.[31] Reflecting the concern that a rule for the Court would potentially have an impact on national law, the issue whether a State to which the Court referred an offence should apply its own statute of limitations was also raised.

At the second session of the Preparatory Commission, Austria put forward a proposal, which, *inter alia*, contemplated that the periods of limitation might be interrupted.[32] Colombia submitted written comments, which pointed out the relationship between periods of limitation for offences (but not for sanctions) and revision under the Statute.[33]

Only a few delegations raised doubts about the inclusion of any periods of limitation in the Rules. The result was a text largely based on the Austrian proposal, where two periods of limitation were provided, one for the offence (i.e., prosecution) and one for enforcement of sanctions, and both with provisions on interruption of the periods under certain circumstances.[34] However, no precise time limit was yet agreed upon. A footnote indicated that the periods of limitation were only intended for the Court, not for national proceedings, and that there was no intention of affecting the right to seek revision in accordance with the Statute. It was, however, noted that further considerations needed to be given as to whether these last mentioned matters should be reflected in the rule. Some delegations were not convinced that, as a practical matter, it would be possible to establish when an investigation had been initiated and, thus, when the first period of limitation should be interrupted. This concern was also mentioned in the footnote, although other delegations had no doubt that the Prosecutor would record and seek information on initiation of an investigation in order, when necessary, to argue in a case that the period of limitation had been interrupted.

When the rule was reviewed again by the Preparatory Commission during its fifth meeting in June 2000, time limits for the periods of limitation were agreed upon—five and ten years respectively—and a new sub-rule was added to clarify that the periods of limitation set forth were only intended for the Court.[35] This was done in an informal meeting and did not generate any major debate. It now appears as Rule 164.

31. Rule 6.29 and footnote 11, *supra* note 11.

32. PCNICC/1999/WGRPE/DP.25 (29 July 1999).

33. PCNICC/1999/WGRPE/DP.36 (6 August 1999) and PCNICC/1999/WGRPE/DP.39 (12 November 1999).

34. Rule 6.34, *supra* note 12.

35. Rule 6.34, *supra* note 13.

E. Procedures

Rule 165: Investigation, prosecution and trial

1. The Prosecutor may initiate and conduct investigations with respect to the offences defined in article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.

2. Articles 53 and 59, and any rules thereunder, shall not apply.

3. For purposes of article 61, the Pre-Trial Chamber may make any of the determinations set forth in that article on the basis of written submissions, without a hearing, unless the interests of justice otherwise require.

4. A Trial Chamber may, as appropriate and taking into account the rights of the defence, direct that there be joinder of charges under article 70 with charges under articles 5 to 8.

Rule 168: Ne bis in idem

In respect of offences under article 70, no person shall be tried before the Court with respect to conduct which formed the basis of an offence for which the person has already been convicted or acquitted by the Court or another court.

Rule 169: Immediate arrest

In the case of an alleged offence under article 70 committed in the presence of a Chamber, the Prosecutor may orally request that Chamber to order the immediate arrest of the person concerned.

Rule 172: Conduct covered by both articles 70 and 71

If conduct covered by article 71 also constitutes one of the offences defined in article 70, the Court shall proceed in accordance with article 70 and rules 162 to 169.

Article 70, paragraph 2 explicitly states that the procedures relating to the offences against the administration of justice shall be dealt with in the Rules. This formed the basis of a general understanding throughout the earlier negotiations, which was also reflected in various documents. First attempts to provide such procedures were made in Siracusa in the draft proposals by France and by the working group of the American Bar Association.

The French idea was to apply mainly the same, albeit somewhat simplified, proceedings as set forth in the Statute for the "core crimes." This scheme got support and special provisions were drafted in respect of initiation of an investigation, the possibility of confirming charges under article 70 without a hearing, and joinder of charges. It was found that the provisions of article 53, on initiation of an investigation, including reviews by the Pre-Trial Chamber, and article 59, on arrest proceedings in the custodial State, should not be applicable. It was not sure whether article 54, paragraph 2(b), concerning investigations in the territory of a State, ought to be excluded. Additionally, it was suggested that in dealing with such offences, a single judge would suffice for the Pre-Trial and Trial Chambers and a panel of three judges for the Appeals Chamber.

The question was raised whether particular appeals provisions would be necessary for articles 70 and 71. In light of the discussions during the first meeting of the Preparatory Commission on rules relating to the pre-trial stage (Part 5), it was concluded that appeals proceedings should be exclusively dealt with in rules relating to that part of the Statute (Part 8), and the Court's decisions under article 70, though not specifically mentioned in the appeals provisions of the Statute, should be considered as covered by those provisions. Thus, a conviction or acquittal or a sentence pursuant to article 70 could be appealed against in accordance with article 81.

At the second session, the procedures proposed in the Coordinator's draft[36] were met with support, while the proposal for reduced Chambers was challenged. Some delegations argued that the proposal was incompatible with the Statute (in particular article 39, paragraph 2(b)), except regarding the Pre-Trial Chamber. This opposition could not be overcome and the rule on reduced chambers had to be deleted. However, the rule on investigation, prosecution and trial remained without any amendments other than a note stating that the need for further preconditions or procedural steps in respect of initiation of an investigation should be considered.[37] The note reflected concerns that the lack of additional conditions would provide the Prosecutor with a wide discretion and, thus, might open the door for arrangements with suspects similar to plea-bargaining. The rule was further considered at the fifth session of the Commission and the text remained unchanged.[38] This means that the procedures set forth in the Statute on investigation, prosecution and trial, and the rules underpinning them, shall also govern the proceedings under article 70, with only the exceptions now contained in Rule 165. In other words, the same high international standards apply to both proceedings.[39]

While there was agreement that Part 2 as a whole would not apply to article 70,[40] some rules were considered necessary regarding the principle of *ne bis in idem* reflected in article 20. However, since article 20 is closely linked to the principle of complementarity, a simple reference to that article was not sufficient, and instead a separate rule had to be drafted. The text put forward to the Preparatory Commission was accepted with some drafting amendments.[41] It finally appears as Rule 168.

Rules 169 and 172, which originated from the French draft proposal in Siracusa, provide for the immediate arrest of a person committing an offence before the Court and, in case of conduct covered by both articles 70 and 71, preference is to be given to an offence under article 70 over misconduct under article 71. These provisions met with only minor drafting amendments throughout the negotiations.

36. Rules 6.30 and 6.31, *supra* note 11.

37. Rule 6.35 and footnote 14, *supra* note 12.

38. Rule 6.35, *supra* note 19.

39. On the importance of ensuring such standards, see Amnesty International, *The International Criminal Court: Drafting Effective Rules of Procedure and Evidence for the Trial, Appeal and Revision—Memorandum for Participants at the Siracusa Intersessional Meeting, 22 to 26 June 1999*, June 1999, at 24.

40. *See supra* section III.A.

41. Rule 6.35, *supra* note 11; and Rule 6.38, *supra* note 12.

F. Sanctions

Rule 166: Sanctions under article 70

1. If the Court imposes sanctions with respect to article 70, this rule shall apply.

2. Article 77, and any rules thereunder, shall not apply, with the exception of an order of forfeiture under article 77, paragraph 2 (b), which may be ordered in addition to imprisonment or a fine or both.

3. Each offence may be separately fined and those fines may be cumulative. Under no circumstances may the total amount exceed 50 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants.

4. In imposing a fine the Court shall allow the convicted person a reasonable period in which to pay the fine. The Court may provide for payment of a lump sum or by way of instalments during that period.

5. If the convicted person does not pay a fine imposed in accordance with the conditions set forth in sub-rule 4, appropriate measures may be taken by the Court pursuant to rules 217 to 222 and in accordance with article 109. Where, in cases of continued wilful non-payment, the Court, on its own motion or at the request of the Prosecutor, is satisfied that all available enforcement measures have been exhausted, it may as a last resort impose a term of imprisonment in accordance with article 70, paragraph 3. In the determination of such term of imprisonment, the Court shall take into account the amount of fine paid.

According to article 70, paragraph 3, the applicable sanctions[42] are imprisonment and fines, and an explicit mandate was given to elaborate further on fines in the Rules. In Siracusa, the draft proposal by France included a maximum fine, which in case of multiple offences would be cumulative. A different calculation of the maximum fine was envisaged in case the offence was solicitation or acceptance of a bribe (in accordance with article 70, paragraph 1(f)). In such case, the maximum fine would amount to "(x) times the amount of the bribe." Hence, the fine would cover any profit from the offence. The essence of the French proposal appeared in the Coordinator's discussion paper submitted at the second session.[43]

While the basic French proposal was not controversial, the method of calculating the fine in case of bribery was. It was suggested that forfeiture according to Part 7 might be used instead to fulfil the aim behind the proposal, namely to prevent the proceeds of the offence from exceeding the fines so as to make the offences economically unprofitable. Besides, since penalties contained in article 77 were not, in general, applicable to offences under article 70, a special provision was necessary. Thus, instead of a separate maximum fine as proposed by France for the offences in article 70, paragraph 1(f), forfeiture was added in respect of such an offence. With this amendment, the proposal was embodied in a revised version of the Coordinator's

42. In order to avoid any confusion between "penalties" for the core crimes in accordance with Part 7 and for the offences in art. 70, the Mont Tremblant draft introduced the term "sanctions" in respect of the latter, for reference. *Supra* note 29, at 86.

43. Rule 6.32, *supra* note 11.

discussion paper.[44] A footnote flagged the issue whether forfeiture should also be possible in respect of bribery of a person not being an official of the Court.

Remembering how difficult it had been in previous negotiations to agree on any fixed amounts, the drafters of the Mont Tremblant document were cautious to avoid a lengthy debate on the issue of maximum fines. It was therefore submitted in that document that a more generic formula, i.e., a percentage of the value of the convicted person's identifiable assets, should be explored.[45] This suggestion was modeled after the rules on calculation of maximum fines to underpin Part 7 and it triggered a further review of the relevant provisions.

The generic formula proposed in the Mont Tremblant document was generally accepted. However, some delegations considered that its application would be too burdensome for the Court. Although this formula was introduced in order to avoid discussions on numbers, a debate nevertheless took place regarding what constituted an "appropriate" percentage of the assets. This was finally set at 50 per cent. Since the rule would also allow cumulative fines, it was clarified that the amount set forth was the maximum total amount. Another idea, to link the maximum fine to the salary of an official, was not accepted.

Provisions on the method of payment of fines and on measures in case of non-payment that are similar to what is provided for in respect of Part 7 now also appear in Rule 166, sub-rules 4 and 5.[46] Besides, it was made clear that forfeiture, when applicable, could be imposed in addition to a combination of imprisonment and a fine. Finally, similar to what was done in the rule on periods on limitation, the rule only applies explicitly to sanctions imposed by the Court.

G. International Cooperation, Judicial Assistance, and Enforcement

Rule 167: International cooperation and judicial assistance

1. With regard to offences under article 70, the Court may request a State to provide any form of international cooperation or judicial assistance corresponding to those forms set forth in Part 9. In any such request, the Court shall indicate that the basis for the request is an investigation or prosecution of offences under article 70.

2. The conditions for providing international cooperation or judicial assistance to the Court with respect to offences under article 70 shall be those set forth in article 70, paragraph 2.

When article 70 was negotiated in Rome, a number of delegations were concerned about the application of the strict obligation of cooperation required of the State Parties with the Court in accordance with Part 9, if they were also extended to offences under article 70. It was, in particular, the obligation to surrender persons to

44. Rule 6.36, *supra* note 12.

45. *See* the *Nota Bene* to Rule 6.36, *supra* note 29. At that time the relevant rule relating to Part 7 was Rule 7.2 (2).

46. Rule 6.36, sub-rules 4 and 5, *supra* note 13.

the Court that worried them. Consequently, article 70, paragraph 2, sets forth a separate regime for cooperation and judicial assistance for article 70 offences. It prescribes that the conditions for providing international cooperation to the Court in these cases shall be governed by the domestic laws of the requested State, namely the ordinary national laws on judicial assistance and extradition. But, it was thought that this might render it impossible in some cases to actually bring the suspect or accused of an offence before the Court. To counter-balance this potential problem, article 70, paragraph 4 (a) was introduced and requires the State Parties to extend their criminal laws to offences against the administration of justice of the Court.

At the outset of the Siracusa meeting, most experts seemed to agree that all of Part 9 would not be applicable to article 70 offences, as it was replaced by the special provision in article 70, paragraph 2. In this spirit, the French draft proposal contained a number of detailed provisions on international cooperation and judicial assistance in respect of article 70. As discussions proceeded, there was a growing understanding that not all of Part 9 should be excluded from being applicable. For example, the obligation in article 88 to ensure procedures for all forms of cooperation would also be needed even when ordinary laws of the requested State applied; in many cases such laws would only apply to requests by another State. Other examples include the provisions on means of communication and the language to be used.

Accordingly, instead of saying that the provisions of Part 9 would not apply, a special rule directed exclusively to the offences under article 70 was drafted. It specified that the conditions for providing international cooperation and judicial assistance were those set forth in the article itself and that the Court might request any form of cooperation or assistance "corresponding to those forms set forth in Part 9," thereby avoiding any problem with the distinction between "surrender" and "extradition." For the benefit of the requested State, the Court should always indicate in its request for cooperation if the request relates to an article 70 offence. This was how the rule appeared in the Coordinator's discussion paper to the Preparatory Commission.[47] After some initial doubts were expressed, Rule 167 stood the test of time and was later included in the final report of the Working Group[48] and adopted by the Commission.

The question of enforcement in respect of sanctions imposed under article 70 was also addressed at the Siracusa meeting. This was an issue not explicitly addressed during the Rome Conference, but which would have a large impact on the proper functioning of the Court since such enforcement would take place in the States concerned. Since Part 10, enforcement, does not exclude application in respect of decisions under article 70, the general conclusion at that meeting was that Part 10 should apply, which corresponded with a French draft proposal.

Thereafter, the Netherlands had considered this issue further and concluded that only the provisions of articles 103 (sentences) and 109, paragraph 1 (fines and forfeiture) should apply. A proposal to that effect was submitted at the second session of the Preparatory Commission.[49] The argument for excluding the other provisions of Part 10 was that they were drafted for the core crimes. In the informal consultations that followed, it was agreed that Part 10 should be excluded with the exception of articles 103 and 109 (in whole) as well as articles 107 (on transfer upon completion of sentence) and 111 (on escape).[50] This provision was then forwarded without amendment for adoption by the Commission, which adopted it as Rule 163, sub-rule 3.

47. Rule 6.32, *supra* note 11.

48. Rule 6.37, *supra* note 19.

H. General Principles of Criminal Law

In Siracusa, France suggested that general principles of criminal law should be applicable to offences against the administration of justice. It was proposed that all provisions of Part 3, except article 29 regarding non-applicability of statute of limitation, should apply. One consequence of this approach was, as pointed out during the debate, that article 26 would preclude jurisdiction over offenders under the age of 18. It was recalled that article 26 was the result of very complicated negotiations where consensus on an age of criminal liability could not be reached, and that young offenders would require a number of special measures. It was hence advised that the limitation of the Court's jurisdiction over young offenders should apply here too; under-aged offenders should rather be dealt with by the national systems.

The issue of applying all provisions of Part 3 to the offences under article 70, with the exception of a special rule on periods of limitations,[51] did not receive much attention in the Preparatory Commission. Presumably, a reason for this was that it was overtaken by the debate on whether further definitions of the offences should be elaborated.[52] Therefore, Rule 163 establishes that Part 3 is applicable to article 70 offences.[53]

IV. MISCONDUCT BEFORE THE COURT UNDER ARTICLE 71

Rule 170: Disruption of proceedings

Having regard to article 63, paragraph 2, the Presiding Judge of the Chamber dealing with the matter may, after giving a warning:

(a) Order a person disrupting the proceedings of the Court to leave or be removed from the courtroom; or,

49. *See* proposal by the Netherlands, *supra* note 24.

50. Rule 6.33 (c), *supra* note 12.

51. *See supra* section III.D.

52. *See supra* section III.B.

53. *See supra* section III A. In retrospect, this very general principle may provide some ill-considered results: for example, the application of criminal responsibility for attempts to commit a crime according to art. 25, para. 3(f), and perjury-like offenses under art. 70, para. 1. However, it is submitted that he Court should be able to handle any oddities that may arise out of the general application of the provisions of Part 3.

(b) In case of repeated misconduct, order the interdiction of that person from attending the proceedings.

Rule 171: Refusal to comply with a direction by the Court

1. When the misconduct consists of deliberate refusal to comply with an oral or written direction by the Court, not covered by rule 170, and that direction is accompanied by a warning of sanctions in case of breach, the Presiding Judge of the Chamber dealing with the matter may order the interdiction of that person from the proceedings for a period not exceeding 30 days or, if the misconduct is of a more serious nature, impose a fine.

2. If the person committing misconduct as described in sub-rule 1 is an official of the Court, or a defence counsel, or a legal representative of victims, the Presiding Judge of the Chamber dealing with the matter may also order the interdiction of that person from exercising his or her functions before the Court for a period not exceeding 30 days.

3. If the Presiding Judge in cases under sub-rules 1 and 2 considers that a longer period of interdiction is appropriate, the Presiding Judge shall refer the matter to the Presidency, which may hold a hearing to determine whether to order a longer or permanent period of interdiction.

4. A fine imposed under sub-rule 1 shall not exceed 2,000 euros, or the equivalent amount in any currency, provided that in cases of continuing misconduct, a new fine may be imposed on each day that the misconduct continues, and such fines shall be cumulative.

5. The person concerned shall be given an opportunity to be heard before a sanction for misconduct, as described in this rule, is imposed.

According to article 71, applicable sanctions and procedures for cases of misconduct before the Court should be provided in the Rules. At the Siracusa meeting, the French draft proposal and the proposal of the working group of the American Bar Association offered a point of departure. Both drafts included a further definition of actions that would constitute misconduct but, as in the case of offences under article 70, there was opposition to doing so. It was thus argued that the concept of "contempt of Court" had been rejected in the negotiations of the Statute, and any further attempts to redefine misconduct would raise that issue again. A related issue that was taken up was whether there should be a code of conduct for counsel. This issue was later transferred to the discussions relating to Part 4 of the Statute and in that context special provisions were worked out.[54]

Regarding sanctions, the French draft proposal, which provided further guidance in addition to that set forth in article 71, was included in the Coordinator's discussion paper.[55] In crafting the procedures, emphasis was placed on making them as simple as possible and allowing sanctions to be imposed immediately by the Chamber before which the misconduct took place. Furthermore, a simplified procedure for hearing appeals against such decisions was proposed. Also these provisions were submitted to the Preparatory Commission in the discussion paper.[56]

54. Rule 4.5 in PCNICC/2000/WGRPE/L.2 (21 June 2000). See also Rule 8.

55. Rule 6.38 in the Coordinator's Discussion Paper, *supra* note 11.

56. *Id.*, Rules 6.37 and 6.39.

In the debate that followed at the second session, Spain, supported by Colombia, pointed out that that a distinction should be made between misconduct in the form of disruption of proceedings and misconduct related to refusals of different kinds to comply with a direction of the Court. They argued that such a division was called for both regarding proceedings and sanctions. While the proceedings for the former form of misconduct should be swift and simple, the procedures for the latter should be further elaborated upon. In addition, they rejected the idea of simplified appeals proceedings.

In subsequent informal meetings, proposals worked out in Siracusa were merged with the Spanish proposal. A generally acceptable text emerged and was included in the revised version of the Coordinator's discussion paper.[57] An outstanding question was whether additional sanctions, provided for in the context of misconduct of Court officials under Part 4, should also be included.

At the inter-sessional meeting in Mont Tremblant, some re-drafting of the provisions was proposed.[58] It was also suggested that a generic formula for establishing the maximum fine to be imposed should be considered here too.[59] During the fifth session of the Preparatory Commission, the provisions were reviewed in informal consultations and the text regarding a refusal to comply with a direction of the Court was amended. The notion of "permanent interdiction" was considered unclear. It was also argued that interdictions lasting for a longer period of time should not be tried before a single judge. Thus, special proceedings were introduced for interdictions for a period exceeding 30 days.[60] Regarding maximum fines, a fixed amount was agreed in place of the suggestion in the Mont Tremblant document. Thereby, the summary form of proceedings against misconduct was underlined.

The provisions on misconduct before the Court are now contained in Rules 170 to 172.

V. FINAL REMARKS

As foreseen in the Statute, articles 70 and 71 have now been supplemented by rules. Regarding article 70, the general approach was to clarify how the article related to the rest of the Statute, e.g., to what extent other provisions of the Statute apply to the operation of article 70. The rules mainly address procedural issues, but some are more substantive in nature. However, proposals for substantive amendments in the form of additional definitions of the offences under article 70 were not accepted, and no such suggestion was adopted in the Rules.

57. Rules 6.40 and 6.41, *supra* note 12.

58. *Supra* note 29, at 87.

59. For the equivalent proposal in respect of offences under art. 70, see *supra* section III B.

60. Rule 6.41, *supra* note 19.

Most complicated was the issue of the Court's jurisdiction over offences under article 70 and the relationship between the Court and State Parties in such cases. Due to different interpretations of article 70, Rule 162 does not conclusively answer the question of concurrent jurisdiction, but it clarifies some aspects of the Court's exercise of jurisdiction. Moreover, it was made clear that the principle of complementarity does not apply to the offences under article 70. In addition, Rule 167 contains special provisions regarding international cooperation and judicial assistance, which underpin the special scheme set forth in article 70, paragraph 2, while, at the same time, they build upon, to the extent possible, what is stipulated in Part 9 of the Statute. An important consequence of this is that State Parties must ensure that their regular laws on extradition and international legal assistance are applicable also to requests from the Court (art. 88).

With the rules that have been developed, articles 70 and 71 have now been put in context and the Court has been provided with a procedural framework for their application. However, in common with most other provisions of the Statute and the Rules, certain issues remain to be elaborated by the Court through its case law.

CHAPTER 12

COMPENSATION TO AN ARRESTED OR CONVICTED PERSON

Gilbert Bitti[1]

I. INTRODUCTION

Compensation to an arrested or convicted person is dealt with in article 85 of the Statute, which reads as follows:

> 1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
>
> 2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.
>
> 3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

Paragraph 1 of article 85 is identical to article 9, paragraph 5 of the International Covenant on Civil and Political Rights (ICCPR)[2] and paragraph 2 is almost identical to article 14, paragraph 6 of the same instrument. While the first two paragraphs of article 85 give a right to compensation to the arrested or convicted person, the third paragraph confers no right to compensation but merely the possibility for the Court to award compensation at its discretion. The provision contained in the third paragraph, which, was inspired by national legislations, does not exist in the ICCPR or other major international human rights instruments. It represents, therefore, an improvement of international law. However, a number of concerns were raised, particularly regarding the possible costs associated with paragraph 3, that required lengthy and complex negotiations.[3]

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1. The author wishes to thank Jennifer Schense, legal adviser to the Coalition for an International Criminal Court, for her very useful notes.

2. For more information, see D. McGoldrick, *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights* (1991).

3. Indeed, the following footnote to the third paragraph of this article is contained in the report of the Working Group on Procedural Matters at the Rome Conference, Document A/CONF.183/