CRIMINAL LAW BETWEEN WAR AND PEACE:

Justice and Cooperation in criminal matters in international military interventions

EL DERECHO PENAL ENTRE LA GUERRA Y LA PAZ:

Justicia y Cooperación penal en las intervenciones militares internacionales

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Stefano Manacorda
Adán Nieto

Coordination:
Manuel Maroto
Daniel Scheunemann

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THE 'HIDDEN' PRIMER JURISDICTION OF THE ICC *ABOUT THE ARTICLE 70 OF THE STATUTE*

DR. KRISZTINA KARSAI
PhD, University of Szeged, Faculty of Law, Department of Criminal Law and Criminal Procedure

I. INTRODUCTION INTO THE TOPIC

The Treaty of Rome containing the Statute[1] of the permanent International Criminal Court (ICC) was signed by the State Parties on 17th July 1998. The Statute is a great *compromise* between really different states of the world with truly differing interests in order to establish a legitimate international organ of criminal jurisdiction to combat international crimes. The Statute as a legal text is *result* of very cumbersome negotiations, and shows that in favour of important moral values the consensus could be reached. 'The Statute is one of the most *complex* international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of State concerns with their own sovereignty.'[2] The Statute as a *law-product* is a reasonable compromise between the known different systems of justice – and as every compromise, it has its imperfection, as well.

The aim of this paper is to show the imperfections concerning an issue, which is a small but not a marginal one, is the issue of the Statute of the ICC. The offences against the administration of justice are regulated only in one article in the Statute,

1 See in details SCHABAS (2004), BASSIOUNI (2000, 2003), M. NYITRAI (2006), SATZGER (2002), VOGEL (2002), TRIFFTERER (2002)

2 SCHABAS (2004) 25

but their influence or impacts on the jurisdiction upon the 'core crimes' of the ICC could be really significant. The paper does not contain a full analysis of this Article and the related Rules of Rules of Procedure and Evidence, this task is fulfilled by the different Commentaries on the Statute, it focuses only on certain imperfections of the regulation. Furthermore it does not treat the parallel provisions of the ICTY (ICTR).[3]

The second part of the paper handles some aspects of the Hungarian implementation. These aspects could be mirrored also in other law systems, in particular in systems of those State Parties that have comparable legal systems.

II. THE INTERNATIONAL CRIMINAL JURISDICTION

The Statute establishes the permanent international criminal court which has the right to exercise jurisdiction upon the most serious crimes, upon international crimes. The 'core crimes' are genocide, crime against humanity and war crimes. All three crimes within the ICC's jurisdiction are already established in international criminal law; the ICC does not set up new crimes but rather embodies the pre-existing international criminal law. War crimes and crimes against humanity are not created as a part of national laws, it is the international community who considers them as crimes and their elements are also defined by the international community as a consequence. In case of these crimes, criminal responsibility arises directly from international law. On the on hand the conviction of a perpetrator of international crime does not need domestic legislation in case of acceptance of the responsibility arising directly from international law. On the other hand the exercising of the national jurisdiction needs sovereign decision of the State because the criminal procedure is a manifestation of the national sovereignty. If a State itself brings the perpetrator of such a crime to justice it has a duty to prosecute and punish according to international law. But the international community has the right to review the given national praxis if it is not in conformity with international law.

The international criminal jurisdiction of the ICC as a whole is based on the acquisition of the international (criminal) law and also contains provisions from national criminal laws. The punishing power (ius puniendi) of the international community to punish works under different conditions and limits from that of the States. This characteristic of difference arises from the speciality of the concerned crimes (in particular, from the serious danger of these crimes to mankind as a whole), and it is the reason why those crimes are excepted from the merely national jurisdiction.[4] The international prosecution and punishment of the mentioned

3 *See* ARBOUR (1998); HARRIS (1998)

4 *See* Decision of the Hungarian Constitutional Court No. 53 of 1993. IV/3

crimes can be performed only under guaranties and the scope of human rights, but the guaranties cannot be commuted or substituted with the guaranties of national criminal law. In this regard, the rules of the ICC may not however be in full conformity with the requirements of all national legal systems but they are not thereby in conflict with what is called the *general part* of criminal law of most legal systems.[5]

The national jurisdictions have the priority to prosecute the following international crimes: the crimes of genocide, the war crimes and the crimes against humanity. The established permanent court can exercise its judicial power derived from the Statute only if it is proved that the State has no willingness or ability to investigate and prosecute these crimes (the principle of the complementarity)[6]. It does not supplant national courts, it enables the conviction of certain serious crimes in case of the *failure* of national justice, although it is transferred to international level then.

The jurisdiction of the ICC is the delegation of the national powers to prosecute: the ICC is an international court but it is not a supranational body and thus, it does not embody a foreign court or jurisdiction. It is important for the distinction between the concepts of surrender and extradition because the different legal statuses of these similar institutions are laid down by the principle of 'non-foreign jurisdiction'. The principle of complementarity constitutes deference to national sovereignty but the Statute creates the possibility to prosecute and also to try against the willingness. The national sphere is given precedence over the international, unless the national sphere is not up to the task.

All in all, the Statute shows that there is no insoluble conflict between the national sovereignty and the ICC and it can be the highest form of the international mutual co-operation. It serves the protection of the most substantial protecting interests and thus could be the most effective, most authentic and fairest trial. It could even work if the States itself could not prosecute. The ability of the Court to exercise its jurisdiction is provided by the Statute when either the territorial State or the State of nationality of the accused is a Party to the Rome Statute (or has consented ad hoc).[7]

III. OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE OF THE ICC

A. Introduction

Article 70 paragraph 1 of the Rome Statute defines certain offences against the administration of the justice of the ICC which must be committed intentionally.

5 *See* BASSIOUNI (2000) 15
6 Article 124, Articles 12-13 of the Statute
7 *See further* BROOMHALL (1999) 45-112

They are as follows:

> (a) Giving false testimony when under an obligation pursuant to Article 69, paragraph 1, to tell the truth;
> (b) Presenting evidence that the party knows is false or forged;
> (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
> (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
> (e) Retaliating against an official of the Court on account of duties performed by that or another official;
> (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

These offences are in factual relation with the jurisdiction of the ICC and according to this relation it is comprehensible and consequential that the Statute itself rules the mentioned crimes. Pursuant to Article 70 paragraph 1, the Court shall have jurisdiction over the mentioned offences, but there is no voice about complementarity and about the primacy of national jurisdictions for these crimes against the administration of justice. Article 70 does not answer the questions how and when the ICC could exercise jurisdiction over the same case and whether the State Party has right to investigate and prosecute.

Article 70(2) The principles and procedures governing the Court's exercise of jurisdiction over offences under this Article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international co-operation to the Court with respect to its proceedings under this Article shall be governed by the domestic laws of the requested State.

The Rules of Procedure and Evidence[8] (The Rules) elaborated the general principles and procedures for the ICC, but not all of the questions are answered regarding the mentioned offences.

Under 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.*

8 *See* the homepage of the International Criminal Court. http://www.icc-cpi.int/

> *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.*
>
> (Statute) Article 70 4(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

It is clear from the comparison of the above mentioned provisions that the Statute and the Rules establish a ***primer jurisdiction*** for the Court in cases of the offences against the administration of its justice, and the State Party can exercise its jurisdiction only if the Court has decided not to proceed. The latter could be based on the Court's own consideration or on the request of the State which otherwise has the jurisdiction. The obligation to create a legal background to the national investigation and prosecution arises also from Article 70 paragraph 4(b). On the one side, this obligation embodies the principle of assimilation, meaning the State Parties have to legislate to protect the ICC against such offences. This regulation proves the existence of primer jurisdiction of the ICC as well, on the other hand. We can recognise thereby an exception to the principle of the complementarity or rather this principle cannot affect the offences defined in Article 70.[9] The Preamble of the Statute ('[e]mphasising that the International Criminal Court established under this Statute shall be complementarity to national jurisdiction') underlines the complementarity, which is contradictional to Article 70 paragraph 1. It would have been less ambiguous not to insist on the elegant *unified* formulation.

9 The idea of applying the principle of complementarity to Article 70 was arisen during the preparatory process, but a consensus could not have been reached. *See* FRIMAN (2001) 609

The application of the Statute is ruled by Rule 163, which states as a main rule that the Statute and the Rules shall apply *mutatis mutandis* to the Court's investigation (prosecution and punishment) but there are many Articles which cannot be applied. It means in practice that all provisions of Part 2 (Jurisdiction, Admissibility, Applicable Law) shall not apply, the rule of the Applicable Law (Article 21) is an exception and the principle of *ne bis in idem* respecting these offences is laid down in Rule 168.

The fact that the personal jurisdiction of the ICC does not cover the offender under 18 years of age can create a special situation. This disposition can be found in Article 26, which must be applied also to the crimes listed in Article 70. It means that the ICC has no competence to conduct proceedings against juvenile perpetrators of these offences, it is reserved as the sole right to States Parties. It could be mentioned, that under-age offenders need special measures and consequently should be dealt by the national systems[10] which is truly an important aspect to be considered. Nevertheless in an extreme case. The non-availability of the juvenile criminal can block the effective proceeding of the Court.

B. The Offences

The definition of crimes in Article 70 paragraph 1 is relatively wide as it includes not only the acts committed before the Court and those targeting directly the 'transparency' of the justice but also several misconduct outside the 'court-room'. It creates another difficulty namely that the wording of crimes is not always completely exact, so even the further interpretation will not get us closer to the definite content of the provision.

For example, criminal behaviour is the retaliation against a witness or an official of the Court or the impediment, the intimidation of an official (Article 70, paragraph 1d, e). This act can be committed through a variation of actions and it could involve many crimes which are neither of similar danger to the protecting interests nor the same violation against the protected person. The retaliation against a witness or an official can be committed through murder, assault, coercion or blackmail or even defamation or other offences against the person. The impediment or intimidation of an official is another kind of behaviour which can be committed either without real violence ('false imprisonment' or violation of the personal freedom) or with serious violence (for example murder with the specific intent to impede the proceeding).

The term of 'official of the Court' (Article 70, paragraph 1d, e, f) is also not defined by the Statute, and – despite the expectations[11] – the Rules of Procedure and Evidence does not regulated this issue. It means, there is no clear limit, as to

10 FRIMAN (2001) 619

11 *See* HARRIS (1999) 920

category of the protected officials. The simple employment by the ICC cannot establish such a protection. There should be rather a real connection between the judicial work of the ICC and the duties of the concerned official (which are hindered by the corruptly influencing, impeding, intimidating or retaliating). Not only the exact circle of offenders of paragraph f ('soliciting and accepting a bribe as an official of the Court in conjunction with his or her official duties') remains obscure, but the concerned duties as well, consequently, it is difficult to discover the limits to disciplinary responsibility for 'serious misconduct' ('serious breach of duty') regulated in Rules Rules 23-32.

The ambiguous and wide wording of these offences by the Statute will make the national implementation and the extension of the national criminal laws difficult or even impossible. The problem lies in the strict requirements of the substantive criminal law derived from its general principles in particular from the maxim (principle) of *nullum crimen sine lege certa* (the prohibition of imprecise criminal law and sanctions), which expresses an incontrovertible minimum of the respect for the principle of autonomy (also said as 'the rule of law).[12]

Furthermore, the Statute does not satisfactory answer the question of who can commit the individual crimes, which can lead to the conclusion that beside the offender, the witness and the members of the Court even anybody else can exercise them.

If we accept all the above mentioned analysis (the group of punished crimes and possible offenders) the behaviours prosecuted according to the Statute will result in broad limits, which is not justified enough. The principle background of this kind of broad regulation can be the consideration that the mentioned acts are accompanied with the core crimes of the Statute, and can hamper or moreover block the conviction of the commission of the original crimes. Thereby, those actions shall be declared to be punishable as offences against the administration of justice.

The question of the time of commission of the offence is not answered either: whether an investigation needs to be commenced at least or, for example, the destroying or tampering of evidences can be already committed *before* any investigation or prosecution have been opened? It would lead too far if we supposed the latter but it is true that the rules are not definite enough.

C. The Penalties

Article 70 paragraph 3 laid down only that 'in the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.'

12 *See* Ashworth (1995) 67; Jescheck / Weigend (1996) 136-137

The penalty of imprisonment: there is no obligation to impose merely in this frame but it serves as a good guide that the maximum penalty is set out in the Statute and is not more than 5 years for all of those offences. It should be a main principle that different penalties are provided for different types of offences, depending upon their seriousness.

The penalty of fine: Rule 166 paragraph 3 of the Rules of Procedure and Evidence prescribes that

> *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 realisable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants.*

As above, the maximum penalties are given by the provisions of ICC but the common frame of the punishment of different acts cannot be justified not even if this frame serves merely as an orientation. Namely, it is not the same if, for example, somebody submits only a false document (as an evidence) or he injures the witness or the official of the ICC. The different interests violated by the different actions require a protection of different degrees which should be mediated by the proportional system of the penalties. Only the different degrees of the protection can show the hierarchy of the protecting interests.

Regarding the fine as a possible penalty for the crimes referred to in Article 5 of the Statute we can find provisions in Article 77 and in the Rules. Rule 146 paragraph 2 prescribes the amount of fine penalty and the criteria for its sentencing.

> *Rule 146(2) (...) Under no circumstances may the total amount exceed 75 per cent of the value of the convicted person's identifiable assets, liquid or realisable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants.*

The Rules regarding the offences against the administration of ICC's justice prohibit also the *mutatis mutandis* application of the Rules to Article 77 (Rule 146) and it means that there are no detailed provisions concerning the precise preconditions of the imposition of fines (pursuant to Article 70 paragraph 3) in the Statute. It is not clear, on the one hand, whether in case of cumulating of crimes, if the accused is charged – at the same time – with more crimes, both from Article 5

and Article 70 of the Statute, the penalty is a cumulative penalty laid down in Article 78[13], or on the other hand in this case two groups of crimes and punishments are not to be combined. In the latter case, it could lead to different substantive rules and procedures, which would be questionable concerning the status and rights of the accused.

For the case, if the State itself investigates and prosecutes these crimes, the Statute does not contain provisions regarding the applicable penalties. In case of domestic jurisdiction, the rules of national criminal law need to be applied. However, this lack of a possible common framework could lead to significant differences of applicable penalties between the State Parties.

D. Penal Execution

As a main rule, Part 10 of the Statute (about the penal execution of the penalties for the core crimes) is not applicable but there are many provisions which must be applied (Articles 103, 107, 109 and 111). It arises from the comparison of the applicable exceptions and of the rules which are not to be applied that not the same provisions are valid in the enforcement of all sentences taken by the ICC: the rules concerning the penalties sentenced for crimes listed in Article 70 are 'milder' because Articles 105, 106 and 110, which would guarantee the domination of the ICC over its final judgement, are not to be applied. The Court's ***exclusive rights*** include: to change the designation of State of enforcement (Article 104); to modify the sentence of imprisonment; to decide any application for appeal and revision (Article 105); to supervise the enforcement of sentences and conditions of imprisonment (Article 106) and to review the sentences concerning reduction (Article 110). The limitation on the prosecution or punishment of other offences (Article 108) also serves the mentioned mitigation, which embodies a stronger power of the States Party over the sentences.

E. The Ways of National Implementations

Pursuant to Article 70 paragraph 4(a)

> Each State Party shall extend its criminal laws penalising offences against the integrity of its own investigative or judicial process to offences

13 Article 78(3) – When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years' imprisonment or a sentence of life imprisonment in conformity with Article 77 (1)b.

against the administration of justice referred to in this Article, committed on its territory, or by one of its nationals.

This paragraph embodies an obligation to amend the national criminal acts. It means that the domestic rules of the State Party containing the ***substantive*** legal conditions to charge individuals must be amended.

The majority of the States Parties will already have Acts that punish the offences against their own administration of justice[14]. In this case, the legislation should be purely extended to given *persons* (accused, witness, official of the ICC) and to given *acts* committed by anybody (influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence; impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties; retaliating against an official of the Court on account of duties performed by that or another official). If a State Party does not have any legislation concerning the protection of the administration of its own justice it has to create a new piece of legislation to comply with the obligation arising from the Statute.

Furthermore, the State Party has the duty to enable to proceed for these crimes: the legal ***procedural*** provisions must be established by legislation if there has not been already a possibility to proceed in the national system. The first sentence of Article 70 paragraph 4b specifies this obligation formally but at the same time it imposes substantial requirements on the processes of the national authorities. These shall treat the case with diligence and effectively (whatever the latter should mean), but there is no sanction for the case of not meeting these latter requirements.

F. Summary

All in all, it should be stated that both the ICC and the State Parties can have jurisdiction upon the crimes laid down in Article 70. The right of the former to prosecute arises directly from the Statute itself, and it is a genuine primer jurisdiction. The obligation to establish the adequate substantive and procedural rules of jurisdiction of the latter is laid down in Article 70 (if the criminal law of the State did not involve the protection of the mentioned interests of any international criminal court before). This is the so-called ***principle of assimilation***; the content of which is

14 *See an analysis* BORNKAMM: Pressefreiheit und Fairness des Strafverfahrens. Die Grenzen der Bericherstattung über schwebende Strafverfahren im englischen, amerikanischen und deutschen Recht. (1980) cited by TRIFFTERER (1999) 925.

already well-known in international law, and nowadays in the European Community law. It means, that the State shall penalise the conduct prescribed by the international treaty if it has such an offence in its law for domestic cases. This legislation is always an extension of existing national rules. Consequently, the principle does not oblige States to create ones, if it does not have comparable offences. Even in case of an extension, the exercising of the jurisdiction of the State Party depends on the request of the ICC, so the State has only an additional jurisdiction in this issue.

The commission or the suspicion of the mentioned crimes can be recognised both by the ICC and the State Party. In the latter case, the State Party has to indicate it to the ICC because it is merely the ICC which can decide whether it will proceed or not. The State Party has to exercise its jurisdiction if the ICC does not proceed or in the case of an offender under the age of 18 because here the State Party has the sole right to judge on the matter. If the ICC convicts the perpetrator who committed an offence against the administration of justice of the ICC the substantive and procedural provisions of the Statute must be applied.

The penalties sentenced by the ICC – similar to the other penalties pursuant to the Statute – must be enforced by the designated State but the national law of the State Party has more influence upon the 'concrete' enforcement (for example the placement on parole).

IV. SOME ASPECTS OF NATIONAL IMPLEMENTATION – THE EXAMPLE OF HUNGARY

A. In General

Hungary belonged to the group of so-called 'like-minded states' during the negotiations and its enthusiasm about the international criminal court did not chilled in the following time. Thereby, there is an intention to ratify it in Hungary, but the necessary legal steps have not been taken yet. The Hungarian Parliament decided on 6th of February 2006 about the confirmation of the Statute in form of an simple decision of the Parliament, but it was not followed by the ratification via formal act. There are some drafts of the possible legislation, although the controversial constitutional interpretations (whether the amendment of the Hungarian Constitution is needed or not) blocks the adoption of this formal act.[15]

The concrete form of the ratification depends on the constitutional rules of the State Party, the national constitutions vary in how they incorporate international law into domestic law, and States differ consequently in their need for implementing

15 Nevertheless, the Republic of Hungary already adopted the ratification act of the Agreement on the privileges and immunities of the International Criminal Court (Act XXXI of 2006)

legislation. There we can find three groups of legislative systems – classified by BROOMHALL – accordingly: '(a) ratification of the Statute with no changes to national law as the international obligation of the Statute automatically become part of that law; (b) rudimentary legislation, declaring the substantive law and the international co-operation procedures of the Statute to be a part of national law and to override any legislation with which they may be incompatible; (c) many systems must undertake a review of national legislation to determine the extent to which the international instrument requires procedures not provided under or inconsistent with national law or the constitution, and must then make appropriate changes to effect implementation.'[16]

In the first step, the legal background of the jurisdiction of the ICC for committed crimes by Hungarian nationals or on Hungarian territory will be laid down by Hungary. Regarding the substantive rules of the Statute and the compatibility of the national legislation with them, there is an important aspect to consider: the codification process of the new Hungarian Criminal Code has begun this year and one of its aims is to ensure the homogenous ruling of international crimes (according to the Geneva Conventions and Rome Statute) in this framework.

Hungary will follow the general principle of '*aut dedere aut judicare'* and, in this regard, firstly complies with the obligation of '*aut dedere*' and after the closure of this process also the obligation of '*aut judicare*'. The whole adoption (class [b]) should be effort in the near future, but some new modification are already undertaken regarding the Statute and the international criminal courts (see below 'In Particular').

Pursuant to Article 4 paragraph 1 of the Hungarian Criminal Code:

> Hungarian law shall also be applied to acts committed by non-Hungarian citizens abroad, if they are (a) criminal acts in accordance with Hungarian law and are also punishable in accordance with the law of the place of perpetration or (b) criminal acts against the state (Chapter X) with the exception of the espionage against allied army, regardless of whether it is punishable in accordance with the law of the place of perpetration or (c) crimes against humanity (Chapter XI) or any other crime, the prosecution of which is prescribed by an international treaty.

From the point of view of the principle *nullum crimen sine lege* (applying it to international crimes) one should distinguish two categories of international crimes, namely, crimes against international law and crimes defined in international treaties. Criminal responsibility of individuals for crimes against international law

16 BROOMHALL (1999) 80 and BROOMHALL (1999b) 119

is based on international law independently from the domestic legal order, while criminal responsibility for crimes defined in [international] treaties depends on their implementation into domestic legal order.'[17] The Hungarian criminal law also punishes crimes against humanity, such as war crimes and genocide (Articles 158-165 and Article 155 of the Hungarian Criminal Code[18]). It means that the most punishable behaviours by the ICC could be prosecuted by the current provisions being in force.

The following special aspects of the Hungarian implementation could be quite marginal in the view of the general influence of the ICC. However, some special problems should be shown by several specific questions that have arisen in the process of the Hungarian implementation.

B. In Particular

B.1. Substantive Criminal Law

In the Hungarian criminal law arose a need to expand the provisions about the decisions taken by foreign courts including into this category the international court. Pursuant to former Article 6 paragraph 1b of the Hungarian Criminal Code the foreign court's decision had the same effect as a Hungarian one, if the foreign court has proceeded for the offence which is punishable according to both the Hungarian and the foreign law, in addition that the procedure abroad and the imposed sanction is in conformity with the Hungarian law. It is the right of the competent national court to decide about this conformity.

In the system of the complementarity, the ICC is not a foreign court, although Hungary extended the scope of this legislation in a way, that the law (to Article 6 paragraph 1b of the Criminal Code) covers all international courts established by an international treaty or by the decision of the Security Council of the UN. It means, their judgements will be 'controlled' by a national court, if the enforcement of the judgement should be realised in Hungary[19].

B.2. Procedural Law[20] and International Co-operation in Criminal Matters[21]

Regarding the procedural provisions, it should be noted that the States Parties are generally obliged to ensure that there are procedures available under their national

17 Wiener (1993) 211

18 Act IV of 1978 on the Criminal Code

19 The legislator replaced this rule from the Code into the Act on International Co-operation in Criminal Matters in 2007, into Article 47 (Act III of 2007).

20 Act XIX of 1998 on the Criminal Procedure

21 Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters

law for all of the forms of co-operation which are specified under Part 9 (Article 88) and to co-operate fully with the Court in its investigation (Article 86). This general obligation is set out and then applied to arrest, surrender and other forms of co-operation. Also they shall, in accordance with the provisions of Part 9 and under procedures of national law, comply with requests by the Court to provide the assistance in relation to investigations or prosecutions (Article 93). Even so Hungary itself does not intend to prosecute at the first place, the Hungarian legal rules must be amended to enable the investigation and prosecution by the ICC. In this regard, some provisions are amended, for example a new ground is laid down for the suspension of the domestic criminal procedure in case of the ICC (or any other international criminal court) exercise its jurisdiction, *but only if* the international criminal court requests the transmission of the Hungarian criminal procedure. Furthermore, there is a new cause for the termination of the criminal procedure, namely jurisdiction exercised by the ICC.

There is a really important distinction between the extradition and the so-called surrender in the Statute of Rome. According to Article 102 of it:

> For the purposes of this Statute: (a) 'surrender' means the delivering up of a person by a State to the Court, pursuant to this Statute; (b) 'extradition' means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

The differentiation between two similar institutions is a very clever solution to avoid several incompatibilities with the different national laws. The material requirements of the surrender provided by the Statute are very close to that of the extradition because it states that those requirements should not be more burdensome than those applicable to requests for extradition between the State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court (Article 91 paragraph 4c).

It needs to be mentioned that the different quality of the institutions exists only from the point of view of the ICC or the State because the Court does not exercise a foreign jurisdiction. But from the point of view of the offender it is not his own state which has the competence over him, in particular, as it is also possible that the sentence will be executed in another state.

The Hungarian legislation contains the obligation to enable the surrender of Hungarian nationals and the possible doubts on the real existence of the mentioned distinction are not relevant from the point of view of this duty. The Hungarian law prohibits only the extradition of nationals to another state (but the Court is not another state) but this is ruled merely in an act and not in the constitution. Further, the Hungarian Act on International Co-operation in Criminal Matters is subsidiary

to international treaties accordingly to the Statute too. Thereby, only the mentioned act must have been amended and new provisions shall have been laid down: the institution of surrender as a whole must have been newly codified.

Concerning the enforcement of sentences taken by the ICC, the question arises whether the Hungarian State will be ready to enforce the sentences. The present legal background allows already the enforcement of these 'foreign' sentences[22] and thus, it is rather a financial issue: if the political will holds it necessary and important the Hungarian State will indicate its willingness to accept sentenced persons.

The Statute ensures that the ICC has almost an exclusive right to affect the sentence taken by the Court thereby the domestic law of the State of enforcement cannot influence it:

> Article 105(1) Subject to conditions which a State may have specified in accordance with Article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.
>
> (2) The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.
>
> Article 110(2) The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

If Hungary takes upon the enforcement of sentences of the ICC, supposedly, the execution will be realised in its common penal institutions. The imprisonment would be executed in the degree of high security[23], i.e. in an institution of greatest security. The prisoners convicted by the ICC would not have fully the same status as the other prisoners as the most important question of whether the sentence will be reduced or not is not ruled by the national law but by the ICC Statute and the Rules and Procedures of Evidence.

C. With Regard to Article 70 of the Statute of the ICC

As earlier mentioned, the Hungarian ratification occurs in several steps due to the pending procedure of codification of the new substantive criminal law. In the first

22 Article 46 of the Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters

23 Pursuant to Article 41 of the Hungarian Criminal Code '[t]he imprisonment shall be executed in an institution for the execution of punishments, in the degrees of high security prison, prison or detention centre.'

step, only the necessary rules will be laid down to enable the proceeding of the ICC in an occurrent Hungarian matter. But obligations have arisen from Article 70 of the ICC which are of ***different nature*** and which bind Hungary (and other Member States) to really create new provisions in its substantive criminal law. See some characteristic questions below.

C.1. Proportionality of penalties

Article 70 paragraph 3 of the Statute provides that the offences against the administration of justice of the ICC foresee a term of imprisonment not exceeding five years or a fine or both. This provision, however, binds only the Court when it exercises the jurisdiction upon the crimes listed in Article 70 paragraph 1. As mentioned, the important question arises whether the national jurisdiction also has the duty to concern this 'material' rule of the Statute or not. It would be very dangerous to state that the concerned provisions of the Statute 'serve as a good guide'[24] to the national legislation because that functions only if we suppose an implied obligation within it. But already the MANUAL 2000 explains that this rule allows different penalties for different types of offences: the penalty depends upon the seriousness of the offences and not upon the provisions of the Statute. Thereby, the rules concerning the penalties bind only the Court in its proceeding. There is no obligation to punish these offences in the domestic criminal law with the penalties of the Statute.

Furthermore, the Statute does not regulate the applicable penalties, if the State itself investigates and prosecutes the offences against the administration of justice of the ICC. In this case, the State applies its domestic criminal law with the prescribed penalties as well. In both case, of the sole extension of the existing domestic provisions or in enacting of new regulation of the offences against the administration of justice in the domestic criminal law, the national legislator prescribes the penalties. Even if supposed, that the national legislator follows the two aspects of the principle of proportionality, that of the proportionality with the seriousness of the offence and the proportionality with the whole system of own criminal sanctions, the prescribed penalties can be identical but also different from that in the Statute. It means, that exercising the national jurisdiction can result different judgements (penalties), consequently the judgements depend on the place of trial (either before the ICC or before national court).

In that case, if the national penalties are more severe (for example the offence against an official under Article 70 of the Statute includes an intentionally murder as

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well), the maximum penalty under the prosecution of the Court would be insufficient, the ICC will require the prosecution by the State[25]. This kind of guided jurisdiction embodies a questionable type of ***forum shopping*** in criminal matters, which is not compatible with the idea and spirit of the international criminal justice established by the Statute.

C.2. Limitation of Offences

Some obscurities are to be found regarding the limitation of this crimes and penalties alike. Rule 164 of the RPE states namely that

> *(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 (...)*
>
> *(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 (...).*

This rule contains the limitation of both criminal responsibility (punishability) and punishment. These provisions do not contain obligations to establish the same rules into the national law for the States Parties. The relevant rules form part of the criminal law. In the Hungarian criminal law, it is part of the substantive law (with procedural character too). Article 33 paragraph 1 of the Criminal Code orders that the punishability shall be prescribed a) in the case of an offence, which is punishable by life imprisonment, by the elapse of twenty years; b) in case of any other crime, by the elapse of the period of time equal to the upper limit of the punishment, but not less than three years.

Since the very different characters of the crimes penalised by Article 70 of the Statute is undoubted – as seen earlier – the similar problem arises concerning the limitation. As mentioned, the limitation of the punishability depends on the frame of the penalty laid down in the Hungarian Criminal Code. The provisions of the limitation bind the ICC, which can only proceed if the questionable period does not elapse. But questionable situations can arise if the Statute's provisions upon the limitation and the relating national provisions are not in conformity with each other, namely the limitation for the same offence is realised on different dates. For example, the punishability for the offence is prescribed earlier in the State than that according to the Statute. One thing is clear, however, that the unavoidable diversity

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of the national rules which could cause impunity or which are comprised milder provisions (for example shorter period of the limitation) would probably be scarcely tolerated by the international community.

Generally, it should also be noted that five years as a general rule of the limitation according to Rule 164 of the Rules and Procedure of Evidence does not correspond to the requirements of the 'traditional criminal law' (supposing that the limitation must also be depended on the gravity of the questionable crime). But probably there is no need to expect the ICC to have the character of traditional (national) criminal law. Still, this consideration could be justified for the jurisdiction upon the core crimes but not in any case regarding the offences against the administration of the justice of the ICC.

According to the limitation of the sanctions, this problem also arises because the limitation's period in the Hungarian law depends on the sentenced penalty:

> Article 67(1) The principal penalty shall be prescribed by the elapse of a) twenty years in case of imprisonment of fifteen years or a more serious punishment, b) fifteen years in case of imprisonment of ten or more years, c) ten years in case of imprisonment of five or more years, d) five years in case of imprisonment of less then five years, e) three years, in case of labour in the public the interest or a fine.

If the ICC proceeds itself the enforcement of sanctions imposed with respect to offences defined in Article 70 shall be subject to a period of limitation of 10 years. It means that the limitation of the sanction does not depend on the (gravity of the) sentenced penalty. The sentenced fine can also be subject to limitation of 10 years (!).

According to the related Hungarian law, only 5 years as sentenced imprisonment prescribes after 10 years, the shorter imprisonment has shorter period of limitation (only 5 years) and the limitation of the enforcement of fines is merely three years.

All in all, the offender gains, if he is brought to trial in Hungary.

C.3. How to implement the offences? (Special Part of the Criminal Code)

The national implementation of the provisions laid down in Article 70 will find the greatest difficulty in extending the national criminal law upon penalisation of the offences or rather in establishing such rules in conformity with the Statute. The crimes against the administration of the ICC's justice incorporate numerous actions – as seen earlier – which are sanctioned usually by national criminal laws but not always and anywhere as crimes against 'the integrity of its own investigative or judicial process'.

There are crimes in Article 70 paragraph 1 which are adequately defined (giving false testimony, presentation of false evidence). Here the extension of national protection can mean simply that the defined new elements must be penalised which hereby supplement the original ones. For example, the special Hungarian crimes against the integrity of the administration of justice can be extended for the special procedure of the ICC, for the special persons and special objects. Also the non-special national crimes against the justice, like bribery, could be supplemented with an element regarding the ICC's jurisdiction (bribery of witness or official). This way of implementation was chosen by the Hungarian legislator (Article 249/B, 258/B-258/F).

The common characteristic of these crimes is the adequate definition by the ICC and their existence (with the same elements) in the Hungarian criminal law.

But there is also another group of crimes listed in Article 70 paragraph 1 which are not worded strictly enough. It means that they are too general to be a subject of national criminal legislation and can thereby contain a lot of different criminal behaviours. The obstruction or interference with the attendance or testimony of a witness, retaliation against a witness or an official of the Court or interference with the collection of evidence or the impediment or intimidation of an official are such acts which can be realised by violence, coercion or duress or by breaking of the personal freedom or by defamatory oral acts or even by crimes against property and also by other crimes. In these cases, there will be almost no problem to prosecute because the mentioned crimes are originally penalised by the national criminal law. The problem regarding the national implementation arises in situations when the committed act *does not embody any crime* according to the Hungarian (or other domestic) criminal law. The obligation of the State Party to legislate switches on here, this is the real legal extension to which the State is obliged by Article 70 paragraph 4a. The Hungarian legislator did not threat this issue, the arisen duty of implementation is not – yet – fulfilled.

C.4. Other Questions

Regarding these crimes and their prosecution (and execution), nearly the same implementing provisions must be laid down as concerning the 'core crimes' of the Statute but the special characteristic of its ruling requires some supplementary approaches. The legislation of implementation must also be concerned *inter alia* that the possibility to surrender must be established and the legal grounds of suspension and termination of the domestic criminal procedure must be extended upon the ICC's proceeding for these crimes.

V. SUMMARY

It is indisputable, that the legal characteristic of the offences against the administration of the justice in the Statute are different from the core crimes, so are the consequences. But the greater flexibility in this legal framework could not be justified by the inherent differences of these offences from the 'core crimes', if it leads to lack of impunity, to difficulties of application and to other legal interferences.