INTERNATIONAL CRIMINAL LAW IN GERMANY
CASE LAW AND LEGISLATION

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I. Introduction

Dear conference participants! First I would like to thank the War Crimes Section of the Canadian Department of Justice - and in particular John McManus - for their friendly invitation to take part in this Conference, and for the unique opportunity to learn about what Canada and other states do in the field of international criminal law. And naturally, I also would like to thank you for your interest in the German approach.

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I think it is safe to say that Germany is among the strongest supporters of an effective international justice. Our support is not only expressed by our unrelenting efforts to make ICC as strong and independent as possible and to defend the integrity of its Statute; our commitment is also demonstrated by cases already tried by German courts, as well as by our draft International Crimes Code[1] and the draft Rome Statute Implementation Act.[2] Both drafts have been adopted by the Bundestag on 25 April 2002, and are presently considered in the Bundesrat; it therefore, is possible (and – with regard to the obligations under the cooperation regime of the Rome Statute – also highly desirable) that they enter into force contemporaneously with the Rome Statute on 1 July 2002.

Before I start, let me make a short preliminary remark on terminology. As the term "international crimes" is not very clearly defined I will, in the following, use the term *core crimes* for the three crimes under the Rome Statute (namely genocide, crimes against humanity and war crimes).

II. Case Law and Current Legislation

Having said this, let me turn without further delay to the first of my three subjects: namely our case law which, at the same time will serve to give you an idea of our current legislation. I will deal here with two issues: the question *which* criminal law provisions can be applied and German *jurisdiction* over crimes committed by a foreigner abroad; for example, in the war in former Yugoslavia.[3]

1. Current German Law

As to the issue of applicable criminal law provisions, it is important to note that we have a very strict approach to *nullum crimen*. It does not suffice that an act was criminal at the time of its commission (e.g. under international law), but the crime and the possible range of sanctions must have been defined in a *German* statute. Thus, the only core crime which currently can be prosecuted, as such, is genocide which is in our Criminal Code since the nineteen fifties when we ratified the Genocide Convention.[4]

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1 *Draft of an Act to Introduce the Code of Crimes against International Law*, (Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches); the Code of Crimes against International Law (hereinafter draft International Crimes Code) is contained in Article 1 of this Act; Articles 2 - 7 of the Act amend other German laws. The German original of the draft and translations into all six UN languages are available at <http://www.iuscrim.mpg.de/forsch/online_pub.html#legaltext> bottom of page.

2 *Draft Act fort the Implementation of the Rome Statute of the International Criminal Court of 17 July 1998* (Entwurf eines Gesetzes zur Ausführung des Römischen Satuts des Internationalen Strafgerichtshof vom 17. Juli 1998); available at <http://www.iuscrim.mpg.de/bin/sonst/prechts.gif>.

3 For a more comprehensive survey of the German case law see, Kai Ambos & Steffen Wirth, *Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts* (1994 - 2000), in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW. CURRENT DEVELOPMENTS 769-797 (Horst Fischer, Claus Kreß & Sascha Lüder, eds., Berlin 2001).

4 Section 220a German Criminal Code reads (translation by the author, cf. English translation of Section 6 of the International Crimes Code, supra note 1): "Whoever, with the intent of destroying as such, in whole or in part, a national, racial or religious group or a group characterized by its affiliation to a people, 1. kills members of the group; 2. causes serious bodily or mental harm to members of the group, especially of the kind referred to in section 226 of the Criminal Code; 3. inflicts on the group conditions apt to bring about its physical destruction in whole or in part; 4. imposes measures de-

In contrast, trials for crimes against humanity and war crimes are not yet possible in Germany as the draft International Crimes Code is not yet in force. However, as under any other jurisdiction, many of the acts amounting to core crimes can be punished in Germany as violations of national law. I'll come back to this right away in connection with a decision on war crimes.

The second interesting issue I will try to explain is jurisdiction and in particular universal jurisdiction. Universal jurisdiction exists under current German criminal law *inter alia* for genocide and where Germany is under a treaty obligation to prosecute[5]; most importantly in the cases of the Geneva Conventions and Additional Protocol I[6] and the Anti Torture Convention[7]. With regard to treaty obligations to exercise jurisdiction it might even be more adequate not to speak of universal jurisdiction but of treaty wide jurisdiction.

This is the legal framework in which German prosecutors in the nineteen-nineties started to indict suspects from the Yugoslav war for genocide and war crimes. These procedures, to date, have resulted in four convictions (Nicola Jorgic, Maksim Sokolovic, Djuradi Kuslic and Novislaw Djajic), one judgment of our federal constitutional court, three of our supreme federal court, and some more decisions by lower courts.[8] In the *Tadic* case the ICTY decided to take the case after charges had been brought in

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signed to prevent births within the group; 5. forcibly transfers children from one group to another, shall be punished by imprisonment for life."

5 Section 6 no. 1 & no. 9 German Criminal Code read (translation according to <http://wings.buffalo.edu/law/bclc/StGBframe.htm>): "German penal law […] is applicable, independent of the law of the place of the act, to the following acts committed outside of the country: 1. Genocide (section 220a); […] 9. Acts that are to be prosecuted by the terms of an international treaty binding on the Federal Republic of Germany even if they are committed outside the country."

6 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (1950) 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, (1950) 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, (1950) 75 U.N.T.S. 135; *Geneva Convention Relative to the Protection of Civilians*, (1950) 75 U.N.T.S. 287; *Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts*, (1979) 1125 U.N.T.S. 3.

7 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (1987) 1465 U.N.T.S. 85.

8 Cf. Bundesverfassungsgericht (BVerfG), Decision, 12 December 2000 - 2 BvR 1290/99 ("*Jorgic*"), reprinted in 28 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (EuGRZ) 76 (2001), available at <www.bverfg.de/entscheidungen/frames/rk20001212_2bvr129099>; Bundesgerichtshof (BGH), Judgment, 30 April 1999 - 3 StR 215/98 ("*Jorgic*"), reprinted in: 45 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN (BGHSt) 65; BGH, Judgment, 21 February 2001 - 3 StR 372/00 ("*Sokolovic*"), reprinted in: 46 BGHST 65 (also in: 54 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2728 (2001)); BGH, Decision, 21 February 2001 - 3 StR 244/00 ("*Kuslic*"), reprinted in: 54 NJW 2732; Bayerisches Oberstes Landesgericht (BayObLG), Judgment, 23 May 1997, 3 St 20/06 ("*Djajic*"), reprinted in: 51 NJW 392 (1998); for further references cf. Kai Ambos & Steffen Wirth, *supra* note 3, at 769 footnote 1.

Germany and Dusko Tadic was surrendered to The Hague. As recently as 15 January 2002 another suspect has been arrested.[9]

2. War Crimes

Let me now come to the case law regarding war crimes. As just indicated, German courts may try grave breaches of the Geneva Law, and this is war crimes in international conflicts, under the principle of universal – or rather treaty wide – jurisdiction. However, as war crimes have not yet been regulated in a German statute, the awkward situation arises that we *do* have jurisdiction but *lack* definitions for the respective crimes. In that situation, all that German courts could do was to apply what they had - namely the law regarding ordinary crimes. Thus, a Bavarian Court tried and convicted an accused from the Bosnian war for (aiding and abetting) manslaughter, instead of the war crime of willful killing.[10]

In such a setting a two step examination of every single crime is required. In the first step the court must examine whether, according to the facts, a crime under the Geneva Law has been committed. This first step, however, would serve only to ascertain German jurisdiction[11] – because universal jurisdiction does not exist with regard to "ordinary" manslaughter, but only with regard to war crimes because they are crimes under international law.[12] In a second step, the court then would have to subsume the *same* facts under the German criminal law provision of manslaughter[13] in order to find out if the person was indeed punishable under German law.

In another case however, the problem was solved in a more simple way; the issue of an international conflict was examined on the jurisdictional level and then the Court simply applied the German law on willful killing.[14] Thus, the armed conflict was treated as a merely jurisdictional issue.

However, there is a problem with both of these approaches - even if the former one seems to be legally sounder than the latter. Whereas there may be no *practical* issues in cases of murder, the picture would look entirely different, for instance, with regard to the war crime of extensive destruction of property. This crime would also be punishable under the German law - namely as destruction of property.[15] But the punishment would be a fine or a maximum term of two years of imprisonment. In contrast, Section 9 (1) our draft International Crimes Code provides for a minimum punishment of 1 year and a maximum of 10 years because our drafters correctly held that destruction of property

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9 Cf. press release <http://www.generalbundesanwalt.de/news/mehr.php?id=3635&rid=132&suche=v%F6lkermord&heftauswahl= >.

10 BayObLG in *Djajic*, *supra* note 8.

11 This method has been chosen by the BGH in *Sokolovic*, *supra* note 8, 300, 302 *et seq*.

12 Cf. Helmut Satzger, *Das neue Völkerstrafgesetzbuch. Eine kritische Würdigung*, 22 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 125, 131 (2002).

13 Sections 211 *et seq.* of the German Criminal Code.

14 BayObLG in *Djajic*, *supra* note 8, 51 NJW 392 (1998); the passages of the decision examining the German law of willful killing are not reprinted.

15 Section 303 of the German Criminal Code.

committed as a war crime is much more serious than destruction of property committed in peace.[16] I think these examples clearly show that punishing core crimes under "ordinary" criminal law is not a very desirable solution.[17]

3. Legitimizing Link

As mentioned above, no similar problems arise when prosecuting genocide, as this crime is already defined in German statute law. However, in there lies yet another problem, which since the very first decisions overshadows German procedures for genocide and war crimes. I am speaking of the fairly strange theory that our Federal Supreme Court developed with regard to universal jurisdiction.

It would not apply the provisions on universal jurisdiction *unless* some kind of *link* exists which somehow connects Germany and the crime.[18] Such a "legitimizing link" ("*legitimierender Anknüpfungspunkt*") has been seen, for example, in the fact that the accused had lived in Germany for a long time and received a pension there.[19]

I think that the Federal Supreme Court was wrong to require this link. Basically, what was done here was mixing up two concepts of jurisdiction: The first of these concepts is that, in general, a state may exercise its jurisdiction only if there is a sufficiently close relation between the crime and the state. As you all know, this relation may be, for instance, that the crime was committed on the states territory by a citizen of the state, or that it was directed against an essential and legitimate interest of this state. However, and this is the second concept, there is a jurisdiction which, *by definition,* does not require any such link - and that is universal jurisdiction. Once it is accepted that there is such a thing as universal jurisdiction, it does not make any sense to require a legitimiz-

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[16] Equally, it is not possible to give due consideration to the so called context element in crimes against humanity (namely that the criminal act must be committed as part of a widespread or systematic attack against civilians, *chapeau* of Article 7 (1) and para. (2) (a) of the Rome Statute) when punishing the crime against humanity of murder under the domestic law for willful killing. This has been pointed out by Dr. Manuel Sager from Switzerland in his presentation. Cf. on the issue also the Explanations on the draft International Crimes Code, *supra* note 1, at II; Helmut Satzger, *supra* note 12, 126.

[17] This conclusion is confirmed by the fact that there are war crimes under the Geneva Conventions which cannot be prosecuted *at all* under our domestic law – as, for instance, forcing a protected person to serve in the forces of a hostile power (Article 8 (2) (a) (v) of the Rome Statute); for other examples cf. Helmut Satzger, *supra* note 12, 126.

[18] Originally the BGH required a legitimizing link for both prosecutions for genocide and for grave breaches of the Geneva Conventions. However, with regard to the latter, this was particularly problematic as the Conventions contain not only a permission to prosecute, but even an *obligation* which is in no way conditional of a legitimizing link (cf., e.g., Article 146 of the fourth Geneva Convention). Thus, the BGH in its first subject matter decision on genocide did no longer claim that a legitimizing link is required with regard to grave breaches but left the issue open, BGH in *Jorgic, supra* note 8, 69. In a later decision it went even further, stating that it is inclined not to require a legitimizing link for the prosecution of grave breaches, BGH in *Sokolovic*, *supra* note 8, 307. However, there is no similar development with regard to the prosecution of genocide (even if the wording of *Sokolovic* is a little more lenient, *id.* at 307). Rather here the holding of *Jorgic* has not yet been reversed. In this decision the BGH held that for prosecutions of genocide under section 6 no. 1 of the German Criminal Code (cf. *supra* note 5) a legitimizing link is mandatory under international law. On the development of the doctrine of the legitimizing link and its criticism cf. Kai Ambos & Steffen Wirth, *supra* note 3, 778-83.

[19] BGH in *Jorgic*, *supra* note 8, 68; BGH in *Sokolovic*, *supra* note 8, 306 *et seq*.

ing link.[20] Let me cut it short. Our courts are very reluctant to give up the time honored principle of legitimizing link despite the fact that all but very few writers are against it.[21]

Luckily the German draft International Crimes Code, which I will turn to in a second- will take care of the matter, and thus it may be hoped that the issues just indicated will soon be history.

III. Draft Legislation

Let me now leave our case law and our current law and turn to our future legislation on core crimes and on cooperation with the ICC. In this regard there exist four legislative projects – two already accomplished and two others whose accomplishment is imminent:

- First - the Ratification Act (IStGH Statutsgesetz) which enabled Germany to ratify the Rome Statute on 11 December 2000 and transformed the Rome Statute into German Law;[22]
- Second - the draft Rome Statute Implementation Act that will allow Germany to cooperate with the International Criminal Court in full accordance with the Statute.[23]
- Third - in connection with the Implementation Act - a constitutional amendment regarding the surrender of German nationals to the ICC;[24]
- Fourth - the draft International Crimes Code[25] under which Germany will be able to prosecute and try core crimes, so as to avoid a ruling of the ICC under the principle of complementarity that Germany is unable or unwilling to prosecute.

In the following I will only consider the latter three of these laws.

1. International Crimes Code

I shall begin with the latter, namely the draft International Crimes Code.[26] This legislation was drafted by a group of experts including law professors and government officials. This approach, which is not normally followed in Germany, proved very fruitful as it allowed to identify and to address most conceivable problems immediately and in the appropriate context. As I will try to show the draft will bring German law in line

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[20] Kai Ambos & Steffen Wirth, *supra* note 3, 779-80; Steffen Wirth & Jan Harder, *Die Anpassung des deutschen Rechts an das Römische Statut des Internationalen Strafgerichtshofs aus Sicht deutscher Nichtregierungsorganisationen*,33 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 144, 147 footnote 35.

[21] Most recently Helmut Satzger, *supra* note 12,131; for further references see Kai Ambos & Steffen Wirth, *supra* note 3, 779 footnote 56.

[22] 2000 BUNDESGESETZBLATT (BGBl.) TEIL II, at 1393.

[23] *Supra* note 1.

[24] 2000 BGBl. I , at 1633.

[25] *Supra* note 2.

[26] For a critical analysis of this draft see Helmut Satzger, *supra* note 12.

with current international developments, enabling us to try all three-core crimes and, moreover, it will fix the issue of universal jurisdiction mentioned above.

a. Principles

At the beginning of my survey of a few key features of the International Crimes Code I will set out some principles which served as guidelines for the drafters. The most important of these principles was to include only such crimes as already exist under customary international law. Otherwise it would not have been possible to provide for true universal jurisdiction.[27] In this regard, Germany, like Canada, holds that all the crimes under the Statute are also crimes under customary international law and that – in addition – there are some more[28] which also fulfill the customary international law requirement.[29]

Another consideration which largely determines the draft, as it is before us now, is that for constitutional reasons we could not incorporate the crimes as they are formulated in the Rome Statute (And, naturally, we also thought that we could improve a little of what we found there). Thus, the way which has been chosen by Canada[30] and others – namely to have a very short and elegant law which simply provides that the crimes of the Rome Statute are applicable also before national courts – was not open to us. We had to reformulate these crimes in order to bring them in accordance with our constitutional requirement that a crime must have been clearly determined at the time of the commission of the act.[31] I do not think, by the way, this will affect our ability to prosecute under the principle of complementarity because a perfect duplication of the Rome Statute is not necessary in this regard.

The last overall characteristic of the draft code is its very existence. That is, we decided to accomplish the implementation of core crimes into German law not by amending our general Criminal Code but to provide for a distinct legislation on its own. This decision was taken for compelling technical reasons[32] for the sake of clarity and easy applicability and last but not least for didactic reasons – a separate law is much easier to use in the education of soldiers and others that must observe international criminal law.[33]

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27 Cf. Helmut Satzger, *supra* note 12, 131.

28 For instance, the draft contains a provision which criminalizes the use of biological or chemical weapons, Section 12 (1) no. 2 of the draft International Crimes Code, *supra* note 1.

29 Cf. Explanations of the draft, *supra* note 1, at I.

30 Sections 4 and 6 of the Crimes Against Humanity and War Crimes Act, Revised Statutes of Canada (R.S.C.), chapter 24 (2000) (Can.), available at <http://laws.justice.gc.ca/en/C-45.9/38096.html>; on this legislation cf. William A. Schabas, *Canadian Implementing Legislation for the Rome Statute*, 3 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 337 (2000).

31 For a criticism of the draft International Crimes Code with a view to the principle of certainty as regulated in Article 103 (2) of the Basic Law see Helmut Satzger, *supra* note 12, 126, 130-31.

32 It would have been extremely burdensome to review our Criminal Code and to examine in every single case whether the crime already is provided for in the Code or whether amendments are necessary.

33 Cf. Helmut Satzger, *supra* note 12, 126-27.

b. Jurisdiction

I would now like to come to the issue which very well might turn out to be the most important one here. Namely the jurisdiction provided for in the draft. Germany will take a three level approach to this issue in order to balance the need to respect the sovereignty of foreign states, the need to prevent impunity, and also our own interest in flexibility and the careful allocation of judicial resources.

The three levels of our approach to jurisdiction are as follows: In the first level, the *scope* of our jurisdiction over core crimes is regulated – and this is plainly universal jurisdiction without any restriction. The second level concerns the *exercise* of this jurisdiction – taking into consideration foreign sovereignty as well as our limited resources. And the third level avails itself of the ICC in order to provide *additional flexibility* for the mutual benefit of the Court and Germany. It provides that under *very* particular circumstances Germany will step back and leave a case for the ICC to decide.

aa. Universal Jurisdiction

I shall start with the first level, our provision on universal jurisdiction. According to Section 1 of the draft, the International Crimes Code will apply to all crimes designated therein[34] "even when the offence was committed abroad and bears no relation to Germany". This formulation does explicitly exclude any requirement of a "legitimizing link"[35]. It contains Germany's *claim* to jurisdiction over core crimes, clarifying that we consider that under current international law, every state may exercise its jurisdiction over alleged core crimes regardless of where or by whom they were committed.

It is submitted that such universal jurisdiction is not only permissible under international law but should also be seen as a key requirement of any national implementation of core crimes. States which can exercise universal jurisdiction will be able to take most cases which could be brought before the ICC and are thereby able to effectively support the effort to end impunity as demanded in the preamble of the Rome Statute – which our hosts chose as the motto of our conference.

bb. Exercise of Jurisdiction

On the second level of our jurisdictional approach we regulate the way in which this universal jurisdiction is exercised. In this regard we do not only claim universal jurisdiction, we are also willing to exercise it widely in accordance with a long standing principle of German Criminal Procedure, namely that a prosecutor *must* prosecute if there is sufficient evidence.[36]

However, there are exceptions from this principle. One is simply a pragmatic consideration, namely that we should not prosecute a person if we will not be able to eventually arrest him or her; but this does not mean that we shall only take action if the person

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[34] There is one exception for the crimes in sections 13 and 14 (regarding the negligence-version of command responsibility and the omission of a superior to report a crime, cf. *infra* note 41). These crimes cannot be prosecuted under the principle of universal jurisdiction under Art. 1 of the draft (cf. footnote 1 to the translations of the draft, *supra* note 1).

[35] Cf. *supra* note 18 and accompanying text.

[36] The so called „Legalitätsprinzip" (which must not be confused with the principle of legality) is contained in Section 152 (2) of the German Code of Criminal Procedure.

is on German soil. Rather the draft provides for an amendment of our Code of Criminal Procedure[37] regulating that a case must not only be prosecuted if the suspect is present on German territory, but also if the suspect's presence *is to be expected*. Very arguably, this means that cases will be taken if there is a substantive chance that the person will be extradited to Germany upon request. The particularities of this provision are to be defined by the courts.

Another exception ensures that German jurisdiction will not be exercised where there is - on the one hand - no legitimate need to do so and - on the other hand - the use of scarce judicial resources can be avoided. Therefore, our courts will defer to a foreign states sovereignty if the foreign prosecutor is closer to the crime and is actually prosecuting the case. More specifically - A German prosecutor, in general, will be required not to take a case, which is prosecuted "by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence".[38] Thus, you may say that we built our own little complementarity into our new code.[39]

cc. Possibility to Let the ICC Take a Case

Finally, there is a last legal mechanism regarding the exercise of our jurisdiction. I am speaking of a provision which is not in the draft act to introduce the International Crimes Code, but in the Rome Statute Implementation Act.[40] Section 28 of this act provides that under certain circumstances Germany need not prosecute a suspect *if* – and this is important – the ICC has agreed *in advance* to step in and take the case itself. This regulation gives us an even greater flexibility but at the same time does not compromise the goal to abolish impunity. With this my explanations on jurisdiction are completed and I will proceed to the substantial law of the draft.

2. General Principles

About the draft's approach to general principles of criminal law I will only say that – with very few exceptions[41] – we did not copy the general principles from Part 3 of the

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37 Cf. the draft of a new Section 153f. (1) of the German Code of Criminal Procedure, Article 3 no. 5 of the draft International Crimes Code, *supra* note 1.

38 Cf. the draft of a new Section 153f. (2) of the German Code of Criminal Procedure, Article 3 no. 5 of the draft International Crimes Code, *supra* note 1.

39 The particularities of this provision are to be defined by our courts; however, the requirement that the foreign actually prosecute most probably must be interpreted in parallel with Article 17 of the Rome Statute, cf. Claus Kress, *War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice*, in 30 ISRAEL YEARBOOK ON HUMAN RIGHTS 103, 170 (2000), proposing to exercise foreign jurisdiction where the state closer to the crime is "neither willing nor genuinely able to prosecute".

40 *Supra* note 2.

41 Sections 3 and 4 of the draft contain special rules regarding superior orders and command responsibility. Note that we differentiate between command responsibility where the superior has at least *dolus eventualis* with regard to his subordinates' conduct (Section 4) and command responsibility where the superior is merely negligent or fails to report a crime after having learned of its commission (Sections 13 and 14). Cf. Helmut Satzger, *supra* note 12, 129; cf. also the approach in Canada (Sections 5 and 7 of the Crimes Against Humanity and War Crimes Act, *supra* note 30) described by William Schabas, *supra* note 30, at 342.

Statute. We rather will apply the general principles that are provided for in our general Criminal Code.[42] A careful analysis revealed that for most, if not all *practical* purposes, the application of these rules should lead to results at least very similar[43] to those envisaged under the Statute.[44]

a. The crimes

As to the crimes of the Draft, they are by and large the same as in the Statute. As mentioned above, in most cases they have been merely reformulated either for greater certainty[45] or to harmonize them with the legislative technique, which is usually applied in German criminal law. Therefore, and to save time, I will limit myself here to pointing out some particularities.

aa. Genocide

I will start with our implementation of genocide[46]. We have implemented the Genocide Convention in our criminal law since the nineteen fifties and will now do little more than transfer this provision from the Criminal Code into the International Crimes Code. However, we slightly *adapted* the wording of this provision; and it now explicitly says what already was a matter of common sense among German lawyers.[47] Namely, that also a *single* genocidal act, such as a *single* killing or a *single* infliction of grave bodily harm constitutes genocide[48] if committed with genocidal intent (this is, with the intent to destroy in whole or in part one of the groups named in the Convention). Thus, Germany takes the position that it is not necessary for the crime of genocide, under customary international law, that the killing etc. was committed in a larger context of similar

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42 Section 2 of the draft International Crimes Code, *supra* note 1. A great advantage of using the general principles from our Criminal Code is that their scope and content is fairly clear. The same can hardly be said about the general principles of the Rome Statute; whoever tried to figure out the meaning of Art. 32 para. 2 of the Statute would probably agree.

43 With regard to the mental element German law arguably goes much further than the Statue as it comprises *dolus eventualis* (Section 2 of the draft International Crimes Code in connection with the generally accepted German doctrine on mental elements; cf. Hans-Heinrich Jescheck and Thomas Weigend, LEHRBUCH DES STRAFRECHTS - ALLGEMEINER TEIL 299-301 (5th ed., Berlin 1996)) which is roughly equivalent to recklessness. If the *dolus eventualis* standard is applicable it is sufficient that a perpetrator considers it possible that his or her conduct meets the elements of a crime; for example, if the perpetrator considers it possible that his or her pistol shot will kill the victim. Whereas some hold that also under the Statute such a mental element would suffice others contend that this is not that case and that knowledge is required.

44 On possible discrepancies between the application of the general principles of the Rome Statute and the general principles of the German Criminal Code cf. Helmut Satzger, *supra* note 12, 127-29.

45 Cf. Helmut Satzger, *supra* note 12, 129-30.

46 For a critical review of the approach of German courts to the law of genocide cf. Kai Ambos & Steffen Wirth, *supra* note 3, 783-796.

47 Cf., e.g., Albin Eser, in SCHÖNKE/SCHRÖDER. STRAFGESETZBUCH. KOMMENTAR § 220a margin no. 4 & 6 (Adolf Schönke, Horst Schröder *et al.* eds., 26th ed. Munich 2001).

48 Cf., e.g., Albin Eser in SCHÖNKE/SCHRÖDER. STRAFGESETZBUCH. KOMMENTAR § 220a margin no. 4 and 6 (Adolf Schönke, Horst Schröder *et al.*, eds., 26th ed., Munich 2001).

acts. (And you may recall that there is a somewhat different wording in the Elements of Crimes regarding Genocide[49]).

bb. Crimes against Humanity

Let me now very shortly turn to the provisions on crimes against humanity. In this regard all I would like to say is that whereas some provisions, for purposes of greater clarity, have a slightly narrower scope than under the Rome Statute[50], our draft in some instances is even wider. For persecution, for example, a connection with another inhumane act or another crime is not required as in Article 7 para (1) letter (h) of the Statute.

cc. War Crimes

This brings me to the last group of crimes in the draft code (as well as in the Statute), namely war crimes. Here the German draft did not follow the structure of the Statute, which organizes these crimes, if I may say so, in a somewhat muddled manner. Rather, the drafters tried to reorganize the long list of war crimes in a more systematic way. The most important outcome of this was that, in most cases, there was no longer a need to draw a distinction between international conflict and non-international conflict. Thus, the large majority of the war crimes under our draft apply in *both* kinds of armed conflicts.

Another important difference to the Statute is that we did *not* include the so-called threshold clause in Article 8 para. (1) of the Statute as under customary international law there clearly is no such requirement.

3. Rome Statute Implementation Act

I shall now turn to the second important legislative effort taken in Germany with regard to international criminal law. Namely the Rome Statute Implementation Act which will – hopefully – enable us to fully cooperate with the ICC[51]. The act will regulate the surrender of suspects, as well as, for instance, the taking of evidence and every other way in which Germany may be required to cooperate with the Court. As the matter is very

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49 Cf. the last Element for all alternatives of the *actus reus* of genocide (Article 6 of the Rome Statute), Finalized Draft Text of the Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add.2 (6 July 2000); cf. on this matter Kai Ambos & Steffen Wirth, *supra* note 3, 789-790.

50 Take, for instance, other inhumane acts – Article 7 para. 1 letter k of the Statute. The Statute requires for the commission of this crime that the perpetrator cause "*great suffering*, or serious injury to body or to mental or physical health"(emphasis added). The term "great suffering" was too vague for us. Therefore, we decided to reformulate the provision so as to require the perpetrator to cause "another person severe physical or emotional harm, especially of the kind referred to in section 226 of the Criminal Code." The reference to the provision in our Criminal Code provides further clarity with regard to the gravity of the harm.

51 On the requirements which such an act should fulfill cf. Steffen Wirth & Jan Harder, *supra* note 20, 145-46; Jörg Meißner, DIE ZUSAMMENARBEIT MIT DEM INTERNATIONALEN STRAFGERICHTSHOF NACH DEM RÖMISCHEN STATUT (forthcomming); on the German draft Rome Statute Implementation Act cf. Jörg Meißner, *Die Zusammenarbeit Deutschlands mit dem Internationalen Strafgerichtshof. Anmerkungen zum Regierungsentwurf eines IStGH-Gesetzes*, 15 HUMANITÄRES VÖLKERRECHT – INFORMATIONSSCHRIFTEN (HUV-I) 35 (2002); Jan MacLean, *Der Entwurf des Gesetzes über die Zusamnmenarbeit mit dem Internationalen Strafgerichtshof*, 35 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) (forthcoming June, 2002); Peter Wilkitzki, *The German Law on Cooperation with the ICC*, 2 INTERNATIONAL CRIMINAL LAW REVIEW (forthcoming, June 2002).

complicated and voluminous I will limit my explanations to a few remarks on some of the most interesting issues.

a. Principles

I shall begin my short survey setting out the basic principles and guidelines, which were applied when drafting the Implementation Act. Among these principles there is one of *singular* importance on which I will dwell a little longer – namely that the ICC has the last say in the interpretation of its own Statute; and that means that the Court determines the obligations of a states party under the cooperation regime and *not* the state itself.[52] This is regulated in Articles 119 para. (1) and 87 para. (7) of the Rome Statute.[53] Moreover, and even more importantly, the principle of the last say is a logical implication of the cooperation regime as such[54]: The Court could *not* possibly function, if States were free to judge themselves the scope of their obligation to cooperate.[55] This is not to say that there are no exceptions, and I will turn to them soon. However, exceptions from the general obligation to comply with requests of the Court are limited and must be *explicitly* mentioned in the Statute. Moreover, even where such exceptions exist, it is – again – up to the Court to interpret their extent and scope.

A very good *practical* example for the implementation of the principle of the last say of the Court is the German way to deal with immunities under international law.[56] With regard to requests for surrender we simply declare our normal rules on immunities of foreign state officials inadmissible.[57]

Why is that? Because we think that such immunities do not exist at all? No, it is because it is *up to the Court* to decide on the existence and the scope of any such immunity.[58] I may add, with a view to what we heard from David Saville (UK), that the Court has the right to do so in all cases, including where nationals of a non-state party are involved.

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52 The same applies with regard to a states voluntary acceptance of sentenced persons for purposes of enforcement (cf. Article 105 of the Rome Statute).

53 Jörg Meißner, *supra* note 51, 35-36, with further references.

54 Cf. Steffen Wirth & Jan Harder, *supra* note 20, 145-46, with further references.

55 Jörg Meißner, *supra* note 51, 36, with further references.

56 On the substantive international law of immunities for core crimes cf. Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute*, 12 CRIMINAL LAW FORUM (forthcoming 2001); see also Steffen Wirth, *Immunity* Ratione Materiae *for Core Crimes? The ICJ's Arrest Warrant-Judgment in the* Yerodia *Case*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW (forthcoming, 2002); Steffen Wirth, *Staatenimmunität für Internationale Verbrechen - das zweite Pinochet Urteil des* House of Lords, 22 JURISTISCHE AUSBILDUNG 70 (2000), Kai Ambos, *Der Fall Pinochet und das anwendbare Recht*, 54 JURISTENZEITUNG (JZ) 16, 20-23 (1999), Kai Ambos MÜNCHNER KOMMENTAR FÜR STRAFRECHT, vor §§ 3-7 (forthcoming 2003).

57 Cf. the draft of a new Article 21 of the German Code of Judicial Administration and Organization (Gerichtsverfassungsgesetz), Article 4 of the Draft Rome Statute Implementation Act, *supra* note 2. Cf. also Frank Jarasch & Claus Kreß, *The Rome Statute and the German Legal Order*, in: THE ROME STATUTE AND DOMESTIC LEGAL ORDERS 91, 94 (Claus Kress & Flavia Lattanzi, eds., Baden-Baden, Ripa di Fagano Alto (AQ) 2000).

58 Cf. Jörg Meißner, *supra* note 51, 37.

If the Court comes to the conclusion that immunities exist, it will decide not to proceed with the request as is provided in Art. 98. Moreover, states may bring their views regarding conceived problems with immunity before the Court at any time.[59]

However, as already mentioned, there also are some limited exceptions from the obligation to cooperate, which I will touch upon shortly now. The first thing I would like to repeat in this context is that any such exception must be in the Statute and is subject to definition and interpretation by the ICC – as indicated above this means that the Court decides on the scope and extent of these exceptions.

There are basically three such situations in which States may oppose a measure of cooperation.[60] *First*, States need not assist the Court in "other types of assistance"[61]– that is, types other than those enumerated in Article 93 (1) (a) - (k) – *if* the measure requested is prohibited under national law.[62] *Second*, they need not give information or evidence in a way which would compromise their national security[63] States need not assist the Court in the provision of evidence or information in a way which would compromise their national security[64]. The *third* situation regards "fundamental legal principle[s] of general application".[65] (In my opinion such fundamental principles, most likely, would be the most important civil rights under a states constitution.[66]). If the assistance requested is not surrender and the manner of the execution envisioned by the request would violate such a fundamental principle, a State may require the Court to enter into consultations to resolve the matter. The Court will modify its request if necessary.

The German approach in dealing with the latter two situations – security relevant information and fundamental principles – is a selective, and let me emphasize a *selective*, application of provisions from our law of criminal procedure. Thus, the transmission of security relevant information or information the transmission of which might infringe on the civil rights of a person, is possible if the same information could also have been given to a German court.[67] In any case, if Germany does not feel fit to cooperate with the Court for one of the reasons mentioned above, it would – in accordance with the Statute – enter into consultations with the Court and seek to resolve the matter.[68]

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59 They can do so in consultations under Rule 195 of the *Draft Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/INF3/Add.1.

60 In very particular situations there might arise other exceptions: Cf., e.g., Article 90 regarding competing requests.

61 Article 93 (1) (l) of the Rome Statute.

62 Article 93 (5) in connection with 93 (1) (l) of the Rome Statute.

63 Article 93 (4) of the Rome Statute.

64 Article 93 (4) of the Rome Statute.

65 Article 93 (3) of the Rome Statute.

66 Cf. Coalition for an International Criminal Court - German Committee, *Zu Ratifizierung und Implementierung des Römischen Statuts des Internationalen Strafgerichtshofs. Die gemeinsame Position deutscher Nichtregierungsorganisationen*, 13 HUV-I 111, 114 para. 20.

67 Section 58 (1) of the draft Rome Statute Implementation Act, *supra* note 2. This approach has been criticized as being too restrictive, Jörg Meißner, *supra* note 51, 42.

68 With regard to "other types of assistance" see Article 93 (3), for security issues see Article 72 (5) and with regard to fundamental principles see Article 93 (3) of the Rome Statute.

With this I will leave the issue of the principle of the last say of the Court and turn to two other basic characteristics of the implementation act. Both seem to go more to drafting than to the matter – but that is just how they appear**.**

One of these characteristics is the fact that the implementation act does not regulate everything but sometimes refers back to the Rome Statute[69] that has been transformed into German law by the Ratification Act. There are at least two advantages in this technique: It reduces the likeliness to "forget" the implementation of a certain issue and it forces judges and officials to look also at the Statute itself (and not only at the implementation act). As a caveat it must be added however, that in most cases the mere referral to the Statute seems not to be sufficient to fulfill a states obligation to implement; that is why Art. 88 of the Statute obliges states to have specific cooperation legislation in place.

Also the second drafting issue might, at first glance, seem a technicality but has in reality an important clarifying purpose: We will not implement our obligations under the cooperation regime by simply amending our extradition act but we decided to have an act on its own. The clear message of this decision is that surrender of a person to the court is not extradition[70] and that cooperation with the Court is not the same as rendering legal assistance to a foreign state. Moreover, a separate act will also give us more flexibility with regard to eventual amendments and, finally, will probably also be easier to digest for judges or other officials, who will have to apply it.[71]

b. Arrest and Surrender (Amendment of the Constitution)

I will now highlight some features with regard to the surrender of persons to the ICC under this draft act. An arrest warrant and the decision to surrender a person must, under our constitution[72], be made by a Court of law.[73] However, as already pointed out in the presentation of David Saville (UK), this Court will not have to decide much more than that there has been a request by the ICC and that the apprehended person is indeed the one specified in this request.[74] In particular German Courts will *not* examine if there are sufficient reasons to believe that the person has committed a core crime or if the arrest warrant is otherwise in accordance with the law.[75] Any other regulation would not be in accordance with the Statute.

But what about the rights of the suspect? Does that mean that he or she has no legal means to challenge the legality[76] of the arrest warrant? The answer is no: Suspects may

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69 Cf., e.g. Section 48 or 68 (3) of the draft, *supra* note 2.

70 Valerie Oosterveld, Mike Perry & John McManus, *The Cooperation of States with the International Criminal Court*, 25 FORDHAM INTERNATIONAL LAW JOURNAL 767, 771 (2002); on the intentions of the German drafters cf. Peter Wilkitzki, *supra* note 51, at I.

71 Cf. Peter Wilkitzki, *supra* note 51, at I.

72 Cf. Article 104 (2) of the Basic Law.

73 Jan MacLean, *supra* note 51, at II. 2. b).

74 Cf. Jan MacLean, *supra* note 51, at II. 2. b); Peter Wilkitzki, *supra* note 51, at II, 1.

75 Peter Wilkitzki, *supra* note 51, at II, 1.

76 The issue of the *legality* of the warrant itself must not be confused with the possibility of a national court on application of the person to decide – giving full consideration to any recommendations of the ICC – on an *interim release* of the person (Article 59 (3) - (6) of the Rome Statute).

have their arrest warrant re-examined on their request by a court of law. However, this court of law is not a national court of the arresting state but the ICC – and, more precisely, the Pre-Trial Chamber (that is the content of rule 117 para. (3) of the Rules of Procedure and Evidence[77]). I must confess that this right of the arrested person to turn to the ICC is not utterly clear from our draft as it stands now. But this is only because the drafters took it for granted that such a possibility exists and saw no need to explicitly provide for it. [78]

Another issue relevant for our surrender legislation was the prohibition to extradite German citizens to foreign states which is regulated in Art. 16 of the German constitution. We took a pretty uncreative approach to this problem and simply changed this provision. However, it is important to understand that most people involved in the process in Germany, as well as most academics did not consider this necessary.[79] The reason is that there *is* a fundamental difference between surrender and extradition because the ICC is *not* a foreign state but a judicial organ, which meets the highest international standards of fair trial. Indeed, during opening plenary of the 9th session of the Preparatory Commission for the ICC[80] the representative of Bulgaria explained that these were the reasons, which enabled Bulgaria to ratify without a constitutional amendment. And, as we heard form Dr. Manuel Sager, Switzerland took the same approach.

So why, then, did we change our constitution all the same? The *first* reason was that we wanted to amend our constitution anyway to enable the extradition of Germans to other countries of the European Community; and the *second* reason was that few academic writers – not the ones with the deepest insight in the ICC process – held that an amendment was necessary and we simply decided to stay on the save side.[81]

The last problem with regard to surrender that I shall mention here regards immunities which exist under our national law for parliamentarians. Our approach in this regard is pragmatic. The draft simply provides that, if such a situation arises, the competent organ will be notified and will take measures so as not to endanger the procedures before the ICC.[82] As to other immunities an adequate interpretation of our constitution can help. Under Article 24 of this constitution Germany may transfer sovereign powers to international organizations. As this provision has the same rank as the provisions according immunities any conflict, under the rule of *lex specialis*, should be solved in favor of Germany's international obligations.[83]

c. Other Forms of Cooperation

With regard to forms of cooperation other than surrender, I can be very short. We simply empowered our courts and other authorities to collect evidence, conduct searches

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77 *Supra* note 59.

78 Meanwhile the draft has been amended and the respective right of the accused is explicitly mentioned in Section 14 (2) sentence 3 of the Rome Statute Implementation Act, *supra* note 2.

79 Cf., e.g., Frank Jarasch & Claus Kreß, *supra* note 57, 99-104.

80 The author took notes of the plenary on 8 April 2002.

81 Jan MacLean, *supra* note 51, at II. 2. a).

82 Section 70 of the Draft Rome Statute Implementation Act, *supra* note 2.

83 Cf. the convincing analysis of Frank Jarasch & Claus Kreß, *supra* note 57, 105-107.

and seizures, question witnesses and undertake other measures in accordance with any request that may come from the ICC. I already mentioned that for matters of security sensitive issues and the so-called fundamental legal principles (and that is fundamental civil rights), we put the ICC on the same footing as German courts.

4. Progressive Implementation

Before I finish let me turn away from the provisions in our draft which merely implement what we *must* do under the Statute and present to you a few issues we are especially proud of. I am speaking of the many regulations in our draft which go further than is required by the Statute and which – hopefully – will help the Court to work more efficiently and to render its procedures a little smoother.

Among these provisions are the following:

- First – we can provide several kinds of assistance to the ICC *before* the Court even asks for such assistance. Thus we can arrest persons,[84] hand over evidence, documents, etc**.** as well as conduct seizures[85] without the need of a formal request from the Court.
- Second – under certain circumstances even normal citizens (and not only state authorities) are empowered by law to provisionally arrest perpetrators of core crimes.[86]
- Third – we will be able to enforce the personal appearance of a person (and that means a witness) before the *ICC* with the same means that can be applied to enforce the appearance of a person before a *German* court.[87] And what is more - we even grant that information provided by a witness to the ICC can*not* be used in a trial before our courts *if* the ICC has given an assurance that such information will not be used against the witness[88]. The same holds true for recordings taken by the ICC, while being present, for instance, during the questioning of a witness by German authorities.[89]
- Fourth – upon request of the ICC we can freeze all assets of a person in order to deny this person the necessary means to flee from justice.[90] (This is a lesson learned from cooperation with the ICTY[91]).

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84 Section 11 (2) of the draft Rome Statute Implementation Act, *supra* note 2.

85 Section 30 (1) of the draft Rome Statute Implementation Act, *supra* note 2.

86 Section 13 (1) Sentence 2 of the draft Rome Statute Implementation Act, *supra* note 2, in connection with Section 127 of the Code of Criminal Procedure.

87 Section 53 (1) of the draft Rome Statute Implementation Act, *supra* note 2.

88 Section 30 (1) of the draft Rome Statute Implementation Act, *supra* note 2; on this provision cf. Jan MacLean, *supra* note 51, at II. 4. e).

89 Section 60 Sentence 4 of the draft Rome Statute Implementation Act, *supra* note 2.

90 Section 52 (4) of the draft Rome Statute Implementation Act, *supra* note 2; cf. Jörg Meißner, *supra* note 51, 41; Jan MacLean, *supra* note 51, at II. 4. d).

91 On the freezing of Milosevic's assets on request of the ICTY cf. Peter Wilkitzki, *supra* note 51, at II, 2.

- Fifth – we can give spontaneous information to the ICC, that is information which the Court did not ask for, but which *we* think might be useful for its work.[92]
- Sixth – we do allow the ICC to sit in Germany.[93]
- Seventh – we will accept sentenced persons for purposes of enforcement. And it is needless to say, that the ICC retains *full* control over all sentenced persons and any matter concerning their release.[94]
- And last but not least – under the act we will be able to waive any claim for reimbursement of expenses incurred for measures of cooperation.[95]

With this I would like to finish and to thank the Canadian Department of Justice again for its friendly invitation.

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92 Sections 4 and 58 of the draft Rome Statute Implementation Act, *supra* note 2; on this issue cf. Jan MacLean, *supra* note 51, at II. 4. g).

93 Section 61 of the draft Rome Statute Implementation Act, *supra* note 2; on this issue cf. Jan MacLean, *supra* note 51, at II. 4. i).

94 Section 41 *et seq*. of the draft Rome Statute Implementation Act, *supra* note 2, on this issue cf. Jan MacLean, *supra* note 51, at II. 3. a); Peter Wilkitzki, *supra* note 51, at II, 2.

95 Section 71 of the draft Rome Statute Implementation Act, *supra* note 2.