



Strasbourg, 20 July 2001

Consult/ICC (2001) 14

**THE IMPLICATIONS FOR COUNCIL OF
EUROPE MEMBER STATES OF THE
RATIFICATION OF THE
ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT**

**LES IMPLICATIONS POUR LES ETATS
MEMBRES DU CONSEIL DE L'EUROPE
DE LA RATIFICATION DU STATUT DE
ROME DE LA COUR PENALE
INTERNATIONALE**

PROGRESS REPORT BY GERMANY AND APPENDICES

I. Ratification

Germany ratified the Rome Statute of the International Criminal Court on 11 December 2000. The statutory basis for ratification was established by the Act of Ratification of the Statute of the International Criminal court and by an Act Amending the Basic Law (Article 16).

1. Act of Ratification

The Act of Ratification of the Rome Statute was unanimously passed by the Federal Parliament (*Bundestag*) and the Federal Council (*Bundesrat*). It entered into force on 8 December 2000 (Federal Law Gazette 2000 II 1393) and created the preconditions for ratification of the Statute. On approval of the Statute, sovereign powers are assigned to an international body pursuant to Article 24 para. 2 of the Basic Law.

2. Act Amending Article 16 of the Basic Law

Through the Act of 29 November 2000 Amending the Basic Law (Federal Law Gazette 2000 I 1633), which entered into force on 2 December 2000, the following sentence has been inserted after the prohibition in Article 16 para. 2 of the Basic Law – “No German may be extradited to a foreign country”:

“A regulation in derogation of this may be made by statute for extradition to a Member State of the European Union or to an international court provided there is observance of the principles of the rule of law.”

The Act Amending Article 16 of the Basic Law has created the constitutional basis making it possible for Germany also to surrender Germans to international courts and thus to the International Criminal Court as well. At the same time, in view of the increasing integration of Member States of the European Union, the constitutional ban on extradition of Germans was repealed in respect to these states.

II. Implementation

1. Act of Implementation

The Statute contains numerous provisions in respect of which there is a need to make adjustments in the existing domestic legal situation. In the first place, this relates to the area of all forms of cooperation between Germany and the International Criminal Court in criminal matters: surrender and transit of persons, execution of the Court’s decisions, rendering other forms of legal assistance, and acquiescence in acts undertaken on national territory in the proceedings concerned. German law will therefore have to be supplemented in a way that will bring it into line with these provisions.

In order to make it possible for the Statute to be ratified as soon as possible, Germany – like many other European countries – has decided to separate ratification from legislation on implementation. The Act of Implementation is, however, to enter into force before the Statute.

In the Federal Ministry of Justice a draft bill has already been drawn up, which is to be tabled in Parliament before the end of the year. With the object of implementing the obligations ensuing from the Statute this draft bill embodies a coherent regulation of the law relating to cooperation with the International Criminal Court in criminal matters. As far as possible, the proven provisions of the Act on International Assistance in Criminal Matters will be followed here. In addition, the Act of Implementation contains amendments to the Code of Criminal Procedure, to the Act on International Assistance in Criminal Matters as well as to other legislation. Particularly, there is a need for implementation and amendment in the following respects:

a. Cooperation in criminal matters

Since the provisions on cooperation with the International Criminal Court contained in the Rome Statute diverge from German mutual assistance in criminal matters with foreign countries in many respects, cooperation in criminal matters with the International Criminal Court is to be dealt with in a separate law. This is also in line with the approach taken in respect of regulation of cooperation with the International Criminal Tribunals for the former Yugoslavia and for Rwanda. It is expected that the new law will contain provisions on the following matters:

- **Surrender to the ICC**

The provisions on jurisdiction and procedure for the surrender of persons to the International Criminal Court – the equivalent of extradition to a foreign country – which for the greater part implement Articles 89 to 92 of the Rome Statute, play a central role. When a request for surrender is received, court proceedings are usually instituted to determine admissibility. Surrender without a court decision is possible in the cases of simplified surrender (Article 92 para. 3, second sentence, of the Statute). Surrender is made on the basis of approval granted by the competent authority. The law will further contain provisions concerning *inter alia* the relationship between a request for surrender and national proceedings (*ne bis in idem*) as well as the relationship between a request for surrender and competing requests (Article 90 of the Statute). Further provisions concern the rule of speciality (Articles 101 and 108 of the Statute). In addition, there are separate provisions on arrest proceedings (Article 59 of the Statute) and on custody pending surrender to the Court (Articles 59 and 92 of the Statute).

- **Transit**

Jurisdiction and procedure for the transit of persons (Article 89 of the Statute), detention in custody during the period of transit and unscheduled landing (Article 89 para. 3 (e) of the Statute), among other things, are established.

- **Taking over enforcement of sentences**

This part relates to Germany taking over enforcement of sentences of imprisonment (Article 77 para. 1, Article 103 paras. 1 and 2, Article 105, Article 106 para. 1 of the Statute), of fines (Article 77 para. 2 (a), Article 109 para. 1), of orders imposed pursuant to Article 77 para. 2 (b) of the Statute and of decisions pursuant to Article 75 of the Statute.

- **Other forms of cooperation**

The provisions on other forms of cooperation are in principle based on Article 93 of the Statute. Detailed provisions are laid down on jurisdiction and procedure, the surrender of objects, seizure and search and the interviewing of witnesses, the independent taking of evidence by the Court in Germany (Article 99 para. 4 of the Statute) as well as the procedure in the case of competing requests (Article 93 para. 9 of the Statute).

- **Further provisions on cooperation**

The other provisions on cooperation relate *inter alia* to competence for making requests for cooperation and consultations within the meaning of Article 97 of the Statute, channels of communication (Article 87 paras. 1 and 2 of the Statute), requests made to the Court (Article 93 para. 10, Article 96 para. 4 of the Statute) as well as privileges and immunities of the International Criminal Court.

- **Cooperation and diplomatic immunity**

Sections 18 and 19 of the German Courts Constitution Act exempt foreign state representatives who are on German territory on official invitation from German jurisdiction pursuant to the Vienna Convention of 18 April 1961 on Diplomatic Relations and the Vienna Convention of 24 April 1963 on Consular Relations. Section 20 subsection 1 grants immunity to foreign state representatives on German territory on official invitation. It is intended to clarify, in a provision in the Act of Implementation, that these provisions do not hinder the execution of a request for cooperation by the International Criminal Court.

b. Offences against the administration of justice by the ICC

As a consequence of the obligation which ensues from Article 70 para. 4, provision is initially to be made, in separate legislation, for an extension of the scope of application of sections 153 et seqq of the German Criminal Code (false testimony when not under oath and perjury) to cover false testimony before international courts, in particular the International Criminal Court.

2. Special codification of international criminal law: “Code of Crimes against International Law”

Germany has resolved to create, in a Code of Crimes against International Law, a new and improved legal basis for the prosecution of international crimes by the domestic courts. The important objectives of this project are to cover appropriately the specific wrongfulness of international crimes, to simplify the application of the law, to achieve greater legal clarity and certainty, and to help promote and spread both international humanitarian law and international criminal law. Furthermore, the Code of Crimes against International Law is intended to ensure that German courts will also be able to prosecute crimes against international law under the Rome Statute:

A working group made up of prominent scholars from the fields of criminal and international law (in particular of humanitarian law) as well as experts from the Federal Foreign Office, the Federal Ministry of Justice and the Federal Ministry of Defence has already drawn up a first

working draft bill (www.bmj.bund.de/ggv/voelkstr.pdf). On the basis of this draft a draft bill has been drawn up in the Federal Ministry of Justice, which, after participation on the part of the other federal ministries, of the *Länder* as well as of the relevant professional associations, is to be tabled in Parliament before the end of the current legislative session.

Implementation of the criminal law provisions of the Rome Statute forms the primary focus of attention. With regard to individual items regulated therein, definitive international customary law, however, already goes beyond what was laid down in the Rome Statute. Hence the Code of Crimes against International Law also contains individual provisions extending criminal liability compared with the Rome Statute. In some instances, norms of customary international criminal law with a wider scope of application are taken into consideration – particularly under Protocol I of 1977 Additional to the Geneva Conventions of 1949 and under Protocol II of 1999 to the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954. In this respect, the Code of Crimes against International Law does justice to Article 10 of the Statute of the International Criminal Court, by virtue of which the definition of the crimes shall not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than that Statute.

- **Scope of application:**

The Code of Crimes against International Law shall be applicable worldwide (principle of universality). At the same time, a new provision is created in the Code of Criminal Procedure, flanking the universality principle in procedural terms. In cases having a domestic bearing there is, on principle, a duty to prosecute in order to prevent crimes against international law from going unpunished. On the other hand, German law enforcement authorities are not supposed to make use of their capacity to prosecute in certain cases with certain factual constellations; instead they are to give precedence to foreign and international law enforcement authorities. This applies, in particular, to the International Criminal Court.

- **General Part**

In the General Part the draft bill dispenses as far as possible with special provisions in relation to existing criminal law so as to ensure legal certainty and easier application. Special rules are only established where this is necessary, particularly if the relevant provisions of the Rome Statute are divergent. Special provisions of this type are currently in place particularly for self-defence, the responsibility of superiors and the statute of limitations.

- **Special Part**

A Special Part then contains definitions of the individual offences under international criminal law. These include genocide, crimes against humanity and war crimes. The contents of the provisions of the Code of Crimes against International Law will be kept as closely as possible to the offences described in the Statute of the International Criminal Court and the corresponding Elements of Crimes. Furthermore, offences not covered by the Statute of the International Criminal Court are included from international agreements binding on Germany, so far as they can claim validity in terms of international customary law. Account is also taken of the decisions of international criminal tribunals and of general state practice.

Compared to the Statute, a new systematisation and tightening up has been undertaken in respect of war crimes – through bringing together parallel provisions. The state of definitive international customary law so permitting, the individual offences therefore apply to all kinds of armed conflict. Thus, the distinction between international and non-international conflicts now only becomes relevant in exceptional cases where special offences have been established. All offences are to comply with the highest possible requirements of legal certainty.

The crime of aggression is currently covered by sections 80 and 80a of the German Criminal Code. It has not yet been decided whether it should be included as such in the Code of Crimes against International Law or whether there should be a special provision, especially in view of the fact that the outcome of the relevant negotiations in New York on the crime of aggression is still awaited.

Appendix I

**Act
on the Rome Statute
of the International Criminal Court of 17 July 1998
(ICC Statute Act)¹
of 4 December 2000**

The Federal Parliament has passed the following Act:

Article 1

Approval is hereby given to the Rome Statute of the International Criminal Court of 17 July 1998, signed by the Federal Republic of Germany in New York on 10 December 1998. The Statute is published below with an official German translation.

Article 2

- (1) This Act shall enter into force on the day following its promulgation.
(2) The day on which the Rome Statute of the International Criminal Court enters, pursuant to Article 126 thereof, into force for the Federal Republic of Germany shall be announced in the Federal Law Gazette.

The constitutional rights of the Federal Council have been heeded.
The above Act is hereby executed and promulgated in the Federal Law Gazette.

Berlin, 4 December 2000

The Federal President
Johannes Rau

The Federal Chancellor
Gerhard Schröder

The Federal Minister of Justice
Däubler-Gmelin

The Federal Minister for Foreign Affairs
J. Fischer

¹ Unofficial translation

Appendix II

Act to Amend the Basic Law² (Article 16)

of 29 November 2000

The Federal Parliament has passed the following Act with the consent of the Federal Council;
Article 79 paragraph 2 of the Basic Law has been heeded:

Article 1 Amendment to the Basic Law

The following sentence shall be inserted after Article 16 paragraph 2 of the Basic law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette, Part III, number 100-1, last amended by the Act of 16 July 1998 (Federal Law Gazette I page 1822):

“A regulation in derogation of this may be made by statute for extradition to a Member State of the European Union or to an international court provided there is observance of the principles of the rule of law.”

Article 2 Entry into Force

(1) This Act shall enter into force on the day following its promulgation.

The above Act is hereby executed and promulgated in the Federal Law Gazette.

Berlin, 29 November 2000

T h e F e d e r a l P r e s i d e n t
J o h a n n e s R a u

T h e F e d e r a l C h a n c e l l o r
G e r h a r d S c h r ö d e r

T h e F e d e r a l M i n i s t e r o f J u s t i c e
D ä u b l e r - G m e l i n

T h e F e d e r a l M i n i s t e r o f t h e I n t e r i o r
S c h i l y

² Unofficial translation