CHAPTER 4

GERMANY: METHODS AND TECHNIQUES USED TO DEAL WITH CONSTITUTIONAL, SOVEREIGNTY AND CRIMINAL LAW ISSUES

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I. INTRODUCTION

Since the beginning of the 1990s, Germany has actively promoted the early establishment of an effective, functioning, independent and therefore credible International Criminal Court (ICC). Consequently, Germany has followed a policy of full support for the ICC even prior to the Rome Conference[1] and ever since thereafter.[2] Germany signed the Rome Statute on December 10, 1998 and ratified it two years later in 2000 also on December 10. The date of December 10 was chosen each time to mark the commemoration of the Universal Declaration of Human Rights of December 10, 1948. Germany concluded its legislation for the implementation of the Rome Statute in German law on June 26, 2002, when the draft Law on Cooperation with the International Criminal Court (ICC Act) and the Draft Code of Crimes against International Criminal Law (CCAICL) were unan-

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1. For a third-party appraisal of the German role in the creation of the Rome Statute, *see* William R. Pace & Mark Thieroff, Participation of non-governmental organizations, *in* Roy S. Lee Ed., *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, at 391–98 (1999). In Herman A.M. van Hebel, Johan G. Lammers & Jolien Schukking Eds., *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, 186 (1999).

2. *See* Andreas Zimmermann, The Creation of a Permanent International Criminal Court, 2 *Max Planck Y.B. U.N. L.* 169ff. (1998); Hans-Peter Kaul, *Auf dem Weg zum Weltstrafgerichtshof*, 177ff. (1997); Hans-Peter Kaul, *Durchbruch in Rom—Der Vertrag über den Internationalen Strafgerichtshof*, 125ff. (1998); Hans-Peter Kaul, *Der Aufbau des Internationalen Strafgerichtshofs, Schwierigkeiten und Fortschritte*, 215ff. (2001).

imously adopted by the German Parliament. These two important laws entered into force on June 30, 2002, just in time before the entry into force of the Rome Statute on July 1, 2002. Germany continues to support the International Criminal Court in all possible fields[3] and is also the largest financial contributor to the ICC, as long as the United States and Japan are not yet state parties.

The purpose of this contribution is to give, in four parts, a summary overview of the methods and techniques used in Germany to deal with constitutional, sovereignty and criminal law issues regarding the Rome Statute.

I will first discuss the question of sovereignty and constitutional issues, explaining, in particular, why in Germany there was never a discussion or concern that the Rome Statute, the ICC or the activities of the prosecutor would or could be a violation or an infringement of the sovereignty or constitutional order of Germany.

I will then briefly explain the German legislative concept,[4] which was often referred to inside the German government as the "Two Phases, Four Legal Building Blocks."

The third part of this Chapter will highlight some key features of the new German Code of Crimes, which formed building block no. 4 of the German legislative concept.

Finally, I will present some conclusions regarding the German experience in dealing with the Rome Statute and its implementation into German law. It is hoped that these conclusions may be useful also for Chinese partners when they consider Chinese accession to the Rome Statute.

Before turning to these German legislative issues outlined above, I would like to say how extremely pleased, even excited I am to be able to participate in this very important Beijing symposium and to express my deep gratitude to our distinguished Chinese hosts, the Chinese Society of International Law. It is wonderful to meet again distinguished colleagues and members of the Chinese delegation at the Rome Conference like Judge Liu Daqun.

This is my first visit to this country, a country which already has given so much to the world, a country whose traditions, culture and wisdom the

3. *See* Hans-Peter Kaul, The International Criminal Court—Current Perspective, *in* Andreas Zimmerman, *International Criminal Law and the Current Development of Public International Law* 15–25 (2003); Hans-Peter Kaul, The International Criminal Court, Country Report submitted by Germany to the XVIth Congress of the International Academy of Comparative Law, Brisbane, 14–20 July 2002, Section IV.A. Public International Law, *in* Eibe Riedel Ed., *Reports on Public Law*, 9–44 (2002).

4. *See* Annex 1 of this Chapter, which contains a chronological overview of the realizations of this legislative program.

German people admire. This conference is, in my view, another concrete proof of the commitment of China to international peace and justice and to the rule of law in this somehow disorderly world, which therefore needs urgently this rule of law and more international justice.

As some of you may know, I was born in 1943, during the Second World War. So, my childhood was heavily marked by the suffering, misery and destruction that the crimes committed by Adolf Hitler and his followers have brought over Europe and also the German people. I still remember that, as children, our favorite playground was the ruins of bombed down houses in our neighborhood.

Soon after, as a young man, I became aware that also China, this great country in the distance, was heavily destroyed and had suffered terribly during the Second World War and in the years afterwards. Ever since then, I have followed, with growing admiration, from the distance, the rise of China and of the Chinese people, from the ashes of war, to their current position, as a leading country in Asia and the world, as a permanent member of the Security Council, and as a country whose commitment to international justice and the rule of law in this world are a hope for many. On this very special day, I also want to express my admiration for the enormous achievement that China is today able, out of its own force, to bring the first Chinese astronaut into orbit. My heartfelt congratulations are with you!

I would like to express some of my hopes regarding this conference on the ICC.

It is my hope that, after this conference, we all may have a better common understanding of why the International Criminal Court is no threat to the sovereignty and constitutional order of states and no threat to the principle of non-intervention in the domestic jurisdiction of states. Otherwise, why would already 92 states from all regions of the world be members of the Rome Statute?

It is also my hope that, after this conference, we all may have a better common understanding of the principle of complementarity, which maintains, even strengthens the primacy and priority of functioning criminal justice systems. The principle of complementarity and its implications must be explained time and again, in the most careful manner, so that unjustified fears and concerns regarding the ICC disappear.

My third hope is that we all may have a better common understanding that, contrary to the assertions of some, the International Criminal Court does not represent a risk of politically motivated prosecutions, in particular, through a prosecutor with a hidden political agenda. All must understand that this argument against the Court is simply false, no matter how often it is repeated.

It is my hope, fourthly, that we all may have a better common understanding that the International Criminal Court will depend entirely on the support and cooperation from states and that it can only be so strong as the state parties, through their indispensable cooperation, will make it. It is largely also for this that the need for the ICC to become more universal, to have the support of more state parties, is so obvious.

It is my hope, fifthly, that the many distinguished experts assembled here by our gracious Chinese hosts will be able to demonstrate again that the International Criminal Court indeed merits and deserves to be fully supported also by China. It is very clear to me: all the 92 state parties including Germany and the German government would like to see China as a partner in the ICC. Full support by China for the ICC would also be a great encouragement for many small, developing and other states, mainly from the Third World, who look to China and who are currently under pressure not to join or support the ICC. Also in this respect the International Criminal Court needs the support of this great country.

In order to enable the participants of this important symposium in Beijing to better understand this contribution, the following texts were sent to the organizers of this conference; I understand they have already been distributed among the participants:

- English and Chinese texts of the new German Code of Crimes against International Law (CCAIL)[5] as well as the English text of the so-called "Explanations"[6] provided by the German government on this law. These explanations may be of particular use as they constitute some kind of an official commentary explaining, in some detail, the rationale and objective of the Code of Crimes and of its provisions.
- English text of the new German Law on Cooperation with the International Criminal Court (ICC Act).[7] This law on cooperation with the ICC has been praised already by some as a very pertinent and complete, if not exemplary, law on cooperation issues.

5. Unofficial English, French, Spanish, Russian and Chinese translations of the German Code of Crimes are available at the Web site of the Max Planck Institute for International Criminal Law in Freiburg, Germany, *at* http://www.iuscrim.mpg.de/forsch/online_pub.html (scroll down until bottom of the page).

6. The full text of the German Code of Crimes against International Law is available in English at the Web site of the Federal Ministry of Justice, Berlin Germany, *at* http://www.bmj.bund.de/images/11461.pdf. The text of the "Explanations" is available in English at the Web site of the Max Planck Institute for International Criminal Law in Freiburg, Germany, *at* http://www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf (starting at page 20).

7. The full text of the German Law on Cooperation with the International Criminal Court (ICC Act) is available in English at the Web site of the Federal Ministry of Justice, Berlin Germany, *at* http://www.bmj.bund.de/images/11501.pdf.

I will give no further details or explanations regarding this ICC Act within the framework of this contribution. International criminal cooperation in general, and the specific regime of cooperation between states and the ICC as provided for in Part 9 of the Rome Statute in particular, are a matter for specialists.[8] If Chinese experts or scholars should have a particular interest or specific questions regarding this law on cooperation with the ICC, the German side, and, in particular, the specialists of the German Ministry of Justice, will be prepared to consult with their Chinese partners. A number of articles and publications on this ICC Act are already available, and the leading German commentary on international criminal cooperation with a detailed analysis of this law[9] may also be available in English soon.

II. CONSTITUTIONAL AND SOVEREIGNTY ISSUES

In 1996 the author of this Chapter took over as Director of the Office for Public International Law in the German Foreign Ministry, responsible for the future ICC and all related work. This responsibility was shared with a number of committed and able lawyers, in particular, at the German Ministries of Justice and Defense. These experts developed, collectively, a concept of continuous team work and mutual support to promote the ICC project. While this unusual close and intensive, day-to-day cooperation between government agencies was certainly also practiced by other states, the necessity for it cannot be regarded as a given or being self-understood. Quite to the contrary, the visible difficulties of a number of states to develop a considered position on the ICC, to ratify the Rome Statute or to accede to it, to elaborate appropriate implementing legislation have quite often been as an underlying source, a lack of coordination and cooperation inside the respective government. As experience demonstrates time and again, such a lack of coordination and cooperation between concerned ministries or government agencies may also create the further risk of differing approaches, misunderstandings, even internal differences of view or disputes, delays and other problems. In general, the Rome Statute and all the complex legal issues involved, including constitutional and sovereignty issues, require the closest possible cooperation and a common understanding of, in particular, the ministries of Foreign Affairs, Justice and Defense in order to come to a coherent approach. This is maybe the first lesson which can be drawn also from the German experience.

It is quite noteworthy that, in Germany, there was never a public or restricted internal discussion inside or outside the government, or a public

8. *See* Tatjana Maikowski, *Staatliche Kooperationsplichten gegenüber dem Internationalen Strafgerichtshof* (2002) and Jörg Meissner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof* (2003).

9. *See* Claus Kress, *Kommentierung zum Völkerstrafrecht*, vor III 26, *in* Heinrich Grützner & Paul Pötz Eds., *Internationaler Rechtshilfeverkehr in Strafsachen* (2003).

or internal concern that the ICC treaty might be a violation of, or at least an infringement or threat to, the Constitution or to the sovereignty of Germany.

What, then, is the reason for this remarkable absence of fears or possible concerns with regard to the sovereignty and constitutional order of Germany with regard to the ICC? Many explanations are possible. Among them, two particularly important aspects can be identified.

Firstly, even at an early stage of the ICC project, all the German ministries concerned and the interested German public clearly recognized that the ICC jurisdiction and all obligations to cooperate with the ICC would not be imposed on Germany.[10] This was compared with the fact that, for example, the jurisdiction of the two *ad hoc* tribunals for the Former Yugoslavia and Rwanda was decided, with binding effect for all U.N. member states, by the Security Council. It was clear to all concerned in Germany that the preparatory work for the ICC followed, as usual, the normal U.N. practice of codification work regarding international law. Consequently, it was also understood that Germany had, as usual, the full sovereign right to make a considered decision, at the appropriate time, whether to join or not to join the group of state parties of the ICC treaty.

Voluntary ratification of or accession to a new international treaty can, according to the German doctrine, hardly be seen as a violation or infringement of the sovereignty of the state concerned. The same is true even when the membership in the ICC treaty leads, according to Article 12 of the Rome Statute, to the acceptance of the jurisdiction of the ICC and of the related obligations to cooperate as contained in Part 9 of the Rome Statute.

The other important factor is the appropriate understanding and knowledge of the principle of complementarity that fully shared at an early stage in the internal discussions and considerations within the German government. Also for the German side, the principle of complementarity, whose *sedes materiae* is now Article 17 of the Rome Statute,[11] was at all times the indispensable basis and foundation of all the work on the ICC project. It is almost impossible to overstate the importance of the complementarity principle from the German perspective. German support for the ICC had as indispensable requisite the complementarity principle. To illustrate this point further, had there been proposed a parallel jurisdiction or primacy of ICC jurisdiction over German national criminal jurisdiction, the German side, in all likelihood, would have opposed it.

10. *See* Hans-Peter Kaul, Towards a Permanent Criminal Court—Some observations of a negotiator, *Hum. Rts. L.J.* 165–74 (1997).

11. *See* John T. Holmes, The Principle of Complementarity, *in* Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* 41–78 (1999).

It is well known that such far reaching and unrealistic proposals were never made at the Preparatory Committee, as there was almost total consensus in the United Nations to base the activities of the future ICC on the principle of complementarity. As this principle has gradually become well known all over the world, it may be sufficient to state that according to the principle of complementarity, the primacy of national criminal jurisdictions is explicitly reaffirmed and that the complementary jurisdiction of the ICC can come into play only, as a last resort, when national criminal systems fail.

According to the German experience, it is submitted that only when one understands fully the complementarity principle as the decisive basis and most important structural limitation of the ICC and, in the same manner, only when one understands fully the implications and legal consequences of the complementarity principle as referred to in Articles 1 and 17 of the Rome Statute, only then will one be able to have a realistic view on the question whether the Rome Statue and the ICC may mean an infringement of the constitutional order or even sovereignty of a state.

Consequently, from 1995 and ever since then, long before the Rome Conference, the German Ministries of Foreign Affairs, of Justice and Defense, have made systematic efforts to explain to all concerned the meaning and legal implications of the complementarity principle. This principle was presented and explained to all ministries concerned, including the Ministry of Internal Affairs, the Chancery, even to the Finance Ministry, to other government agencies, to the Parliament and the interested German public including the media and academic circles as the indispensable basis for constructive German participation in the process leading to the establishment of the ICC. The methodology to make the complementarity principle known and understood by all concerned comprised also an informal approach through a series of questions and answers,[12] including, for example the following:

- Will the ICC be a supra-national court, in the sense of this international law term, as for example the European Court in Luxembourg? Obvious answer: Not at all, in particular because of the complementarity principle which upholds the priority of national criminal jurisdictions.
- Will the ICC otherwise be some kind of a global super court, with competence for all core crimes? No, national courts maintain their priority and competence because of the complementarity principle.
- Will the ICC be able, at least in certain situations, to replace national criminal courts or to take over their cases? No, because of the complementarity principle.

12. For the explanations of the complementarity principle, *see* Klaus Kinkel, *Für einen funktionsfähigen Weltstrafgerichtshof* 2860 (1997); Hans-Peter Kaul, *Auf dem Weg zum Weltstrafgerichtshof: Verhandlingsstand un Perspektiven* 177–81 (1997).

- Will the ICC be able to act as some kind of super appeal or revision court for the decisions of national courts? Again, not at all because of the principle of complementarity.
- Will the ICC be able to demand, like the Yugoslavia tribunal did in the *Tadic* case (Mr. Tadic was arrested in Germany),[13] that states defer their national criminal proceedings to the ICC? No, the ICC, in stark contrast to the ICTY, has no primacy but only a complementary jurisdiction.

This method, to explain further the complementarity principle, proved to be quite effective. In general, the message derived from these questions and answers is clear and compelling: The principle of complementarity, as the decisive basis of the Rome Statute, provides a strong, in all likelihood insurmountable, protection of the constitutional order, sovereignty and sovereign rights of states to exercise criminal jurisdiction if they are willing and able to do so. Furthermore, on this basis one may say that the Rome Statute strengthens the sovereign rights of states insofar as its complementarity regime recognizes and reaffirms the primacy of national criminal jurisdictions.

This explains, to a large extent, why Germany has since the mid-1990s consistently pursued in all fora its policy of full support for the ICC. On this basis there was, in the light of grim historic experience, a widely shared conviction in Germany that the ICC offers a significant chance for more international justice and a strengthening of the rule of law in international relations.

It may also be of interest to the audience of this symposium why the German side never accepted the fear or expressed concern by some that, in particular, an ambitious prosecutor, with a political agenda of his own, would create a risk of politically motivated prosecutions against nationals of certain states.

On the German side there was always a good measure of confidence that the state parties would elect as the prosecutor only a personality with integrity and the highest qualifications. The election of Prosecutor Moreno-Ocampo from Argentina, also teaching law at Harvard University in the United States, has confirmed this assumption. At the same time, it may be useful to recall that even long before and during the Rome Conference, Germany and other ICC-supportive states wanted to address and allay these concerns. Regardless of whether they were real or, as it was also possible, of a tactical nature, one had to take them quite seriously in order to achieve consensus on the prosecutor with his or her fundamental role in criminal proceedings. That is why—some may recall this (in particular Mrs. Fernandez de Gurmendi from Argentina, today Chef de Cabinet of the ICC prosecutor)—Argentina and Germany submitted before the Rome Conference a joint text proposal[14] on the prosecutor. This proposal immediately found wide support among participating states and is therefore now contained in Article 15 of the Rome Statute. The analysis of, in particular, Article 15, paragraphs 3 and 4 and Article 53 leads to a very clear conclusion: the prosecutor and all his major decisions are under the full control of the judges of the Pre-Trial Chamber. This leads to a further critical question: Is it really likely or probable that the judges of the Pre-Trial Chamber, including the author of this contribution, would give a green light to the prosecutor when the prosecutor—against all likelihood—asked out of political motivations for the authority to commence criminal proceedings against a national of a powerful state? As an answer to this question, it can be mentioned that a number of ICC judges have already stated that they would immediately resign from the Court if somehow they were not able to stop such highly unlikely attempts. While this position is fully understandable, there are all reasons to be confident that the judges of the ICC Pre-Trial Chamber will indeed never be confronted with such a necessity.

13. Michael, P. Scharf, *Balkan Justice—The Story Behind the First International War Crimes Trial Since Nuremberg* 96–101 (1997).

III. THE GERMAN LEGISLATIVE CONCEPT REGARDING THE ROME STATUTE

This part of the report on the German experience can be rather brief as the explanatory note,[15] contains basically all the necessary information. In the autumn of 1998, after the Rome Conference, the German ministries of Foreign Affairs and Justice developed jointly the legislative concept of "Two Phases, Four Legal Building Blocks" to implement the Rome Statute. In phase I the German government elaborated and adopted the draft ratification law[16] and the draft law to amend Article 16, paragraph 2 of the German Constitution.[17] This enabled Germany to ratify the Rome Statute on December 10, 2002. In phase II, lasting from 1999 to the summer of 2002, the German government elaborated and adopted the draft Law on Cooperation with the International Criminal Court (ICC Act)[18] and the draft Code of Crimes against International Law (CCAIL),[19] *i.e.*, Legal Building

14. *See* Silvia Fernandez de Gurmendi, The Process of Negotiations, *in* Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* 217–37 (1999).

15. *See* http://www.bmj.bund.de/images/11461.pdf and http://www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf.

16. *Gesetz zum Römischen Statut des Internationalen Strafgerichtshofs vom 17. Juli 1998* Teil II, at 1393 (2000).

17. *Gesetz zur Änderung des Grundgesetzes (Artickel 16) vom 29. Novenber 2000*, Teil I, at 1633 (2000).

18. *See supra* note 14 (the official publication of the Law on Cooperation with the ICC was in 2002), at Teil I, at 2144.

19. *See id.* (the official publication of the CCAIL was in 2002) at Teil I, at 2254.

Blocks numbers 3 and 4. In this way, Germany managed to complete its legislative program regarding the Rome Statute just in time, on June 30, 2002, one day before the entry into force of the Rome Statute on July 1, 2002.

It may also be useful to explain the reasons for amending the German Constitution. Article 16, paragraph 2 of the German Constitution prohibits the extradition of German nationals to a foreign country. This general prohibition did not allow for any exceptions. Thus, the prohibition to extradite German nationals to a foreign country as contained in sentence 1 of paragraph 2 was supplemented with a second sentence which provides that in the future, German nationals can be surrendered also to international courts and to courts within the European Union member states.[20] While it was the Rome Statute that triggered and made necessary this constitutional amendment, this amendment will also allow, in the future, the surrender of German nationals to, for example, the International Criminal Tribunals for the former Yugoslavia and for Rwanda and to courts within the European Union.

This constitutional amendment[21]—short, but quite important—was adopted in the German Parliament on October 28, 2000, with 528 yes votes, two abstentions, one no vote, and that all the three other laws or "Legal Building Blocks" of the German legislative concept regarding the Rome Statute were adopted unanimously. This shows the very strong support for the International Criminal Court within all political parties represented in the German Parliament, from the right to the left.

IV. KEY FEATURES OF THE NEW GERMAN CODE OF CRIMES AGAINST INTERNATIONAL LAW

In this section, important aspects will be explained further for which the relevant provisions and further detailed explanations can be found in the Chinese and English translations of the Code of Crimes against International Law and in the English text of the "Explanations,"[22] which can be regarded as some kind of an official commentary on this code.

Before June 30, 2002, the German commitment to international criminal law and justice were not fully reflected in substantive criminal law, with the notable exception of the crime of genocide punishable under a specific provision of the General Criminal Code. This means that crimes against humanity and war crimes were only "somehow" punishable with the norms of the General Criminal Code. When the Rome Statute was adopted, Germany felt more and more the need to remedy the insufficiencies concerning the coverage of these crimes through a specific new draft law.

20. *See supra* note 15.

21. *Id.*

22. *Id.*

The objectives of the Code of Crimes against International Law and guiding principles of this law are:[23] to better cover the specific wrong of international crimes as was hitherto possible, to promote legal certainty and practicability through a further single law; and to ensure, in accordance with the principle of complementarity, that Germany will always be able to prosecute crimes for which the ICC is competent, and to promote international humanitarian law by creating a national body of appropriate provisions.

It should be noted that the new Code of Crimes against International Law will also facilitate, for example, the educational task to teach soldiers in the German armed forces that violations of international humanitarian law are war crimes under German law as they are under the Rome Statute.

When preparing this legislation, the most important principle was to include only such crimes which already exist under customary international law. At the same time, the German legislation was faced with the necessity to reformulate these crimes to bring them in line with the very strict standards of legal certainty as required under the German Constitution. Therefore, the approach of incorporating the text of the Rome Statute and its Articles 6 to 8 core crimes into the domestic law as used, for example, by the United Kingdom, was not open to the German legislator.

Germany established in 1999 a special working group of experts to focus on the elaboration of the Draft Code of Crimes against International Law. This group consisted partly of nationally known experts on international criminal law, international humanitarian law and criminal law[24] and partly of government officials from the ministries of Justice, Foreign Affairs and Defense. This composition, achieved through a very careful and stringent selection process to ensure that the participating experts would be highly qualified and ready to work very hard, proved to be quite productive. As planned, the national working group of experts was able to present a consolidated draft Code of Crimes against International Law in May 2001. The German legislature adopted on June 26, 2002 the text with only minor modifications.

It is known that Germany has, for a long time, endorsed the international law principle of universal criminal jurisdiction and held the view that,

23. *See* Gerhard Werle & Florian Jessberger, International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law, 13 *Crim. L. F.* 191–223, at 199 (2002).

24. *See* the contributions on the CCAIL from members of this group: Claus Kress, *Vom Nutzen eines deutschen Völkerstrafgesetzbuchs* 40 (2000); Werle & Jessberger, *supra* note 23; Andreas Zimmermann, Implementing the Statute of the International Criminal Court: The German Example, *in* L.C. Vohrah, et al. Eds., *Man's Inhumanity to Man* 977–94 (2003) and Main Features of the new German Code of Crimes against International Law, *in* Matthias Neuner Ed., *National Legislation Incorporating International Crimes—Approaches of Civil and Common Law Countries* 137–55 (2003).

under current international law, states may introduce the principle of universal jurisdiction for genocide, crimes against humanity and war crimes, as these crimes violate the essential interests of the international community as a whole.[25] Section 1 of the new Code of Crimes against International Law establishes this principle in its purest form: German law applies to these crimes, no matter where, by whom and against whom they are committed.

But, in order to prevent the German criminal justice system from being overburdened or the initiation of investigations which may never have a tangible result, the new law establishes a procedural safety net. According to the new Section 153F of the Code of Criminal Procedure,[26] there are some narrow exceptions from the general duty to prosecute. The exceptions are concerned with circumstances where there is no need or realistic chance of bringing a perpetrator to justice in Germany.[27] In particular, the prosecutor has full discretion to decide whether to prosecute a crime under the new Code when it has been committed abroad by a non-German national against a non-German national and where the suspect is neither present on German territory nor expected to enter German territory.

The national group of experts examined carefully the general principles of criminal law contained in Part 3 of the Rome Statute but came to the conclusion that Germany will rather apply the well-tested and well-proven general principles of the General Criminal Code than those of Part 3 of the Rome Statute. The national group of experts was of the view that the application of these general principles will lead to results that are both appropriate and fully consistent with the Rome Statute. Furthermore, there are three other reasons for the technique used. First, it avoids unnecessary legislative work; second, it avoids an unnecessarily cumbersome Code of Crimes against International Law; and finally, it also helps to avoid both possible contradictions on the part of the legislator and also possible misunderstandings on the part of those called to apply the new law.

We now turn to the substantive criminal law and, in particular, the definition of the core crimes as contained in Section 6 to 12 of the new Code.

25. *See* the proposal by Germany on universal jurisdiction prior to the Rome Conference, U.N. Doc. A/AC.249/1998/DP.2 (Mar. 23, 1998); on this proposal, *see*, Hans-Peter Kaul, Preconditions to the Exercise of Jurisdiction, *in* Antonio Cassesse et al. Eds., *The Rome Statute of the International Criminal Court—A Commentary*, 3 volumes, at 583–618 (2002)—on the German proposal, and part of the text *see especially* 597–99.

26. The text is contained in Article 3 of the Act to introduce the Code of Crimes against International Law.

27. *See* Werle & Jessberger, *supra* note 23; Zimmermann *supra* note 24.

For well-known reasons, the crime of genocide was already part of German criminal law introduced in the 1950s as a consequence of the crimes committed in Germany before and during the Second World War. In order to include the crime of genocide into the new code, genocide has been moved from the General Criminal Code to Section 6 of the Code of Crimes against International Law. It follows in substance the definition of Article 6 of the Rome Statute, which is itself based on Article 2 of the Genocide Convention.

Crimes against humanity are dealt with in Section 7 of this new Code. In general, Section 7 follows the structure of Article 7 of the Rome Statute. Thus, the Code of Crimes also distinguishes between the general prerequisite of "a wide-spread or systematic attack directed against any civilian population" as chapeau (Gesamttat) and the single inhuman acts (Einzeltaten). It should also be noted that a new and clarified definition of the crime of enforced disappearance is now contained in Section 7, subsection 1, number 7 of the Code.

With regard to war crimes as defined in Sections 8–12, the new Code first and foremost transposes the definitions contained in Article 8 of the Rome Statute. Provisions of Additional Protocol I to the Geneva Conventions have also been included.[28] The new Code also rearranges and classifies the war crimes of the Rome Statute in a more systematic manner, namely: war crimes against persons (Section 8); war crimes against property and other assets (Section 9); war crimes against humanitarian operations and emblems (Section 10); war crimes of prohibited methods (Section 11); war crimes of using prohibited means (Section 12).

A very important feature of the new Code of Crimes against International Law is that it eliminates, as far as possible, the traditional distinction between war crimes in international armed conflict and war crimes in non-international armed conflict. These distinctions are maintained in Article 8 of the Rome Statute, notwithstanding the fact that many war crimes under the category of international armed conflict have parallel provisions in the category for internal armed conflict. The German code follows the trend of recent case law of the two *ad hoc* tribunals for the Former Yugoslavia and Rwanda.

With regard to sanctions and sentencing, it is useful to recall that the Rome Statute contains only general provisions on sanctions and sentencing. On the other hand, the new German Code of Crimes, in marked contrast to the Rome Statute, provides for a set of concrete and specific penalties attached to each crime. From the German viewpoint, this was necessary because of, again, rather strict constitutional standards of legal certainty and *nulla poena sine lege*. Also the relative seriousness of each crime, thus, becomes clearer and more visible.

28. *See* the table at 53 and 54 of the "Explanations."

V. CONCLUDING OBSERVATIONS

In the concluding part of this contribution it may be appropriate to sum up the German experience with a few observations of a more general nature.

One important aspect for the German side is the realization, confirmed time and again, that the project of the International Criminal Court and the Rome Statute as the founding treaty are, from the legal point of view, very complex and involve a great number of difficult issues and questions. In order to identify those issues and to come to terms with and to solve them, there arose, in Germany, the necessity to make, in particular, a combined and sustained effort of experts from Foreign Affairs, the ministries of Justice and Defense, but also of scholars and university professors. Such a combined effort was necessary to achieve a common understanding of the issues involved and, in particular, a considered view on key questions of the ICC project such as complementarity, jurisdiction or the limited powers of the prosecutor of the International Criminal Court. Similarly, with regard to the German legislative concept to implement the Rome Statute, another joint effort and hard work was necessary to elaborate and adopt the implementing legislation in question.

As it is the declared purpose of the important symposium "Comparative Study on International Criminal Law and the Rome Statute" to better enable the distinguished Chinese hosts to study the ICC and the Rome Statute, it may be appropriate to recall some practical methods and techniques that were used in Germany. A first German experience is that there has to be a core group of experts from the various government agencies and scholars who, on the basis of a common objective and understanding, take it upon themselves to perform this work. It is highly advisable that this core group must comprise, in particular, experts from Justice, Foreign Affairs, Defense and the armed forces. With regard to the latter, the German experience confirms that a position of full support for the International Criminal Court would not have been possible without full involvement of international humanitarian law experts from the German Ministry of Defense. Largely due to this technique used, it proved possible to convince the Ministry of Defense and the armed forces that the ICC indeed represents progress towards more international criminal justice. It turned out to be very useful to explain to the military that existing obligations under international humanitarian law—not to commit war crimes—are not changed by the Rome Statute but simply clarified. In the same manner, a thorough explanation of the principle of complementarity may reassure members of the armed forces that, in the unlikely event that soldiers should be involved in war crimes of the magnitude punishable under the Rome Statute, the national criminal jurisdiction and its priority over the ICC will remain unchanged. A third element of the German experience is that it is of particular importance to explain to all concerned, even to the public at large, why the limited complementarity jurisdiction of the ICC leaves the national criminal court system fully intact and why the prosecutor cannot be a dangerous authority allegedly vested with the unfettered power of potentially politically motivated prosecutions.

The International Criminal Court was planned and is destined to become a universal court. Also, for the sake of its effectiveness and credibility, the ICC must become, over time, a universal institution supported by as many U.N. member states as possible. It is also the firm view of all members of the ICC that their institution deserves to be supported by all states. It deserves also the support of China, this great and emerging power. The Court needs Chinese support in the most comprehensive sense, in political, material and other terms; in forms of practical criminal cooperation and in any other form that China can offer. In principle, Chinese experts are also needed within the ICC, which is currently building up its staff of international civil servants. On the bench of the judges, hopefully, the ICC will one day have a Chinese Judge like Judge Shi, who is currently the President of the International Court of Justice and Judge Liu Danqun at the International Criminal Tribunal for the Former Yugoslavia. Any support from the Chinese side is welcome, including, in particular the culture, tradition and wisdom of this great country.

Annex 1

The German Legislative Concept Regarding the Rome Statute

"Two phases, four legal building blocks"

July 1998–October 1998	Elaboration of the legislative concept within the German Govern, enabling
December 11, 1998	Germany signs the Rome Statute
December 1998–December 2000	**Phase 1: Enabling Germany to ratify the Rome Statute**
	Elaboration and legislative process of
	— Draft Ratification Law for the Rome Statute[29] (= Building block number 1)
	— Draft law to amend Article 16, paragraph 2 of the German Constitution[30] ("Basic law")
	(= Building block number 2)
October 28, 2000	Final adoption of these laws by the German Parliament
December 11, 2000	Germany ratifies the Rome Statute
1999–June 2002	**Phase 2: Enabling Germany to fully cooperate with the International Criminal Court**
Elaboration and legislative process of	**— Draft Law on cooperation with International Criminal Court (ICC Act)**
	(=Building block number 3)
	— Draft Code of Crimes against International Law (CCAIL)
	(=Building block number 4)

29. *Gesetz zum Römischen Statut des Internationalen Strafgerichtshofs vom 17. Juli 1998* Teil II, at 1393 (2000).

30. *Gesetz zur Änderung des Grundgesetzes (Artickel 16) vom 29. Novenber 2000* Teil I, at 1633 (2000).

June 26, 2002	Final, unanimous adoption of these laws by the German Parliament
June 30, 2002	Entry into force of these laws
July 1, 2002	Entry into force of the Rome Statute

Germany: Methods and Techniques used to Deal with Constitutional, Sovereignty and Criminal Law Issues

Current text of Article 16, Para 2 of the German constitution ("Basic Law")

(Building block number 2)

As amended by law of November 29, 2000

Article 16, Para. 2 reads:

No German may be extradited to a foreign country.* A regulation in derogation of this may be made by a 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.

* Second sentence inserted by constitutional amendment of November 29, 2000.