



The German Code of Crimes Against International Law

- **The ICC and national criminal justice systems**

The ICC Statute acknowledges the idea of **decentralized justice**. Under article 1, the International Criminal Court “shall be complementary to national criminal jurisdictions”. The ICC Statute emphasizes the leading role of domestic prosecutions by affirming that the “effective prosecution” of international crimes “must be ensured by taking measures at the national level and by enhancing international cooperation”. Furthermore, the Statute “recalls that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.

However, **the ICC Statute does not establish any obligations** as regards the transposition of the substantive criminal law of the Statute into national legislation. In fact, the national systems retain their autonomy with regard to their criminal law provisions even after becoming party to the ICC Statute. Should punishment under domestic law however be impossible or inadequate, the possible “sanction” is that the International Criminal Court may take over the case. The threshold established by the Statute is the “willingness and ability [of the State to prosecute]”- test.

- **National implementation of international legal norms**

As regards the implementation of the substantive law provisions of the ICC *Statute* several options can be distinguished:

- An easy (and widespread) approach is to simply **rely on existing law**. This model complies in principle with the requirements of the ICC Statute, but for policy reasons it is not recommendable.
- The **reference** to the ICC Statute or to international customary law is a way of comprehensively integrating the substantive law into the domestic legal system. The obvious advantage of this approach is the complete congruence of international and national rules. However, at least in those jurisdictions where the principle of legality is taken particularly seriously there are doubts about this approach.
- The other basic model is the (full) **codification** model, which means copying the wording into domestic law by amending existing prescriptions or creating a new Code. This approach allows the specific needs and views of the implementing State to be taken into account and the necessary adjustments to national criminal law to be included, but risks not being completely congruent with the ICC Statute.

- **Objectives and structure of the German Code of Crimes Against International Law**

- Objectives

The Code of Crimes Against International Law (CCIL) has four principal aims. First, it shall remedy the deficiencies of the prior legislation by **addressing the specific wrong** of the crimes against international law more adequately. In addition, this shall avoid any



discrepancies between German and international criminal law. Secondly, the CCIL shall promote **legal certainty and practicability**. In view of the principle of complementarity the third aim is to **ensure that Germany itself will always be in a position to prosecute** crimes that fall within the competence of the International Criminal Court, in order to prevent German nationals to be prosecuted by the International Criminal Court. Last but not least, the creation of the CCIL shall **promote the ideas of international humanitarian law**.

➤ Format of implementation

The CCIL applies what can be described as a “**modifying codification**”. It is a **comprehensive and independent codification**. This approach allowed for both the consideration of the **specific requirements of the Constitution** (particularly the provisions on legal certainty which, by international comparison, are strict) and the **general principles of criminal law** and the inclusion of norms which are not embodied by the ICC Statute but which form part of **customary international law**.

➤ Structure

The CCIL consists of 14 sections. These sections are divided in two parts. Part 1 (sections 1 to 5) contains general provisions, applicable to all crimes against international law. Part 2 (sections 6 to 14) comprises the definitions of crimes against international law.

• **Provisions of the CCIL**

➤ General Part

Section 1 extends the German jurisdiction under the **universality principle** to genocide, crimes against humanity and war crimes, even when these offences were committed abroad and have no specific link to Germany.

Section 2 of the CCIL is the key norm of Part 1. It provides for **the applicability of general criminal law** unless the CCIL does have express provisions in this regard. Section 2 reflects the basic decision of the German law-maker to implement the provisions on crimes against international law into the tried and tested system and the existing dogmatic framework of German criminal justice. The underlying idea was that, as a rule, the application of the General Part of the German law will lead to results that are both appropriate and in congruity to the Statute. Only where the norms of the ICC Statute differ significantly from the general German criminal law special provisions tracking the prescriptions of the ICC Statute were included in the CCIL.

The few special provisions included in the CCIL relate to the the responsibility of military commanders and others in authority (sections 4, 13 and 14), the imprescriptibility of crimes against international law (section 5) and the obedience to superior orders (section 3). In these respects the provisions of the CCIL take precedence over the General Part of German criminal law.

➤ Genocide

The crime of genocide was already part of German criminal law prior to the enactment of the CCIL. It has been moved from the Criminal Code to section 6 of the CCIL. It follows the definition of article 6 of the ICC Statute and article 2 of the Genocide Convention.



➤ Crimes against humanity

Crimes against humanity are dealt with in section 7. Following the overall structure of article 7 of the ICC Statute, section 7 distinguishes between the general prerequisite of “a widespread or systematic attack directed against any civilian population” as “chapeau” (“**Gesamttat**”), and the single inhumane acts (“**Einzeltaten**”). The internal order of these inhumane acts has been re-arranged according to their seriousness. Also new as compared to article 7 of the ICC Statute is the introduction of both, aggravating circumstances (“Qualifikationstatbestände”) in subsections 3 and 5, in particular the death of the victim, and less serious cases (“minder schwere Fälle”) in subsections 2 and 4, allowing for the mitigation of the sentence under specific circumstances.

The definition of enforced disappearance (section 8 (1) No. 7 ICC Statute), apartheid and “other inhuman acts of similar character” (article 7 (1) (k) ICC Statute) required refinement as the transposition of the legal definition contained in the ICC Statute would have been in conflict with the constitutional prerequisites for legal certainty.

Section 8 (1) No. 10 of the CCIL follows customary international law and covers persecution as an independent crime.

➤ War crimes

Article 8 of the CCIL first and foremost transposes the definitions contained in article 8 of the ICC Statute. Provisions of Additional Protocol I to the Geneva Conventions have also been included as far as they are part of customary law.

The CCIL re-arranges the definitions contained in article 8. As far as possible it **removes the traditional distinction between war crimes in international armed conflict and war crimes in non-international armed conflict** (civil war) that underlies article 8 of the ICC Statute. As a consequence, the chapter on war crimes is structured according to the nature of the objects which are attacked. Thus the CCIL goes beyond the ICC Statute by extending the application of several provisions to crimes committed in non-international conflicts (cf. section 11 and 12). This extension is however consistent with customary international law.

Recommended reading: Gerhard Werle: *Principles of International Criminal Law*, Part One (G), 2005; Gerhard Werle / Florian Jeßberger: International Criminal Justice is Coming Home: The New German Code of Crimes against International Law, in: *Criminal Law Forum* 13 (2002), S. 191 – 223;