



Embassy
of the Federal Republic of Germany
The Hague

File No. Re-20-502.12
Verbal Note No. 187/2012
(please quote when replying)

Note Verbale

The Embassy of the Federal Republic of Germany presents its compliments to the Secretariat of the Assembly of States Parties and – with reference to the letter of the Secretariat ICC-ASP/11/SP/PA/12, by which, in reference to paragraph 6, sub-paragraph (h), of the plan of action, the States Parties were asked to provide to the Secretariat information relevant to promotion of the ratification and full implementation of the Rome Statute – has the honour to communicate the following:

(i) Information on obstacles to ratification or full implementation facing States

- The German Constitution contains a general prohibition of extradition of German nationals (article 16 para. 2 GG). To cooperate with the ICC, it was necessary to be capable of surrendering also German nationals to the Court. Therefore, to implement an exception of the general rule of article 16 para. 2 GG into the German Constitution, the provision had to be amended. (For the amendment see point (vii) below).
- The implementation of article 70 para. 4 ICC Statute, which had been outstanding at the time of the last communication according to paragraph 6, sub-paragraph (h) of the plan of action, has meanwhile been completed. Since 5 November 2008, a new section 162 of the German Criminal Code is in force which extends the German provisions on false testimony (sect. 153 et seq. German Criminal Code) to such offences committed in proceedings before the ICC.

To the
Secretariat of the
Assembly of State Parties
International Criminal Court
Maanweg 174
2516 AB Den Haag

(ii) National or regional strategies or plans of action to promote ratification and/or full implementation

- „Through the Lens of Nuremberg: The International Criminal Court at its Tenth Anniversary“ , October 4th and 5th, 2012
- Workshop und Media Conference on International Criminal Law in Nuremberg , October 2-7, 2012
- Contribution to the Symposium “10 Years of German Code on International Criminal Law”, organized by the University of Hamburg/Germany, May 10th to 12th, 2012
- Meeting of the Working Group International Criminal Law in Nuremberg, May 4th and 5th, 2012
- Organization of the International Symposium on the implementation of the “Kampala-Amendments”, concerning the crime of Aggression, held in the Federal Ministry of Justice in Berlin, March 14th and 15th, 2012
- Participation in the “Genocide Network”, organized by the EU Council
- Promotion of the lecture series on the practice of International Criminal Law in Germany “Ringvorlesung: Die Praxis des Völkerstrafrechts in Deutschland”, organized by the University of Marburg/Germany
- Workshop and Media Conference on International Criminal Law in Gaborone 2011
- Conference and exhibition on the ICC in Bangkok 2010
- Contribution to the “Intersessional Meeting of the Special Working Group on the Crime of Aggression” in Princeton, June 11th to 14th, 2007, organized by the Liechtenstein Institute on Self-Determination (Princeton University)
- Promotion of the seminar “Implementation of the Rome Statute for the International Criminal Court for the Middle East/North African Region” in Nottingham, April 15th to 19th, 2007, organized by the University of Nottingham
- Furtherance of the seminar “The ICC and the Arab World” in Abu Dhabi/UAE organized by the International Criminal Law Network (ICLN) in 2007

To the
Secretariat of the
Assembly of State Parties
International Criminal Court
Maanweg 174
2516 AB Den Haag

- Promotion of the exhibition “From Nuremberg to The Hague – International and Mixed Criminal Courts” shown at the University of Sana’a/Republic of Yemen between January 27th and February 12th, 2007, as well as Panel Discussion at the Yemeni Parliament on February 11th, 2007: “The International Criminal Court and the Development of International Criminal Law” organized by the Friedrich-Ebert-Foundation in Sana’a/Republic Yemen
- Promotion of an international symposium on the International Criminal Court (ICC): “The International Criminal Court Reviewed – Significance, Accomplishments and Challenges” – November 4th, 2006 at Keio University Tokyo/Japan
- Contribution to the “Intersessional Meeting of the Special Working Group on the Crime of Aggression”, June 2006 Liechtenstein Institute on Self-Determination (Princeton University)
- Promotion of a seminar on the ICC in Chishinau/Moldova (March 3rd and 4th, 2006) organized by the International Criminal Law Society (Germany)
- Preparation and Organization of the Exhibition “From Nuremberg to The Hague – International and Mixed Criminal Courts” by the Goethe-Institut (German Cultural Institute) and Nuremberg Center for Human Rights
- Promotion of a seminar in Manila/Philippines, organized by the Philippine Coalition for the International Criminal Court (PCICC)
- Promotion of the Translation of the “Law on Cooperation with the International Criminal Court (ICC Act)” by the University of Göttingen/Germany
- Contribution to the “Intersessional Meeting of the Special Working Group on the Crime of Aggression”, June 13th to 15th, 2005 organized by the Liechtenstein Institute on Self-Determination (Princeton University)
- Promotion of a Training Course for the Asia/Pacific Region at the University of Nottingham
- Contribution to and furtherance of a seminar organized by the Coalition for the International Criminal Court (CICC) with the title “Development of Strong Implementing Legislation UN-ICC”

To the
 Secretariat of the
 Assembly of State Parties
 International Criminal Court
 Maanweg 174
 2516 AB Den Haag

- Contribution to and promotion of a seminar organized by the International Criminal Law Network (ICLN) in Amman/Jordan (February 14th to 16th, 2005) with the title “The ICC and the Arab World”
- The German government is committed to the goals of the European Action Plan.

(iii) Technical and other assistance needs and delivery programmes

None

(iv) Planned events and activities

- Conferences and media workshops on International Criminal Law
- Summer Schools on International Criminal Law
- Seminars on International Criminal Law
- Meetings of the “Working Group International Criminal Law”
- Furtherance of the European Action Plan

(v) Examples of implementing legislation for the Rome Statute

Since Germany opted for a full-fledged and autonomous implementation of the ICC Statute into domestic law, two comprehensive laws implementing the Statute substantively and procedurally have been adopted and various provisions of other laws have been changed:

- The substantive law for the implementation of the provisions defining crimes in the Rome Statute is the Code on International Criminal Law (Völkerstrafgesetzbuch, “VStGB”), of 26 June 2002 which mainly – apart from a few rules on the General Part – incorporates the crimes of the ICC Statute (article 5-8) into the domestic law. The VStGB entered into force the 1st July 2002, the same day as the ICC Statute. It

To the
Secretariat of the
Assembly of State Parties
International Criminal Court
Maanweg 174
2516 AB Den Haag

has been translated into eight languages; Arabic, Chinese, English, French, Russian, Spanish, Greek and Portuguese.

- The procedural or cooperation law is the ICC Implementation Act (Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofs, “IStGH-Ausführungsg”) of 21 June 2002. This law consists of various articles which either create autonomous laws in it or reform other laws. The ICC Implementation Act contains 13 articles, the most important being article 1 which contains the actual ICC Cooperation Law, consisting of 73 sections. This cooperation law, together with the motives, was translated into English, Arabic, French, Russian and Spanish. The ICC Cooperation Law consists of seven parts and regulates the three common forms of assistance in criminal matters: the surrender of requested persons (sect. 2 et seq.), the execution of prison sentences and other sanctions issued by the ICC (sect. 40 et seq.) and other forms of assistance (sect. 47 et seq.). In addition, it deals with the transit of suspects (sect. 34 et seq.) and outgoing German requests to the ICC (sect. 64 et seq.). The ICC Cooperation Law transposes Germany’s duties to cooperate strictly following the Statute. The structure of the Law equals the structure of the German Act on International Assistance in Criminal Matters (Gesetz über die internationale Rechtshilfe in Strafsachen, “IRG”) that is applicable to horizontal mutual assistance, but contains autonomous terms which take into consideration the special character of cooperation with the ICC. The Federal Ministry of Justice rules on requests for the mutual assistance by the Court and on submission of requests to the Court for mutual assistance in agreement with the Federal Foreign Office and with other federal ministries whose departments are affected by the mutual assistance (sect. 68).
- Both laws (the Code on International Criminal Law and the ICC Cooperation Law) are autonomous laws that, in principle, can be understood and applied by themselves without references to other laws. This is especially true for the Cooperation Law which provides for a special cooperation regime with the ICC without making reference to the IRG.
- On 25 August 2004, the Agreement on the privileges and immunities of the ICC (Übereinkommen über die Vorrechte und Immunitäten des Internationalen Strafgerichtshofs) was implemented into German law through translation and

To the
Secretariat of the
Assembly of State Parties
International Criminal Court
Maanweg 174
2516 AB Den Haag

publication in the German federal law gazette. Thus, the Court enjoys legal international personality with regard to Germany including the legal capacity necessary for the exercise of its functions, e.g. the capacity to contract, to acquire and to dispose of immovable and movable property and to participate in legal proceedings.

(vi) Bilateral cooperation agreements between the Court and States Parties

By implementing the Cooperation law, the German legislator has created the prerequisites for a cooperation between Germany and the Court. Therefore, there are currently no further bilateral agreements necessitated. Should there occasionally appear a case where an agreement seems necessary, the German government will accord this with the Court on an *ad hoc*-basis, as has already been practised with other international Courts.

(vii) Solutions to constitutional issues arising from ratification

As already described above under point (i), the formerly absolute prohibition of extradition of German nationals had to be amended. Therefore, concerning the ICC, an exception of this prohibition was created, by inserting a new second sentence in article 16 para. 2 GG allowing for an extradition to a Member State of the European Union or to an International Tribunal provided that the principles of the rule of law are observed.

(viii) National contact points for matters related to promotion of ratification and full implementation

German Federal Foreign Ministry, International Criminal Court section, 500.

The Embassy of the Federal Republic of Germany has further the honour – with reference to the letter of the Secretariat of the Assembly of States Parties ICC-ASP/11/SP/PA/12 and Annex III thereto – to submit in the annex the implementing

To the
Secretariat of the
Assembly of State Parties
International Criminal Court
Maanweg 174
2516 AB Den Haag

legislation questionnaire prepared by the Court and duly completed by the German Federal Government.

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the Secretariat of the Assembly of States Parties its highest consideration.

The Hague, October 17, 2012

L.S.

To the
Secretariat of the
Assembly of State Parties
International Criminal Court
Maanweg 174
2516 AB Den Haag

Annex III: Implementing legislation questionnaire for States Parties

1. Has your Government adopted any national legislation implementing the Rome Statute („the Statute“), or otherwise enacted legislation pertaining to the Rome Statute?

Yes.

**IF NOT
Part A**

2.-4. Not applicable.

**IF YES
Part B**

5. In implementing the Statute, did your Government draft a stand-alone legislation or did it incorporate the articles or substantive provisions of the Statute into pre-existing law?

Germany opted for the implementation of the Rome Statute in two comprehensive and autonomous laws which entered into force on 1 July 2002, the same day as the Rome Statute:

1. the Code on International Criminal Law (Völkerstrafgesetzbuch, “VStGB”) of 26 June 2002, which implements the Rome Statute substantively, and
2. the ICC Cooperation Law (Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof, “IStGHG”) of 21 June 2002, which creates new procedural law.

The Code on International Criminal Law is translated into the six official UN languages and also into Greek and Portuguese. The German ICC Cooperation Law is translated into English, French, Spanish, Arabic and Russian.

In addition, various provisions of pre-existing laws had to be changed, including article 16(2) of the German Constitution (*Grundgesetz*, GG - Basic Law) which enabled German authorities to surrender German nationals to the ICC.

Several procedural laws were reformed by the ICC Implementation Act (Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofs, “IStGH-Ausführungsg”) of 21 June 2002.

More recently, the German Criminal Code has been complemented, in line with Germany’s obligation under article 70(4)(a) Rome Statute, with a clause that extends the German provisions on false testimony to such offences committed in proceedings before the ICC.

6. Does the implementing legislation incorporate the substantive crimes through reference to the Statute or by incorporating the crimes into domestic law?

The substantive crimes of articles 5-8 Rome Statute are incorporated into domestic law in §§ 6-12 of the Code on International Criminal Law (VStGB).

7. Does the implementing legislation incorporate the following aspects of cooperation with the Court and if yes, how?

All of the following aspects of cooperation with the Court have been incorporated in the ICC Cooperation Law (IStGHG). In some respects the IStGHG goes beyond the implementation of Germany's duties under the Rome Statute and provides for additional forms of cooperation through which the German authorities may support the work of the Court.

(a) Arrest and surrender;

- Matters relating to surrender to the Court are regulated in Part 2 of the ICC Cooperation Law. § 2(1) IStGHG establishes the principle that persons who are located in Germany and whose surrender is requested by the Court shall be surrendered for criminal prosecution and execution of a sentence in accordance with the Rome Statute and the IStGHG. For the execution of a sentence, the suspect may, in agreement with the Court, be directly transferred to the state of enforcement (§ 2(2) IStGHG)
- The decision on the request for surrender follows in principle a two-stage procedure, which comprises a ruling by the competent court on the permissibility of the surrender (§§ 6-8, 20-22 IStGHG) and subsequent approval by the federal government. If the conditions for surrender, namely the jurisdiction of the Court and submission of the required documents, are satisfied, the authorities have no discretion. The documents that must be submitted are specified in § 5 IStGHG with reference to article 91(2) and (3) Rome Statute.
- § 3 IStGHG safeguards the principle "ne bis in idem" and implements the duty to consult with the ICC where the person sought for surrender brings a challenge on the basis of this principle (article 89(2) in conjunction with article 20 Rome Statute). Conflicting requests for surrender and extradition by the Court and third states are dealt with in § 4 IStGHG, which implements article 90 Rome Statute. § 4(1) IStGHG furthermore provides for the possibility that the ICC is informed on any request made by a third state for the extradition of a person for an offence that falls within its jurisdiction.
- § 9 IStGHG (investigation measures), §10 IStGHG (detention) and § 11 IStGHG (provisional detention) implement the obligation under article 59(1) Rome Statute to take immediate steps for the arrest of a person to be surrendered. Unlike an order for detention prior to extradition, the order of detention of a suspect sought by the ICC requires no ground for arrest other than the Court's request for arrest and surrender and is no matter of discretion. Subject to stricter conditions and going again beyond the provisions of the Rome Statute, the ICC Cooperation Law stipulates in § 11(2) that provisional detention with a view to later surrender to the Court may also be ordered prior to the receipt of a request for arrest and surrender.

(b) Interim release;

In accordance with § 16(2) IStGHG, the execution of an arrest warrant for surrender may be suspended only under the conditions laid down in article 59(4) Rome Statute. This threshold is higher than the one which applies to the suspension of the execution of an arrest warrant during domestic preliminary investigations. The ICC shall be given the opportunity to present its position prior to any decision on the suspension of the execution of an arrest warrant and again if the competent Higher Regional Court intends to deviate from the Court's recommendation (§ 16(3) IStGHG).

(c) Cooperation with OTP investigations;

The ICC Cooperation Law contains no specific provisions on cooperation with the OTP. Rather, the act generally refers to the Court as one entity, including the OTP (see the definition in § 1(2) IStGH). Cooperation with investigations by the OTP is hence covered by the general provisions on cooperation with the Court.

(d) Cooperation with the Court on the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes;

- Upon request and following an order of seizure or freezing within the meaning of article 93(1)(k) Rome Statute, objects that may be used as evidence in proceedings before the Court or that could have been obtained by a suspect or a participant from an act within the jurisdiction of the ICC or as compensation for such an object will be surrendered (see § 51(1) and (2) no. 1 IStGHG). The rights of third parties must remain unaffected (§ 51(2) no. 2 IStGHG). Objects containing information that has been received from a third state or an intergovernmental or supra-national entity with the request that it be treated confidentially shall not be surrendered until consent has been obtained from the originator (§ 51(1) in conjunction with § 58(3) IStGHG).
- In connection with the surrender of a person, objects that may serve as evidence in the proceedings before the ICC or that may have been obtained by the suspect or a participant directly or indirectly from the act for which surrender has been approved or as compensation for such objects may be surrendered without a special request (see § 29 IStGHG).

(e) Enforcement of sentences;

- § 40 sentence 1 IStGHG embodies the principle that judicial assistance shall be provided to the Court through the execution of its non-appealable sentences in accordance with the Rome Statute and the IStGHG. § 41 IStGHG contains detailed provisions on the enforcement of prison sentences. The enforcement of monetary fines is regulated in § 43 IStGHG.
- Enforcement of prison sentences presupposes a request by the ICC and an agreement with the competent German authorities on the assumption of responsibility for the enforcement (see § 41(1) IStGHG). Unlike in the case of mutual assistance with third states, no recognition in an exequatur procedure is required for decisions of the Court before they can be enforced. In deviation notably from the provisions of the German Criminal Code on the maximum term of fixed-term imprisonment, § 41(2) IStGHG declares that the sentence shall be enforced to the extent set forth by the Court. It also renders inapplicable §§ 57 through 57b of the Criminal Code concerning early release as well as the provisions of the Criminal Procedure Code on the enforcement of prison sentences.
- Part 4 of the ICC Cooperation Law also provides for the enforcement of orders of forfeiture pursuant to article 77(2)(b) Rome Statute (§§ 40 sentence 2, 44 IStGHG) as well as of restitution orders in accordance with article 75(2) Rome Statute (§§ 40 sentence 2, 45 IStGHG).

(f) Other forms of cooperation (see in particular article 93 of the Rome Statute)

- Other forms of cooperation with the Court are governed by Part 5 of the IStGHG. § 47(1) IStGHG establishes the principle that judicial assistance shall be provided to the Court upon its request and in accordance with the Rome Statute. § 47(2) IStGHG lays down a

broad definition of judicial assistance covering all support that is given to the Court in its activities based upon the Rome Statute. It does not require that the assistance sought relates to ongoing proceedings against specific suspects. In line with Germany's obligation under article 93(1) Rome Statute, provision of assistance is mandatory once the primarily formal requirements of § 47 IStGHG are satisfied. The German authorities are granted no discretion in complying with the request.

- § 47 IStGHG covers the forms of judicial assistance enumerated in article 93(1) Rome Statute. In order to allow for the development of new forms of cooperation with the Court, no comprehensive list has been included in the IStGHG. In accordance with article 93(1)(l) Rome Statute, the acts of judicial assistance that may be requested by the Court are hence not limited in terms of their substance.
- The ICC Cooperation Law also contains no public policy (*ordre public*) exception on the basis of which judicial assistance could be denied. For certain constellations in which a request for assistance may create difficulties, and which have been acknowledged as such by the Rome Statute, § 48 IStGHG envisages the possibility to postpone the execution of the request until it has been determined how to proceed in accordance with the Rome Statute.
- In principle, judicial assistance will only be provided upon a formal request by the Court that satisfies the requirements of article 96(1) Rome Statute (cf. § 47(1) IStGHG). An exception relates to officially obtained information, which may under certain conditions be transmitted without a request if it is suitable for the initiation of proceedings, to support ongoing proceedings, or to prepare a request for judicial assistance of the Court (§ 58(2) IStGHG).
- §§ 51-60 IStGHG contain specific provisions on particular forms of assistance. Aside from cooperation on freezing or seizure of objects within the meaning of article 93(1)(k) of the Rome Statute (§ 51 IStGHG, see also note (e) above), these include search and seizure (§ 52 IStGHG), the summoning of witnesses (§ 53 IStGHG), the temporary surrender of persons in custody (§ 54 IStGHG), the temporary assumption of jurisdiction over and transfer of persons who are in custody outside of Germany for investigations or for the taking of evidence (§ 55 IStGHG), the protection of victims and witnesses (§ 56 IStGHG), the service of documents (§ 57 IStGHG), the transmittal of officially obtained information to the Court (§ 58 IStGHG), as well as telecommunications surveillance and other covert measures (§ 59 IStGHG).
- Members and other authorized representatives of the Court shall be allowed, upon request, to be present during judicial assistance activities (§ 60 IStGHG). Upon special request and agreement with the competent German authorities, they shall also be permitted to independently conduct questioning, inspections and similar evidence gathering in Germany (§ 62 IStGHG). Pursuant to § 61 IStGHG, the Court will be allowed, upon its request, to conduct hearings in Germany.

8. Does the implementing legislation designate a channel of communication with the Court?

Decisions on requests for mutual assistance are in principle to be taken by the Federal Ministry of Justice, in agreement with the Federal Foreign Office and with other federal ministries whose departments are affected (§ 68(1) IStGHG; but cf. also the exceptions, *ibid.*). In accordance with the declaration made by the Federal Republic of Germany upon ratification of the Rome Statute, requests from the Court can be transmitted directly to the Federal Ministry of Justice or an agency designated by the Federal Ministry of Justice in an individual case. As such agency was designated the Federal Office of Justice.