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As of 28 December 2001

Draft of an Act to Introduce the Code of Crimes against International Law*

The Federal Parliament has passed the following Act:

Article 1
Code of Crimes against International Law (CCAIL)

Part 1
General provisions

Section 1
Scope of application

This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences[1] designated therein even when the offence was committed abroad and bears no relation to Germany.

Section 2
Application of the general law

The general criminal law shall apply to offences pursuant to this Act so far as this Act does not make special provision in sections 1 and 3 to 5.

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* Translation Brian Duffet; revision by Jan Christoph Nemitz and Steffen Wirth.

[1] In German law the term “serious criminal offence” (“Verbrechen”) is used to denote criminal offences (“Straftaten”) that are punishable with not less than one year of imprisonment. Mitigating (and aggravating) circumstances - as regulated for instance in section 8 subsection (5) - are to be disregarded in this respect (section 12 German Criminal Code). As a result, all criminal offences in the present Draft Code are “serious criminal offences” (“Verbrechen”) with the sole exception of the criminal offences in sections 13 and 14 (see the Explanations: B. Article 1, section 1). Please note that the terminological differentiation between “criminal offences” (“Straftaten”) and “serious criminal offences” (“Verbrechen”) is, for technical reasons, not reflected everywhere in this translation.

Section 3
Acting upon orders

Whoever commits an offence pursuant to Sections 8 to 14 in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt so far as the perpetrator does not realise that the order is unlawful and so far as it is also not manifestly unlawful.

Section 4
Responsibility of military commanders and other superiors

(1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate. Section 13 subsection (2) of the Criminal Code shall not apply in this case.

(2) Any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organisation or in an enterprise shall be deemed equivalent to a civilian superior.

Section 5
Non-applicability of statute of limitations

The prosecution of serious criminal offences[2] pursuant to this Act and the execution of sentences imposed on their account shall not be subject to any statute of limitations.

[2] Cf. footnote to section 1.

Part 2
Crimes against International Law

Chapter 1
Genocide and crimes against humanity

Section 6
Genocide

(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group

1. kills a member of the group,

2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code,

3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,

4. imposes measures intended to prevent births within the group,

5. forcibly transfers a child of the group to another group

shall be punished with imprisonment for life.

(2) In less serious cases referred to under subsection (1), numbers 2 to 5, the punishment shall be imprisonment for not less than five years.

Section 7
Crimes against humanity

(1) Whoever, as part of a widespread or systematic attack directed against any civilian population,

1. kills a person,

2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part,

3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates to himself a right of ownership over that person,

4. deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another State or another area in contravention of a general rule of international law,

5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,

6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,

7. causes a person’s enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,

   (a) by abducting that person on behalf of or with the approval of a State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person’s fate and whereabouts, or

   (b) by refusing, on behalf of a State or of a political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,

8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code,

9. severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or

10. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognised as impermissible under the general rules of international law

shall be punished, in the cases referred to under numbers 1 and 2, with imprisonment for life, in the cases referred to under numbers 3 to 7, with imprisonment for not less than five years, and, in the cases referred to under numbers 8 to 10, with imprisonment for not less than three years.

(2) In less serious cases under subsection (1), number 2, the punishment shall be imprisonment for not less than five years, in less serious cases under subsection (1), numbers 3 to 7, imprisonment for not less than two years, and in less serious cases under subsection (1), numbers 8 and 9, imprisonment for not less than one year.

(3) Where the perpetrator causes the death of a person through an offence pursuant to subsection (1), numbers 3 to 10, the punishment shall be imprisonment for life or for not less than ten years in cases under subsection (1), numbers 3 to 7, and imprisonment for not less than five years in cases under subsection (1), numbers 8 to 10.

(4) In less serious cases under subsection (3) the punishment for an offence pursuant to subsection (1), numbers 3 to 7, shall be imprisonment for not less than five years, and for an offence pursuant to subsection (1), numbers 8 to 10, imprisonment for not less than three years.

(5) Whoever commits a crime pursuant to subsection (1) with the intention of maintaining an institutionalised regime of systematic oppression and domination by one racial group over any other shall be punished with imprisonment for not less than five years so far as the offence is not punishable more severely pursuant to subsection (1) or subsection (3). In less serious cases the punishment shall be imprisonment for not less than three years so far as the offence is not punishable more severely pursuant to subsection (2) or subsection (4).

Chapter 2

War crimes

Section 8
War crimes against persons

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. kills a person who is to be protected under international humanitarian law,

2. takes hostage a person who is to be protected under international humanitarian law,

3. treats a person who is to be protected under international humanitarian law cruelly or inhumanly by causing him or her substantial physical or mental harm or suffering, especially by torturing or mutilating that person,

4. sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,

5. conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities,

6. deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and lawfully present in an area to another State or another area in contravention of a general rule of international law, or

7. imposes on, or executes a substantial sentence in respect of a person who is to be protected under international humanitarian law, in particular the death penalty or imprisonment, without that person having been sentenced in a fair and regular trial affording the legal guarantees required by international law,

8. exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health

(a) by carrying out experiments on such a person , being a person who has not previously given his or her voluntary and express consent, or where the experiments concerned are neither medically necessary nor carried out in his or her interest,

(b) by taking body tissue or organs from such a person for transplantation purposes so far as it does not constitute removal of blood or skin for therapeutic purposes in conformity with generally recognised medical principles and the person concerned has previously not given his or her voluntary and express consent, or

(c) by using treatment methods that are not medically recognised on such person, without this being necessary from a medical point of view and without the person concerned having previously given his or her voluntary and express consent,

9. treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner

shall be punished, in the cases referred to under number 1, with imprisonment for life, in the cases referred to under number 2, with imprisonment for not less than five years, in the cases referred to under numbers 3 to 5, with imprisonment for not less than three years, in the cases referred to under numbers 6 to 8, with imprisonment for not less than two years, and, in the cases referred to under number 9, with imprisonment for not less than one year.

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character, wounds a member of the adverse armed forces or a combatant of the adverse party after the latter has surrendered unconditionally or is otherwise placed hors de combat shall be punished with imprisonment for not less than three years.

(3) Whoever in connection with an international armed conflict

1. unlawfully holds as a prisoner or unjustifiably delays the return home of a protected person within the meaning of subsection (6), number 1,

2. transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory,

3. compels a protected person within the meaning of subsection (6), number 1, by force or threat of appreciable harm to serve in the forces of a hostile Power or

4. compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country

shall be punished with imprisonment for not less than two years.

(4) Where the perpetrator causes the death of the victim through an offence pursuant to subsection (1), numbers 2 to 6, the punishment shall, in the cases referred to under subsection (1), number 2, be imprisonment for life or imprisonment for not less than ten years, in the cases referred to under subsection (1), numbers 3 to 5, imprisonment for not less than five years, and, in the cases referred to under subsection (1), number 6, imprisonment for not less than three years. Where an act referred to under subsection (1), number 8, causes death or serious harm to health, the punishment shall be imprisonment for not less than three years.

(5) In less serious cases referred to under subsection (1), number 2, the punishment shall be imprisonment for not less than two years, in less serious cases referred to under subsection (1), numbers 3 and 4, and under subsection (2) the punishment shall be imprisonment for not less than one year, in less serious cases referred to under subsection (1), number 6,and under subsection (3), number 1, the punishment shall be imprisonment from six months to five years.

(6) Persons who are to be protected under international humanitarian law shall be

1. in an international armed conflict: persons protected for the purposes of the Geneva Conventions and of the Protocol Additional to the Geneva Conventions (Protocol I) (annexed to this Act), namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;

2. in an armed conflict not of an international character: the wounded, the sick, the shipwrecked as well as persons taking no active part in the hostilities who are in the power of the adverse party;

3. in an international armed conflict and in an armed conflict not of an international character: members of armed forces and combatants of the adverse party, both of whom have laid down their arms or have no other means of defence.

Section 9

War crimes against property and other rights

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character pillages or, unless this is imperatively demanded by the necessities of the armed conflict, otherwise extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the power of the perpetrator's party, shall be punished with imprisonment from one to ten years.

(2) Whoever in connection with an international armed conflict and contrary to international law declares the rights and actions of all, or of a substantial proportion of, the nationals of the hostile party abolished, suspended or inadmissible in a court of law shall be punished with imprisonment from one to ten years.

Section 10

War crimes against humanitarian operations and emblems

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. directs an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, or

2. directs an attack against personnel, buildings, material, medical units and transport, using the distinctive emblems of the Geneva Conventions in conformity with international humanitarian law

shall be punished with imprisonment for not less than three years. In less serious cases, particularly where the attack does not take place by military means, the punishment shall be imprisonment for not less than one year.

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character makes improper use of the distinctive emblems of the Geneva

Conventions, of the flag of truce, of the flag or of the military insignia or of the uniform of the enemy or of the United Nations, thereby causing a person's death or serious personal injury (section 226 of the Criminal Code) shall be punished with imprisonment for not less than five years.

Section 11

War crimes consisting in the use of prohibited methods of warfare

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. directs an attack by military means against the civilian population as such or against individual civilians not taking direct part in hostilities,

2. directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, or against undefended towns, villages, dwellings or buildings, or against demilitarised zones, or against works and installations containing dangerous forces,

3. carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated,

4. uses a person who is to be protected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets,

5. uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law,

6. orders or threatens, as a commander, that no quarter will be given, or

7. treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party

shall be punished with imprisonment for not less than three years. In less serious cases under number 2 the punishment shall be imprisonment for not less than one year.

(2) Where the perpetrator causes the death or serious injury of a civilian (section 226 of the Criminal Code) or of a person who is to be protected under international humanitarian law through an offence pursuant to subsection (1), numbers 1 to 6, he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.

(3) Whoever in connection with an international armed conflict carries out an attack by military means and definitely anticipates that the attack will cause widespread, long-term and severe damage to the natural environment on a scale out of proportion to the concrete and direct overall military advantage anticipated shall be punished with imprisonment for not less than three years.

Section 12
War crimes consisting in employment of prohibited means of warfare

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character

1. employs poison or poisoned weapons,

2. employs biological or chemical weapons or

3. employs bullets which expand or flatten easily in the human body, in particular bullets with a hard envelope which does not entirely cover the core or is pierced with incisions

shall be punished with imprisonment for not less than three years.

(2) Where the perpetrator causes the death or serious injury of a civilian (section 226 of the Criminal Code) or of a person protected under international humanitarian law through an offence pursuant to subsection (1), he shall be punished with imprisonment for not less than five years. Where the perpetrator intentionally causes death, the punishment shall be imprisonment for life or for not less than ten years.

Chapter 3
Other crimes

Section 13
Violation of the duty of supervision

(1) A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it.

(2) A civilian superior who intentionally or negligently omits properly to supervise a subordinate under his or her authority or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Act, where the imminent commission of such an offence was discernible to the superior without more and he or she could have prevented it.

(3) Section 4 subsection (2) shall apply mutatis mutandis.

(4) Intentional violation of the duty of supervision shall be punished with imprisonment for not more than five years, and negligent violation of the duty of supervision shall be punished with imprisonment for not more than three years.

Section 14
Omission to report a crime

(1) A military commander or a civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution of any offence pursuant to this Act, to such an offence committed by a subordinate, shall be punished with imprisonment for not more than five years.

(2) Section 4 subsection (2) shall apply mutatis mutandis.

Annex to Section 8 subsection (6) number 1

For the purposes of this Act the term “Geneva Conventions” shall constitute a reference to the following:

- I. GENEVA CONVENTION of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Federal Law Gazette 1954 II page 781, 783),
- II. GENEVA CONVENTION of 12 August 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Federal Law Gazette 1954 II page 781, 813),
- III. GENEVA CONVENTION of 12 August 1949 relative to the Treatment of Prisoners of War (Federal Law Gazette 1954 II page 781, 838) and
- IV. GENEVA CONVENTION of 12 August 1949 relative to the Protection of Civilian Persons in Time of War (Federal law Gazette 1954 II page 781, 917)

For the purposes of this Act Protocol I shall constitute a reference to the following:

Protocol Additional to the GENEVA CONVENTIONS of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (Federal Law Gazette 1990 II page 1550, 1551)

Article 2

Amendment to the Criminal Code

The Criminal Code in the version published on 13 November 1998 (Federal Law Gazette I page 3322), as last amended by the *Act of 19 June 2001 (Federal Law Gazette I page 1142)*, shall be amended as follows:

1. In the Table of Contents the indications in respect of sections 220 and 220a shall be amended as follows:
“Sections 220 and 220a (Deleted)”

2. Section 6, number 1, shall be hereby repealed.

3. In section 78 subsection (2) the words “under Section 220a (genocide) and“ shall be deleted.

4. In section 79 subsection (2) the words "punishments for genocide (Section 220a) and of“ shall be deleted.

5. In section 126 subsection (1), number 2, the words “murder, manslaughter or genocide (Sections 211, 212 or 220a)“ shall be replaced by the words “murder or manslaughter (Sections 211 or 212) or genocide (section 6 of the Code of Crimes against International Law“.

6. In section 129a subsection (1), number 1, the words “murder, manslaughter or genocide “Sections 211, 212 or 220a“ shall be replaced by the words “murder or manslaughter (Sections 211 or 212) or genocide (section 6 of the Code of Crimes against International Law)“.

7. In section 130 subsection (3) the words “Section 220a subsection (1)“ shall be replaced by the words “section 6 subsection (1) of the Code of Crimes against International Law“.

8. In section 138 subsection (1), number 6, the words “murder, manslaughter or genocide (Sections 211, 212 or 220a)“ shall be replaced by the words “murder or manslaughter (Sections 211 or 212) or genocide (section 6 of the Code of Crimes against International Law)“.

9. In section 139 subsection (3), number 2, the words “Section 220a subsection (1), number 1,“ shall be replaced by the words “section 6 subsection (1), number 1, of the Code of Crimes against International Law“.

10. Section 220a shall be hereby repealed.

Article 3
Amendment to the Code of Criminal Procedure

The Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette I page 1074, 1319), as last amended by the *Act of 25 June 2001 (Federal Law Gazette I page 1206)*, shall be amended as follows:

1. In section 100a, first sentence, number 2, the words “murder, manslaughter or genocide (sections 211, 212, 220a Criminal Code)” shall be replaced by the words ”murder, manslaughter (sections 211, 212 Criminal Code) or genocide (section 6 Code of Crimes against International Law)”.

2. In section 100c subsection (1), number 3 (a), the words “murder, manslaughter or genocide (sections 211, 212 and 220a Criminal Code) shall be replaced by the words “murder, manslaughter (sections 211, 212 Criminal Code) or genocide (section 6 Code of Crimes against International Law)”.

3. In section 112 subsection (3) the words “section 6 subsection (1), number 1, of the Code of Crimes against International Law or” shall be inserted after the words “of a criminal offence pursuant to”, and the words “section 220a subsection (1), number 1,” shall be deleted.

4. Section 153c shall be amended as follows:

a) Subsection (1) shall be amended as follows:

aa) In number 2 the comma shall be replaced by a full stop.

bb) The following sentence shall be inserted after number 2:
“Section 153f shall apply to offences punishable pursuant to the Code of Crimes against International Law.“

cc) The previous number 3 shall become subsection (2), and the words “The public prosecution office may dispense with prosecuting an offence” shall be inserted after the subsection mark.

b) The previous subsections (2) to (4) shall become subsections (3) to (5).

5. The following section 153f shall be inserted after section 153e:

“Section 153f

(1) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be anticipated. If in the cases referred to under Section 153c subsection (1), number 1, the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a state on whose territory the offence was committed or whose national was harmed by the offence.

(2) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, the public prosecution office should dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if

1. there is no suspicion of a German having committed such offence,

2. such offence was not committed against a German,

3. no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated and

4. the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and is intended.

(3) If in the cases referred to under subsection (1) or (2) public charges have already been preferred, the public prosecution office may withdraw the charges at any stage of the proceedings and terminate the proceedings.

Article 4
Amendment to the Courts Constitution Act

In section 120 subsection (1), number 8, of the Courts Constitution Act in the version published on 9 May 1975 (Federal Law Gazette I page 1077), as last amended by the *Act of 26 November 2001 (Federal Law Gazette I page 3138)*, the words “(section 220a Criminal Code)” shall be replaced by the words “(section 6 Code of Crimes against International Law)”.

Article 5
Amendment to the Act Amending the Introductory Act to the Courts Constitution Act

In Article 2 paragraph (1), first sentence, number 1, of the Act Amending the Introductory Act to the Courts Constitution Act of 30 September 1977 (Federal Law Gazette I page 1877), as amended by the *Act of 28 March 1980 (Federal Law Gazette I page 373)*, the words “murder, manslaughter or genocide (sections 211, 212, 220a)” shall be replaced by the words “murder or manslaughter (sections 211, 212) or genocide (section 6 of the Code of Crimes against International Law)”.

Article 6
Amendment to the Act on State Security Files
of the Former German Democratic Republic

Section 23 subsection (1), first sentence, number 1 (b) of the Act on State Security Files of the Former German Democratic Republic of 20 December 1991 (Federal Law Gazette I page 2272), as last amended by the *Act of 17 June 1999 (Federal Law Gazette I page 1334)*, shall be amended as follows:

1. The words “or 220a” shall be deleted.

2. The following dash shall precede the first dash:
“section 6 of the Code of Crimes against International Law,”.

Article 7
Repeal of a continuing provision
of the Criminal Code of the German Democratic Republic

Section 84 of the Criminal Code of the German Democratic Republic – CC – of 12 January 1986 in the new version of 14 December 1988 (Law Gazette I Number 3 page 33), as amended by the Sixth Criminal Law Amendment Act of 29 June 1990 (Law Gazette I Number 39 page 526), which, pursuant to Annex II Title III Subject Area C Chapter I Number 1 of the Unification Treaty of 31 August 1990 in conjunction with Article 1 of the Act of 23 September 1990 (Federal Law Gazette 1990 II page 885, 1168) continues in force, shall be hereby repealed.

Article 8
Entry into force

This Act shall enter into force on the day after its promulgation.

Previous wording of Section 153c of the Code of Criminal Procedure

Section 153c. [Non-Prosecution of Offenses Committed Abroad]

(1) The public prosecution office may dispense with prosecuting criminal offenses:

1. which have been committed outside the territorial scope of this statute, or which an inciter or accessory to an act committed outside the territorial scope of this statute has committed within the territorial scope thereof;
2. which a foreigner committed in Germany on a foreign ship or aircraft;
3. if a sentence for the offense was already executed against the accused abroad, and the sentence which is to be expected in Germany would be negligible after taking the foreign sentence into account or if the accused has already been acquitted by final judgment abroad in respect of the offense.

(2) The public prosecution office may dispense with prosecuting criminal offenses committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of proceedings would pose the risk of serious detriment to the Federal Republic of Germany or if other predominant public interests present an obstacle to prosecution.

(3) If charges have already been preferred, the public prosecution office may in the cases of subsection (1), numbers 1 and 2, and of subsection (2) withdraw the charges at any stage of the proceedings and terminate the proceedings if the conduct of proceedings would pose the risk of serious detriment to the Federal Republic of Germany, or if other predominant public interests present an obstacle to prosecution.

(4) If criminal offenses of the nature designated under section 74a subsection (1), numbers 2 to 6, and under section 120 subsection (1), numbers 2 to 7, of the Courts Constitution Act are the subject of the proceedings, the Federal Prosecutor General shall have these powers.

Explanations

Overview

A. General

I. Grounds for the draft

The Statute of the future International Criminal Court (ICC), located in the Hague, was accepted by 120 states at the diplomatic representatives‘ conference in Rome on July 17th, 1998. The international community of states agreed to establish a permanent independent International Criminal Court for the first time in the Statute. This was the result of intense negotiations, in which the Federal Republic of Germany played a decisive role.

However, the decision to create this exceptional new institution of international jurisdiction followed a long period of development. The first formal proposal to establish a court of this nature was made by Gustave Moynier, one of the first presidents of the International Committee of the Red Cross, in 1872. Many decades later, it was the devastating catastrophe of World War II which led to the establishment of the military criminal tribunals of Nuremberg and Tokyo. Later, Article 6 of the Genocide Convention, passed in 1948, assumed that an international criminal tribunal would be established. However, the idea was not implemented. Again, almost half a century passed before the war in Yugoslavia and genocide in Rwanda finally led to the establishment of ad-hoc criminal tribunals. The United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia in a resolution in 1993 (UN Doc. S/Res/827, May 25th 1993, BT-Drs. 13/57, App. 1 and 2) and the International Criminal Tribunal for Rwanda in a resolution in 1994 (UN DOC. S/Res/955, November 8th 1994, BT-Drs 13/7953).

Also in 1994, the United Nations Human Rights Commission presented the first draft for a codification of international crimes (Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/51/10). A preparatory committee, which finally drew up the draft of the statute for a permanent international criminal court, was subsequently set up by the United Nations.

The court referred to in the Rome Statute which, according to the preamble of the Statute, "has jurisdiction over the most serious crimes which affect the international community as a whole", shall supplement domestic jurisdiction, whose fundamental priority is embedded in the Statute (Art. 17 of the ICC Statute). Complementing domestic criminal jurisdiction, it shall be competent for judging the following crimes: genocide, crimes against humanity, war crimes and – pending an agreement by the states party to the treaty - the crime of aggression. As soon as the Statute enters into force, i.e. when it has been ratified by 60

states, the first permanent international body responsible for punishing the most serious crimes against international law shall commence operation.

In order to align German material criminal law with the Rome Statute, and to facilitate the domestic prosecution process which has priority, a largely independent body of rules in the form of a Code of Crimes against International Law (CCAIL), is to be drawn up. The principal objective of this is to implement the penal regulations of the Rome Statute. However, in some of the matters regulated, consolidated international customary law already exceeds that laid down in the Rome Statute. The CCAIL therefore contains individual regulations which extend the criminal liability over that of the Rome Statute. In individual cases, more extensive international customary criminal law standards are incorporated, particularly from Additional Protocol I (1977) to the 1949 Geneva Conventions (BGBI. 1990 II p. 1551) (Additional Protocol I) and from the 2nd Protocol of 1999 to the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (38 International Legal Materials 769, 1999). The CCAIL thus takes into account Article 10 of the ICC Statute, which expressly states that Part 2 of the Statute containing the definition of the crimes may not be interpreted as affecting or restricting existing rules of international law, or such rules in development for purposes other than those of the Statute.

II. Objective of the Code of Crimes against International Law

The objectives of the Code of Crimes against International Law are as follows:

- to cover the specific wrong of the crime against international law better than is currently possible under general criminal law;
- to promote legal clarity and practical application with standards in a single body of rules;
- to guarantee indubitably for the complementarity of the prosecution responsibility of the International Criminal Court that Germany is always in a position to prosecute crimes for which the ICC is competent;
- to promote and contribute to the spread of international humanitarian law by creating an appropriate national body of rules.

It is to be assumed that the existing German elements of crimes cover most of the conducts punishable as individual offences under the ICC Statute, in such a way that they are generally criminalized as "common crimes" by a certain element of a crime or a combination of elements. However, the actual wrong under international law is currently not specifically covered under existing German criminal law. For example, in crimes against humanity, the

functional connection between the commission of the crime and a widespread or systematic attack against a civilian population is not taken into account, nor is the connection with an armed conflict for war crimes, thus ignoring the context of organized use of violence, which facilitates the commission of crimes.

In addition, the ICC in part criminalizes conducts which are difficult or impossible to cover with the elements of general criminal law, such as the statement by warring parties that no quarter shall be given, or the transfer of part of the civilian population by an occupying force into an occupied zone, which is illegal under international law.

The German CCAIL reflects the development of international humanitarian law and international criminal law, and provides independent criminal law provisions harmonized for the specific legal matter. This represents considerable progress compared with the prior practice of applying the general provisions of German criminal law to the core crimes of international law, as well as a contribution to the consolidation of international criminal law, both in terms of legal systematization and legal politics.

III. Concept of the draft and relationship to general criminal law

Most conducts covered by international criminal law were already criminalized under the German Criminal Code. The introduction of the CCAIL does not affect this. The answer to the resulting question on the relationship of the CCAIL to general criminal law can be derived from the concept on which the draft is based:

In the general provisions (Sections 1 to 5), the draft of the CCAIL refrains from providing specialized regulations where possible for legal safety and to facilitate the application of the law in practice. The General Part of the Criminal Code shall apply to the elements of the CCAIL in most cases as well. Special regulations are made only where they are required to implement the Rome Statute. For the scope of the CCAIL, Sections 1 to 5 have priority over different provisions in the Criminal Code, but do not affect them for the scope of general criminal law. Thus, if the same act is covered by both the penal regulations of the Criminal Code and by those of the CCAIL, different general rules may be applicable to them.

In contrast, the Special Part (Sections 6 - 14) of the draft contains independent descriptions of criminally liable conduct in specific provisions. The content of these provisions is based on the directives of the Rome Statute and other binding instruments of international humanitarian law, as well as on the so-called Elements of Crime accepted by the Preparatory

Commission of the ICC on 30/6/2000 (PCNICC/2000/1/Add.2; see Art. 9 of the ICC Statute), on precedents of international criminal courts and on general state practice. Several of the formulations of the draft regulations differ from these directives, in order to harmonize them with the terms and structures of criminal law usual in Germany. In the war crimes chapter, the structure of the draft alone differs considerably from the standards in the Rome Statute; here, parallel regulations in the Statute are combined with the intention of structuring the content more clearly, thus facilitating legal application. However, even where identical or similar terms to those in general German criminal law are used, the offences in the Special Part of the CCAIL are independent provisions, which must be interpreted taking into account in particular the precedent of the International Criminal Court and other international criminal courts.

The CCAIL does not set up a self-contained regime for crimes which are committed in armed conflicts or in connection with attacks against the civilian population. Conducts liable for punishment under general criminal law may therefore still be punishable under the Criminal Code even if they are not punishable under the regulations of the CCAIL. It must be noted that operations of war permitted by international law, such as killing or wounding hostile combatants in armed conflict, are not punishable under general principles and cannot be punished according to Sections 211 ff. of the Criminal Code. This is only the case, however, if the perpetrator adheres to the relevant binding rules of the international law of warfare; if the conduct was prohibited under international law, it may be punishable under German law even if international law does not criminalize it. For example, the pilot of an aircraft who has not observed the precautionary measures required by international law (see e.g. Art. 57 Subsection 2 of Additional Protocol I), and as a result has killed civilians by dropping bombs, is punishable under German law (if it is applicable according to Sections 3 to 7 of the Criminal Code) for wilful killing, even if the conduct is not liable for punishment under international criminal law.

If a perpetrator, by his or her conduct, fulfils both an offence under general criminal law and an offence under the CCAIL, the general rules of concursus delictorum apply. Under these rules, the CCAIL shall often be applicable according to the principle of lex specialis; depending on the situation, coincidence (Section 52 of the Criminal Code) may also be applicable. As the CCAIL only contains crimes with a basis in the Rome Statute or international customary law, but German criminal law provides for more extensive criminal liability in appropriate contexts, the principle of lex specialis does not apply absolutely in the CCAIL in order to avoid loopholes in criminal liability. Sentencing under the principle of concurrence of norms can also have an important clarifying function in such cases.

IV. Other planned legislation related to the ICC Statute

Five other legislation projects are planned in conjunction with the present draft. Two of these have already been implemented:

- The ICC Statute Act has created the conditions required in Germany for the entry into force of the Rome Statute (BGBI. 2000 II p. 1393). It was ratified by the Federal Republic of Germany on December 11th 2000.

- In a parallel legislation process, Article 16 Subsection 2 of the Basic Law was amended to create the constitutional conditions required to allow Germany to hand German citizens over to the International Criminal Court. For this reason, a supplement to Article 16 Subsection 2 was added to the Constitution (Grundgesetz, GG), authorizing the parliament to enact a law allowing to turn individuals over to certain international criminal courts (BGBI, 2000 I p. 1633).

- Currently, a draft law for the implementation of the Rome Statute (Entwurf eines Gesetzes zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofs vom 17.Juli 1998; RSAG-E) is being prepared. Article 1 of this law contains the draft of a law on cooperation with the International Criminal Court (Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof (Entwurf); IStGHG-E). In particular, it shall contain provisions to align the domestic legal situation with the Rome Statute with regard to the cooperation in criminal law between Germany and the Criminal Court, transfer or passage of persons, the execution of decisions by the court, provision of other legal aid and permission for proceedings to take place on German territory.

- It is also intended to establish the constitutional requirements to introduce the first-instance competence of the higher regional courts (Oberlandesgerichte) as standard under Section 120 Subsection 1 of the Courts Constitution Act (Gerichtsverfassungsgesetz; GVG) for all elements of crimes covered by the CCAIL by means of a law amending the Constitution (GG). For this purpose, Article 96 Subsection 5 of the Constitution (GG) shall be extended to include criminal trials as a result of crimes against humanity and war crimes in addition to genocide, which is already covered.

- In addition to the planned amendment to the constitution, a legislation project to re-word Section 120 Subsection 1 No. 8 of the Courts Constitution Act (GVG) is planned. This

provision shall implement the first instance competence of the higher regional courts for all crimes under the CCAIL after the constitutional basis required is established. This also has the result that the public prosecutor general (Generalbundesanwalt) bears the sole responsibility for prosecution in accordance with Section 142a Subsection 1 of the Courts Constitution Act (GVG).

V. Legislative competence

The legislative competence of the German Federal Government for Articles 1 to 5 and Article 7 is based on Article 74 Subsection 1 No. 1 of the Constitution (criminal law, legal proceedings, constitution of courts). For Article 6, the federal government is the only competent body due to the nature of the matter, as the changes affect a consequential ruling which implemented the treaty of union after the accession of the new Federal States (of the former GDR) to the territory of the Federal Republic of Germany (Chapter II, Subject B, Paragraph II, Number 2, Letter b of Appendix I of the Treaty of Union).

The entitlement of the Federal Government to use the legislative competence for Article 1 is based on Article 72 Subsection 2 Alt. 2 of the Constitution. The rulings serve to preserve uniformity of jurisdiction. They are intended to establish uniform legal conditions for the prosecution of crimes against international law throughout Germany. This is in the interest of the entire state. The objective is to facilitate national prosecution of crimes in Germany by incorporating the specific wrong of the crime against international law in a single body of rules which is valid throughout the Federal Republic of Germany. Moreover, it must be guaranteed indubitably that German courts nationwide can always prosecute crimes for which the criminal court is responsible with respect to the complementarity of the responsibility of prosecution of the International Criminal Court. This cannot be achieved by means of regional law. The regulations are also required for effective nationwide prosecution of crimes against international law.

The necessity of a federal law ruling for Articles 2 to 5 is due to the fact that these changes concern the Criminal Code, the Code of Criminal Proceedings, the Law Introducing the Courts Constitution Act and the Courts Constitution Act itself, these areas are already regulated by federal law and continue to require regulation under federal law, as a federal law basis is still required for the prosecution of crimes, criminal proceedings and the organization of the courts. The amendments result solely from the embodiment of the principle of universal jurisdiction in Section 1 of the Code of Crimes against International Law and the addition of the element of genocide to the Code of Crimes against International Law.

Section 84 of the Criminal Code of the former GDR can only be repealed by the Federal Government as this regulation remained in force as federal law after the reunification of Germany. The repeal is implemented in Article 7.

B. On Article 1
Code of Crimes against International Law

Part one.
General provisions

On Section 1 (Scope of application)

The (serious) crimes governed in the CCAIL are all directed against the vital interests of the international community. The ICC Statute refers to them as the "most serious crimes, which affect the international community as a whole". They are therefore of a cross-border nature and subject to the principle of universal jurisdiction. As a result of the particular orientation of these crimes, the trial of crimes committed abroad, even by foreign citizens, is not at variance with the principle of non-intervention . For German criminal law to be applicable to offences committed abroad, no specific "legitimizing link" is required for crimes under the CCAIL (see Lagodny/Nill-Theobald, JR 2000 205, 206; Eser, in: Festgabe 50 Jahre BGH, p. 26 ff., each with further references). As the Federal Supreme Court (*Bundesgerichtshof*, BGH) has until now interpreted Section 6 of the Criminal Code differently (see BGHSt 45, 64, 66; recently the more open judgement of the BGH dated 21/02/2001, 3 StR 372/00), the formulation of Section 1 expressly clarifies that no particular legitimizing link is required with regard to crimes under the CCAIL. However, it must be noted that the applicability of the duty of prosecution for offences committed abroad under the International Criminal Code is specifically restricted by Section 153f of the Code of Criminal Procedure (StPO) in Article 3 No. 5 of the draft CCAIL (EGVStGB). For crimes under Sections 13 and 14 of the CCAIL, which are not as serious as the core crimes under Sections 6 to 12, and are therefore to be classified as misdemeanours, the general provisions apply, especially as in cases without legitimizing links, the access to command and hierarchy structures and processes will often be insufficient for proper investigations in cases under Sections 13 and 14 of the CCAIL. The more extensive scope of Article 28 of the ICC Statute with respect to the jurisdiction of the ICC is not affected by this.

On Section 2 (Application of general criminal law)

Section 2 states that the CCAIL excludes the applicability of the corresponding rulings of general criminal law, in particular the Criminal Code, only with respect to Sections 1 and 3 to 5.

With respect to the General Part, the rulings of the first three sections of the Criminal Code and the unwritten principles, e.g. on the requirements of intent or negligence, generally recognized in German criminal law apply under this regulation. Thus, the matter governed in the CCAIL remains embedded in general German criminal law. The CCAIL only has priority over the general provisions in accordance with Section 2 where it contains special regulations in Section 1 and in Sections 3 - 5, which are required by cogent directives of the ICC Statute.

As Section 2 only provides for special provisions to the exact extent specified here, the entire Special Part of the Criminal Code is applicable to the conducts punishable under the CCAIL. Should violations of the CCAIL and the German Criminal Code coincide, the rules of German criminal law on concursus delictorum (see above A. III.), which are comprised in the referral in Section 2, apply. The same applies when regulations of the CCAIL coincide with rules of the Military Criminal Code (WStG), which is applicable to crimes by soldiers of the army of the Federal Republic of Germany.

In some situations concerning the general principles of criminal law, the provisions of the General Part of the German Criminal Code apply in accordance with Section 2, although the corresponding regulations of the ICC Statute are formulated differently. Depending on the matter, the differences in the cases in question are not so great that it would be necessary to incorporate the regulations of the Statute (and consequently depart from general German criminal law). The areas in question are as follows:

a) Principle of legality

The principle of legality, described in Articles 22 to 24 of the ICC Statute, is already contained in Article 103, Subsection 2 of the Basic Law and Section 1 of the Criminal Code.

b) Criminal responsibility of juveniles

Although Art. 26 of the ICC Statute only provides for the competence of the International Criminal Court for persons of 18 years or older when the crime was committed, there is no need for a ruling on criminal responsibility of minors other than that in Section 19 of the Criminal Code. Art. 26 of the ICC Statute does not make specific international criminal law provisions on the matter of criminal responsibility of minors, but merely excludes the jurisdiction of the ICC for them; Art. 26 of the ICC Statute is based on the practical consideration that separate procedure and sanction rulings for trials against minors, who are

generally not involved in crimes against international law in leading positions, would have required too great an effort. It does not, however, prevent the trial of juvenile perpetrators according to national law, i.e. under the Juvenile Court Law in Germany. Section 105 of the Juvenile Court Law (JGG) applies for adolescents from 18 to 21 years old.

c) Intent

According to Art. 30 of the ICC Statute, intent with respect to a person‘s conduct and at least probable knowledge of the consequences and concomitant circumstances of the act is required for intentional action. The requirement of intent also refers to the existence of a "widespread or systematic attack against the civilian population" in Section 7 of the CCAIL or of an "armed conflict" in Section 8 of the CCAIL. The intent definition of Art. 30 of the ICC Statute does not cover cases in which the perpetrator only views the outcome of the offence as possible, but is willing to condone it should it occur. According to the German understanding, intent exists in the form of dolus eventualis in such a situation. The stricter definition of intent in the ICC Statute was not incorporated in the CCAIL, as the crimes governed here cannot be considered less reproachable if perpetrated with dolus eventualis than other cases of German law, where the perpetrator must only view the consequence as possible for the crime to be punished as crimes committed with intent. For example, perpetrators who mistreat a person under their control, not knowing but condoning that the victim may as a result suffer "severe physical or mental harm" are guilty of the crime of torture with intent (Section 7 Subsection 1 No. 5 of the CCAIL). It would therefore seem generally appropriate that punishability of crimes committed with intent be extended in harmony with the general provisions of German criminal law beyond the minimum requirement prescribed by the ICC. Dolus eventualis is, however, not sufficient in cases in which the description of the act in the elements of the offence requires that the conduct has a certain objective, such as "directing an attack against the civilian population" in Section 11 Subsection 1 No. 1 of the CCAIL (see explanation on Section 11).

d) Consent

No special ruling on the effect of consent is required. It would be conceivable to expressly emphasize the inalienability of rights for the protection of the individual (as in Article 8 of the 4th Geneva Convention of 1949). However, the fundamental non-acceptability of individual consent as justification of the perpetrator for the crimes covered by the CCAIL - other than the exceptions expressly provided for by Section 8 Subsection 1 No. 8 of the CCAIL - can be derived from the fact that they are directed against super-individual legally-protected rights,

which are not at the disposal of individuals. Where consent on the part of the victim excludes the implementation of the provision such as for the war crime of rape (Section 8 Subsection 1 No. 4 of the CCAIL), the perpetrator cannot be punished; this corresponds with general German criminal law and does not require special provisions in the CCAIL.

e) **Self-defence**

Although Article 31 Section 1 Letter c of the ICC Statute contains a separate ruling on self-defence which includes some modifications of Section 32 of the Criminal Code, it is not necessary to include the Statute regulation in the CCAIL. The jurisprudence of German courts also rejects the necessity of self-defence if there is a clear disproportionality between the legal rights defended and violated. It is therefore not necessary to expressly name the requirement of proportionality established in the Statute. The list in the Statute of the only rights to which self-defence applies is merely an abstractly anticipated concretization of the principle of proportionality, so no special regulations for self-defence are necessary. On the contrary, it must be assumed that the legal definition of Section 32 Subsection 2 of the Criminal Code in conjunction with the interpretation of the element of necessity from Section 32 Subsection 1 of the Criminal Code suffice to incorporate the requirements of the ICC Statute, especially as the relevant provisions of the Rome Statute shall apply for the application and interpretation of Section 32 of the Criminal Code in relevant cases. Special regulations could also easily lead to problems in legal application and, moreover, create the mistaken impression that acts criminalized by the Code of Crimes against International Criminal Law could be conceived to be acts of self-defence.

f) Reprisals

The referral in Section 2 does not prevent the provisions of international customary law also being applied in the scope of the General Part. The law of reprisals, which has always been discussed as a special justification for crimes against international law, especially war crimes (see BGHSt 23, 103, 107 ff. for further details), but whose applicability is becoming increasingly restricted, requires special consideration. A reprisal is defined as conduct in contravention of international law which is used by one subject of international law as a means of preventing conduct in contravention of international law by another subject of international law (BGH, c.f., p. 107). Reprisals are, however, only allowed under strict conditions in international law, if at all: They must be ordered by the heads of state or military leadership in order to enforce or restitute a right, and not just as revenge, their use must be proportional, and they may only be used as ultima ratio, i.e. after a failed attempt to reach an

amicable agreement and after prior warning, and they must take into account humanitarian considerations (see Art 50 ff. of the Draft articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission in the latest version; UN Doc. A/CN.4/L.600 of August 11th 2000). Acts committed in times of peace, which fulfil the elements of genocide or of crimes against humanity cannot be justified as reprisal, as these restrictive conditions alone exclude reprisal as a means of justification.

In certain cases reprisal may be considered as justification for acts in conjunction with an armed conflict, which fulfil the elements of a war crime. For example, this is conceivable if an act of war, which in itself is in contravention of international law such as use of prohibited weapons against combatants, is used as reprisal to prevent further (similar) violations by the hostile side. Moreover, it is assumed that international customary law (still) allows reprisal against civilians under strict conditions (see e.g. Greenwood, Netherlands Yearbook of Humanitarian Law 20 [1989], p. 47 f.). The International Court of Justice avoided committing itself on this matter in the advisory opinion on the assessment under international law of the use of nuclear weapons (ICJ Reports 1996, No. 46). In 1991, the Federal Republic of Germany reserved the right to "react using all means permitted by international law" to "severe and planned breaches" of Additional Protocol I, in particular Art. 51 and 52. (declaration on the entry into force of Additional Protocols I and II, No. 6 BGBI. 1991 II p. 968, 969). It herein indicated that it does not consider that the new treaty-based prohibition of reprisal introduced by Additional Protocol I expresses the full scope of international customary law. This interpretation of the law applies in particular to armed conflicts not of an international character, for which there are no bans on reprisals.

The latest developments of international humanitarian law point in the direction of an extensive ban on reprisal. The Geneva Conventions of 1949 includes bans on reprisals for international armed conflicts (see Art 46 of the 1st Geneva Convention; Art. 47 of the 2nd Geneva Convention; Art 13 Subsection 3 of the 3rd Geneva Convention; Art. 33, 34, 147 of the 4th Geneva Convention), which not only apply under international treaties, but also reflect international customary law. In particular, this excludes reprisals against persons protected under international humanitarian law and who are under the control of a party to the conflict. For this core area, it has long been assumed that reprisals are also prohibited by international customary law in armed conflicts not of an international character. (Kalshoven, Netherlands Yearbook of International Law 21 [1990], 78 f.; International Committee Red Cross, eds., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions, 1987, p. 1372 f.). This interpretation was confirmed by the influential finding in the Tadic jurisdiction decision (Tadic, IT-94-1-AR 72, 2/10/1995, par. 87. ff., 137), where

international humanitarian law of armed conflicts not of an international character came a step closer to that of international armed conflicts.

Additional Protocol I goes one step further and excludes reprisals against civilians of the hostile party to the conflict as an operation of war in an international armed conflict in general (Art. 51 ff., in particular 51 Subsection 6, 75 Subsection 2 c of Additional Protocol I), and the International Criminal Tribunal for the Former Yugoslavia accepted the international customary law consolidation of the new bans on reprisal introduced by Additional Protocol I (Kupreskic et al., IT-95-16-T, 14/1/2000, par. 527-536, 533). In this case, the court did not differentiate between international armed conflicts and armed conflicts not of an international character (Kupreskic et al, ibid., par. 534).

In view of this tendency in the development of international law, which is still in a state of flux, it is not recommendable to incorporate reprisal as justification in the Code of Crimes against International Law. The narrow area for which reprisals may currently still be considered a justification can be left to the jurisprudence to decide in each individual case, taking into account the relevant state of the development of international humanitarian law.

g) Criminal responsibility

The provision in Article 31 Subsection 1 Letter a of the ICC Statute on the exclusion of responsibility for mental disease corresponds to Section 20 of the Criminal Code. Where Article 31 Subsection 1 Letter b of the ICC Statute includes responsibility for self-induced intoxication, the provision has no direct equivalent in the German Criminal Code. The criminal liability of a perpetrator in such a situation is, however, guaranteed under existing German criminal law, either under the principles of "actio libera in causa" or at least in criminal liability according to Section 323a of the Criminal Code. It is therefore not recommended that a special provision be made for this disputed matter, which is in a state of flux in legal politics, for this minor area of crimes against international law.

h) Mistake of fact and mistake of law

The ruling on mistakes of fact contained in Article 32 Subsection 1 of the ICC Statute is equivalent to that governed by Section 16 of the Criminal Code. However, Article 32 Subsection 2 in conjunction with Article 33 of the ICC Statute generally excludes the consideration of even an unavoidable mistake of law - except in the particular case of superior order - in contrast to Section 17 of the Criminal Code. Constitutional considerations

stand in the way of the transfer of this regulation into German law, as the maxim "error iuris nocet", still widely accepted in Anglo-American law, contradicts the guilt principle embedded in German constitutional law. However, as the ruling on mistakes of law in Section 17 of the Criminal Code, for all practical purposes, has the same results as the application of Article 33 Subsection 2 of the Statute, no special ruling similar to this provision was needed: Due to the strict requirements made by German jurisdiction on the avoidability of a mistake of law as in Section 17 of the Criminal Code (see e.g. BGHSt 39, 1, 32-35), it is difficult to imagine cases in which a perpetrator of genocide, crimes against humanity, or war crimes could successfully appeal using the defence of an unavoidable mistake of law in Germany.

i) Duress

The cases of duress governed by Article 31 Subsection 1 Letter d of the ICC Statute correspond largely with the provision for duress under Section 35 of the Criminal Code. There are only two differences: Offences committed solely for the purpose of protecting personal liberty (of movement) can be excused under Section 35 of the Criminal Code, but not under Article 31 Subsection 1 Letter d of the Statute; and the Statute only provides for impunity if the damage intended by the perpetrator is not more severe than that prevented. In cases in which there is a clear disproportionality between the outcome of the act under duress and the legal right saved, existing German law also refuses to excuse the offence in accordance with Section 35 Subsection 1 Clause 2 of the Criminal Code (see Lenckner/Perron, in: Schönke/Schröder, StGB, 26th ed., § 35 margin number 33 with further references). It is therefore improbable that cases in which a perpetrator who commits a crime contained in the CCAIL to protect his or her own personal freedom (or that of a family member) would be excused under Section 35 of the Criminal Code, as the legal rights protected in the CCAIL are generally more important than personal liberty. It would therefore seem that no special provision is required to replace Section 35 of the Criminal Code.

j) Irrelevance of official capacity

No regulation is included on the irrelevance of official capacity for criminal liability according to Article 27 Subsection 1 of the ICC Statute, as German criminal law does not recognize any general exclusion of criminal liability for members of government or parliament. The regulation of Article 27 Subsection 2 of the ICC Statute which provides for the irrelevance of domestic or international immunity provisions does not affect the criminal liability, but (only) the ability of the ICC to prosecute international crimes. In this respect, parliamentary immunity under Article 46 Subsection 2 to 4 of the German Constitution and under

comparable regulations of the federal states constitutions do not pose problems. In this regard it should be sufficient to guarantee primary domestic prosecution, with a view to the ruling in the statue, if the immunity of a member of parliament is repealed by parliament should he or she be suspected of a crime against international law. Cases of collision resulting from the indemnity of members of parliament for statements in parliament are not to be expected. The rulings in Sections 18 to 20 of the Courts Constitution Act (GVG) do not impede the Statute, as Art. 27 Section 2 of the ICC Statute does not oblige Germany to prosecute foreign perpetrators subject to these regulations. With respect to the cooperation with the ICC, the draft law introducing the CCAIL (see A. IV above) rules that Sections 18 to 20 of the Courts Constitution Act (GVG) do not prevent the handing over of persons to the International Court of Justice.

k) Commission, complicity, attempt

The ruling on individual responsibility under criminal law in Article 25 of the ICC Statute does not require special implementation, as it is equivalent in content to the forms of commission and complicity in Sections 25 to 27 of the Criminal Code and to the attempt provision under Sections 22 to 24 of the Criminal Code. Complicity in a group offence, governed in Article 25 Subsection 3 Letter d of the Statute is also covered by Section 27 of the Criminal Code. The only difference in this form of complicity is that the supporting act of the accomplice relates to the (at least attempted) crime of a group. This difference does not justify a separate provision.

l) Legal consequences and applicable penalties

General special provisions on the legal consequences and applicable penalties are not incorporated. The principal provisions of the ICC Statute on this matter for the jurisprudence of the ICC are made in Articles 77, 78 and 110, supplemented by relevant Rules of Procedure and Evidence (see UN-Doc. PCNICC/2000/1/Add. I. Finalized draft text of the Rules of Procedure and Evidence, of November 2nd 2000, Rules 145-148). The penalties provided for in the Statute are imprisonment for up to 30 years, without specifying a minimum sentence, life imprisonment and unrestricted fines. The latter can only be imposed in addition to a prison sentence. No particular ranges of penalties are assigned to the elements listed in Art. 5 to 8 of the ICC Statute. Suspended sentences, either on imposition of the sentence or the subsequent suspension of the remainder of the sentence are not provided for. Art. 110 does provide the option of reducing the penalty in retrospect, after a minimum of two thirds of the prison sentence have been served or 25 years of a life sentence.

These provisions pose problems for German law due to their considerable latitude and constitutional requirements of certainty, as well as from the point of view of equality when compared with those tried under general criminal law. However, they are not directly definitive for the criminal jurisdiction of German courts. In order to ensure that domestic prosecution has priority over the complementary jurisdiction of the ICC, which only intervenes when a state is unwilling or unable to prosecute accordingly (see Art. 17, 20 Subsection 3 of the ICC Statute), it must only be guaranteed that German provisions on legal consequences allow penalties which would not be considered clearly inappropriate due to a lack of severity based on the directives of the Rome Statute and international criminal precedents.

Therefore specific ranges of penalties are assigned to the individual offences in the draft, which take into account the abstract hierarchy of wrongs. The draft, like the Statute, only provides for prison sentences as penalties in view of the gravity of the crimes in question. Otherwise, the above considerations do not require or indicate special rulings different to those in general criminal law. In particular, there is no difference in specific sentencing to Article 78 Subsection 1 of the ICC Statute and the relevant regulations of the Rules of Procedure and Evidence which existing sentencing law and related precedents could not take into account.

The following considerations are of primary importance for the assignment of the specific ranges of penalties: First, the CCAIL punishes the gravest crimes against the peaceful co-existence of peoples, namely genocide, crimes against humanity and war crimes, and therefore sets generally higher penalty ranges than for corresponding elements in general criminal law. Second, the draft assumes that a higher penalty is generally appropriate for crimes against humanity due to the functional connection with a "widespread or systematic attack against a civilian population" than for war crimes with comparable elements. Third, the draft must specify the weighting of the sub-elements within the various categories of crimes. Irrespective of the independence of the CCAIL, the penalty ranges in the Criminal Code can be used to a large degree to determine the proportions: If we ignore the connection with an armed conflict or a widespread or systematic attack on a civilian population, the Criminal Code contains many parallel elements. The definitive assessment of wrongs by the German Federal Legislator can be derived from the range of penalties and used for weighting of the offences of the CCAIL relative to one another. Finally, the objective that the specifically indicated penalties create a consistent system must be taken into account, including any less serious cases or qualified cases. In view of the high minimum penalties, the draft provides for

less serious cases particularly where, due to a broad definition of the elements, there is a great latitude in the gravity of the offences.

m) Ne bis in idem

No provision on the "ne bis in idem" principle " (Article 20 of the ICC Statute) in connection with the International Criminal Court is required, as a corresponding provision on the relationship between the ICC and the German Federal High Court is included in the draft of the law implementing the CCAIL (see Section 3, Section 70 IStGHG-E).

On Section 3 (Acting under orders or instructions)

Although the mistake of law provision under Section 17 of the Criminal Code remains applicable for the scope of the CCAIL, a regulation related to Article 33 of the ICC Statute and Section 5 of the Military Criminal Code (Wehrstrafgesetz**;** WStG) is required for superior orders. Like Section 5 of the Military Criminal Code, Section 3 contains a more lenient mistake of law provision than that in Section 17 of the Criminal Code for perpetrators of war crimes acting under military or equivalent civilian orders, which, as a more lenient provision, cannot be omitted due to the principle of universal jurisdiction.

The draft text is based on the difference implied in Section 22 of the Military Criminal Code between binding orders and non-binding orders (i.e. orders in contravention of criminal law or humanitarian law). Where a subordinate carries out a binding order, the act may not be punished under the CCAIL, as, according to the definition in Section 22 Subsection 1 of the Military Criminal Code such an order cannot require any actions in contravention of the Criminal Code or human rights law (see also Section 11 Subsection 1 Clause 3 of the Soldiers Act [Soldatengesetz; SoldG]). Section 3 only concerns cases in which a subordinate carries out an order which is actually non-binding. Section 5 of the Military Criminal Code, which contains special grounds for excuse and a special mistake of law provision, includes a privilege for soldiers, as it is not the mere avoidability of the error which decides the guilt for the wrong as in Section 17 of the Criminal Code, but how obvious the illegality of the act is. This provision also applies under Article 33 of the Statute, but effectively only for war crimes due to the legal fiction of the obvious nature of the illegality in Article 33 Subsection 2 of the ICC Statute. This fiction was not incorporated in the CCAIL; it would have posed problems with respect to the guilt principle and, moreover, it is legally unnecessary if Section 3 is restricted to crimes under Chapter two and three of the CCAIL - as is the case. The crimes under Chapter three are also incorporated here, as for example the unlawful nature of a

command not to report a crime against humanity is not as obvious as the unlawful nature of an order to commit such a crime.

The orientation towards the recognition of the unlawful nature rather than the knowledge of the unlawful nature is solely for linguistic reasons. It aligns the wording with that of Section 5 of the Military Criminal Code (WStG) without changing the content. The remaining difference in the wording compared with the Military Criminal Code (WStG), where the unlawful nature of the crime is the deciding factor, and not that of the command, is because the wording follows that of the Statute closely. In practice it should not be of consequence, as the Statute tacitly assumes that all orders to commit crimes under the CCAIL are unlawful and the perpetrator can only be excused if he or she was unaware of the unlawful nature of the act.

The extremely far-reaching extension of the privilege of erring subordinates to orders of civilian superiors in the ICC Statute is restricted to "orders of comparable actual binding effect" in Section 3. The measure for this is the hierarchical super- and subordination relationship often associated with military orders, which could exist between a civilian governor of an occupied zone and his or her subordinates, for example.

On Section 4 (Responsibility of military commanders and other superiors)

The regulation incorporates an aspect of the responsibility of superiors for crimes by subordinates contained in Article 28 of the ICC Statute. German criminal law contains no such general ruling, but the result of criminal liability of the superior is reached in cases in which the superior consciously allows to occur an offence by the subordinate bound by orders, either in Section 13 of the Criminal Code or in any case in the special regulation of Section 357 of the Criminal Code. Just as in Section 357 of the Criminal Code, Section 4 requires the superior to be punished to the same extent as the subordinate, although according to legal dogma, the negligence of the former could be classified as mere complicity. Due to the particular responsibility of the superior, Subsection 1 Clause 2 clarifies that the sentence cannot be reduced in accordance with Section 13 Subsection 2 of the Criminal Code. In accordance with Paragraph 2, the provision applies not only for de jure, but also for de facto military and civilian superiors; the decisive factor is the existence of actual authority and control, which implies that the superior could have prevented the act.

If the superior was unaware of the pending crimes of the subordinate, he or she cannot be punished as a wilful perpetrator of a crime according to the principles of German criminal law due to a lack of intent. It was therefore impossible to extend the perpetrator concept in this

area in the General Part of the CCAIL in accordance with the "respondeat superior" maxim, as in Article 28 Letter a (i) of the ICC Statute for cases of mere negligent failure to prevent crimes. Such cases shall be covered by the regulations on violation of the duty of supervision (Section 13) and failure to report a crime (Section 14) in the Special Part of the CCAIL.

On Section 5 (Non-applicability of the statute of limitations)

Article 29 of the ICC Statute excludes the statute of limitations for all (serious) crimes subject to the jurisdiction of the ICC, including all "most serious crimes, which affect the international community as a whole" named in Article 5 of the ICC Statute. This strict directive is implemented in Section 5. In the ruling on the non-applicability of the statute of limitations, the legislator uses all latitude available in accordance with the jurisdiction of the Federal Constitutional Court in order to avoid the objection of a lack of complementarity of the German provision. For reasons of equality with respect to the Criminal Code, the provision only covers the crimes regulated by the CCAIL, as the misdemeanours regulated in Sections 13 and 14 are less serious. However, it is clear that this provision leads to certain friction with general German criminal law, particularly with respect to less serious cases of war crimes, as the statute of limitations is inapplicable only to murder and genocide under German criminal law (Section 78 Subsection 2 of the Criminal Code). It must also be noted that for other offences which result in prison sentences of 10 years or over, Section 78 Subsection 3 Nos. 1 and 2 of the Criminal Code prescribe a statute of limitations of 20 or 30 years, which is often equivalent to non-applicability of the statute of limitations. Besides which, it is often the case for crimes under the CCAIL, that in the states which are called on primarily to prosecute the crimes (the state in which the crime was committed, home state of perpetrator), prosecution is restricted for prolonged periods as a result of a lack of actual desire to prosecute on the part of the state (see Section 78 b Subsection 1 No. 2 of the Criminal Code); In order to prosecute the crimes under Sections 6 - 12 of the CCAIL in such cases, even after prolonged periods, it would appear justified to repeal the statute of limitations.

In accordance with the exclusion of the statute of limitations provided for in Section 79 Subsection 2 of the Criminal Code for the execution of penalties for genocide, Section 5 also states that the execution of penalties for crimes under the CCAIL is not subject to the statute of limitations.

In the case of Sections 13 and 14 of the CCAIL, other provisions apply, as these are merely misdemeanours, which means that the general statutes of limitations as stated in Section 78 Subsection 3 No. 5 or Section 79 Subsection 3 of the Criminal Code apply for these

elements in accordance with Section 2 of the CCAIL. In view of the minor nature of the underlying acts, this seems appropriate.

Part two.
Crimes against international law

Chapter one.
Genocide and crimes against humanity

Genocide and crimes against humanity are included in the same chapter due to their close connection. The offence of genocide has proven itself in the proceedings to date and the wording is virtually unchanged from that of the Criminal Code. The offence of crimes against humanity has been formulated as closely as possible to the wording of the Rome Statute.

On Section 6 (Genocide)

The wording of this paragraph is principally the same as in the previous elements of genocide in Section 220a of the Criminal Code. The regulation is based on the definition in Article II of the Convention on the Prevention and Punishment of Genocide of 1948 (BGBI, 1954 II p. 729), and thus corresponds to Article 6 of the ICC Statute.

The formulation of numbers 1, 2 and 5 which differ from Article 6 of the ICC Statute and Section 220a of the Criminal Code clarifies that the requirements for genocide can be fulfilled even if the act is only directed against one person. This version of the offence takes into account the elements of crime for Article 6 of the ICC Statute and confirms the prior interpretation of the offence of genocide (see Jähnke, in Leipziger Kommentar, 11th ed., Section 220a Note 10; Eser, in Schönke/Schröder, 26th ed., par. 220a Note 4). If the conduct is directed against more than one person, it can be assumed that all committed acts constitute a single crime of genocide (see BGHSt 45, 65, 85 ff.). The other differences in Section 6 Subsection 1 No. 3 and No. 5 compared with the previous version of Section 220a of the Criminal Code (StGB) are merely linguistic.

The element used to date in Section 220 a of the Criminal Code of a group "characterized by affiliation to a people" has been replaced by the term "ethnic" in accordance with the wording of Article 6 of the ICC Statute, which is also used in Section 7 Subsection 1 No. 10, as in the ICC Statute. This does not change the material content of the regulation.

For public incitement to genocide punishable under Article 6 in conjunction with Article 25 Subsection 3 Letter e of the ICC Statute, the prior criminal liability under Sections 111 and 130a of the Criminal Code remains unchanged.

On Section 7 (Crimes against humanity)

This regulation is based on Article 7 of the ICC Statute. A series of previously existing international law instruments have been included in the formulation, particularly Article 6c of the Statute of the International Military Tribunal of Nuremberg, Article II No. 1c of Control Council Law No. 10, Article 5c of the Statute of the International Criminal Tribunal for the Far East, Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia and Article 3 of the Statute of the International Criminal Tribunal for Rwanda. Crimes against humanity form a group of offences separate from war crimes. They can be committed both in times of peace as well as during armed international conflicts or armed conflicts not of an international character.

The element of the crime was formulated as closely as possible to Article 7 of the ICC Statute. The partial specifications of individual elements take into account the requirements of the constitutional certainty principle. The sequence of individual elements is different to Art. 7 Subsection 1 of the ICC Statute. The differences are due to the inclusion of the crime of apartheid as a qualification (compare Art. 7 Par 1 Letter j of the ICC Statute with Section 7 Subsection 5 of the CCAIL). The sequence of individual acts in Paragraph 1 is determined by the gravity of the act as expressed in the range of penalties set.

1. The basic element of Section 7 Subsection 1

The material elements of crimes against humanity always require the implementation of at least one of the alternatives specified in Section 7 Subsection 1 No. 1 to 10. The individual alternatives are primarily conducts which are already covered as such by penal regulations of the Criminal Code. The individual offences - following the Rome Statute closely - only become crimes against humanity, and thus crimes against international law if they are committed as part of a "widespread or systematic attack against a civilian population", and thus are in a functional connection with such an attack. The individual offences must be a part of this attack, the so called "context element".

Subjectively, there must always be at least dolus eventualis (Section 15 of the Criminal Code). The intent must be to integrate the individual act in a widespread or systematic attack on a civilian population, whereby dolus eventualis is sufficient if such an attack is underway. On the other hand, the intent must include the implementation of (at least) one alternative of Section 7.

a) The context element

In order to interpret the element of an "attack on the civilian population", we must look at the legal definition in Article 7 Subsection 2 Letter a of the ICC Statute. According to this, "attack on the civilian population" means a "conduct which is related to the multiple commission of acts referred to in [Article 7] Subsection 1, pursuant to or in furtherance of a state or organizational policy to commit such attack". Thus, a collective, typically a state as defined by international law, but not necessarily so, must be responsible for the attack. A military attack as defined by international humanitarian law (see Art. 49 of Additional Protocol I) is therefore not required to fulfil the element.

Widespread attacks are in particular those which cause a large number of civilian victims; a systematic attack requires a considerable degree of planning. Often both elements will be fulfilled simultaneously.

b) The individual acts

On Section 7 Subsection 1 No. 1 (Willful killing)

The regulation is based on Article 7 Subsection 1 Letter a of the ICC Statute and requires that the perpetrator causes the death of one or more persons.

On Section 7 Subsection 1 No. 2 (Extermination)

The regulation is based on Article 7 Subsection 1 Letter b of the ICC Statute. The alternative is closely related to the elements of genocide. In contrast to Article 7 Subsection 2 Letter b of the ICC Statute, extermination is formulated on the basis of Section 220a Subsection 1 No. 3 of the Criminal Code. The element of the "intent to destroy a population in whole or in part", which was added to the wording of the Rome Statute, serves to appropriately specify the conditions for criminal liability by aligning it with the element of genocide.

In contrast to the offence of genocide, the alternative of extermination is not restricted to certain groups and includes in particular political or social groups. The conduct need not cause the actual destruction of a population, just as this is unnecessary for genocide. In individual cases, provided the offence requirements of the current version of Section 220a Subsection 1 No. 3 of the Criminal Code or the planned version of Section 7 Subsection 1 No. 3 of the CCAIL are fulfilled, there may be a concurrence of offences with this very element.

On Section 7 Subsection 1 No. 3 (Enslavement)

This regulation is based on Article 7 Subsection 1 Letter c of the ICC Statute. The alternative of enslavement criminalizes the exercise of a claimed right of ownership to a person, in particular the typical case of trafficking in women or children. In order to interpret the alternative, it is necessary to consider the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of September 7th 1956 (BGBI, 1958 II p. 205) and the precedents of the International Criminal Tribunal for the former Yugoslavia (Kunarac et al. IT-96-23-T and IT-96-23/1-T, 22/2/2001, par. 515 ff.).

On Section 7 Subsection 1 No. 4 (Deportation or forcible transfer)

The regulation is based on Article 7 Subsection 1 Letter d of the ICC Statute. The alternative requires the forcible deportation of a person from the area in which the person is lawfully present.

In contrast to Article 7 of the ICC Statute, Section 7 Subsection 1 No. 4 does not require the deportation of "the population" (Article 7 Subsection 1 Letter d of the ICC Statute) or of several "persons" (Article 7 Subsection 2 Letter d of the ICC Statute). The extension of the provision over the wording of the ICC Statute corresponds to the provision in the elements of crime**s** and is required to criminalize the punishable wrong. As in the cases of Nos. 1, 3, 5 to 9, it is sufficient if the offence is directed against one person. The considerable increase of the wrong results here from the functional connection of the individual act with the collective act. Domestic law which contravenes international law is unimportant in determining whether a person is „lawfully“ present in an area.

Only the underlying violation of international law makes the act a crime against international law. The formulation "general rule of international law", which is different to that in the ICC Statute, refers to Article 25 of the Constitution, and thus in particular to the rules of

international customary law as in Article 38 Paragraph 1 Letter b of the ICJ Statute. As Article 25 of the Constitution only covers universally applicable international customary law, it guarantees that even according to German law, only conducts which can be classified as punishable wrongs according to universally applicable standards are covered. Deportation measures which only violate international treaty regulations or regional international customary law do not fulfil the elements.

Deportation measures violate the general rules of international law if there are no objective reasons for such measures, e.g. if entire ethnic groups or parts thereof are forcibly driven from their usual settlement area for race reasons alone as part of a policy of so-called "ethnic cleansing". In contrast, lawful measures to terminate the period of residence of foreign citizens who are illegally present in an area are not covered by the scope of application of the law. The same applies for the transfer of ethnic groups for their own protection, e.g. from natural disasters or military operations in the event of an armed conflict.

On Section 7 Subsection 1 No. 5 (Torture)

This regulation is based on Article 7 Subsection 1 Letter f of the ICC Statute. The formulation "in any other way" clarifies that control situations which are comparable in nature to detention are covered.

The alternative of torture is excluded does not apply if the suffering is a consequence of sanctions permitted by international law. These include sanctions which are in keeping with the general rules of international law. Actions which are not prohibited by existing international customary law are not to be considered torture, such as in states where the death penalty is executed in a way that conforms to international law. In contrast to Section 7 Subsection 1 Nos. 4 and 9, reference is made not only to universally applicable international customary law, but to legal sanctions which are permissible under regional international customary law only also do not fulfil the alternative of torture. Thus, Section 7 Subsection 1 No. 5 only covers universally prohibited sanctions as torture. There is no basis in international customary law for a more extensive penalization of torture; criminal liability in accordance with other regulations is unaffected.

On Section 7 Subsection 1 No. 6 (Sexual violence)

This regulation is based on Article 7 Subsection 1 Letter g of the ICC Statute. In contrast to the wording of the ICC Statute, the element of "sexual coercion" has been added to the

formulation (see Section 177 of the Criminal Code). This basic concept guarantees that the elements of "sexual slavery" and "any other form of sexual violence of comparable gravity" mentioned in the ICC Statute are covered by the provision. The inclusion of conduct punishable under German criminal law as sexual coercion among the crimes against humanity also corresponds to international customary law, as shown in particular by the precedents of the International Criminal Tribunal for the former Yugoslavia (Kunarac et al., IT-96-23-T and IT-96-23/1-T, 22/2/2001, par. 436 ff.).

The formulation of the element of "forced pregnancy", however, is closely based on the legal definition in Article 7 Subsection 2 Letter f of the ICC Statute. Subjectively, the "intention of influencing the ethnic composition of a population" is required according to the definition. The rulings on abortion (Sections 218 to 219 of the Criminal Code) remain unaffected.

On Section 7 Subsection 1 No. 7 (Enforced disappearance)

This regulation is based on Article 7 Subsection 1 Letter i of the ICC Statute. It penalizes a practice already qualified as a crime against humanity by the Inter-American Convention on Forced Disappearance of Persons of 1994 (OEA/Ser. P, AG/doc. 3114/94 rev. 1). The legal definition contained in Article 7 Subsection 2 Letter i of the ICC Statute does not meet the certainty requirements of German law in specifying the individual criminal responsibility. Section 7 Subsection 1 No. 7 therefore distinguishes between the alternative acts of deprivation of freedom and refusal to supply information, based on the Elements of Crime**s** for the Rome Statute.

On Section 7 Subsection 1 No. 7 Letter a

The core of the fulfilment of the offence according to letter a is formed by the deprivation of freedom, which is described in more detail in the offence. The formulation "severely" clarifies that deprivation of freedom for a short period is not covered by the scope of application of the element. Deprivation must also be ordered by or carried out with the approval of a state or a political organization. Also required to fulfil the offence is that subsequently, in spite of an inquiry e.g. by relatives of the victim, information on the fate and location of the person unlawfully imprisoned is not supplied immediately without an objective reason for the delay. Conversely, mere failure to provide corresponding information without an inquiry is not sufficient to fulfil the offence of enforced disappearance. Failure to supply the information in question is an element which requires intent on the part of the perpetrator. Therefore, in accordance with Section 7 Subsection 1 No. 7 Letter a, criminal liability only applies if, in

addition to the deprivation of freedom, the information named in the CCAIL is not disclosed; if this was the objective of the perpetrator and if the required intent is given. The teleological interpretation alone means that misleading information is not sufficient information. To clarify this, the element "truthful" is included. The perpetrator under Letter a need not actively refuse or provide information. If information is provided without delay, this means that the perpetrator of deprivation of freedom cannot be prosecuted for successful forced disappearance.

On Section 7 Subsection 1 No. 7 Letter b

For the second alternative under Letter b, the offence is in the refusal of immediate information after prior kidnapping or severe deprivation of freedom. Therefore, a request for information is a prerequisite for this alternative - refusal to supply information is impossible if the party concerned not asked. The alternative forms a mirror image to Letter a, so that the description there applies accordingly. However, in contrast to Letter a, it is not sufficient here for the refusal of information to occur with mere approval of the state or the political organization in question. The offence is only fulfilled if there is a corresponding order, or if the refusal to supply information is not ordered by the state or a political organization, but the perpetrator, by his or her own decision and without instructions, integrates himself or herself in a state policy of enforced disappearances and simultaneously violates an existing legal duty to supply information. Such a legal duty can be derived from domestic law, e.g. from criminal procedure law or constitutional law, but also from international law. In accordance with Section 7 Subsection 1 No. 7 Letter a, this section also rules that conscious provision of misleading information is equivalent to a refusal to supply information if the other requirements exist. In any case, for Letter b, the element intent must also relate to the fact that the victim on whose fate the information is refused was first kidnapped or deprived of freedom in another way in accordance with Letter a.

Subjectively, the regulation requires the intention of removing the person "from the protection of the law for an extended period" in addition to intent.

On Section 7 Subsection 1 No. 8 (Other inhumane acts of a similar character)

This regulation is based on Article 7 Subsection 1 Letter k of the ICC Statute. In contrast to the ICC Statute, the formulation "other inhumane acts of a similar character" was not included in the provision due to the certainty requirement. In the wording "severe physical or mental harm, in particular of the type referred to in Section 226 of the Criminal Code" the

alternative uses the formulation from the earlier Section 220a Subsection 1 No. 2 of the Criminal Code.

On Section 7 Subsection 1 No. 9 (Imprisonment)

This regulation is based on Article 7 Subsection 1 Letter e of the ICC Statute. The alternative requires that the perpetrator prevent one or more persons from leaving a given place freely. This also covers situations in which a person is not fully deprived of physical freedom of movement, but it is limited to a certain area e.g. by transfer to a camp. The formulation "severely" excludes imprisonment for short periods.

The act does not take on the character of a crime against international law unless the underlying international law is violated. The formulation "general rule of international law", which is different to that in the Rome Statute refers to Article 25 of the Constitution, only covers clauses of international customary law which are universally applicable.

On Section 7 Subsection 1 No. 10 (Persecution)

This regulation is based on Article 7 Subsection 1 Letter h, Subsection 2 Letter g of the ICC Statute. The alternative covers the order of deprivation or severe restriction of fundamental human rights. The rights to life, health or freedom of movement, among others, are considered to be fundamental human rights. In contrast to the ICC Statute, the crime of persecution does not require a "connection" to other crimes under the CCAIL. Such a requirement does not correspond with the latest developments of existing international customary law, as the International Criminal Tribunal for the former Yugoslavia recently expressly confirmed on several occasions (Kupreskic et al., IT-95-16-T, 14/1/2000, par. 580, Kordic and Cerkez, IT-95-14/2-T, 26/2/2001, par. 193 ff).

The perpetrator must act on certain grounds referred to in the law. The element "other grounds universally recognized as unlawful under the general rules of international law" in Subsection 1 No. 10 leaves room for a pro-human rights development of international customary law. Persecution for reasons of sexual orientation, for example, cannot currently be prosecuted as a punishable crime against humanity. Despite intensive negotiations, advocates of the express inclusion of this group did not succeed in getting this motion passed. It must therefore be assumed that no corresponding prohibition clause exists in general international customary law, which would be required for inclusion in the CCAIL in

accordance with the principle of universal jurisdiction. The formulation of the law remains open should international customary law develop accordingly in the future.

2. Less serious cases of Subsection 1

On Section 7 Subsection 2 (Less serious cases)

For less serious cases of Subsection 1 Nos. 2 to 9, Subsection 2 provides for punishment under a more lenient range of penalties. This facilitates the handling of cases in which the objective gravity of the specific act or the personal guilt, reduced by personal threat to the perpetrator in a command and obey situation for example, does not justify the application of the standard range of penalties. As a less serious case of a major restriction of basic human rights is inconceivable, the element of persecution is not mentioned in Section 7 Subsection 2.

3. Qualifications

On Section 7 Subsection 3 (Crimes against humanity which result in death)

Section 7 Paragraph 3 provides for an increase of the minimum penalty if the act caused the death of a person, even through negligence (Section 18 of the Criminal Code)

On Section 7 Subsection 4 (Less serious cases of Subsection 3)

Section 7 Paragraph 4 allows the higher range of penalties to be reduced for less serious cases.

On Section 7 Subsection 5 (Crime of apartheid)

This regulation is based on Article 7 Subsection 1 Letter j, Subsection 2 Letter h of the ICC Statute. The inclusion of the crime of apartheid in the ICC Statute had a great symbolic effect, primarily as a result of the apartheid regime in South Africa, which has now been overcome.

In contrast to the ICC Statute, the crime of apartheid in the CCAIL is not an independent crime, but a qualification. According to the ICC Statute, the crime of apartheid can exist if

"inhumane acts of a similar character" to those named in Paragraph 1 have been committed. This element could not be included because of the certainty principle. Section 7 Subsection 5 Clause 1 of the CCAIL therefore requires that a crime under Paragraph 1 has been committed. In accordance with the ICC Statute, the qualification subjectively requires the intention "of maintaining an institutionalized regime of systematic oppression and domination of a racial group over another racial group".

Paragraph 5 is only applied if the act is not already subject to a severe penalty under Paragraph 1 or 3.

For less serious cases, Clause 2 allows punishment according to a more lenient range of penalties, provided the act is not subject to severe penalties under Paragraph 2 or Paragraph 4.

Chapter two
War crimes

1. General preliminary remarks

The war crimes chapter covers crimes against international law committed in connection with an international armed conflict or an armed conflict not of an international character. The offences contained in the ICC Statute form the greater part of this chapter. However, the draft also includes regulations of international law which must be implemented by the Federal Republic of Germany as a result of international obligations, namely the regulations of Additional Protocol I. The 2nd Protocol of 1999 to the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 was also taken into account. The penal regulations of the CCAIL only exceed the scope of the ICC Statute in accordance with the consolidated status of the international customary law as it has become manifest in the international practice and accompanying opinio iuris. The practice of international law by states during armed conflicts, relevant statements by states, in particular as expressed in military manuals, and the relevant, generally accepted statements of the most important organs of international organizations are taken into account.

The Statutes for the International Criminal Tribunals for the former Yugoslavia and Rwanda and the precedents of both criminal tribunals are also of fundamental importance for the determination of international customary law in the field of war crimes as codifications of customary law. The latter has made an enormous contribution to the confirmation, consolidation and development of norms of international customary law. The CCAIL is also harmonized with the practice of the Federal Republic of Germany, which applies the law of international armed conflict in all areas of application, as laid down in Central Service Regulation (Zentrale Dienstvorschrift**;** ZDv) 15/2 of the German Armed Forces of 1991 (No. 211).

In the war crimes chapter, the CCAIL takes into account the historical development of criminalization of violations of important regulations of international humanitarian law, which, among other things, lead to the inclusion of the regulations of the so-called "grave breaches" in the Geneva Conventions (Art. 49 of the 1st Geneva Convention Art. 50 of the 2nd Geneva Convention, Art. 129 of the 3rd Geneva Convention, Art. 146 of the 4th Geneva Convention, Art. 85 of Additional Protocol I). However, not all acts of war prohibited by international humanitarian law result in criminal liability under the Code of Crimes against International Law, as not all conducts punishable under international law are also punishable under

international customary law. The CCAIL merely implements existing international customary criminal law in German law, but does not attempt to restrict the further development of international humanitarian law.

In contrast to the sequence of offences in the ICC Statute, the system of war crimes in the CCAIL is based on the development of the substance of international humanitarian law, which has largely been influenced over the decades by the distinction between the protection of persons and property on one hand (Geneva law) and the limitation of the use of certain methods and means of warfare on the other (Hague law). These factors, taking the certainty principle into account, result in a clear division of crimes into war crimes against persons (Section 8), against property and other rights (Section 9), against humanitarian operations and emblems (Section 10), and war crimes of using prohibited methods (Section 11) and means of warfare (Section 12). The fact that the draft omits the distinction made by the ICC between war crimes in international and (civil) war crimes in armed conflict not of an international character as a main structural principle for the laws also facilitates the application of the law. The tendency to treat international and national armed conflicts equally before the law is not only expressed in the ICC Statute itself, but most of all in the precedents of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The draft demonstrates this tendency in the external structure of the elements of the crimes, of which most are applicable to both international and non-international conflicts, as the majority of war crime elements today apply to all kinds of armed conflicts. Where the status of existing international customary law does not allow international armed conflicts and armed conflicts not of an international character to be treated equally, the differences have been retained by including particular elements.

The table below shows an overview of the assignment of individual regulations of the ICC Statute and other regulations to the respective regulations of the CCAIL:

War crimes against persons, Section 8 of CCAIL	War crimes against property and other assets, Section 9 of CCAIL	War crimes against humanitarian operations and emblems, Section 10 of CCAIL	War crimes of using prohibited methods, Section 11 of CCAIL	War crimes of using prohibited means, Section 12 of CCAIL
ICC Statute				
Art. 8 (2) a) i) Art. 8 (2) a) ii) Art. 8 (2) a) iii) Art. 8 (2) a) v) Art. 8 (2) a) vi) Art. 8 (2) a) vii) Art. 8 (2) a) viii)	Art. 8 (2) a) iv)			
Art. 8 (2) b) vi) Art. 8 (2) b) viii) Art. 8 (2) b) x) Art. 8 (2) b) xv)	Art. 8 (2) b) xiii) Art. 8 (2) b) xiv) Art. 8 (2) b) xvi)	Art. 8 (2) b) iii) Art. 8 (2) b) vii) Art. 8 (2) b) xxiv)	Art. 8 (2) b) i) Art. 8 (2) b) ii) Art. 8 (2) b) iv) Art. 8 (2) b) v)	Art. 8 (2) b) xvii) Art. 8 (2) b) xviii) Art. 8 (2) b) xix) Art. 8 (2) b) xx)

Art. 8 (2) b) xxi) Art. 8 (2) b) xxii) Art. 8 (2) b) xxvi)			Art. 8 (2) b) ix) Art. 8 (2) b) xi) Art. 8 (2) b) xii) Art. 8 (2) b) xxiii) Art. 8 (2) b) xxv)	
Art. 8 (2) c) i) Art. 8 (2) c) ii) Art. 8 (2) c) iii) Art. 8 (2) c) iv)				
Art. 8 (2) e) vi) Art. 8 (2) e) vii) Art. 8 (2) e) viii) Art. 8 (2) e) xi)	Art. 8 (2) e) v) Art. 8 (2) e) xii)	Art. 8 (2) e) ii) Art. 8 (2) e) iii)	Art. 8 (2) e) i) Art. 8 (2) e) iv) Art. 8 (2) e) ix) Art. 8 (2) e) x)	
Additional Protocol I				
Art. 11 Subs. 1 Cl. 2 Art 11 Subs. 2 a Art 11 Subs. 2 b Art 11 Subs. 2 c Art 11 Subs. 4 Art. 85 Subs. 4 a Art. 85 Subs. 4 b Art. 85 Subs. 4 c Art. 85 Subs. 4 e		Art. 85 Subs. 3 f	Art. 85 Subs. 3 a Art. 85 Subs. 3 b Art. 85 Subs. 3 c Art. 85 Subs. 3 d Art. 85 Subs. 4 d	
2nd Protocol of 1999 to the Convention for the Protection of Cultural Property				
			Art. 15	

The CCAIL does not use the terms of the ICC Statute if they are primarily based on the directives of the treaty conference of Rome, and will not play an important role for the implementation of the ICC Statute in the future. Thus, the terminologically and historically-based distinction in the ICC Statute between the "grave breaches" of the Geneva Conventions and the so-called "other serious violations“ is not incorporated as it has no relevance for the CCAIL as a nationally applicable and universally valid law. On the other hand, the terms in the ICC Statute are used without a separate explanation if they represent generally accepted international law.

In the event of lawful operations of war, i.e. those permitted by international law, there can be no criminal liability under the CCAIL partly because no relevant provision intervenes, e.g. for the killing of a combatant of the opposing army in battle or the destruction of military objects. But there may also be no criminal liability when so-called "collateral damage", such as the killing of persons who must be protected or destruction of civilian objects, occurs as concomitant damage, e.g. during an attack which otherwise adheres to the regulations of international humanitarian law, for example the proportionality principles.

2. Common material requirements for war crimes

a) Connection with an armed conflict

The material element of war crimes always requires the execution of one of the individual criminal acts referred to in Sections 8 to 12 of the CCAIL. The majority of these individual criminal acts are conducts already covered as such by penal regulations of the Criminal Code. They do not take on the character of war crimes, and thus of crimes against international law unless they are committed in connection with an armed conflict. Only under this condition does their inclusion in the preamble of the ICC Statute as "the most serious crimes, which affect the international community as a whole". Conversely, for war crimes the offence does not have to be embedded in a widespread and systematic attack against the civilian population, as for crimes against humanity. However, war crimes are also often committed as "part of a plan or a policy or as part of a large-scale commission of such crimes" (see Art. 8 Subsection 1 of the ICC Statute).

The connection with an armed conflict must be functionally understood such that offences which are merely committed contemporarily with an armed conflict are not covered. For war crimes of using prohibited methods and means of warfare, the connection to an armed conflict is clear. The International Criminal Tribunal for the former Yugoslavia expressly confirmed that the connection also exists if "... the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting" (Kunarac et al., IT-96-23-T and IT-96-23/1-T, 22/2/2001, par. 568). This should be of practical relevance for Section 8 of the draft in particular. It is not required that the offences are committed during the timeframe of an armed conflict, i.e. during armed operations of war. Provided the substantial conduct regulations of international humanitarian law apply, e.g. for the treatment of prisoners of war in the care of the custodial force, a war crime can be committed when military operations are interrupted or even terminated. Particular geographic proximity to the military operations is also not required. War crimes can also be committed in parts of the country outside the battle zone or behind enemy lines. The International Criminal Tribunal for the former Yugoslavia confirmed the application of this principle for all types of conflict with the following formulation: "... humanitarian law continues to apply in the whole territory of the warring States, or in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there" (Tadic, IT-94-1-AR72, 2/10/1995, par. 70; confirmed in Delalic et al., IT-96-21-T, 16/11/1998, par. 183).

b) International armed conflicts and armed conflicts not of an international character

The CCAIL uses the terms "international armed conflict" and "armed conflict not of an international character" to describe its specific applications. The draft thus follows the

generally accepted practice, confirmed in the judgements of international and national courts. The term "international armed conflict" covers war or other forms of conflict involving armed hostilities between two or more states in accordance with the common Article 2 of the four Geneva Conventions. In accordance with Article 8 Subsection 2 Letter f of the ICC Statute, the formulation "armed conflict not of an international character" covers conflicts in which armed forces within a state fight against organized armed groups, or such groups fight amongst themselves, provided the military operations are of a prolonged nature. This extension of the scope of the regulations on conflicts not of an international character over Article 1 Subsection 1 of Additional Protocol II of 1977, which can now be considered to be consolidated in international customary law, is also in accordance with the established precedents of the International Criminal Tribunal for the former Yugoslavia (see. Tadic, IT-94-1-AR72, 2/10/1995, par. 70). Again in accordance with Article 8 Subsection 2 Letter d and Letter f Clause 1 of the ICC Statute, which in turn repeats Article 1 Subsection 2 of Additional Protocol II, and also reflects existing international customary law, the regulations of this chapter are not applicable to internal disturbances, riots, and isolated or sporadic acts of violence and other similar acts which cannot be classified as armed conflicts.

Sections 8 Subsection 3, 9 Subsection 2 and 11 Subsection 3 only apply for international armed conflicts. All other elements in this chapter apply to both international armed conflicts and armed conflicts not of an international character.

c) Perpetrators

Anyone, even a civilian, can commit a war crime if the requirements of the respective crime are fulfilled, and the particular connection of the offence with the armed conflict exists.

3. The subjective element of war crimes

Subjectively, intent (Section 15 of Criminal Code) is required for all war crimes. For all war crimes, the general provisions in the Criminal Code and the provisions specified in the CCAIL apply (see explanation on Section 2 under c).

4. The specific offences

On Section 8 (War crimes against persons)

On Section 8 Subsection 1 No. 1 (Willful killing)

The regulation is based on Article 8 Subsection 2 Letter a (i) and Subsection 2 Letter c (i) of the ICC Statute. It requires that the perpetrator cause the death of a person protected under international humanitarian law. Typical acts in armed conflicts covered by the offence are the killing of prisoners of war or the killing of interned civilians. However, the killing of a member of the hostile force, who is taking direct part in the military operations does not fulfil the element, as the person is not protected under Section 8 Subsection 6. Nor is killing a civilian under Section 8 Subsection 6 criminally liable, in international conflicts or conflicts not of an international character in accordance with Section 8 Subsection 1 No. 1, unless the civilian is under the control of the attacker. Killing civilians in this way by "distance attacks" could be criminal liable under the regulations of warfare law, Sections 11, 12, or under general criminal law.

The means used to kill the civilian have no consequence for the fulfilment of the offence of Section 8 Subsection 1 No. 1. The use of typical weapons of war is not required.

In contrast to prisoners of war and civilians, who must be in the control of the hostile forces as victims in cases of Section 8 Subsection 1, for other persons who are "protected under international humanitarian law" according to Section 8 Subsection 6, such as the sick and the wounded, ship-wrecked and combatants "hors de combat" covered by Section 8 Subsection 6 No. 3 killed in distance attacks, criminal liability according to Section 8 Subsection 1 No. 1 is always applicable. Criminal liability can be excluded in individual cases if the killing of the protected persons was the result of a legal act of war, e.g. in connection with an attack against combatants or other military targets in harmony with international law.

Otherwise, the remarks under A. III. apply to the applicability of killing offences of general criminal law.

On Section 8 Subsection 1 No. 2 (Taking of hostages)

This regulation is based on Article 8 Subsection 2 Letter a (viii) and Subsection 2 Letter c (iii) of the ICC Statute. The Statute does not contain any other elements of the crime. The core wrong of hostage taking is that the perpetrator kidnaps or seizes a protected person in order to force the hostile party in an armed conflict to a particular act, toleration or omission. With respect to acts of kidnapping or seizure, Section 239 of the Criminal Code can be applied. The element can be further specified, particularly using the Elements of Crime (PCNICC/2000/1/Add. 2) and the precedents of international legislative bodies.

On Section 8 Subsection 1 No. 3 (Cruel or inhumane treatment)

This regulation is based on Article 8 Subsection 2 Letter a (ii), Subsection 2 Letter a (iii), Subsection 2 Letter b (x), Subsection 2 Letter c (i) and Subsection 2 Letter e (xi) of the ICC Statute, which criminalize subjection to severe physical or mental injury by various actions, as under Art. 11 Subsection 2 and Art. 85 Subsection 4 Letter c of Additional Protocol I. Inhumane and cruel treatment are expressly mentioned as well as torture and mutilation.

The content of the individual regulations of the ICC Statute is covered sufficiently in the penalization of cruel and inhumane treatment. The emphasis on torture and mutilation is based on the particular, historically documented frequency of such crimes in armed conflict. The term torture is to be understood as in Section 7 Subsection 1 No. 5 of the CCAIL.

If the physical or mental harm or suffering are caused by a lawful act of war, there is no criminal liability in accordance with the general principles of international law.

On Section 8 Subsection 1 No. 4 (Sexual violence)

This regulation is based on Article 8 Subsection 2 Letter b (xxii) and Subsection 2 Letter e (vi) of the ICC Statute. It is virtually identical to Section 7 Subsection 1 No. 6 of the CCAIL. The remarks there therefore also apply here. The people concerned are referred to as "those persons to be protected by international humanitarian law", in contrast to Section 7 Subsection 1 No. 6 of the CCAIL. In particular, the elements of the crime cover those acts in which one or more perpetrators allow sexual violence to be exercised against the victim, such as the case of forcing a person to prostitution in camps or houses specially created for the purpose, which is particularly common in armed conflicts. However, cases in which the deprivation of reproductive capacity is the result of a lawful act of war are not criminally liable, e.g. as a result of a shot wound suffered by a combatant in battle.

On Section 8 Subsection 1 No. 5 (Conscription of children as soldiers)

This regulation is based on Article 8 Subsection 2 Letter b (xxvi) and Subsection 2 Letter e (vii) of the ICC Statute. These two provisions in the Statute criminalize both the conscription of children and their enlistment in armed groups, as well as their use in hostilities. Section 8 Subsection 1 No. 5 of the CCAIL applies to both international armed conflicts and armed conflicts not of an international character in accordance with the ICC Statute. The age limit of

15 from the ICC Statute has been retained and corresponds to the current generally recognized minimum age for military troops and armed groups in all conflict types covered by the CCAIL (see also UN Doc. S/2001/40 in conjunction with UN Doc. S/2000/1234). The increase of the minimum age for the participation of children in armed conflicts to 18 years, brought into force by the Optional Protocol to the UN Convention on the Rights of the Child, 2000 (UN Doc. A/Res/54/263, June 26th 2000), was not incorporated in the draft text, as there is to date a lack of general customary law commitment to the new protective regulations. Criminal liability could not be extended due to the principle of universal jurisdiction.

Criminal liability for acts of conscription or enlistment of children requires that an armed conflict is underway. Even if the armed conflict has not yet been finally terminated, e.g. during a cease-fire, the offence of conscription or enlistment can still be fulfilled.

Use for active participation in hostilities includes, in addition to the use of children for military operations, their use for supporting acts. Use for supporting acts without prior conscription or enlistment is, however, only punishable if the supporting act results in direct participation in hostilities, such as in supporting the transport of munitions or clearing mines.

On Section 8 Subsection 1 No. 6 (Deportation or forcible transfer of civilian population)

This regulation is based on the provisions in Article 8 Subsection 2 Letter a (vii) and Subsection 2 Letter e (viii) of the ICC Statute, which are combined without changing their content. As in Section 7 Subsection 1 No. 4 of the CCAIL, the regulation criminalizes acts of deportation against the civilian population, and as in that paragraph, the deportation of one person is sufficient. The explanations on Section 7 Subsection 1 No. 4 of the CCAIL also apply here accordingly. Thus, a transfer does not violate a general rule of international law if it occurs for cogent military reasons or if it is necessary for the safety of the civilian population (see Art. 49 Subsection 2 of the 4th Geneva Convention).

On Section 8 Subsection 1 No. 7 (Punishment without a fair and regular trial)

This regulation is based on Article 8 Subsection 2 Letter a (vi) and Subsection 2 Letter c (iv) of the ICC Statute. It combines the various acts violating guarantees in criminal proceedings listed in the ICC Statute for international armed conflict and armed conflict not of an international character without changing the content. The provision covers all kinds of punishment pronounced in legal proceedings in breach of fundamental guarantees which

must be observed under international customary law, as codified in Art. 75 of Additional Protocol I and Art. 6 of Additional Protocol II to the four Geneva Conventions. However, only the imposition of severe penalties is covered by the provision, in order to exclude minor cases from the scope of the regulation. Both the judging body and the proceedings must fulfil the minimum requirements of international law.

On Section 8 Subsection 1 No. 8

Offences under Section 8 Subsection 1 No. 8 are offences of endangerment which result in specific risk of death or in serious harm to health.

On Section 8 Subsection 1 No. 8 Letter a (Medical and other experiments)

This regulation is based on Article 8 Subsection 2 Letter b (x) and Subsection 2 Letter e (xi) of the ICC Statute and on Article 11 Subsection 2 Letter b of Additional Protocol I. The term experiment includes all forms of medical, scientific and biological experiments expressly named in the ICC Statute. The individual acts can take various forms, which range from direct influence on the body of the victim to indirect effects of certain experiments on the body. Direct administration of pathogens or poison is also covered by the element, as well as the examination of bodily reactions to particular climatic environmental conditions, e.g. in heat or cold experiments. There is no medical necessity if the treatment serves neither to heal or to prevent illness, but only serves the purposes of the experiment, which are not in the interest of the victim.

Experiments which are neither necessary for medical reasons, nor in the interest of the victim are generally punishable, even if the victim gives prior consent. Even medically justified experiments or other experiments in the interest of the victim are criminally liable unless prior voluntary consent is obtained. This clarification, which neither the ICC Statute nor Additional Protocol I expressly contain, satisfies the objective of comprehensive protection of the right to self-determination. However, necessary life or health saving measures in the interest of the victim are, in general, not prohibited.

On Section 8 Subsection 1 No. 8 Letter b (Removal of tissue and organs)

This regulation is based on Article 11 Subsection 2 Letter c, in conjunction with Subsection 1 of Additional Protocol I and is in accordance with existing international customary law. The limitation of the application of the regulation to international conflicts in Additional Protocol I

was abandoned in the CCAIL, as the protection of persons held by the opposing party can be assumed to have been extended to all types of conflicts under international customary law. This is because tissue and organ removal covered by this regulation should only be viewed as a sub-case of generally prohibited inhumane treatment; a differentiation would not do justice to the relationship of Section 8 Subsection 1 No. 8 Letter b to the prohibition of inhumane treatment under Section 8 Subsection 1 No. 3.

The removal of tissue and organs for transplantation purposes is criminalized. Removal of blood or skin for therapeutic purposes carried out in accordance with medical principles, to which the person protected by international humanitarian law voluntarily gave prior express consent is excluded. This regulation follows the traditional understanding of medically necessary treatment of wounded soldiers, for whom blood transfusion and skin transplants are most important for survival, which still applies today. Comparatively, other organs are less important for the medical treatment of the wounded.

On Section 8 Subsection 1 No. 8 Letter c (Use of non-approved methods of treatment)

This regulation is based on Article 11 Subsection 1 Clause 2 of Additional Protocol I and now applies to both international armed conflict and armed conflict not of an international character by virtue of international customary law. The grounds for the application of this regulation to all types of conflicts are the same as for the offence of the removal of organs. The provision does not cover medical experiments and organ removal regulated in sub-clauses a and b, but all other non-approved methods of treatment. This can include administration of unsuitable medicines and administration of an overdose of a certain medication or taking surgical measures in place of unavailable medication.

When using medically non-approved methods of treatment on persons protected by international humanitarian law, criminal liability exists unless the action taken is medically necessary and prior, express consent has been given voluntarily.

On Section 8 Subsection 1 No. 9 (Humiliating and degrading treatment)

This regulation is based on Article 8 Subsection 2 Letter b (xxi) and Subsection 2 Letter c (ii) of the ICC Statute and Article 85 Subsection 4 Letter c of Additional Protocol I. It is based on internationally developed principles for the protection of individuals from humiliating and degrading treatment, which formed the basis for the inclusion of Section 31 in the Military Criminal Code in the Federal Republic of Germany. The provision is of great practical

importance in armed conflict. Persons under the control of a party to the conflict, such as prisoners of war, are often subjected to humiliating or degrading treatment in order to force the hostile party to certain military actions, such as cessation of attacks or diplomatic action, e.g. offers of peace. In ethnically-motivated armed conflicts, humiliating or degrading acts are also often used as means of warfare.

In principle, any kind of humiliating or degrading treatment is sufficient to fulfil the offence. Such acts include corporal punishment, display or insulting of prisoners in particular. However, the formulation "gravely" excludes insults of a minor nature from the scope of the offence.

On Section 8 Subsection 2 (Wounding of persons hors de combat)

This regulation is based on Article 8 Subsection 2 Letter b (vi) and Subsection 2 Letter c of the ICC Statute and on Art. 85 Subsection 3 Letter e of Additional Protocol I. It is of practical importance because combatants hors de combat are often taken prisoner by hostile soldiers whom they fought in battle, and then are particularly at risk of being wounded.

The scope of existing international customary law is broader the ICC Statute, as it also covers situations in which persons are hors de combat without laying down their weapons or surrendering in another way, based on Article 85 Subsection 3 Letter e of Additional Protocol I. Thus, the CCAIL covers cases in which it is clear that the persons to be protected are hors de combat, but due to their specific situation, e.g. unconsciousness caused by wounding, they had no opportunity to surrender.

The killing of members of armed forces or combatants hors de combat is already regulated by Section 8 Subsection 1 No. 1 of the CCAIL. This is the result of the reference in Subsection 1 to persons protected according to international humanitarian law, who include members of armed forces and combatants hors de combat according to the definition in Subsection 6. Therefore it was not necessary to include a special separate regulation on killing persons hors de combat in the CCAIL to correspond with that in Article 8 Subsection 2 Letter b (vi) of the ICC Statute.

Wounding as a result of lawful acts of war is not punishable.

On Section 8 Subsection 3 No. 1 (Unlawful confinement)

This regulation is based on Article 8 Subsection 2 Letter a (vii) of the ICC Statute and Article 85 Subsection 4 Letter b of Additional Protocol I. It only applies in international armed conflicts, as there is not yet a sufficient basis in customary law for a corresponding criminalized prohibition for armed conflicts not of an international character.

Unlawful confinement also includes cases in which the justification for arrest is no longer valid, and the person is still not released, or in which procedural guarantees to examine the legality of the confinement were not observed.

The wording of the regulation goes beyond that of the ICC Statute in that the Statute contains no explicit reference to delayed returns home, but is limited to unlawful confinement. The inclusion of the act of returning home in the CCAIL is objectively required because the majority of cases of delayed return are already covered by the basic regulation of unlawful imprisonment. Moreover, the regulations of the Geneva Conventions on the return home of interned civilians and prisoners of war are embedded in international customary law. Unjustified delays in the return home can therefore be included in the CCAIL, following the legal political objective of comprehensive criminalization of acts of unlawful confinement.

Unlawful confinement can occur as a result of a series of measures by civilian or military authorities. It does not require unlawful instructions by a court. Both civilians and prisoners of war can be the victims of the offence in question. Unjustified delays in the return home can be implemented by a wide variety of measures, which range from simple continuation of imprisonment to the release of prisoners in an area which, due to its nature or location, renders the return to the prisoners‘ native country or home more difficult. See the explanation of Section 8 Subsection 6 No. 1 on the term "protected person" relevant for both alternatives. This group of persons named as a sub-group of the "persons protected under international humanitarian law" is explained in greater detail there.

On Section 8 Subsection 3 No. 2 (Transfer by the occupying power of its civilian population)

This regulation, which is also embedded in international customary law, is based on Article 8 Subsection 2 Letter b (viii) of the ICC Statute and Article 85 Subsection 4 Letter a of Additional Protocol I and is only applicable in international armed conflicts. It simplifies the wording of the provisions from the ICC Statute and Additional Protocol I without changing their content. The wording of the ICC Statute on the element of "transfer" is used unchanged.

As the purpose of the regulation is the protection of civilian population resident in the occupied zone, the transfer of a few persons who belong to the civilian population of the occupying forces is sufficient to fulfil the offence. That also applies in cases in which the civilians are transferred to unpopulated areas, in order to manifest the state of occupation.

The element of "transfer" can be fulfilled by indirect or direct acts. A typical direct act of transfer action is the relocation of the population of the occupying power to the occupied zone. Indirect acts of transfer include the provision of financial or other incentives for citizens of the occupying power to settle in the occupied zone. As these acts are obviously covered by the regulation, there is no need for these formulations to be repeated from the ICC Statute.

In any case, the element of transfer requires that the transfer be of a prolonged nature.

On Section 8 Subsection 3 No. 3 (Compelling a person to serve in the armed forces of a hostile power)

This regulation is based on Article 8 Subsection 2 Letter a (v) of the ICC Statute. It is only applicable in international armed conflicts. The unlawful act is compelling a person to serve in the armed forces of a hostile power. Compulsion to provide services for the armed forces, e.g. assisting in transporting weapons or other military material without enlistment in the armed forces is not sufficient to fulfil the element. In order to specify the content of the term "to compel", the means of coercion from Section 240 of the Criminal Code have been included in the element. It was not necessary to include the element "unlawful" from Section 240 of the Criminal Code (StGB), as the reprehensibility for the use of means of coercion for this purpose is generally assumed, as it is assumed in the Rome Statute and in the Elements of Crimes. See the explanation on Section 8 Subsection 6 No. 1 on the term "protected person".

On Section 8 Subsection 3 No. 4 (Compelling a person to take part in operations of war)

This regulation is based on Article 8 Subsection 2 Letter b (xv) of the ICC Statute. It, again, is only applicable in international armed conflicts. Operations of war means active participation in war operations, as well as supporting actions, which enable the hostile forces to wage war. It covers the production of munitions and digging trenches as well as transport of weapons. However, agricultural work to produce food for the armed forces is not to be considered participation in war operations, as a result of the restrictive interpretation required. As in

Section 8 Subsection 3 No. 3, the element is also specified based on Section 240 of the Criminal Code. Again, it was unnecessary to include a reprehensibility clause.

The wording used in Article 8 Subsection 2 Letter b (xv) of the ICC Statute which states the offence is punishable "even if" the persons in question already served the belligerent party before the commencement of the war is unimportant and unnecessary for element acts according to the CCAIL and ICC Statute, as even the earlier employment in the service of the belligerent party would not affect the fulfilment of the element, and would not be acceptable as justification.

On Section 8 Subsection 4 (Qualifications)

Section 8 Subsection 4 provides for an increase in the minimum sentence if the death of one of the victims is caused by an offence under Paragraph 1 No. 2 to 6, at least negligently (Section 18 of Criminal Code), or if specific danger is realized by an offence under Paragraph 1 No. 8 in the onset of death or severe physical or mental harm to the victim.

On Section 8 Subsection 5 (Less serious cases)

Section 8 Subsection 5 provides for punishment from a more lenient range of penalties for less serious cases of Subsection 1 Nos. 2 to 4 and No. 6, Subsection 2 and Subsection 3 No. 1.

On Section 8 Subsection 6 (Persons protected under international humanitarian law)

This regulation explains the term "persons protected under international humanitarian law" to which most of the specific offences of Section 8 Subsection 1 refer. The combination of the various groups of protected persons under this single term corresponds to the common substance of the regulations in the ICC Statute for crimes against persons. All persons covered here have in common that they are not or no longer directly taking part in hostilities, or are unable to take part and therefore are particularly in need of protection by international humanitarian law. They include civilians, as opposed to combatants or, in the case of an armed conflict not of an international character, as opposed to members of the armed forces and combatants of the hostile party, as well as combatants or fighters hors de combat as a result of wounding or for other reasons.

The term "persons protected under international humanitarian law" takes into account the specific situation of the persons in question, on which the respective protected status is based. Thus, a combatant authorized to take part in operations of war according to the relevant national laws, and who can as such be lawfully attacked under international law, becomes a person protected under international humanitarian law according to the CCAIL when he or she is hors de combat, and cannot be attacked.

On Section 8 Subsection 6 No. 1

For international armed conflicts, Section 8 Subsection 6 No. 1 refers to the term "protected person" in accordance with the four Geneva Conventions and Additional Protocol I. The regulation covers the wounded and sick according to Article 13 of the 1st Geneva Convention, the wounded, sick and shipwrecked in accordance with Article 12 of the 2nd Geneva Convention, prisoners of war in accordance with Art. 4 of the 3rd Geneva Convention and civilians referred to in Art. 4 of the 4th Geneva Convention. Also covered are combatants in the hands of the hostile party in accordance with Art. 44 Subsection 4 of Additional Protocol I, who cannot be considered prisoners of war due to prior violations of international law, and refugees and the stateless in accordance with Art. 73 Subsection 1 of Additional Protocol I.

The term "civilians" includes members of humanitarian aid missions and peace-keeping missions, who are not on the side of one of the parties to the conflict. The fact that they may be wearing the uniform of their home country or the military insignia of an international organization has no bearing on this. This is not only derived from Art. 50 of Additional Protocol I combined with Art. 4 Section A Subsection 1, 2, 3 and 6 of the 3rd Geneva Convention and Subsection 43 of Additional Protocol I, but also from Art. 8 Subsection 2 Letter b (iii) and the identically-worded Art. 8 Subsection 2 letter e (iii) of the Rome Statute. These regulations expressly assume that the staff of peace-keeping missions are always to be considered civilians in accordance with international humanitarian law. This is always the case unless the persons in question take part in military compulsory measures as members of armed forces in accordance with Chapter VII of the Statutes of the United Nations (peace enforcement).

As the persons are also always protected according to the four Geneva Conventions or Additional Protocol I, not all civilians are covered by Section 8 Subsection 6 No. 1, but in accordance with Subsection 4 of the 4th Geneva Convention only those who are not of the same nationality and are not under the control of the hostile party. However, it must be taken

into account that in accordance with the precedents of the International Criminal Tribunal for the former Yugoslavia, it is not the formal assignment according to the laws of nationality which counts, but whether the victim is actually to be considered a member of the hostile party (permanent jurisprudence of the ICTY, most recently confirmed in Kordic and Cerkez, IT-95-14/2-T, 26/2/2001, par. 152; BGH, following this precedent, judgement dated 21/02/2001, 3 StR 372/00).

The use of the term "of the person protected under international humanitarian law" in Section 8 Subsection 6 creates a practical difference between Section 8 and Section 11 in particular, which refers to warfare law. War crimes against persons in accordance with Section 8 Subsection 1 can only be committed against civilians if they are under the control of the hostile party. However, if civilians who are not under the control of the hostile party are harmed in distance attacks, even as concomitant damage, the regulations based on warfare law, as well as violations of Section 10 of the CCAIL and regulations of general criminal law may be applicable.

On Section 8 Subsection 6 No. 2

Section 8 Subsection 6 No. 2 determines the group of persons protected for conflicts not of an international character exactly as in Section 8 Subsection 6 No. 1. This is clear for the wounded, sick and shipwrecked, who are listed expressly again in Section 8 Subsection 6 No. 2. Instead of the prisoners of war protected in international armed conflicts, captured combatants are protected in armed conflicts not of an international character. They are covered as "persons who are not participating directly in the hostilities and are in the power of the hostile party" - just as civilians under the control of the hostile party. Like Section 8 Subsection 6 No. 1, members of humanitarian aid missions and peace-keeping missions are also included.

On Section 8 Subsection 6 No. 3

Section 8 Subsection 6 No. 3 also includes as persons protected by international humanitarian law in international conflicts and conflicts not of an international character, members of armed forces and combatants of the opposing party who are no longer participating in operations of war and have surrendered or are defenceless in any other way, and are not yet under the control of the hostile forces. The objective need for this is derived from the fact that these persons, even after they have surrendered, are not covered by the status of Section 8 Subsection 6 No. 1 and 2 despite their need of protection, until they are in

the control of the hostile forces as prisoners of war or captured combatants. The protection of these combatants "hors de combat" corresponds with international customary law and is contained in Art. 41 of Additional Protocol I for international armed conflicts, and in the common Art. 3 of the Geneva Conventions and Art. 4 of Additional Protocol II for armed conflicts not of an international character.

On Section 9 (War crimes against property and other rights)

On Section 9 Subsection 1 (Pillaging and destruction of assets)

This regulation is based on Article 8 Subsection 2 Letter b (xvi), Subsection 2 Letter b (xiii), Subsection 2 Letter e (v) and Subsection 2 Letter e (xii) of the ICC Statute. It combines the above-mentioned articles of the ICC Statute, as the objective content of the individual regulations is similar.

The term "pillaging" does not require further explanation in view of the common understanding of the term which underlies Section 9 Subsection 1 of the CCAIL and Section 125a Clause 2 No. 4 of the Criminal Code. The same applies to the acts of destruction, appropriation and seizure which are also to be understood as they are under general criminal law. For all offence modalities, Paragraph 1 requires that the assets in question are in the control of the acting party. The grounds for this for pillaging as well as appropriation and seizure can be deduced from the description of the act alone. For destruction, this restriction means that the destruction of assets of the hostile party by distance attacks does not fulfil the elements of the crime. However, such distance attacks can be criminally liable according to Section 11 or general criminal law.

However, assets are not only under the control of the party when the corresponding zones are occupied in accordance with the 4th Geneva Convention. Effective control by the acting party over these assets is sufficient, even if only for a limited time. Section 9 Subsection 1 can therefore also be fulfilled during offensive military operations of war.

In contrast to pillaging, which is always unlawful, destruction, appropriation and seizure of assets of the opposing party are only punishable if they are committed when it is not strictly necessary for the armed conflict. Only such circumstances which enable the belligerent party to perform operations of war shall be considered military requirements in accordance with the regulation. The element of imperative demand by necessity of armed conflict, which is included in the text of the ICC Statute, is omitted here as it would not result in an objective

change or specification for examining the necessity and would only cause difficulties in interpretation. Moreover, the identification of the acts as violations of international law indicates that destruction, appropriation and seizure which are not justified by military requirements, but do not violate international law as lawful acts of war are not punishable under Section 9 Subsection 1.

In contrast to the regulations of the ICC Statute on the destruction of assets in Art. 8 Subsection 2 Letter b (xiii) and Art. 8 Subsection 2 Letter e (xii) the offence is restricted in the CCAIL by the wording "extensively". The resulting difference from the wording of the ICC Statute is appropriate, as the core right protected by the regulation is unaffected and only minor offences are excluded.

On Section 9 Subsection 2 (Abolition and suspension of rights)

This regulation is based on Article 8 Subsection 2 Letter b (xiv) of the ICC Statute. It is only applicable in international armed conflicts. The element not only covers economic warfare, which in the past has often used the abolition and suspension of rights of persons of the hostile power to reach their objectives. Other discriminatory measures and restrictions of law can also be subject to this regulation.

The CCAIL introduces a threshold for criminal liability which is not expressly contained in the ICC Statute, by limiting it to all or a majority of the members of the hostile party. In this, it implements the objective and purpose of Article 8 Subsection 2 Letter b (xiv), which - as made clear at the state conference in Rome during the negotiation of the ICC Statute by state representatives - is intended to cover methodical or systematic acts and is not intended to cover individual conduct. In view of the wide variety of possible offences, it does not cover individual cases of deprivation of rights.

As only measures in contravention to international law are penalized, embargo measures based on a resolution passed by the Security Council in accordance with Chapter VII of the Charter of the United Nations are not covered.

On Section 10 (War crimes against humanitarian operations and emblems)

Section 10 criminalizes attacks against humanitarian operations and emblems. The protection of humanitarian operations requires that participation in humanitarian aid missions or peacekeeping missions occurs in accordance with the Charter of the United Nations.

Section 10 is, however, not of an exclusive character. Therefore, where members of humanitarian aid missions and peacekeeping missions are protected civilians (see explanation of Section 8 Subsection 6), attacks may be punishable under Section 8 Subsection 1 or Section 11 Subsection 1.

On Section 10 Subsection 1 Clause 1 No. 1 (Attacks against aid missions and peacekeeping missions)

This regulation is based on Article 8 Subsection 2 Letter b (iii) and the identically worded Article 8 Subsection 2 Letter e (iii) of the ICC Statute, which implement the protection of the staff of humanitarian aid missions or peacekeeping missions, guaranteed under customary law and consolidated in many resolutions of the United Nations Security Council in criminal law (e.g. in UN Doc. S/Res 1258, August 6th 1999, and most recently in the statement by the President of the Security Council on February 9th 2000 on the protection of UN and humanitarian aid staff, UN Doc. S/PRST/2000/4).

All types of attacks against humanitarian aid missions or peacekeeping missions are covered. The term “attack” covers all violent acts irrespective of the type of weapons used. The scope of the regulation includes both attacks against members of the armed forces of states participating in peacekeeping missions and attacks against civilian aid staff, provided they are subject to the protection afforded to civilians and civilian objects in accordance with international humanitarian law. For example, they are not protected if the armed forces or the civilian aid staff take direct part in hostilities using their equipment.

Attacks against objects which are classified as military objects are not covered by the scope of the regulation; objects are classified according to the regulations of Articles 51 and 52 of Additional Protocol I, which are valid under customary law.

The perpetrator must intend to direct the attack against persons and objects with the protected status covered by the element and view the outcome of the attack as sure or wish the attack to succeed.

On Section 10 Subsection 1 Clause 1 No. 2 (Attacks against persons and objects marked with the distinctive emblems of the Geneva Conventions)

This regulation is based on Article 8 Subsection 2 Letter b (xxiv) and the identically worded Subsection 2 Letter e (ii) of the ICC Statute, which criminalize attacks against persons and

objects marked with the distinctive emblems of the Geneva Conventions. It is applicable to both international armed conflicts and armed conflicts not of an international character. Although there is no reference to the loss of protection under international humanitarian law comparable to Section 11 Subsection 1 No. 1 of the CCAIL, crimes are only punishable under this regulation and in accordance with existing international customary law if two requirements are fulfilled. First, the emblems must comply with international law. Second, this protection of protected objects and persons may not have been lost in accordance with the regulations of Additional Protocol I, which for their part reflect international customary law.

The term "attack" corresponds to that in Section 10 Subsection 1 Clause 1 No. 1.

On Section 10 Subsection 1 Clause 2 (Less serious cases)

Clause 2 allows punishment from a more lenient range of penalties for less serious cases. A case shall be deemed less serious in particular if no military means were used for the attack.

On Section 10 Subsection 2 (Improper use of recognized distinctive emblems)

This regulation is based on Article 8 Subsection 2 Letter b (vii) of the ICC Statute and Article 85 Subsection 3 Letter f of Additional Protocol I. In contrast to the ICC Statute, the CCAIL assumes that the regulation is applicable to both international armed conflicts and armed conflicts not of an international character. Without recognized distinctive emblems, which mark both persons and objects and indicate the neutrality of the operation, the performance of humanitarian missions in all types of conflict is impossible. This inseparable connection between the protection of personnel and objects and the emblems which mark them requires that the scope of the regulation be extended to conflicts not of an international character in accordance with consolidated state practice. Without criminalization of the improper use of distinctive emblems, the prohibition of attacks under Section 10 Subsection 1 of the CCAIL in particular would be particularly meaningless in situations in which it becomes especially difficult to differentiate between combatants and non-participants due to the circumstances of the conflict. The state community therefore does not differentiate between various conflict types in its unanimous condemnation of attacks against humanitarian missions (UN DOC. S/PRST/2000/4 of February 9th 2000 and the underlying debate; UN Doc. A/Res52/167 of December 16th 1997 on the protection of humanitarian aid staff). The decision made for the CCAIL is also supported by the agreement of December 15th 1994 on the safety of staff of the United Nations and assisting staff (BGBI. 1997 II p. 230) This agreement, which is

applicable for all types of conflict, protects the operations against all acts which prevent the mandate being exercised.

Typical cases are treacherous killing or wounding of an enemy while making improper use of the named signs and emblems. In general, improper use takes place during battle, e.g. the shooting of hostile soldiers from a vehicle marked with the emblem of the Red Cross, the primary application of the regulation. Other acts can also fulfil the elements of the crime. For example, unlawful use of a recognized emblem, the discovery of which causes the enemy to target persons or objects marked in this way for attacks, in order to avoid military disadvantages, are also subject to the offence. An example is the prohibited use of the red cross emblem on munitions transports to prevent attacks against them, if the hostile force shoots transports of wounded marked with the red cross as a result of this conduct.

The act must always result in the death or serious injury of a person.

On Section 11 (War crimes of use of prohibited methods of warfare)

On Section 11 Subsection 1 No. 1 (Attacks against the civilian population)

This regulation is based on Article 8 Subsection 2 Letter b (i) and Subsection 2 Letter e (i) of the ICC Statute, as well as Article 85 Subsection 3 Letter a of Additional Protocol I. Its objective is to penalize attacks against civilian populations as a method of warfare. In contrast to acts of killing and wounding against civilians already covered in Section 8 Subsection 1 of the CCAIL Section 11 only relates to such attacks which are brought about using military means.

The fact that the regulation is only applicable when an attack is directed "against the civilian population as such" has important consequences for the subjective requirements for criminal liability: The perpetrator must target the objective of the attack specifically, and he or she must know that the persons attacked are part of a civilian population not directly involved in the hostilities. In view of the formulation of the provision, dolus eventualis is not sufficient. If the perpetrator uses military means against persons, of whom he is not sure whether they are enemy soldiers or civilians, the subjective element is not fulfilled. The same also applies if the perpetrator attacks a military object specifically and takes into account the possibility that the attack could kill civilians in the vicinity. In this case, there is no intentional "attack against the civilian population as such". However, if the perpetrator violates the duty in accordance with international humanitarian law of differentiating between military targets and

civilian objects (see e.g. Art. 57 Subsection 2 Letter a (ii) of Additional Protocol I), he or she performs an act of war in contravention of international law. The killing of civilians is not punishable under the CCAIL, but could be punishable under German law, if German criminal law is applicable under Sections 3-7 of the Criminal Code.

On Section 11 Subsection 1 No. 2 (Attacks on civilian objects)

This regulation is based on Article 8 Subsection 2 Letter b (ii), Subsection 2 Letter b (v), Subsection 2 Letter b (ix) and Subsection 2 Letter e (iv) of the ICC Statute and Article 85 Subsection 4 Letter d of Additional Protocol I of 1977. The ICC Statute criminalizes attacks against individual objects specifically mentioned for all types of conflicts, such as churches, while attacks against "civilian" objects as such (see Article 52 Subsection 1 of Additional Protocol I) and other objects specifically referred to, such as undefended cities, are punishable only in international armed conflicts under the Statute. This complicated distinction in the Statute, which is based on history and various protection regulations for individual objects, is abandoned in the CCAIL.

The CCAIL combines the regulations discussed in various parts of the Statute and criminalizes actions for both international armed conflicts and armed conflicts not of an international character. This grouping under the heading of attacks on civilian objects corresponds with the present legal situation under international customary law, which has been expressed in recent precedents of international courts and the findings of the community of states, and links the protection of the civilian population to the protection of civilian objects for all conflict types (UN Doc. S/RES 1265 of September 17th 1999 on the protection of the civilian population in armed conflicts; Kupreskic et al., IT-95-16-T, 14/1/2000, par. 521).

These precedents allow all objects named in the Statute to be classified as civilian objects protected by criminal law, provided they are protected under international humanitarian law. For the decision as to the cases in which the objects are not covered by this protection, and one of the named objects is a legitimate military target, the definition in Article 52 of Additional Protocol I, which is valid under customary law, can be used. This is supplemented by other requirements of international humanitarian law. For example, under Article 19 of the 4th Geneva Convention, civilian hospitals may not be attacked, even if they are used for hostilities, until a warning has been issued and a deadline has been set by which time the conduct must be changed.

In its present version, the regulation also takes into account Article 15 of the 2nd Protocol of 1999 to the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 in its customary law core, which criminalizes attacks against cultural assets in general and so-called "cultural property under enhanced protection".

For the subjective requirements, the remarks on Section 11 Subsection 1 No. 1 of the CCAIL apply accordingly. The perpetrator must also direct the attack specifically against protected civilian objects for No. 2; i.e. he or she must be sure (and not only consider probable) that the objects are not military, but protected civilian objects, and definitely intend to strike them.

The reduction of the penalty imposed in Subsection 1 Clause 2 for less serious cases allows appropriate punishment for cases in which the damage caused is not severe and no lasting damage is to be expected.

On Section 11 Subsection 1 No. 3 (Attacks which lead to disproportionate harm to civilians and damage to civilian objects)

This regulation is based on Article 8 Subsection 2 Letter b (iv) of the ICC Statute and Article 85 Subsection 3 Letters b and c of Additional Protocol I. The application of the regulation to armed conflicts not of an international character not incorporated in the ICC Statute is justified in existing customary law, which also penalizes disproportionate damage in armed conflicts not of an international character. Both the International Court of Justice in its report on the use and threat of use of nuclear weapons (ICJ Rep. 1996, Notes 30 - 33) and the International Criminal Tribunal for the former Yugoslavia (Kupreskic et al., IT-95-16-T, 14/1/2000, par. 524) have established the customary law validity of the proportionality principle without differentiating between types of conflicts. The community of states also condemned disproportionate use of violence in numerous documents with varying wording on the use of violence in certain international conflicts and conflicts not of an international character (Report of General Secretary on Kosovo, UN Doc. S/1998/912; UN Doc. S/Res./1173, June 12th 1998, Angola; UN Doc. S/Res./1322, October 7th 2000, Middle East).

The regulation does not specify the disproportionality through particular elements. However, Article 57 of Additional Protocol I must also be observed when interpreting it. The criteria to be considered which have developed in customary law apply for all damage referred to in the regulation.

The perpetrator must carry out an attack with military means. The offence penalizes non-discriminatory attacks, which are prohibited under Article 51 of Additional Protocol I but are only punishable under international customary law if they result in disproportionate killing and wounding of civilians or in disproportionate damage to civilian objects (see Article 85 Subsection 3 Letter b of Additional Protocol I).

As a result of the element "attack", direct intent is subjectively required in two respects: The perpetrator must want to attack a target and thereby "anticipate as sure" that he or she will cause disproportionate "collateral damage" in this attack. The level of knowledge of the perpetrator, even if he or she disputes it, can often be derived from his or her general information on the local situation at the time of the attack, e.g. if he or she was aware that the military target which was attacked was in a residential area.

With regard to the circumstance that the expected damage be "out of proportion" with the expected military advantage, knowledge of the relevant facts on which this disproportion is based is sufficient for intent. If the perpetrator merely incorrectly assesses the proportion of goods affected, it does not necessarily exclude intent on his/her part. Such cases are to be treated in accordance with the general rules on mistakes of law.

On Section 11 Subsection 1 No. 4 (Abuse of persons as human shields)

This regulation is based on Article 8 Subsection 2 Letter b (xxiii) of the ICC Statute. It refers to all groups of persons referred to in Section 8 Subsection 6 of the CCAIL and reflects the status of international criminal law, which criminalizes the abuse of persons protected under the Geneva Conventions, such as the use of prisoners of war as so-called human shields. In view of the development of customary law confirmed by the International Criminal Tribunal for the former Yugoslavia, which aims to protect civilians comprehensively in all types of conflicts, and extensive state practice, which holds the abuse of civilians as human shields in armed conflicts not of an international character as a punishable violation of international criminal law, conflicts not of an international character must also be incorporated into the scope of the regulation. An objective differentiation would not do justice to the problem of human shields in armed conflicts not of an international character and would negate the latest developments of international criminal law.

On Section 11 Subsection 1 No. 5 (Starvation of the civilian population)

This regulation is based on Article 8 Subsection 2 Letter b (xxv) of the ICC Statute. In contrast to the ICC Statute, it is applicable to both international and armed conflicts not of an international character. The objective connection of this regulation with other provisions of the CCAIL requires that the scope be widened accordingly. In general, attacks on the civilian population and civilian objects are criminalized for all types of conflicts under the CCAIL in accordance with international customary law. Starvation of the civilian population has the same effect as direct attacks against the civilian population and civilian objects. The scope must be extended to conflicts not of an international character also because the CCAIL, just like the ICC Statute punishes inhumane treatment of humans without distinguishing between conflict types.

The present regulation is in harmony with recent international customary law, as expressed in numerous documents of the United Nations and, in particular, in the demands of the community of states, to allow affected civilian populations access to aid deliveries during conflicts not of an international character (UN Doc. S/RES/1265 of September 17th 1999 on the protection of civilian populations during armed conflicts; UN Doc. A/RES/54/182, December 17th 1999, Sudan; UN Doc. A/RES/54/179, December 17th 1999, Congo; UN Doc. A/RES/54/185, December 17th 1999, Afghanistan).

On Section 11 Subsection 1 No. 6 (Warfare without quarter)

This regulation is based on Article 8 Subsection 2 Letter b (xii) and Subsection 2 Letter e (x) of the ICC Statute. It penalizes warfare with the intention of killing the opposing forces under any circumstances and of refusing to take prisoners, and always begins when such warfare is threatened or ordered.

Based on the definition in the "Elements of Crime" of the Rome Statute, the term "commander" has been added to the elements of the crime in order to make clear that a certain authority of command is required to fulfil the elements of this crime, without which such an order or threat has no credibility, and which also proves the methodical application (PCNICC/2000/1/Add. 2). For the same reasons, the term "declaring" used in the ICC Statute has been replaced in the CCAIL by "ordering or threatening" for further precision. This corresponds to the existing grounds for criminalization, which is not the failure to give quarter in an individual case, but in the methodical use of this particularly ruthless form of warfare.

On Section 11 Subsection 1 No. 7 (Treacherous killing or wounding)

This regulation is based on Art. 8 Subsection 2 Letter b (xi) and Subsection 2 Letter e (ix) of the ICC Statute. Treacherous killing and wounding of hostile combatants has been viewed as a war crime since Article 23 Letter b of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 was passed (RGBI. 1910, 132). The term "treacherous" conduct which has been used and generally recognized since 1907 requires the exploitation of deviously obtained trust, e.g. by pretending to be a civilian or feigning injury, in contrast to the element “malice” in Section 211 Subsection 2 of the Criminal Code (see BGHSt 30, 105, 115 f.).

The grounds for criminalization is not the killing or wounding of the hostile combatant as such, but the treacherous conduct. The killing or wounding of hostile combatants or fighters becomes punishable if it violates the trust based on the protection granted by international humanitarian law. As a result of the treacherous conduct, the protection standards of international humanitarian law may no longer be observed in subsequent warfare. If the perpetrator pretends to be a civilian, and using this trick kills a hostile combatant, it is to be feared that the hostile combatants will from then on kill civilians as well - in contravention of international humanitarian law - as they assume that they are also soldiers in disguise. This ratio for the prohibition of treacherous killing and wounding justifies its classification as a prohibited method of warfare and not as a war crime against persons; it also explains the lower penalties imposed for treacherous killing compared with crimes of killing under Section 8 Subsection 1 No. 1 of the CCAIL and Section 211 of the Criminal Code.

The regulation covers the treacherous killing of members of hostile forces in international conflicts and of fighters in conflicts not of an international character. The formulation "fighter of the adverse party" describes the status of the non-state side in civil war more precisely in terms of international law than does the German translation of the ICC Statute, as the term "individuals belonging to a hostile nation or army" does not apply to armed conflicts not of an international character.

On Section 11 Subsection 2 (Qualification)

Section 11 Subsection 2 provides for an increase of the minimum penalty, if through an offence under Paragraph 1 Nos. 1 to 6 the death of a civilian or other person protected by international humanitarian law or serious injury of such a person in accordance with Section 226 is caused. If a civilian is killed or seriously injured as a result of the offence, it is unimportant for the outcome qualification whether the person in question is under the control of hostile party, in contrast to Section 8 Subsection 6.

The range of penalties is again increased if the perpetrator acts with intent in causing the death.

On Section 11 Subsection 3 (Damage to the environment in international armed conflicts)

This regulation is based on Article 8 Subsection 2 Letter b (iv) of the ICC Statute. It covers military attacks in which the environment is extensively damaged and moreover in which the damage is out of proportion with the military advantage specified in the elements of the crime. In practical application, the regulation will regularly result in criminal liability for such actions which cause at least regional contamination of the environment, and are moreover clearly out of proportion with the anticipated military advantage.

The regulation cannot yet be extended to cover armed conflicts not of an international character, as international customary law is not yet sufficiently consolidated.

On Section 12 (War crimes of the use of prohibited means of warfare)

On Section 12 Subsection 1 No. 1 (Use of poison or poisonous weapons)

This regulation is based on Article 8 Subsection 2 Letter b (xvii) of the ICC Statute. By extending the scope to armed conflicts not of an international character it applies to all conflict types mentioned in the ICC Statute. The use of poison has been considered a grave breach of international humanitarian law since the Hague Convention on the Laws and Customs of War on Land was passed in 1907.

The text of the Hague Laws and Customs of War on Land was accepted word-for-word at the Conference of States in Rome for the ICC Statute. The particular political circumstances surrounding the conference prevented the extension of the regulation to all types of conflict in the text of the Statute as required by customary law. Such an extension corresponds with the current legal situation, which also takes into account the great endangerment of the civilian population as a result of the use of poison in conflicts not of an international character. In Article 3, the Statute of the International Criminal Tribunal for the former Yugoslavia contains an element for the use of poison. In the Tadic jurisdiction decision, the Appeals Chamber of the Tribunal referred to the generally recognized principle that weapons prohibited in international conflicts may not be used under any circumstances when interpreting Article 3 (Tadic, IT-94-1-AR72, 2/10/1995, par. 119).

On Section 12 Subsection 1 No. 2 (Use of biological or chemical weapons)

This regulation is based on Article 8 Subsection 2 Letter b (xviii) of the ICC Statute. In contrast to the provision in the ICC Statute, it applies to both international armed conflicts and armed conflicts not of an international character. This extension is also embedded in international customary law, and treaty law regulations on the use of biological and chemical weapons which apply to the Federal Republic of Germany. The use of both biological weapons and chemical weapons is prohibited under treaty law for all types of conflicts (Agreement on the Prohibition of the Development, Production and Storage of Bacteriological (Biological) Weapons and Toxic Weapons of 19/4/1972, BGBI. 1983 II p. 132: Agreement on the Prohibition of the Development, Production and Storage of Chemical Weapons dated 13/1/1993, BGBI. 1994 II p. 806). In the Tadic trial, the International Criminal Tribunal for the former Yugoslavia found with reference to state practice, that the prohibition of the use of chemical weapons also applies to armed conflicts not of an international character (Tadic, IT-94-1-AR72, 2/10/1995, par. 124).

The wording of the regulation has been aligned with the above-mentioned international regulations which apply to the Federal Republic of Germany without changing the content, by limiting it to the use of biological or chemical weapons. The terms need no further specification, as German law contains such explanations in the ratification act regarding the Chemical Weapons Agreement (Vertragsgesetz zum Chemiewaffenübereinkommen, see above), among others. The criminalization in the CCAIL is also necessary because although Section 17 of the law implementing the Chemical Weapons Agreement (Ausführungsgesetz zum Chemiewaffenübereinkommen, CWÜAG, BGBI 1994 I p. 1954) and Section 20 of the law implementing Article 26, Section 2 of the Constitution (law on controlling weapons of war, Gesetz über die Kontrolle von Kriegswaffen, BGBI 1990 I p. 2506) penalize various conducts, ranging from production to export, they do not cover the use of such weapons. Moreover, while Section 17 of the Chemical Weapons Agreement (CWÜAG) applies to crimes committed abroad by Germans, the principle of universal jurisdiction - which is applicable to crimes under the CCAIL - does not apply.

On Section 12 Subsection 1 No. 3 (Use of so-called dum-dum bullets)

This regulation is based on Article 8 Subsection 2 Letter b (xix) of the ICC Statute. In spite of the lack of a reference to conflicts not of an international character in the ICC Statute, the CCAIL assumes that it is applicable to both international armed conflicts and to armed

conflicts not of an international character. The penal regulation which has been valid and generally recognized in its criminal law form since the 2nd Hague Declaration of 1899, like the regulations on the use of poison and chemical and biological weapons, is also applicable under customary international law to conflicts not of an international character.

The CCAIL contains no further elements regarding the use of other conventional weapons. There is a series of penal regulations which also apply to the Federal Republic of Germany for anti-personnel mines and laser weapons, such as the anti-personnel landmine ban of the Ottawa Convention of 1997 (BGBI. 1998 II p. 778). There is a lack of general acceptance in the community of states for criminalization of prohibitive regulations, which means that it currently cannot be incorporated into the CCAIL. If such penal standards become criminalized in either treaty or customary law, future legislative bodies may have to examine an additional entry into the CCAIL.

On Section 12 Subsection 2

Section 12 Subsection 2 provides for an increase in the minimum penalty - just as in Section 11 Subsection 2 – if a crime under Subsection 1 causes the death of a civilian or a person protected under international humanitarian law, or if such a person is seriously injured under Section 226 of the Criminal Code. If the perpetrator acts with intent in causing the death, the range of penalties is increased additionally.

Chapter three.
Other crimes

On Section 13 (Violation of duty of supervision)

While Section 4 provides for the liability of the superior in accordance with the model of Section 357 of the Criminal Code, if he or she was aware of an impending offence by a subordinate, Section 13 regulates the violation of duty of supervision independently and thus penalizes the cases of mere negligent non-avoidance of crimes by subordinates that are mentioned in Article 28 of the ICC Statute equally in weight as intentional cases. Similar to Section 130 of the Act on Regulatory Offences (Gesetz über Ordnungswidrigkeiten, OWiG) and Section 41 of the Military Criminal Code, the criminal liability of abstractly dangerous, intentional or - with reduced penalties in accordance with the second half of Paragraph 4 - negligent violation of the duty of supervision is connected to the merely objective consequence that a crime which could have been predicted and avoided by the superior was

committed by a subordinate. This solution satisfies the requirements of the guilt principle and justifies the penalty in this regulation. In contrast, in accordance with the principle of universal jurisdiction laid down in Section 1, it is not sufficient if the crime could only have been made far more difficult by proper supervision.

For civilian superiors, paragraph 2 requires a particularly clear predictability of the commission of the crime in accordance with the distinction in Article 28 Letter b (i) of the ICC Statute.

On Section 14 (Failure to report a crime)

Under Article 28 Letter a (ii) of the ICC Statute, the person who fails to report an offence committed by a subordinate is just as criminally liable as the perpetrator. This regulation seems considerably exaggerated and cannot be sustained dogmatically under German law. The present regulation takes into account sufficiently the objective intention of inducing the superior to report crimes of which he or she becomes aware. This duty, which is embedded in international law in Article 28 of the ICC Statute, has priority over the law of confidentiality for civil servants (see Section 61 Subsection 2 BBG [Bundesbeamtengesetz, German Civil Servants Law]**,** Section 14 Subsection 2 SoldG); the superior may, however, be internally bound to make the report through the prescribed official channels. This section does not require that the report be made "immediately", but "without delay". Possible delays in reporting the crime due to actual difficulties or military necessity do not fulfil the elements of the crime. Under Section 14, criminal liability is based (similar to Section 40 of the Military Criminal Code and comparable to Section 138 of the Criminal Code) on the fact that the failure of the superior to act creates (or increases) the abstract danger of non-punishment of the responsible subordinate. In view of the gravity of the offence as an abstract crime of endangerment which is comparable to the gravity of an offence under Sections 258 and 258a of the Criminal Code, the moderate maximum penalty of 3 years of imprisonment seems appropriate.

C. On Article 2 - Amendments to the Criminal Code

As Article 1 with Section 1 of the Code of Crimes against International Law provides for the application of the principle of universal jurisdiction to all crimes described in this law, including genocide, which has now been included in the CCAIL, Section 6 No. 1 of the Criminal Code, based on the previous element of genocide from the Criminal Code must be repealed. Art. 2 also contains necessary consequential amendments to the Criminal Code

which result from the inclusion of Section 220a of the Criminal Code in Section 6 of the CCAIL. The respective lists of crimes were not changed other than the required consequential amendments, as the mere addition of more or all crimes under the CCAIL to the list of crimes would tilt the respective balance and result in disputes, which could not be resolved in this legislation project without extensive delays. The need for adaptation as a result of the CCAIL must be examined independently of this draft law in the respective context.

D. On Article 3 - Amendment to the Code of Criminal Procedure

On Article 3 Nos. 1 to 3

The amendment orders in Nos. 1 to 3 relate to necessary consequential amendments as a result of the inclusion of the genocide element in the CCAIL. No more crimes under the CCAIL were incorporated as suitable reference crimes for the reasons mentioned in Article 2 except those which were necessary consequential amendments.

On Article 3 No. 4 (Section 153c)

For offences which are punishable under the CCAIL, the wide latitude granted to a public prosecutor by Section 153c Subsection 1 No. 1 and 2 of the Code of Criminal Procedure for refraining from prosecuting offences committed abroad and offences by foreign citizens on foreign ships in domestic waters is restricted by a particular structuring of the exercise of his or her discretion in Section 153 f of the Code of Criminal Procedure. Article 3 No. 4 therefore excludes offences punishable under the CCAIL from the scope of Section 153c Subsection 1 Nos. 1 and 2 of the Code of Criminal Procedure. The replacement of numbers 1 and 2 with a special regulation does not exclude other options of refraining from prosecuting or stopping proceedings in accordance with the Code of Criminal Procedure or Section 28 of the ICC law (see above under A.IV) as a special regulation in connection with the ICC.

On Article 3 No. 5 (Section 153f)

The new Section 153f of the Code of Criminal Procedure supplements the principle of universal jurisdiction embedded in Section 1 of the CCAIL in procedural law. It restricts the discretion of the public prosecutor which otherwise exists for crimes committed abroad in the case of CCAIL crimes committed abroad, and structures the exercise of discretion in two directions: For cases with a domestic reference, a fundamental duty of prosecution results

from Section 153f of the Code of Criminal Procedure (principle of mandatory prosecution, the so called “Legalitätsprinzip”) in order to prevent international crimes going unpunished; on the other hand, German prosecution authorities should refrain from using their power of prosecution in certain situations, and yield to foreign or international prosecution authorities. Overall, the legislative body relieves the public prosecutor to a certain degree of the often politically-sensitive decisions whether to prosecute an international crime committed abroad through the specific directives of Section 153f of the Code of Criminal Procedure. The extent of investigations required for the individual proceedings is kept under control by Section 153f, which combats the risk of German investigative resources being overburdened - especially in relation to the planned amendments to the Constitution (GG) and the Courts Constitution Act (GVG) (see Explanation A. IV).

Section 153f of the Code of Criminal Procedure is based on the following ideas: in the light of Section 1 of the CCAIL, it must always be assumed that for all crimes under the CCAIL, irrespective of the location of the crime and the nationality of the persons involved, the German justiciary is responsible and the department of public prosecutors has a duty to intervene in accordance with the principle of mandatory prosecution. As the primary objective is to prevent non-punishment of perpetrators of international crimes by international solidarity in prosecution, the investigation and prosecution duty is not limited to crimes which have a German connection; even if there is no connection to Germany, the results of investigation initiated in Germany could be valuable for proceedings before a foreign or international criminal court. On the other hand, German investigative resources should not be over-burdened with cases which have no connection to Germany and for which no notable clarification success is to be anticipated. It must also be considered that even cases subject to the principle of universal jurisdiction have a hierarchy of responsibility: the state in which the crime takes place and the home state of the perpetrator or victim and a competent international court are called on first to prosecute the perpetrator; the jurisdiction of third-party states (which exists under international law) must be understood as a subsidiary jurisdiction which should prevent non-punishment, but not otherwise inappropriately interfere with the primarily responsible jurisdiction. The state in which the crime was committed and the home state of the perpetrator or victim deserve priority due to their particular interest in the prosecution and due to the general proximity to evidence; and an international criminal court which is prepared to take over the case can best demonstrate the idea of international solidarity, and typically has extensive methods of obtaining evidence as a result of the (vertical) criminal law cooperation. If the priority of prosecution to be recognized by the ICC, it is not in contravention of the principle of complementarity of Art. 17 of the ICC Statute. This is because this principle should not be understood such that it encourages the state, whose

jurisdiction in a specific case is based solely on the principle of universal jurisdiction, to claim this jurisdiction before the ICC.

The above considerations justify graded restrictions of the duty of prosecution. The following grades are provided for:

On Section 153f Subsection 1

If a foreign citizen is not present on German territory and is not expected to be present, prosecution in Germany is generally unlikely to be successful. Therefore, in this case, Paragraph 1 Clause 1 places it at the discretion of the public prosecutors to pursue where possible or refrain from pursuing prosecution**.** In view of this decision, later anticipated requests for legal assistance may also be taken into consideration. The accused is deemed to be present in the country if he or she is in Germany, even temporarily. Presence as part of a through-journey is sufficient. The accused must only remain in Germany long enough for him or her to be arrested. It is irrelevant whether his or her presence in Germany is voluntary or involuntary.

If such a suspect who is not in this country and who is not expected to enter the country, is a German, the particular responsibility of the Federal Republic of Germany for international crimes of its citizens would suggest that it should request the extradition of the suspect and carry out the prosecution here. However, there may be good reasons to leave the judgement to an international court of justice or a court of the location of the crime. Therefore, in this respect, the public prosecutors are granted the discretion to decide provided the prosecution of the crime has already been initiated by a jurisdiction with greater priority of responsibility. (Paragraph 1 Clause 2) The purpose of the regulation makes clear that the act of refraining from prosecution cannot be justified under Section 153f of the Code of Criminal Procedure if the prosecutions abroad are mere sham prosecutions, or prosecutions conducted without serious intent to prosecute, for the purpose of shielding the accused from prosecution.

On Section 153f Subsection 2

If the offence has no connection to Germany, no suspect is in the country and an international criminal court or a state directly affected and thus more responsible has taken on the prosecution of the offence - as part of a justiciary procedure - the suspect shall not be prosecuted in Germany in accordance with the principle of subsidiarity (Section 2 Clause 1). However, for exceptional situations (e.g. if it is to be feared that the prosecution initiated in

the state where the crime was committed will be impeded and important witnesses are in Germany) the possibility of a domestic prosecution must also remain intact. As in Subsection 1, sham prosecutions are not sufficient. Under this relatively narrow ruling, the principle of mandatory prosecution remains unaffected - except in cases of Subsection 1 - provided only a connection with the domestic country is lacking or only the prosecution was initiated abroad. This would seem justified: if the offence has no connection with Germany, the principle of mandatory prosecution in conjunction with the principle of universal jurisdiction requires that the German prosecution authorities make every effort to prepare for later prosecution (whether in Germany or abroad), unless a jurisdiction with primary responsibility has commenced investigations. If, on the other hand, a foreign state or an international criminal court is already investigating the matter, but there is a link in terms of offence, suspect or victim to Germany, the German authorities should avail of the investigation opportunities resulting from the German connection, for reasons of worldwide solidarity alone, even without specific requests for legal aid, in order to support the trial abroad as well as possible and to be prepared for the case for possible take over by Germany at a later time.

If the offence is prosecuted by an international or foreign jurisdiction with higher priority and a foreign suspect is in Germany, the extradition or transfer of this suspect to the prosecuting jurisdiction generally has priority over subsidiary German prosecution interests. However, this can only apply if the extradition of the person in question is permitted and actually intended. This case is regulated in Subsection 2 Clause 2 in such a way that even in this case, the public prosecutors "should" refrain from domestic prosecution.

On Section 153f Subsection 3

Subsection 3 of the norm provides that the public prosecutor may withdraw the charge or discontinue the proceedings if, in the cases provided for in Subsections 1 or 2, a public indictment has already been filed.

E. On Article 4 - Amendment to the Courts Constitution Act (Gerichtsverfassungsgesetz)

Article 4 concerns a consequential amendment made necessary by the inclusion of the crime of genocide in the CCAIL.

F. On Article 5 - Amendment to the Act Amending the Introductory Act to the Courts Constitution Act (Gesetz zur Änderung des Einführungsgesetzes zum Gerichtsverfassungsgesetz)

Article 5 concerns a consequential amendment made necessary by the inclusion of the crime of genocide in the CCAIL.

G. On Article 6 - Amendment to the Act on State Security Files of the Former German Democratic Republic (Stasi-Unterlagen-Gesetz)

Article 6 concerns a consequential amendment made necessary by the inclusion of the crime of genocide in the CCAIL.

G. On Article 7 - Repeal of a provision of the Criminal Code of the German Democratic Republic currently still in force

This provision repeals Section 84 of the Criminal Code of the GDR (StGB DDR) which provides for a special exclusion of the statute of limitations and remains in force in the new Federal States in accordance with the Treaty of Union, as it is has now been made obsolete by Section 5 of the Code of Crimes against International Law.

H. On Article 8 - Entry into force

This regulation contains the ruling on the entry into force of the law.