

Germany's Diplomatic and Judicial Policy on the Establishment of the ICC

Miwako Fukunaga

Introduction

The ICC Statute, which had been concluded in July 1998, took effect in July 2002 and the International Criminal Court (ICC) was founded as a permanent international judicial institution to try individuals for the most serious crimes under international law, i. e. genocide, crimes against humanity and war crimes. The establishment of the ICC after long efforts is a landmark event in the history of international law and will have a large influence on the development both of international criminal justice and international politics.

Ever since the establishment of the ICC was put on the agenda in the international arena after the end of the Cold War, Germany has consistently developed diplomatic and judicial policy to promote and support the realization of the Court. It committed itself actively in the development process of the ICC Statute, while it enacted a series of domestic laws for the implementation of the Statute and effective cooperation with the ICC. So what political aims and long-term perspective have prompted the unified Germany to develop such a policy? Further, how does this policy link with activities intended for “overcoming the Nazi past” (*“Vergangenheitsbewältigung”*), which forms the basis of post-war Germany's political culture, or with the political consciousness underlying these efforts? It will be necessary to consider precisely how the continuous and new elements in the efforts of overcoming the past before and after the unification have influenced on Germany's ICC policy.

The first section of this paper will evaluate Germany's role in the international negotiation process toward the establishment of the ICC. The second section will describe the general consensus of the major political parties of Germany concerning the institution of the ICC, and explore key political factors which contributed to the formation of the ICC policy in the unified Germany. The third section will examine details and characteristics of the ratification of the ICC Statute and the legislation of relevant laws in Germany. Through these investigations, the outline of Germany's diplomatic and judicial policy on the establishment of the ICC and its political background will be made clear.

1. Germany's role in the establishment of the ICC

The effort to establish the ICC resumed at the end of the 1980s after a long hiatus. In the new international political circumstances of the post-Cold War era brought about by factors such as

the reactivation of the United Nations resulting from the release of a deadlock situation between the East and the West, the breakout of new regional conflicts and civil wars which brought about large-scale massacres and grave violations of human rights therein, and the increase of international crimes like terrorism and drug trafficking as attendant phenomena of globalization, calls for a permanent international criminal court became more strident and its establishment was put back on the agenda of the international community as a priority issue. In this situation Germany exhibited great initiative as a core member of the so-called “like-minded countries” in the negotiation process toward the drafting and adoption of the ICC Statute, especially at the United Nations Preparatory Committee and the Rome Diplomatic Conference held in the summer of 1998, and actively strove for the establishment of an independent, authoritative court.

The like-minded countries positioned as their common objectives inter alia the independence of the ICC from the United Nations Security Council, automatic jurisdiction for the ICC – meaning that those countries having ratified the Statute would automatically accept its jurisdiction – and an independent ICC Prosecutor who can initiate an investigation *proprio motu*.¹⁾ Attempting to achieve these objectives, Germany made many significant suggestions about main issues in the negotiation of the ICC Statute. Above all, the proposal to introduce universal jurisdiction was indicative of their intention to establish the ICC as a “world criminal court” (Weltstrafergerichtshof) under whose jurisdiction the whole of the international community would lie.²⁾

In the discussion of the definition of the crimes within the ICC's jurisdiction Germany also made important contributions. Firstly it submitted on the basis of informal consultations a draft of the crime of aggression restricting its coverage to the most serious and incontrovertible armed attacks against another state.³⁾ Because of the divergent positions of delegations on complicated questions, namely whether the crime should be included in the crimes within

1) Motoko Mekata, *Kokkyō o Koeru Shiminnettowaku*, Tōyōkeizaishinpōsha 2003, p. 141; Angelika Schlunck, “Der Internationale Strafergerichtshof: Diskussionsstand vor der Diplomatischen Konferenz in Rom vom 15. Juni bis 17. Juli 1998,” in: Horst Fischer and Sascha Rolf Lüder (eds.), *Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafergerichtshof*, Berlin Verlag 1999, p.153.

2) Cf. Roy S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*, Kluwer Law International 1999, pp. 132-133; Hans-Peter Kaul, “Der Internationale Strafergerichtshof: Das Ringen um seine Zuständigkeit und Reichweite,” in: Fischer and Lüder, *op. cit.*, p.184. Germany stated that under current international law all nations might exercise universal jurisdiction over genocide, crimes against humanity and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place, where the crime had been committed. Since the contracting Parties to the ICC Statute could individually exercise universal jurisdiction for those crimes, they could also, by ratifying the Statute, grant the Court with a similar authority; M. Cherif Bassiouni (ed.), *The Legislative History of the International Criminal Court*, vol. 3, Transnational Publishers, Inc. 2005, pp. 145-146. After the proposal of universal jurisdiction had failed to gain the support of many participants, Germany made a counterproposal to the suggestion offered by five permanent members of the Security Council which would significantly limit the ICC's jurisdiction. It contributed to the adoption of the provision that the Court may exercise jurisdiction if the territorial State where the crime was committed, or the State of nationality of the accused are States Parties to the Statute or accept *ad hoc* the Court's jurisdiction; Kaul, *op. cit.*, pp. 184-190.

3) Cf. Lee, *op. cit.*, pp. 81-83.

ICC's jurisdiction, how this crime should be defined, and whether the prosecution of this crime should presuppose a determination by the Security Council that an act of aggression was committed, Germany sought to reach compromise through its restrictive definition. Germany's proposal found broad support and contributed to the incorporation of this crime into the ICC Statute, whereas the delegations could not agree on the crime's definition and it was prescribed that the Court shall exercise its jurisdiction over the crime after the definition is later adopted.⁴⁾ Secondly, in elaboration of the definition of war crimes Germany took the initiative to draw up the "Bonn paper", which provided an important basis for the Statute.⁵⁾

With regard to the role of the ICC Prosecutor, Germany proposed together with Argentina a system whereby the Prosecutor needs approval from the Pre-Trial Chamber of the Court before conducting an investigation *ex officio*.⁶⁾ This proposal, taking into consideration the anxieties of some delegations concerning arbitrary and politically motivated investigations by the Prosecutor, was accepted by many states and led to the adoption of the independent status of the Prosecutor. Furthermore, Germany made proposals on the law of evidence to introduce some legal principles of continental Europe into the Statute.⁷⁾ In the negotiation for the establishment of the ICC, Germany played on the one hand a pioneering role in proposing various constructive and progressive concepts. On the other hand, it acted as an intermediary by conducting unofficial meetings or proposing pragmatic compromises and contributed essentially to the maintenance of the negotiation process and to the reaching of agreements.

Though the establishment of the ICC gained broadened support after the end of the Cold War, there still existed marked gaps in the standpoints of each state concerning the specific powers and system of the Court. Because of the negative attitudes of some major states toward the powerful and independent Court, above all of the United States, which expressed particular concern for possible prosecution of its military and civil personnel dispatched to all corners of the globe, the negotiation process remained difficult until the final stage of the Rome Conference.⁸⁾ In this situation like-minded countries including Germany allied themselves closely with the NGO Coalition for the International Criminal Court (CICC), which shared primary goals with them, and through various activities, for example, proposing the draft texts for the Statute, organizing informal consultations, offering necessary knowledge and advice to

4) *Ibid.*, pp. 83-85.

5) *Ibid.*, pp. 105-107. The Bonn Paper is based chiefly on a proposal of the United States and a common proposal of New Zealand and Switzerland. Reflecting both drafts, it included in its regulations on international conflicts the grave breaches provisions of the Geneva Convention, the provisions of Additional Protocol I to the Geneva Convention and Hague Regulations, and in regulations of internal conflicts, besides common Article 3 of the Geneva Conventions, the provisions of Additional Protocol II to the Geneva Conventions and other norms.

6) Cf. *Ibid.*, pp. 183-188; Bassiouni, *op. cit.* vol. 3, pp. 175-176.

7) Lee, *op. cit.*, p. 244.

8) The United States insisted, for example, on introducing the trigger mechanism that the investigation and prosecution of the ICC premise the Security Council's referral of the situation to the ICC, and that the ICC requires the consent to the prosecution by the State of the accused's nationality at least with regard to the non-party State of the ICC Statute. Furthermore it opposed *proprio motu* investigations by the ICC Prosecutor; David Wippman, "The International Criminal Court," in: Christian Reus-Smit (ed.), *The Politics of International Law*, Cambridge University Press 2004, pp. 166-176.

the delegations, and lobbying at the UN or campaigning in each state, they acted as motive powers for the establishment of the ICC and ultimately succeeded in gaining the support of the overwhelming majority of states for the adoption of the ICC Statute.⁹⁾ While many compromises were forced to be made through negotiations with opposing states such as the United States, in the words of Germany's former Foreign Minister Fischer, "a good compromise" was reached¹⁰⁾, and the like-minded countries could attain their essential objectives.¹¹⁾ After the Rome Conference, too, Germany continues to take part in preparatory works and negotiations actively and strives to establish the ICC as an effective and credible institution.¹²⁾

2. The ratification of the ICC Statute and the implementing legislation in Germany

2.1 The consensus on the establishment of the ICC

In December 1998, Germany signed the ICC Statute, before ratifying it in December 2000. What is important to note here is that all the main political parties unanimously supported the establishment of an independent and powerful International Criminal Court.¹³⁾ NGOs and academics also appealed for the contribution of Germany toward a swift establishment of the court.¹⁴⁾

At the heart of this broad consensus lay a common recognition that one of the most important and urgent challenges for the international community was to change, via the establishment of the ICC, the present situation in which genocides and other serious human

9) Bassiouni, *op. cit.* vol. 1, pp. 74-91; Mekata, *op. cit.*, pp. 122-152.

10) *Verhandlungen des Deutschen Bundestages. Stenographische Berichte (VDB)*, 24. 2. 2000, p. 8375.

11) According to the adopted Statute the ICC may start prosecution not only by referral of the Security Council but also by referral of State Parties or by the initiation of the Prosecutor, namely the ICC can act in principle independently from the Security Council and its Prosecutor has also relatively strong authority. It is provided further that by ratifying the Statute the States accept automatically the jurisdiction of the ICC. On the other hand the Court's jurisdiction and authority are limited in many respects. For example, the Security Council may defer the investigation or prosecution by the Court for a period of twelve months by its resolution, which is renewable. Further, a state may opt out of the Court's jurisdiction over war criminals for seven years after the entry into force of the Statute for it with regard to crimes committed by its own nationals, or on its territory; cf. Wippman, *op. cit.*, pp. 166-176; Mekata, *op. cit.*, pp. 142-145.

12) Germany contributes both financial support and human resources to the ICC. In February 2003 German Ambassador Hans-Peter Kaul was elected as Judge of the ICC; cf. Brigitte Zypries, "Strafverfolgung von Völkerrechtsverbrechen: Eine Herausforderung für die deutsche Justiz," in: Gunnar Theissen and Martin Nagler (eds.), *Der Internationale Strafgerichtshof. Fünf Jahre nach Rom*, Deutsches Institut für Menschenrechte a. o. 2004, p. 12; Bassiouni, *op. cit.* vol. 1, p. 114; http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/Voelkerrecht/IStGh/hintergrund__ICC.html.

13) Cf. *VDB*, 24. 2. 2000, pp. 8374-8386; 27. 10. 2000, pp. 12348-12362.

14) The German branch of the CICC, the *Koalition für einen Internationalen Strafgerichtshof -Deutsches Komitee*, requested in its February 2000 position paper that Germany acts as a model for other states to follow in the ratification and implementation of the ICC Statute, and proposed many suggestions to support the ICC; "CICC.DE, Zu Ratifizierung und Implementierung des IStGH-Statuts -Die gemeinsame Position deutscher Nichtregierungsorganisationen, 2. 2. 2000"; see also its summary; "Sechzehn

rights violations frequently occur and their perpetrators are left free without being claimed for responsibility.

The ICC, having deterrent effect on potential perpetrators by putting an end to impunity, preventing the germination and reproduction of hatred or feelings of retaliation and restoring justice through the investigation of historical facts (particularly the terrible experiences of victims), as well as advancing international law and encouraging the standardization of international and national legal systems concerned with these serious crimes, is seen as an institution which will contribute to the strengthening of the rule of law in the international community, to the prevention of serious international crimes and consequently to the maintenance of peace.¹⁵⁾

The principle of noninterference in sovereign states has often obstructed the international community from prosecuting individuals responsible for serious international crimes. In Germany, however, fundamental values such as human rights and peace are considered as belonging to “global politics” (“*Weltinnenpolitik*”), which concerns the whole of the international community. Thus, the view is generally shared that national sovereignty should be partly limited, when it relates to the maintenance of these values.¹⁶⁾

2.2 Political factors in Germany's ICC policy

Since World War Two, Germany has endeavored in various fields to overcome the negative historical legacies of its Nazi past. In the sphere related to the ICC too, Germany has practiced policies such as prosecution of Nazi crimes by its own judiciary, constitution of internal legal institutions which protect human rights widely, and accession to most of the international human rights and humanitarian laws as well as support for human rights institutions of the United Nations. As the former Minister of Justice Däubler-Gmelin indicated that Germany has particular responsibility to make efforts for the establishment of the ICC because of the history of Nazism,¹⁷⁾ the policy of unified Germany to support for the ICC is underpinned by a reflexive recognition of its own history and is founded on a long historical line of efforts at overcoming the past. On the other hand, the sentences of the Nuremberg Trials and other war crimes trials, or legal principles and regulations which the Allied nations had developed or constituted in order to prosecute crimes committed under Nazi regime were not actively accepted by the majority of politicians or jurists in West Germany, and their attitude concerning

Anforderungen an die Umsetzung des IStGH-Statuts -Die gemeinsame Position deutscher Nichtregierungsorganisationen.” Further, in September of the same year 70 university professors signed their name to an appeal to the German Parliament (Bundestag) calling for the prompt ratification of the ICC Statute; *Süddeutsche Zeitung*, 14. 9. 2000.

15) VDB, 24.2.2000, pp. 8374-8386; 27.10.2000, pp. 12348-12362; Sascha Rolf Lüder and Thomas Vormbaum (eds.), *Materialien zum Völkerstrafgesetzbuch*, LIT Verlag o. J., pp. 73-80, 93-101. From these viewpoints the adoption of the ICC Statute and the establishment of the Court are hailed as a “historic milestone in the development of international law,” and as a “historic success”; VDB., 24.2.2000, p. 8374, 8376.

16) Cf. VDB, 24.2.2000, p. 8375, 8378, pp. 8380-8381; 27.10.2000, p.12354, 12357.

17) *Ibid.*, 27.10.2000, p.12349.

the institutionalization of international criminal justice remained rather skeptical.¹⁸⁾ In this respect, the fact that since the unification Germany has played an active role in the establishment of the ICC, and also that the German judiciary has taken a positive stance in judicial practices with respect to international criminal law, represents a marked change compared with the era of separation.¹⁹⁾

This change in policy appears in the discourse concerning the Nuremberg Trials. In postwar Germany, a variety of criticisms were leveled at the Nuremberg Trials, primarily labeling them as “winner’s justice” or pointing out the violations of the principle of *nulla poena sine lege*. However, in line with the support policy for the ICC, it has become more standard for these Tribunals to be viewed as an essential basis for the establishment of the ICC.²⁰⁾ In this way the practices of postwar Germany to overcome the Nazi past and the attempts of Allied nations to prosecute Nazi crimes are both positioned as part of a common process aiming at developing international criminal justice and reinforcing the rule of law in the international community.²¹⁾

What political factors assisted, then, in the formation of the ICC policy of Germany? Firstly, the legal norms prescribed in the ICC Statute accord in essence with the political and legal norms of Germany which are founded on the Basic Law and underlie its postwar anti-Nazi democracy. Further, after the unification, the political norms of Germany have transformed gradually from anti-Nazi to anti-totalitarian or anti-genocidal, that is to say, they have become more universal. In parallel therewith the interest of practical policies on the furtherance of fundamental values such as human rights, freedom and peace in the international community or on the construction of global politico-judicial institutions, which will maintain such values, has increased, although the government, main political parties as well as the society of Germany still make much of working on the Nazi past.²²⁾

In unified Germany, in view of national and international political environments which have radically changed after the end of the Cold War, human rights came to be regarded as a key

18) Cf. Heribert Ostendorf, “Die Bedeutung der Nürnberger Prozesse für die Strafverfolgung von Kriegsverbrechen durch die UN,” in: Gerd R. Ueberschär (ed.), *Der Nationalsozialismus vor Gericht*, Fischer Taschenbuch Verlag 1999, pp. 264-268; Norbert Frei, *Vergangenheitspolitik*, Verlag C. H. Beck 1996, pp. 133-306; Philipp Austen, “Kokusaikeijisaibansho no Setsuritsu to Rippōjō no Taiou (Jō),” *Sousakenkyū*, no. 608 (5/2002), p. 68; Florian Jeßberger, “Das Völkerstrafgesetzbuch: Herausforderung und Verpflichtung für die deutsche Justiz,” in: Theissen and Nagler (eds.), *op. cit.*, p. 47.

19) Osten, *op. cit.*, p. 68; Jeßberger, *op. cit.*, p. 47.

20) An example of this assessment can be seen in the words of Ludger Volmer, former undersecretary of the Ministry of Foreign Affairs, who, during the debate over the ratification of the ICC Statute in the German Parliament, argued that the Nuremberg Trials and the Tokyo Trials provided the first realization of “the principle that neither political leaders nor soldiers can be allowed to hide behind the shields of extraterritoriality or sovereignty to escape punishment for serious crimes” and showed clearly that “the dignity of humanity must be protected also with international criminal law”; *VDB*, 27.10.2000, p.12358.

21) It is very symbolic for this situation that during the negotiation for the ICC former US prosecutors at the Nuremberg Tribunal Whitney R. Harris and Benjamin Ferencz supported the German delegation striving to establish an effective and independent Court and there existed close contact and cooperation between them. Harris was also present at the German Parliament enacting the Acts to ratify the ICC Statute.; Hans-Peter Kaul, “Der Internationale Strafgerichtshof – Das Vermächtnis von Nürnberg,” in: Andreas Zimmermann (ed.), *Deutschland und die internationale Gerichtsbarkeit*, Duncker & Humblot 2004, pp. 80-81.

22) For instance the protection and promotion of human rights in the international community was positioned as a main issue in the foreign policy of the unified Germany; cf. Florian Pfeil, *Zivilmacht für die Menschenrechte?*, Verlag Dr. Kovač 2000, pp. 9, 64-65.

factor for the security policy, as being the precondition for any social and economic developments.²³⁾ The ICC, whose function is to prosecute and prevent international crimes which violate human rights on a large scale, is therefore acknowledged as an essential institution for promoting security and welfare in both Germany and international society. Furthermore, the establishment of the ICC corresponds with Germany's political principle concerning international order, which respects multilateral cooperation based upon international law.²⁴⁾

Secondly, large-scale genocides or ethnic cleansings which took place in the post Cold War era and political and legal supports for *ad hoc* international tribunals set up to prosecute these serious crimes, especially the Yugoslav wars and the cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY), have increased the understanding of international criminal justice and of the necessity of a permanent international court, which set forward the debates on the establishment of the ICC. As well as proposing the establishment of an international criminal tribunal at the United Nations General Assembly, Germany also supports the ICTY according to a bill adopted in 1995, by, for instance, providing monetary aid, dispatching a team of experts for the investigation or accepting prisoners.²⁵⁾ Further, based on domestic criminal law, the German judiciary prosecutes perpetrators of crimes committed in the Yugoslav wars.²⁶⁾

Thirdly, full support and promotion of the ICC was adopted as a common policy of the European Union (EU) and thus enabled Germany to develop its own policy in harmony with this.²⁷⁾ In its Common Position the EU declared that the principles of the ICC Statute

23) *Ibid.*, pp. 9-11; VDB, 5.12.1996, pp. 13053-13056.

24) Some members of the German Parliament expressed their expectation that the establishment of the ICC would change the present situation whereby the Security Council and its five permanent members enjoy a privileged position concerning international peace and security, and would allow the international community to prosecute perpetrators of serious international crimes without being affected by the political interests of individual states; VDB, 24.2.2000, S.8376; 27.10.2000, p.12357.

25) Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press 2004, p. 35; Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für das ehemalige Jugoslawien, Bundesgesetzblatt, 1995 I, pp. 485-488; http://www.auswaertiges-amt.de/www/de/aussepolitik/vn/voelkerrecht/istgh/stgh_ruanda_jug_html.

Germany also provides the International Criminal Tribunal for Rwanda (ICTR) with support based on the bill which was enacted in 1998; Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof für Ruanda, Bundesgesetzblatt, 1998 I, pp. 843-845.

26) Cf. Gunnar Theissen, "Ansatzpunkte für eine aktive Menschenrechtspolitik zum internationalen Strafrecht," in: Theissen and Nagler (eds.), *op. cit.*, p. 76; Kai Ambos and Steffen Wirth, "Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts," in: Horst Fischer, Klaus Kreß and Sascha Rolf Lüder (eds.), *International and National Prosecution of Crimes Under International Law*, Berlin Verlag 2001, pp. 769-797.

27) Cf. e. g. Bulletin EU 11/1997, 3/1998, 5/1999. After the adoption of the ICC Statute the EU adopted and regularly reviews the Common Position and the Action Plan to follow it up; cf. esp. *Official Journal of the EU*, L 155, 12. 6. 2001, p.19; *OJ*, L 164, 22. 6. 2002, p.1; Council of the EU, 9019/02, 27. 5. 2002. In April 2006 the EU made an Agreement with the ICC on cooperation and assistance; Council of the EU, ICC-PRES/01-01-06. According to this common policy all the member states of the EU, with the exception of the Czech Republic, ratified the ICC Statute; <http://www.icc-cpi.int/asp/statesparties.html>. Other European States such as the associated countries of the EU, the EFTA countries or members of the European Economic Area also declared that they share the objectives of the Common Position of the EU and thus the European states constitute a core part of the States Parties of the ICC; e. g. 5751/02(Presse 21) of the EU, 29.1.2002.

correspond entirely with the principles and objectives of the Union which gives the rule of law, respect for human rights as well as the preservation of peace and the strengthening of international security the highest priority.²⁸⁾

The formation of the common ICC policy of the EU was encouraged by political factors such as the value system mentioned above which was reaffirmed through the establishment of the EU, the extension of the concept of security and the strengthening of the human rights policy²⁹⁾, the impact brought by the Yugoslav wars and the experience of the cooperation with the ICTY as well as the policy which respects cooperation with the UN and multilateralism. The ICC policy of the EU, which has restructured its organization drastically and has attempted to enlarge and deepen the community since the 1990s, and that of unified Germany, have therefore parallel and common backgrounds.

In addition, the fact that the EU undertakes the creation of an area of “freedom, security and justice” and intensifies gradually its character as a supranational political community and also that the member states of the EU are accustomed to referring issues of human rights to international justice, that is, to the European Court of Human Rights, could explain the high level of consent to the ICC in the European states.³⁰⁾

3. The relevant domestic Laws and their characteristics

In order to ratify and implement the ICC Statute Germany adopted a series of domestic Laws. Firstly, in December 2000, Article 16, paragraph 2 of the Basic Law which had prohibited the extradition of Germans to foreign countries, was amended and the constitutional obstacle to the surrender of German suspects to the ICC was removed.³¹⁾ Also in December 2000, the ICC

28) *OJ*, L 155, p.19. The value system of the EU also bears the mark of experiences of World War Two and the Holocaust, and it is remarkable that since the 1990s there has been a change in the historical consciousness of these events. The collaboration with the Nazi regime under its occupation or the indigenous anti-Semitism in many European states has recently come to light, allowing the Holocaust to be recognized as a phenomenon involving Europe as a whole; cf. Yuji Ishida, *Kako no Kokufuku*, Hakusuisha 2002, pp. 311-324. This transformation, which might be referred to as “the europeanization of the Holocaust,” corresponds that within the unified Germany the Nazism and Holocaust are understood from a more universal perspective, and is related to the development of the awareness in European nations that the overcoming and prevention of serious crimes like genocide is an urgent issue not only for Germany but also for other European states.

29) In the EU Treaty the development and consolidation of democracy, the rule of law and respect for human rights and fundamental freedoms are defined as objectives of its Common Foreign and Security Policy. Establishment of the rule of law and the protection of human rights are also considered as one of the best means for strengthening international order in the European security strategy; cf. Takako Ueta, “Kakudai EU to Oushūanzenhoshōbouseisaku (ESDP),” in: Yuichi Morii (ed.), *Kokusaikankei no Naka no Kakudai EU*, Shinzansha 2005, pp.127-129. In line with these views emphasis has been placed upon human rights policy in the EU too and support for the ICC and other international criminal tribunals have become its important elements; Pfeil, *op. cit.*, pp.90-93; cf. e. g. European Commission, “Commission Staff Working Document. European Initiative for Democracy and Human Rights Programming Document 2002-2004,” p.9.

30) Wippman, *op. cit.*, p.161.

31) Gesetz zur Änderung des Grundgesetzes (Artikel 16), Bundesgesetzblatt, 2000 I, pp. 1633-1634. Under the ICTY Cooperation Law, only the extradition of foreign nationals to the ICTY and to the states which accept the prisoners had been allowed, and the amendment of the Basic Law to enable the extradition of German nationals had been passed up. As one justification for this deliberate decision, the Minister of Justice of the time, Leutheusser-Schnarrenberger, argued that the provision in the Basic Law prohibiting

Statute Act (*Gesetz zum Römischen Statut des Internationalen Strafgerichtshofs vom 17. Juli 1998*) was adopted to introduce the ICC Statute as a domestic law.³²⁾

After the ratification of the ICC Statute, two more significant laws entered into force in summer 2002. Firstly, the ICC Statute Implementation Act (*Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes vom 17. Juli 1998*) instituted the procedures for judicial cooperation with the ICC.³³⁾ Secondly, with the Act to Introduce the Code of Crimes against International Law (*Gesetz zur Einführung des Völkerstrafgesetzbuches*) a new criminal code for the crimes within the jurisdiction of the ICC was established, in order that the German judiciary, according to the ICC Statute's principle of complementarity, could prosecute those crimes effectively.³⁴⁾

The crime of genocide had already been defined in the German Criminal Code after West Germany's accession to the Genocide Treaty in 1954, and also the prosecution of crimes against humanity and war crimes had been partially possible under the current criminal law. But through the reconstitution of these crimes within an integrated legal framework, it was intended to enable a more accurate grasp of the particular illegality of the core international crimes and to give the provisions for them more clarity and practical applicability.³⁵⁾ In addition, an Act was enacted in August 2004 which prescribes the privileges and immunities of the ICC based on the Agreement of September 2002.³⁶⁾

While all of these laws are based upon the ICC Statute, German legislators took into account also the provisions of international humanitarian laws and the statutes of other international criminal courts which are recognized as customary international law, so that they are even more progressive than the ICC Statute itself.³⁷⁾ For example, the ICC Statute Implementation Act provides a level of judicial cooperation above and beyond that prescribed in the ICC Statute itself, such as the arrest of suspects and the handing over of evidence before any request from the ICC, the freezing of all assets of suspects on the ICC's request, the spontaneous supply of information to the ICC, acceptance of those found guilty as prisoners in Germany under the ICC's control and so on.³⁸⁾ The Act to Introduce the Code of Crimes

the extradition of German nationals was adopted in consideration of the history of the NS era in which the basic rights of Jewish citizens had been invalidated through their mass deportation by the Nazis; *VDB*, 9.3.1995, p.1764. On the occasion of the ratification of the ICC Statute, however, it was decided to amend the Basic Law to allow the surrender of Germans to international courts including the ICC and to other EU states. The recognition that the rule of law is thereby firmly established and the desire to contribute to the EU policy to construct an area of "freedom, security and justice" provided the foundation for that decision; *VDB*, 24.2.2000, pp. 8379-8381; 27.10.2000, p.12350.

32) Bundesgesetzblatt, 2000 II, pp. 1393-1483.

33) Bundesgesetzblatt, 2002 I, pp. 2144-2165.

34) Bundesgesetzblatt, 2002 I, pp. 2254-2260.

35) Lüder and Vormbaum (eds.), *op. cit.*, p.23.

36) Gesetz zu dem Übereinkommen vom 9. September 2002 über die Vorrechte und Immunitäten des Internationalen Strafgerichtshofs, Bundesgesetzblatt, 2004 II, pp. 1138-1153.

37) Lüder and Vormbaum (eds.), *op. cit.*, p.23.

38) Jörg Meißner, "Das Gesetz zur Ausführung des Römischen Statuts des Internationalen Strafgerichtshofes," in: *Neue Justiz*, 7/2002, p.349; Steffen Wirth, "International Criminal Law in Germany – Case Law and Legislation, Presentation to the Conference Combating International Crimes Domestically (3rd Annual War Crimes Conference, Ottawa, 22-23 April 2002, hosted by the Canadian Department of Justice, Crimes against Humanity and War Crimes Section)," pp.16-17.

against International Law provides that the German judiciary has universal jurisdiction over the crimes prescribed in the ICC Statute. That means it can prosecute those crimes even in the case that both the accused and the victim are foreigners and the crime took place on foreign soil.³⁹⁾

With regard to the definitions of these crimes, again, these laws provide greater possibilities of prosecution and more progressive content than the ICC Statute, specifically by enacting that even single cases of homicide can be deemed to be genocide if they were conducted with the intention of wiping out any particular group; by removing the threshold clause which prescribes that war crimes can only be prosecuted as such when they constitute part of a plan or a policy or were conducted on a large scale; and by largely removing the distinction between international and non-international military conflicts and reconstituting the provisions of each criminal act in a more systematic order.⁴⁰⁾ Another notable difference between this law and the ICC Statute is that specific sentences are prescribed for each individual crime.⁴¹⁾

The above-listed laws are the embodiment of Germany's intention to support the ICC sufficiently and, for the purpose of complementing its prosecution, to build the national legal system, which reflects the cutting edge of international law including the ICC Statute. Germany's policy of creating an environment in which the ICC can effectively fulfill its functions, and of helping to promote the development of international criminal law and international justice, can be clearly seen in this law-making process that does not merely stop at the acceptance of the ICC Statute.

In conclusion

Since the 1990s, in parallel with the policy of support for the ICC, Germany has sent troops of the Federal Defence Force to countries outside the NATO area such as Cambodia, Somalia or the former Yugoslavia in the framework of peace keeping operations of the UN or multilateral "humanitarian interventions," and in spring 1999 during the Kosovo conflict, participated in battle outside the NATO area for the first time since the Second World War. The universalization of political norms in the unified Germany and its growing political interest in advancing these norms at the global level, opened up also the path to the use of military measures to counteract genocides or grave human rights violations. Germany had restricted strictly any military action on foreign soil in consideration of the aggressive war waged by Nazi Germany. However, the transformation of the political function that the Nazi past has in

39) Under the current German Criminal Code the crime of genocide and most war crimes could have been prosecuted according to the Code's principle of universality, regardless of the place, where the crime had been committed, the nationality of the accused and the victim. On the other hand the possibility to prosecute crimes against humanity and war crimes in civil wars, to which the principle of universality had not been applied, had been restricted. With the adoption of the Code of Crimes against International Law, under which the principle of universality covers all these crimes, this restriction upon the jurisdiction was removed; cf. Austen, *op. cit.*, pp.69-70; (Ge), no.610 (7/2002), p.62.

40) Wirth, "International Criminal Law in Germany," pp.10-11; Steffen Wirth, "Germany's New International Crimes Code: Bringing a Case to Court," in: *Journal of International Criminal Justice*, 1/2003, pp.156-157.

41) Austen, *op. cit.*, no.610, p.63.

German society, which arose in relevance to the universalization of political norms, brought about the change of this precept. Through this transformation, in which the response to the Yugoslav wars, in particular the participation in the air strike by NATO during the Kosovo conflict, acted as the main catalyst, the historical lessons of "Auschwitz" were reinterpreted. It has been transformed from shackles restraining Germany from military action in other countries to the basis for an allowance and justification of the use of military measures to prevent genocide and human rights violations in cases in which these are considered likely to occur.⁴²⁾

In order to accurately grasp the position Germany's ICC policy occupies both in its domestic and foreign policy as well as in international politics and its meaning for them, it would be necessary to consider the political context surrounding that policy and the interrelation between the ICC policy and the policy of humanitarian intervention. It could be said that the relationship between them contains not only complementary but also tense and contradictory elements in many aspects: the legal conditions and procedures required for the intervention are not definitely established in international society, and interventions could be carried out selectively and be arbitrarily affected by the interests of intervening states; political measures put in place during any intervention by concerning states could potentially exert political influence upon the activities of the international courts and could consequently erode the fairness and neutrality of their rulings; especially from a mid-to-long term perspective, military intervention could obstruct the recovery of peace or the reconstruction of the rule of law afterwards. How Germany will proceed with the ICC policy, particularly in consideration of the relevance between the development of international criminal justice and policies of humanitarian intervention, should be closely observed for the significance it will have upon the future of the ICC and international criminal justice.

42) The words of former Foreign Minister Fischer concerning the conflict in Kosovo are particularly revealing of this change. While pointing out that the two principles of "no more war" and "no more Auschwitzes" were lessons which came from the darkest hour of twentieth century German history, he argued that "no more Auschwitzes" meant, in today's terms, a requirement to "nip in the bud" any such possibilities. He said also, "In cases in which peace is threatened by political violence, democracy must finally fight as *ultima ratio*." ; *Tagesspiegel*, 23.5.1999; *Der Spiegel*, 21.6.1999.