

IV. Implementation Measures

Germany underscores its commitment to respect and to ensure respect for the GC in all circumstances and to comply with international law in general by taking specific implementation measures. For instance, rules concerning the use of force in general and in circumstances of armed conflicts in particular can be found at every level and in different branches of German legislation (e.g. the Basic Law and the German Criminal Code). The implementation of these rules is flanked by an active policy of distribution, dissemination and legal training of the individuals concerned.

With regard to Germany's Armed Forces, the Federal Ministry of Defence implements IHL and additional rules, shaping German national practice, above all with its Law of Armed Conflict Manual (*Zentrale Dienstvorschrift A-2141/1, Humanitäres Völkerrecht in bewaffneten Konflikten*, latest revision 18 February 2018, hereafter: LOAC Manual⁸). The LOAC Manual is a key instrument for implementing IHL and serves soldiers and civilian personnel at all command levels in training courses, military exercises and general training. It describes IHL from the point of view of the Federal Ministry of Defence and includes historical developments in humanitarian law as well as rules for the application of humanitarian law in armed conflicts. This implementation report does not aim to restate IHL norms or repeat the LOAC Manual in full but will refer to it whenever appropriate.

1. Protection of Civilians and Civilian Objects

a. Distinction between Civilian Objects and Military Objects

For Germany, the protection of the civilian population during armed conflicts is of the utmost importance and highest priority. The constant distinction between protected civilian objects and military objectives during

8 An English translation of a prior version (Joint Service Regulation (ZDv) 15/2) is accessible under <https://www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf> (Accessed 31 August 2020). The new version currently in force does not include a changed content.

military operations in armed conflict settings is one of the core obligations of IHL. Attacks during armed conflicts, i.e. any “acts of violence against the adversary, whether in offence or in defence” (Art. 49 para. 1 AP I), shall be limited strictly to military objectives (Art. 52 para.2 AP I). The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations (Art. 51 para. 1 AP I), unless and for such time as they take a direct part in hostilities (Art. 51 para. 3 AP I). Civilian objects, i.e. all objects which are not military objectives, shall not be the object of attack or of reprisals.

The definition of “military objectives” used in the LOAC Manual is congruent with Art. 52 para. 2 AP I and explains the rules by way of examples (LOAC Manual, para. 406 et seqq.) (references omitted):

"Military objectives are adversary forces and objects that, by their nature, location, purpose or use, make an effective contribution to military action and whose total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage, unless these objects enjoy special protection under international law. The term 'military advantage' refers to the advantage that can be expected of an attack as a whole and not only of specific parts of the attack. If these conditions are met, the following objects specifically are considered military objectives:

- the armed forces and military installations of a Party to a conflict,*
- military aircraft, land vehicles and warships,*
- buildings and objects for combat service support and*
- economic targets such as armaments factories, traffic installations, industrial plants or telecommunication facilities, which contribute effectively to military activities.*

Even specific areas can be military objectives, provided all conditions are fulfilled.

Civilian objects must not be the object of attack or of reprisals. An unlawful attack against civilian objects that are protected as civilian objects by LOAC is punishable as a war crime. Civilian objects are all objects which are not military objectives such as buildings dedicated to religion, education, art, science and charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected and undefended towns, villages or dwellings.

An object that is normally dedicated to civilian purposes should, in case of doubt, be assumed not to be making an effective contribution to military action, and therefore be treated as a civilian object.

[...]

The civilian population and individual civilians enjoy general protection against dangers arising from military operations.

Civilians lose their special protection and may become military objectives themselves if and for such time as they take a direct part in hostilities."

In order to give effect to the principle of distinction, members of the German Armed Forces are required to wear uniforms as distinctive signs. For this purpose, the Federal Ministry of Defence issued the Joint Service Regulation A1–2630/0–9804 “Suit Regulations for Military Personnel of the *Bundeswehr*”. This regulation determines the official uniform to be worn by the members of the German Armed Forces. Permissible exemptions from the above-mentioned regulation require an individual case assessment and the authorisation of the Federal Ministry of Defence.

The LOAC Manual also contains the rules specifically applicable to air operations (paras. 1118, 1153, 1156 and 1157). In order to translate these rules into practice and safeguard compliance in all types of operations, including high-intensity operations in multinational settings, Germany has approved the NATO regulations on NATO’s Joint Targeting Process (JTP) and implemented them as part of its own regulations. This process is the central control and coordination mechanism for the employment of all military assets and modelled closely to comply with Art. 57 AP I in particular. The JTP synchronises and optimises the use of all types of military assets in order to achieve the intended effect, under the precondition to avert damage to uninvolved parties. With the implementation of the JTP through the Joint Service Regulation A-100/12 of 17 April 2018 “National Participation in and National Contribution to the Joint Targeting Process in Multinational Operations” responsibilities and competences that identify the necessary measures and resources for all phases of the process were defined. The mandatory involvement of the Directorate-General for Legal Affairs of the Federal Ministry of Defence and the respective responsible legal advisers in the subordinate area or the legal adviser staff officers deployed abroad ensures that emerging legal concerns are taken into account and addressed at all times.

b. Protection of the Civilian Population against Indiscriminate Attacks

Related to the principle of distinction, IHL also prohibits indiscriminate attacks. The relevant provision of the LOAC Manual (para. 403, references omitted) states:

"The prohibition of indiscriminate attacks contains that neither the civilian population as such nor individual civilians may be the object of attack and that they must be spared as far as possible. Parties to the conflict must direct their attacks only against military targets. To the extent feasible, attacks against military objectives must be conducted with maximum care for the civilian population and individual civilians. Attacks which may affect the civilian population must be preceded by an effective warning, unless circumstances do not permit such a warning. Attacks which do not distinguish between combatants or persons taking a direct part in hostilities and the non-participating civilian population or between civilian objects and military objectives are thus prohibited."

The manual further references Art. 51 AP I for examples of indiscriminate attacks and categorises indiscriminate attacks to be punishable as war crimes.

c. Prohibition of Excessive Civilian Damage or Loss of Civilian Life

Another basic tenet of the protection of civilians is the prohibition of excessive civilian damage or loss of civilian life. Pursuant to IHL, as the LOAC Manual translates it into practice, "attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination of these, which would be excessive in relation to the concrete and direct military advantage anticipated (principle of proportionality)" are prohibited (LOAC Manual, para. 403). This rule has a particularly strong bearing on the choice of means and methods of warfare. As one of the basic rules of IHL, the LOAC Manual stresses that the principle of proportionality as endorsed in the law of armed conflict must be adhered to at all times (para. 404). The manual references the importance of distinguishing the principle of proportionality stemming from IHL from the general principle of proportionality used in German domestic law. For under IHL, a specific assessment has to be made between the concrete and direct military advantage anticipated on the one hand and the expected incidental civilian loss and/or damage on the other.

In accordance with the declaration adopted by the Federal Republic of Germany upon depositing the instrument of ratification of the Additional Protocols, a military advantage is the advantage expected to result from the

entire attack and not from the individual acts that constitute the attack.⁹ The relevant perspective concerning the expected damage to civilian objects is that of the military decision maker at the time of the decision. As such, the principle refers to the kind of damage that is the direct and foreseeable result of the attack at the time of the decision.

d. Protection of Schools as Civilian Objects

Different international soft law initiatives highlight the need for specific action to protect civilians in armed conflicts, mainly by reinforcing existing rules of IHL and promulgating the need to implement and comply with existing obligations. One recent example of such an initiative is the “Safe Schools Declaration”, which was included in this report as an example.¹⁰

Due to the detrimental effect of armed conflicts on education and in particular on schools, universities and the safety of students, on 22 May 2018 Germany – as the 75th State – endorsed the “Safe Schools Declaration” and the “Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict” (Lucens Guidelines). The “Safe Schools Declaration” recognises the impact of armed conflicts on education and reaffirms the non-legally binding Lucens Guidelines aimed at reducing the use of schools and universities by parties and minimising the negative impact of armed conflicts on the safety and education of students. In connection with the endorsement of the “Safe Schools Declaration”, the Federal Government emphasised and underlined Germany’s commitment to IHL by issuing an interpretative endorsement declaration. According to this note, Germany’s commitment naturally includes seeking to protect and promote education and it fully supports the underlying goal of the “Safe Schools Declaration”, namely to better protect students, teachers and educational establishments from attack during times of armed conflict.

9 Notification by the Federal Foreign Office of the Entry into Force of Additional Protocols I and II to the Geneva Conventions of 1949, 30 July 1991, German Federal Law Gazette 1991 II, page 968 https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl291s0968.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl291s0968.pdf%27%5D__1598856446876 (Accessed 31 August 2020).

10 Other soft law initiatives in which Germany is involved have been excluded from this report due to them not being part of IHL.

IV. Implementation Measures

Germany underlined its commitment to IHL, according to which schools and universities, as civilian objects, enjoy protection against direct attacks and the effects of hostilities as provided for, in particular, in Arts. 48, 51 paras 4 and 5, 52 para. 1, 57 and 58 AP I. As objects that are normally dedicated to civilian purposes, in case of doubt whether they are being used to make an effective contribution to military action, they shall moreover be presumed not to be so used (Art. 52 para. 3 AP I; see also LOAC Manual, para. 409). Deliberate attacks on objects which are not military objectives constitute war crimes, in both international and non-international armed conflicts. Furthermore, Germany stated that it will continue to ensure the protection of schools and universities in full accordance with IHL. For each military operation, consideration will be given as to how to implement the Guidelines in the context of specific missions – making practical recommendations for action – in order to comply with IHL.

2. Persons under Specific Protection

a. Prisoners of War, Internees and Detainees

The LOAC Manual contains basic rules for the protection of prisoners of war and internees, referring primarily to the GC III relative to the Treatment of Prisoners of War (paras 801–851) resp. to the GC IV relative to the Protection of Civilian Persons in Time of War (paras 587–594). It holds that the relationship between LOAC and the international protection of human rights in armed conflicts has not been finally settled. Human rights standards deemed to be applicable in an individual mission will be specified for each mission to ensure legal clarity (para. 105).

Acknowledging the practical and legal questions associated with the treatment of persons deprived of their liberty in military missions, the Federal Ministry of Defence has issued Joint Service Regulation A-130/19, which deals with the “Treatment and Protection of Persons Taken into Custody on Missions Abroad”. This regulation is the key Federal Ministry of Defence publication for the treatment and protection of detainees on missions abroad that do not fall under the legal framework of the IHL applicable to international armed conflicts. The regulation comprises the legal provisions governing the protection and treatment of detained persons and contains principles and best practice standards, setting out guidance for the strategic level as well as fundamental rules and principles that apply at the operational level. The revised regulation refers to the applicable in-

ternational legal instruments, includes i.a. the case law of the European Court of Human Rights and takes note of various international best practices and standard-setting documents. Special Publication C1–130/19–8007 “Execution of Detention Tasks in Missions Abroad” implements Joint Service Regulation A-130/19 and gives guidance on the execution of detention tasks in missions abroad at the operational and tactical level. Both regulations are complemented by General Publication B1–221/0–4 “Training for the Conduct of Detention Tasks outside International Armed Conflicts”, which ensures the training of the service personnel concerned with detention tasks outside international armed conflicts on the basis of those regulations.

Depending on the mandate and the specific nature of a mission, mission-specific regulations will be issued by the Federal Ministry of Defence to ensure that mission-specific legal and operational requirements are met, for example the General Publication B-130/6 “Guidelines for Detention of Persons within the Framework of the EU-led Operation ATALANTA”. All regulations issued are subject to constant review in order to ensure that all international and national legal obligations of the Federal Republic of Germany concerning the treatment and protection of people deprived of their liberty are being met. That includes prisoners of war, internees and other detainees.

To ensure that the minimum standard of treatment applicable to all detained persons in all circumstances is being met, the above-mentioned regulations set out in detail the guarantees under international and domestic law particularly that all persons deprived of their liberty, i.a.

- are to be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria,
- are protected from threats in a way that is equivalent to the protection of German Armed Forces,
- receive basic provisions of an equivalent standard to those normally received by German Armed Forces,
- are deprived of their liberty under adequate conditions, including appropriate food, clothing, housing, access to the open air, hygiene, medical care, due regard for the religious customs and traditions of the detainee and protection from climatic conditions, dangers of military activity and insults, violence, sexual assault and intimidation.

To fully comply with applicable international law and in order to ensure that every detained person can effectively exercise his or her rights and receives the protections he or she is entitled to, the individual legal status of

persons deprived of their freedoms needs to be determined. The recently revised version of the Joint Service Regulation A-130/19 provides a detailed review procedure for all persons deprived of their freedom on missions abroad outside of an international armed conflict, which ensures the timely status-determination in every single case.

b. The Wounded, Sick and Shipwrecked as well as the Medical Service

A cornerstone of IHL is the protection of the wounded, sick and the shipwrecked as well as of the medical personnel providing their medical assistance and care. The LOAC Manual refers to the specific rules of the Geneva Conventions and Additional Protocols and outlines the applicable guarantees (LOAC Manual paras 601 et seq.). Chief among them is the basic rule that the wounded, sick and shipwrecked shall be respected and protected in all circumstances and that any attempts upon their lives, or violence to their persons, are prohibited. Reprisals against the wounded, sick and shipwrecked are prohibited. All possible measures shall be taken to collect the wounded, sick and shipwrecked and to ensure their adequate medical assistance (LOAC Manual, paras. 604 et seq.).

In 2002, the *Bundeswehr* restructured its medical services in order to provide for an effective protection of people wounded in armed conflicts and founded the Joint Medical Service as an independent major military organisational element. It is the mission of the *Bundeswehr* Medical Service to protect, maintain and restore the health of military personnel and perform the duties outlined in Chapter 6 (“Protection of the Wounded, Sick and Shipwrecked”) of the LOAC Manual.

Pertinent regulations transpose IHL’s rules on the wearing of the distinctive emblem and identity card into practice. Implementing requirements of IHL, Medical Service Regulation C1–800/0–4016 “Operation of Weapons by the *Bundeswehr* Medical Service” addresses among others the specific issue of weapons permitted for the *Bundeswehr* Medical Service personnel. In order to exercise the right to self-defence in armed conflicts, German medical personnel may be equipped with light individual weapons such as pistols, rifles and machine pistols. Crew served weapons as well as weapons usually used for participation in active combat operations are not permitted. Moreover, weapons may only be used by medical personnel in order to defend themselves, their patients, establishments, material and means of transportation against illegal attack by an adversary.

These rules apply in international and non-international armed conflicts alike.

c. Civil Protection / Civil Defence Units and Personnel

The term “civil protection” in the sense of the *Basic Law* and the Federal Civil Protection and Disaster Assistance Act (*Gesetz über den Zivilschutz und die Katastrophenhilfe des Bundes – ZSKG*; hereafter: CPDAA) comprises non-military measures to protect the civilian population against the dangers of hostilities, to help it to recover from or mitigate their immediate effects, and to provide the conditions necessary for the survival of the civilian population (cf. Art. 73 para. 1 no. 1 Basic Law and Sec. 1 CPDAA). Sec. 1 para. 2 CPDAA lists self-protection, warning of the population, construction of shelters, regulation on residence, disaster management in the event of an armed conflict, measures for health protection and measures for the protection of cultural property as examples of civil protection tasks. In Germany’s federal system the Federation is in charge of civil protection (Sec. 2 para. 1 CPDAA). In general, the *Länder* execute the CPDAA on federal commission (Art. 85 para. 1 Basic Law), and the Federation may draw on *Länder* resources and provides additional equipment, supplies and training to the *Länder*.

Sec. 3 para. 2 CPDAA highlights that the status of the German Red Cross (GerRC) and the other voluntary aid organisations and their personnel under IHL remains unaffected. According to Sec. 26 para. 1 CPDAA public and civilian civil protection organisations qualified to contribute to the fulfilment of civil protection tasks include, in particular, the Workers’ Samaritan Federation (*Arbeiter-Samariter-Bund – ASB*), the German Life Saving Association (*Deutsche Lebens-Rettungs-Gesellschaft – DLRG*), the GerRC (*Deutsches Rotes Kreuz – DRK*), the *Johanniter-Unfall-Hilfe* (JUH) and the *Malteser Hilfsdienst* (MHD). Sec. 3 para. 1 reiterates that civil protection units, institutions and installations need to conform with the preconditions set out in Art. 63 GC IV and Art. 61 AP I. On that basis, protection for German civil protection units and personnel is provided for within the framework of Art. 63 GC IV and Arts. 62 – 66 AP I.

According to Art. 66 AP I, each party to the conflict shall endeavour to ensure that its civil defence organisations, their personnel, buildings and material are identifiable. To ensure protection, Germany has also ratified the “Regulations concerning identification” in Annex I (to AP I) as amended on 30 November 1993 (Federal Act of 17 July 1997 on the Amendment

of Annex I to Protocol I Additional to the 1949 Geneva Conventions, Gesetz vom 17. Juli 1997 zur Änderung des Anhangs I des Zusatzprotokolls I zu den Genfer Rotkreuz-Abkommen von 1949). Art. 66 para. 8 AP I demands that the High Contracting Parties take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof. Sec. 125 para. 4 *Act on Regulatory Offences*¹¹ (*Ordnungswidrigkeitengesetz* – OWiG; hereafter: ARO) defines as a regulatory offence any uses of insignia or designations which according to international law are equivalent to the insignia (i.e. emblems) of the red cross against a white background or to the designation “Red Cross”¹² without authorisation or which may be mistaken for them.

d. Religious Personnel Attached to the German Armed Forces

Pursuant to IHL, military chaplains must be respected and protected under all circumstances and at all times, not only when they perform religious functions (LOAC Manual, para. 711 et seq.). While articles used for religious purposes are not explicitly protected by international law, the LOAC Manual refers to them and notes that, in the spirit of the Geneva Conventions, they should be respected and not used for unintended purposes (para. 713).

In Germany, a military chaplaincy with full-time chaplains and special administrative offices has so far been established in the German Armed Forces for the Christian (Catholic and Protestant) and Jewish faiths.¹³

Pursuant to the LOAC Manual, religious personnel in the IHL context means all military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached

- to the armed forces, medical units, medical transports or civil defence organisations of a party to a conflict or

11 https://www.gesetze-im-internet.de/englisch_owig/ (Accessed 31 August 2020).

12 In accordance with Art. 38 GC I, the red crescent on a white ground as well as the red lion and sun on a white ground (the latter currently not in use) are also recognised by the terms of the Convention. AP III recognises a red frame in the shape of a square on edge on a white ground – referred to as the red crystal – as an additional emblem.

13 The term “chaplain” is today interpreted broadly as not confined to religious personnel of the Christian faith (as the official German translation of “Feldgeistlicher” already implies, see e.g. Art. 24 GC I).

- to medical units or medical transports of neutral States, aid societies of neutral States, or international humanitarian organisations (LOAC Manual, para. 701).

While, according to IHL, religious personnel may be military or non-military personnel, in the Federal Republic of Germany, religious personnel are not soldiers. They are thus not members of the armed forces in terms of the law of armed conflict (LOAC Manual, para. 701). Although chaplains do not lose their protection under international law if they are armed and use arms only for self-defence or in respect of the wounded, sick and shipwrecked against attacks in violation of international law, in Germany, chaplains are as a matter of principle not armed.

3. Relief Actions / Humanitarian Assistance

The IHL rules governing relief actions and humanitarian assistance, in particular Arts. 70 and 71 AP I as well as customary international law, prescribe the legal framework for humanitarian assistance in the context of armed conflicts. General Assembly Resolutions 48/182 (1991) and 58/114 (2004) define the humanitarian principles of humanity, neutrality, impartiality and independence for humanitarian assistance in general. Germany strictly implements this normative framework and applies it in its humanitarian assistance. The Federal Foreign Office explicitly reiterates in its Strategy for Humanitarian Assistance Abroad 2019 to 2023 that it

*“is committed to the humanitarian principles and on this basis contributes to the advancement of the international humanitarian system” and that “[U]pholding the humanitarian principles of Humanity, Impartiality, Neutrality and Independence is a key prerequisite for humanitarian assistance”.*¹⁴

The humanitarian principles were confirmed by the Federal Constitutional Court in 2018, when its First Senate ruled on the prohibition of an association that was accused of having indirectly supported a terrorist organisation.

14 <https://www.auswaertiges-amt.de/blob/282228/3cfd87de36f30bb61eed542249997631/strategie-huhi-englisch-data.pdf> (Accessed 31 August 2020); cf. also the Strategy of the Federal Foreign Office for Humanitarian Assistance Abroad 2012, <https://www.auswaertiges-amt.de/blob/252958/a6a692e0402f38c966178a95caf6c688/121115-aa-strategie-humanitaere-hilfe-data.pdf> (Accessed 31 August 2020).

tion by channelling donations to that organisation.¹⁵ The Court states in its decision, in particular, that:

*"In this respect, the prohibition of an association pursuant to Art. 9(2) GG may not serve to prohibit humanitarian actions that are permissible under international law. [...] The[se] rules allow a distinction between permissible humanitarian aid from aid that violates the concept of international understanding within the meaning of Art. 9(2) GG. [...]. When an association makes donations with the intention to alleviate suffering, and when it observes the general principles of humanity, neutrality and impartiality, it does not meet the prohibition requirement under Art. 9(2) GG."*¹⁶

Furthermore, principled humanitarian action does not constitute an offence under German criminal law on terrorism, including under Directive 2017/541/EU of 15 March 2017. Despite the fact that EU legislators decided not to include an explicit exemption under the criminal law on terrorism for humanitarian organisations, certain concerns were recognised, addressed and confirmed in Recital 38 of the Directive as follows:

"The provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, [...]"

Apart from these considerations, it is the German understanding that there is no need to transpose the Directive on combating terrorism into German domestic law, as the Federal Government notified to the EU Commission in September 2018, given that relevant regulations are already fully incorporated into German legislation.

This includes a ban on forming a terrorist organisation under Sec. 129 a (in conjunction with Sec. 129 b para. 1) of the Criminal Code (*Strafgesetzbuch*), which also applies to the financing of a terrorist organisation (punishable offence for both members and non-members of such an organisation), and the offence of terrorist financing under Sec. 89 c para. 1 of the Criminal Code. Moreover, providing assets to persons and organisations included in the EU's and the UN's lists of sanctions is a punishable offence under the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*).

15 BVerfG (Federal Constitutional Court), Order of the First Senate of 13 July 2018 – 1 BvR 1474/12, para. 137, English translation available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/07/rs20180713_1bvr147412en.html (Accessed 31 August 2020).

16 Ibid., paras. 133 and 137.

Under German criminal law, the performance by humanitarian organisations providing principled humanitarian action does not constitute an offence under German criminal law on terrorism. It would generally lack – at least – the subjective element (*mens rea*) for such crimes. The offence of terrorist financing under Sec. 89 c para. 1 of the Criminal Code requires, with regard to the financing of another person's acts, the knowledge or intention that the funds are to be used to commit terrorist offences. Whereas Sec. 129 a of the Criminal Code only requires conditional intent, thus, the offender must be aware or at least believe that it is possible and accept that its financial support will benefit a terrorist organisation. However, this test is generally not met when due care is taken, e.g. when selecting local contracting partners and monitoring the use of funds, including by making use of the UN's and the EU's lists of sanctions in relation to terrorism which are in the public domain. The same applies to a violation of the ban on the provision of financial assets under Sec. 18 of the Foreign Trade and Payments Act, as the act must be intentional in this case as well.

Furthermore, EU regulations concerning embargos also often exempt organisations from criminal liability either with regard to the Foreign Trade and Payments Act and the support of terrorism or provide a justification for their actions.

4. Protection of Cultural Property

The protection of cultural property is one aspect of the protection of civilian objects and of civil protection / civil defence in Germany (Sec. 1 para. 2 no. 7 CPDAA). Regarding measures for the protection of cultural property, Sec. 25 CPDAA refers to the legislation that implements the 1954 Hague Convention in domestic law. The Protocol of 1954 to the Hague Convention is implemented by the Cultural Property Protection Act of 2016 (*Gesetz zum Schutz von Kulturgut* – KGSG).¹⁷

Despite the exclusive legislative and executive powers of the *Länder* in the field of cultural matters, the responsibility regarding the protection of cultural property in the event of an armed conflict, to the extent that it constitutes a matter of civil defence, is assigned to the Federal Ministry of

17 German Federal Law Gazette 2016 I, page 1914, https://www.bgbl.de/xaver/bgbl/tart.xav?startbk=Bundesanzeiger_BGBL&start=//%5B@attr_id=%2527bgbl116s1914.pdf%2527%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl116s1914.pdf%27%5D__1595864062702 (Accessed 31 August 2020).

the Interior, Building and Community¹⁸ in general and to the Federal Office of Civil Protection and Disaster Assistance (*Bundesamt für Bevölkerungsschutz und Katastrophenhilfe*) in particular. The Office is specifically responsible for the packaging, documentation and storage of secured microfiche at the Central Refuge of the Federal Republic of Germany.

In general, cultural property should be marked with the distinctive emblem according to Arts. 16 and 17 of the 1954 Hague Convention (see also LOAC Manual, para. 939). A detailed report on the national implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols (1954 and 1999) by Germany is contained in its reply submitted on 16 September 2013 to UNESCO.¹⁹ In Sec. I:3.4–I:3.5 of this report, the Federal Government stated:

“From the Federal Government’s perspective, use of the emblem would make the cultural property bearing it recognizable as such, thus ensuring transparency for the general public and for potential parties to an armed conflict. Furthermore, it would help foster general awareness of the value of, and the need to, protect the objects bearing the emblem (mandate from the 1999 Second Protocol). On the other hand, this recognizability could pose risks particularly in the event of an armed conflict. Use of the emblem could put cultural property at greater risk if it then becomes a deliberate target. In view of this, several Länder, including Hamburg and Brandenburg, have deliberately decided against using the emblem. Hesse and Rhineland-Palatinate also have reservations, not least due to recent incidents (in Mostar, Dubrovnik, Afghanistan, Mali), which they believe justify their skepticism. The Association of Regional Monument Conservationists in the Federal Republic of Germany [Vereinigung der Landesdenkmalpfleger] shares this view, as it informed the Federal Government in February 2013.”

The Federal Government Commissioner for Culture and the Media has published a central database of movable “cultural property of national significance” in Germany registered by the *Länder*.²⁰ The Federal Ministry of Defence is regularly being provided with a list which includes the recorded

18 https://www.bbk.bund.de/EN/FederalOffice/Abouttheoffice/abouttheoffice_node.html (Accessed 31 August 2020).

19 See National Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its two (1954 and 1999) Protocols – Reply Submitted [to UNESCO] by the Federal Republic of Germany 2013–09–16”.

20 http://www.kulturgutschutz-deutschland.de/DE/3_Datenbank/dbgeschuetzterkulturgueter_node.html (in German) (Accessed 31 August 2020).

immovable cultural property on its maps; these are available to all military units upon request.

5. Protection of the Environment

The rules of the LOAC Manual with regard to the protection of the natural environment are primarily based on Art. 35 para. 3 and Art. 55 para. 1 AP I and the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention). According to Art. 35 para. 3 and Art. 55 AP I, it is prohibited to employ methods or means of warfare which are intended or may be expected, to cause “widespread, long-term and severe damage” to the natural environment. Such damage to the natural environment significantly exceeds normal combat damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. (LOAC Manual para. 435). For reference, the LOAC Manual refers to legally non-binding interpretative declarations that were adopted regarding these terms in, and for the purposes of, the ENMOD Convention to define their threshold. Thereafter, ‘widespread’ means an area of several hundred square kilometres, ‘long-lasting’ means lasting some months or approximately one season, and ‘severe’ means a serious or significant disruption of, or damage to, human lives, natural and economic resources or other goods (para. 436). The LOAC Manual additionally provides that means and methods of warfare must be used with due consideration of environmental aspects (para. 434).

German environmental protection laws and regulations – primarily – apply within the territory of the Federal Republic of Germany. Nevertheless, Germany may apply environmental protection provisions abroad as a matter of policy, providing that this is in accordance with international or local law. The applicable internal guidelines are collated in Joint Service Regulation A-2030/3 “Environment Protection and Management”. A policy of best possible protection of personnel and the highest level of environmental damage control is the basic guideline for all missions of the Armed Forces.

6. Tracing Missing Persons and the Reunification of Families

Family unity is a fundamental principle of IHL and includes learning about the fate of family members gone missing. The GerRC Tracing Service supports people who have become separated from their families due to armed conflicts, disasters, re-settlement, expulsion or migration, not knowing where their relatives are or wishing to live together again in one country. Every year, tens of thousands of people turn to the GerRC Tracing Service. Even more than 75 years after it ended, many of the enquiries concern the whereabouts of people with whom contact was lost during the Second World War.

In its present structure since 1945, the GerRC Tracing Service has been performing these services within the GerRC with a humanitarian mandate based on:

1. Arts. 16, 17 GC I, Art. 19 GC II, Arts. 122, 124 GC III, Arts. 25, 26, 136–139, 141 GC IV and Arts. 33 and 74 AP I,
2. Art. 5 para. 2 lit. e of the Statute of the Movement of Red Cross and Red Crescent Societies and Art. 4 lit. e of the Statute of the International Committee of the Red Cross,
3. Sec. 2 para. 1 no. 3 and 4 GerRC Act,
4. the National Statutes of the GerRC
5. the Tracing Service Agreement between the Federal Ministry of the Interior, Building and Community and the GRC, renewed in December 2018.

The work of the GerRC Tracing Service is institutionally funded by the Federal Republic of Germany. In 1966, the GerRC was entrusted by the German Federal Ministry of Interior with the planning, preparation and discharge of a National Information Bureau (NIB) in the Federal Republic of Germany in accordance with Art. 122 GC III and Art. 136 GC IV, which in turn transferred this task to the Tracing Service. The centrally organised NIB has the task, in the event of an armed conflict, of collecting information on prisoners of war and civil internees of the opposing party and of forwarding this information to the Central Tracing Service of the ICRC and to the NIB of the opposing party to the conflict and of receiving corresponding information.

7. Means and Methods of Warfare

The LOAC Manual (paras. 401, 437 – 490 et seqq.) also transcribes the fundamental IHL norms on “means and methods of warfare” stating that the right of the parties to an armed conflict to choose means and methods of warfare is not unlimited. It is particularly prohibited “to employ means or methods which are intended or are of a nature or may be expected to cause

- superfluous injury or unnecessary suffering
- damage indiscriminately to military objectives and civilians or civilian objects or
- widespread, long-term and severe damage to the natural environment.” (para. 401).

This chapter of the LOAC Manual also includes rules concerning weapons review (para. 405 and below IV. 7. b).

a. Prohibitions and Restriction of the Use of Specific Weapons

Germany has signed and ratified all major conventions currently in force²¹ which prohibit or restrict the use of certain weapons, including the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects (CCW Convention) and its Protocols, the Conventions on chemical and biological weapons, as well as the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, also known as the Ottawa Convention or Mine Ban Treaty (MBT) and the Convention on Cluster Munitions (CCM), also known as the Oslo Convention.²²

i. Chemical Weapons

Germany has implemented the Chemical Weapons Convention (CWC) in national legislation by the Federal Act on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 2 August 1994 and the corresponding regulation of 20 November 1996 as amended (last

21 Date of publication: September 2020.

22 See Annex 1: List of treaties signed and ratified by Germany.

update with regard to amendments to schedule 1 chemicals as of 6 July 2020). The use of chemical weapons (Art. I (1) b) CWC) and of riot control agents as a method of warfare (Art. I (5) CWC)²³ is thus prohibited.

Even before the Chemical Weapons Convention entered into force in 1997, the Federal Republic of Germany had refrained from producing chemical weapons on its territory (LOAC Manual para. 466 and seq. with reference to Article I Protocol No. III annexed to the Brussels Treaty 1954). Violations of bans concerning chemical weapons in Germany are punishable under the War Weapons Control Act (*Kriegswaffenkontrollgesetz*, hereafter: WWCA). Employing chemical weapons, especially asphyxiating, poisonous or other gases and all analogous liquids, materials or devices, is punishable as a war crime under the Code of Crimes Against International Law (*Völkerstrafgesetzbuch*, hereafter: CCAIL; in concreto Sec. 12 para 1 no. 2 CCAIL).

Even though the stockpiles of old chemical weapons had been destroyed by 2007, chemical ammunition from before 1946 is still being found and recovered in Germany. All newly discovered items are duly notified to the OPCW and promptly destroyed.

ii. Biological Weapons

Germany has implemented the Biological and Toxin Weapons Convention (BWC) in national legislation by the Federal Law on the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 21 February 1983. Germany views the prohibition of the use of biological weapons as a part of customary international law (LOAC Manual, para. 474). The WWCA penalises violations of bans on biological weapons, see section 20 para. 1 WWCA. Employing biological weapons is punishable as a war crime under Sec. 12 para 1 no. 2 CCAIL.

In August 2016, Germany hosted a Peer Review Compliance Visit to the *Bundeswehr* Institute of Microbiology, thereby opening new grounds for promoting transparency in two respects: by opening a BWC-relevant military facility to all BWC members, Germany has set a high standard both in

23 Concerning riot control agents, the LOAC Manual (para. 470) spells out that the use of irritants in armed conflicts to fight the adversary is prohibited. On the other hand, the CWC allows the use of such irritants for law enforcement purposes including domestic riot control purposes.

promoting transparency and in building confidence. The Federal Ministry of Defence has thus made a significant contribution to the Federal Government's practical policy of non-proliferation. Furthermore, the visit has demonstrated the possibility to reconcile openness and transparency on the one hand with military security requirements on the other. Germany supports other States Parties to the BWC in preparing and conducting similar measures, for example in 2018 at the Richard Lugar Center for Public Health Research in Tbilisi, Georgia.

iii. Certain Conventional Weapons

Germany has implemented the Convention on Certain Conventional Weapons (CCW) by federal legislation in 1992 and 2004, with the latter extending the scope of the convention to non-international armed conflicts. The protocols I to V were implemented by federal laws in 1992 (Protocol I, III), 1997 (Protocol II, IV) and 2005 (Protocol V) respectively.

Due to its universal acceptance, the CCW is at the heart of Germany's diplomatic efforts to strengthen further arms control and disarmament initiatives. Thus, Germany has been particularly active in the field of preventive measures such as weapons and ammunition management as well as physical security and stockpile management (PSSM) by providing worldwide financial and specialist assistance to relevant projects and training efforts with the aim of "minimizing the occurrence of explosive remnants of war" in line with Protocol V on Explosive Remnants of War (ERW).

The potential challenges for compliance and respect for IHL posed by emerging technologies in the area of *Lethal Autonomous Weapon Systems* (LAWS) is another topic of specific interest. Germany, together with other states, in particular France, actively supports the work of the *Group of Governmental Experts* (GGE) on LAWS established in 2016. By facilitating the diplomatic process, hosting and sponsoring events such as the virtual Berlin LAWS Forum in April 2020 and submitting various official working papers outlining Germany's position on this topic, Germany actively contributed to the elaboration of the eleven guiding principles on LAWS agreed within the GGE in 2019. These principles confirm and operationalise *inter alia* the unconditional applicability of IHL to LAWS.

IV. Implementation Measures

iv. Mines

Germany has implemented the Ottawa Convention (MBT) in national legislation through the Act of 30 April 1998 on the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. As early as December 1997, Germany was one of the first states worldwide to complete the environmentally compliant destruction of its stockpiled anti-personnel mines. In this process, more than 2.1 million APM were destroyed, including the stockpiles of the former National People's Army (*Nationale Volksarmee* – NVA) of the former German Democratic Republic (approx. 480,000), of the then Federal Ministry of the Interior (5,400) and of the German Armed Forces (approx. 1.7 million). Hence, Germany had already fulfilled the central obligation before the MBT entered into force on 1 March 1999. As of 31 December 2018, Germany held 583 anti-personnel mines retained for the development of and training in mine detection and mine clearance, as permitted by the MBT.

v. Cluster Munitions

Germany has implemented the Oslo Convention through the Act of 6 June 2009 on the Oslo Convention on Cluster Munitions. The significant stockpiles held by the German Armed Forces at the time of signature (about 43 million submunitions) became subject to destruction by 30 July 2018. In fact, the German Armed Forces' stockpiles of these munitions had been destroyed by late 2015, i.e. about three years before this deadline. The German Armed Forces still retain small amounts of cluster munitions for purposes permitted under the Convention, the development of and training in clearance techniques. These holdings are being reduced steadily in the course of training for the destruction of cluster munitions and explosives ordnance disposal.

vi. Explosive Weapons in Populated Areas

Germany is gravely concerned by the humanitarian harm being caused during active hostilities, often due to a lack of compliance with or ineffective implementation of IHL when it comes to the use of explosive weapons in populated areas (EWIPA). Therefore, the international community

needs to achieve a more effective implementation of IHL in order to further improve the protection of civilians. Germany participated in the Vienna conference on “Protecting Civilians in Urban Warfare”; the vast majority of the 133 participating States signalled their support for a political declaration that focuses on improving the protection of civilians with respect to the use of explosive weapons in populated areas. Germany actively promotes the approach to strengthen compliance with existing rules of international humanitarian law through the development and sharing of military good practices. Germany would see merit in a declaration that proposes concrete measures and mechanisms for enhancing and spreading the exchange of good practices. These measures should also include the strengthening of data collection and appropriate training capacities to disseminate the good practices to be agreed upon in the political declaration, as well as adequate mechanisms to fund the above-mentioned activities.

vii. Cyber Weapons and Means of Warfare

During the last decades, information and communication technologies have come to play a pivotal role in the military domain and have led to new means and strategies of warfare. International law applies to cyberspace, as most recently confirmed by General Assembly Resolution A/RES/70/237. This includes the application of IHL. Thus, Germany considers IHL to be fully applicable to cyber operations that form part of armed conflicts. It furthermore is of the view that IHL fulfils a core function in regulating the use of cyber technology as a means of warfare and in limiting the effects of armed conflict in this regard. In view of the special characteristics of cyberspace such as the worldwide interconnectedness of networks and the ensuing vulnerabilities of and security risks for users of cyber infrastructures, the discussions on the precise modalities of how international law, including IHL, applies in cyberspace, are still ongoing. Germany is actively engaged in these discussions and is working to strengthen the role of international law, including IHL, in the cyber context. Relevant fora are, inter alia, the United Nations’ Group of Governmental Experts on advancing responsible State behaviour in cyberspace in the context of international security, the Group of Governmental Experts on developments in the field of information and telecommunications in the context of international security and the United Nations’ Open-ended Working Group on developments in the field of information and telecommunications in the context of international security (OEWG).

b. **Weapon Reviews**

Under the provisions of Art. 36 AP I, all contracting parties are obliged, when studying, developing, acquiring or adopting a new weapon, means or method of warfare, to determine whether its employment would, in some or all circumstances of employment, be prohibited by AP I or by any other rule of international law.

In March 2015, under the auspices of the Federal Ministry of Defence's Directorate-General for Legal Affairs, an independent "Steering body for the legal review of new weapons and methods of warfare" was established within the Federal Ministry of Defence. It is composed of representatives of the Directorate-General for Legal Affairs, as well as of all competent entities at the Ministry that serve as points of contact, such as the Directorates-General for Equipment, Strategy and Operations, Forces Policy, Security and Defence Policy and Planning. The competent entities are meant to provide additional expertise, as well as initiate legal reviews of new weapon systems. The Joint Service Regulation A-2146/1 "Examination of new Weapons, Means and Methods of Warfare" stipulates the central provisions for the procedures.

The question of whether or not a new weapon or method of warfare can and should be introduced is ultimately determined based on the respective legal provisions, and on whether or not a sufficient number of scenarios can be imagined for legally permissible and useful employment of this weapon in actual military operations. This standard demonstrates that the legal review of a new weapon must be performed based not only on legal expertise, supported by technical and medical opinions and assessments, but must also take military and operational analyses into account. The large amount of information that needs to be exchanged across various areas of expertise was a compelling argument for the establishment of a formal review body within the Federal Ministry of Defence.

8. **German Red Cross and other Voluntary Aid Societies – Recognition and Status**

Following World War II, the German Red Cross of the Federal Republic of Germany was recognised as the National Red Cross Society on the territory of the Federal Republic of Germany and voluntary aid society, auxiliary to the German authorities in the humanitarian field, on 26 February

1951.²⁴ The German Red Cross of the German Democratic Republic was created by decree on 23 October 1952.²⁵ After German reunification, recognition of the GerRC was confirmed by a declaration of the Federal Chancellor on 6 March 1991²⁶ and reaffirmed in form of a formal act of Parliament (GerRC Act) in December 2008 which states in Sec. 1: “The “Deutsches Rotes Kreuz e.V.” (German Red Cross e.V.) is the National Red Cross Society on the territory of the Federal Republic of Germany and Voluntary Aid Society, auxiliary to the German authorities in the humanitarian field”.

As voluntary aid society, the GerRC assumes the tasks that arise from the GC and their AP, in particular

1. rendering assistance to the regular medical service of the German Armed Forces as defined in Art. 26 GC I, including the utilisation of hospital ships pursuant to Art. 24 GC II;
2. the dissemination of knowledge of IHL as well as the principles and ideals of the International Red Cross and Red Crescent Movement and the assistance to the German Federal Government in this field;
3. the assumption of the tasks of an official Information Bureau pursuant to Art. 122 GC III and pursuant to Art. 136 GC IV;
4. the conveyance of correspondence under the preconditions stipulated by Art. 25 para. 2 GC IV and the provision of tracing services according to Art. 26 GC IV and Art. 33 para. 3 as well as Art. 74 AP I.

In addition, the *Johanniter-Unfall-Hilfe e.V.* and the *Malteser Hilfsdienst e.V.* are voluntary aid societies as defined in Art. 26 GC I.²⁷

24 Letter from Federal Chancellor Konrad Adenauer of 26 February 1951.

25 Decree (“(Erste) Verordnung über die Bildung der Organisation „Deutsches Rotes Kreuz“) of 23 October 1952 (GBI. p. 1090).

26 Letter from Federal Chancellor Helmut Kohl of 6 March 1991.

27 The *Johanniter-Unfall-Hilfe e. V.* was recognised by letter from Federal Chancellor Konrad Adenauer of March 1963. After German reunification, the recognition was confirmed by letter from Federal Chancellor Helmut Kohl of 18 October 1991.

The *Malteser Hilfsdienst e.V.* was recognised by letter from Federal Chancellor Konrad Adenauer of 28 June 1962 and, which was confirmed after German reunification by letter from Federal Chancellor Helmut Kohl of 25 November 1991.

