

VI. Enforcement of IHL

1. Internal System to Monitor Observance of IHL by the German Armed Forces and Command Responsibility

Within the German Armed Forces, a superior has to ensure that subordinates are aware of their duties and rights under IHL. The superior is supported in these tasks by legal advisers. The superior is obliged to prevent and, where necessary, to suppress, or to report to competent authorities, breaches of IHL and relevant international law. A superior is criminally responsible for the violation of these obligations, especially in case of an armed conflict (paras. 150, 153 – 155, 1506 LOAC Manual).

When a disciplinary superior learns (e.g. by reports, own observation, complaints etc.) of incidents giving rise to the suspicion that IHL has been violated by subordinates, the superior has to ascertain the facts and examine whether disciplinary measures are to be taken. If the disciplinary offence constitutes a criminal offence, the superior is obliged to transfer the case to the appropriate prosecution authority when criminal prosecution is called for (para. 1525 LOAC Manual). Legal advisers have immediate access to the commanding officer and the right to report directly (para. 154 LOAC Manual). In a case of a severe disciplinary offence (including breaches of international law), the Disciplinary Attorney for the German Armed Forces conducts the investigation and brings the charge before the military disciplinary court (para. 155 LOAC Manual).

Pursuant to Sec. 33 German Military Penal Code³³ (*Wehrstrafgesetz* – WStG; hereafter: GMPC), punishment is imposed on anyone who in abuse of his or her command responsibility or official position has ordered a subordinate to commit an unlawful act, which is then committed by the latter. Unsuccessful incitement to commit an unlawful act is also punishable in accordance with Sec. 34 GMPC. Sections 4 and 14 CCAIL follow the same conceptual direction (see annex). While the GMPC is a specific military criminal law, this law is also administered by the ordinary civilian public prosecutor.

33 <https://www.gesetze-im-internet.de/wstrg/index.html> (in German) (Accessed 31 August 2020).

2. Securing Enforcement through Disciplinary Action

The elementary duties of all civil servants include loyalty to the Constitution. The executive as such is bound by law and justice (Art. 20 para. 3 Basic Law). An essential part of this loyalty to the constitution is respect for human rights, which are guaranteed by the Basic Law. Furthermore, insofar as IHL is part of German law on the basis of either Art. 59 para. 2 or Art. 25 Basic Law, all public servants are obliged to adhere to it. This also applies to every individual soldier. Thus, a breach of this law constitutes a breach of official duties.

Respecting IHL also constitutes part of the official duties enshrined in the catalogue of soldier's duties and rights in Sec. 6 – 36 Soldiers Act. Sec. 10 para. 4 stipulates that a superior may give orders only for official purposes and only in conformity with the rules of international law, the laws, and the service regulations. The corresponding rule for subordinates (Sec. 11 paras. 1 and 2) forbids obeying an order which would lead to a violation of human dignity or a criminal offence. This includes the prohibition to obey orders constituting grave breaches of IHL. According to Sec. 23 para. 1 Soldiers Act, any violation committed culpably by soldiers constitutes a breach of duty.

According to Sec. 15 para. 1 Military Discipline Code³⁴ (*Wehrdisziplinarordnung* – WDO; hereafter: MDC) breaches of duty (Sec. 23 Soldiers Act) may be sanctioned – if committed with intent and knowledge or by negligence – by simple disciplinary measures (*einfache Disziplinarmaßnahmen*) ordered by the disciplinary superior (Sec. 22 MDC) or by judicial disciplinary measures (*gerichtliche Disziplinarmaßnahmen*), ordered by a German Armed Forces Disciplinary and Complaints Courts (*Truppendienstgericht* – Sec. 68 et seqq. MDC), and the Federal Administrative Court (Sec. 68, 80 MDC). Simple disciplinary measures are defined in Sec. 22 et seqq. MDC, disciplinary measures in Sec. 58 et seqq. MDC.

In the German military legal system, there are no military courts as such. Instead, on the basis of the authority provided for in Art. 96 para. 4 Basic Law, federal courts have been established for service members of the German Armed Forces to decide on disciplinary and complaint proceedings. These courts are referred to as military service courts. Military service courts do not have any punitive powers. Service members who have committed a criminal offence will primarily face trial before a criminal court

34 https://www.gesetze-im-internet.de/wdo_2002/index.html (in German) (Accessed 31 August 2020).

that is part of the ordinary judiciary. However, in such cases a parallel disciplinary proceeding will regularly be held.

Military service courts are the German Armed Forces Disciplinary and Complaints Courts and the Federal Administrative Court (*Bundesverwaltungsgericht*). These courts are independent in the exercise of their judicial functions.³⁵ At the German Armed Forces Disciplinary and Complaints Courts full-time judges are joined by service members as honorary judges. The judges who preside in the Disciplinary and Complaints Courts do not carry military ranks and are selected from experienced and qualified legal advisers. At the Federal Administrative Court, the bench comprises of three civilian federal judges and two soldiers, with a civilian federal judge presiding. The military disciplinary attorneys are subject to the Disciplinary Attorney General for the German Armed Forces (*Bundeswehrdisziplinaranwalt*). In proceedings before the Military Affairs Division of the Federal Administrative Court, the commanding officers and the Federal Ministry of Defence are represented by him/ her.

3. Securing Enforcement through Criminal Law

In Germany, the use of military force abroad and other actions of the German Armed Forces are not exempt from national criminal law. While IHL-compliant use of force by members of the armed forces is not punishable by law, the use of force in violation of IHL will result in criminal proceedings. Generally, the public prosecution office is obliged to take action in relation to all prosecutable criminal offences if there are sufficient factual indications (c.f. Sec. 152 para. 2 German Code of Criminal Procedure (*Strafprozessordnung*)).³⁶ With regard to criminal offences pursuant to the Code of Crimes against International Law, in particular war crimes, the Federal Prosecutor General shall discharge the duties of the public prosecution office pursuant Art. 96 para 5 no. 3 Basic Law, Sec. 120 para. 1 no. 8 and Sec. 142a para.1 Courts Constitution Act (*Gerichtsverfassungsgesetz* – GVG, hereafter: CCA). This applies also to the use of force by German soldiers to which German criminal law may apply according to Sec. 3 and Sec. 7 of the German Criminal Code, Sec. 1 a GMPC, Sec. 1 CCAIL. It also

35 The military jurisdiction is an independent jurisdiction as defined in Art. 20 para.3, Art. 92 et seq. of the Basic Law. Accordingly, all judges are independent and subject solely to the law.

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

applies to the use of force against German nationals, to which German criminal law may apply according to section 7 para. 1 of the German Criminal Code, Sec. 1 CCAIL.

4. Securing Enforcement through the Rome Statute and the Code of Crimes against International Law (CCAIL)

The Statute of the International Criminal Court, which was adopted in Rome on 17 July 1998 and entered into force on 1 July 2002, was passed into German law on 4 December 2000. In order to allow extraditions of German nationals to the Court and thus give full effect to the system of international criminal justice, Germany amended Art. 16 of the Basic Law.

On 21 June 2002, the *Bundestag* adopted the Law on Cooperation with the International Criminal Court³⁷ (*Gesetz über Zusammenarbeit mit dem Internationalen Strafgerichtshof* – IstGH-Gesetz). Its provisions refer, in particular, to the cooperation between German authorities and the ICC, the extradition of persons to the ICC, the execution of ICC decisions, legal assistance to the ICC and its Office of the Prosecutor and the permission of procedural measures by ICC authorities on German territory.

On 26 June 2002 the *Bundestag* furthermore, adopted the CCAIL.³⁸ The CCAIL does not copy verbatim the provisions of the Rome Statute but establishes equivalent provisions satisfying German constitutional law requirements with respect to legal clarity and certainty. Although there is always the risk that such autonomous definitions, inadvertently, are not exactly congruous to the international norms, this difficulty can be overcome by an interpretation which takes due account of corresponding international norms and jurisprudence. In 2017, the Crime of Aggression was implemented into the CCAIL as Sec. 13 by the *Bundestag*.³⁹ Germany avails itself of the complementarity principle allowing for full jurisdiction of crimes punishable under the Rome Statute.⁴⁰ Since the adoption of the

37 Law on Cooperation with the International Criminal Court promulgated on 21 June 2002 (Federal Law Gazette 2002 I, at pp. 2144), last amended by Art. 13 of the Law of 17 August 2017 (Federal Law Gazette 2017 I, at pp. 3202), <https://www.gesetze-im-internet.de/istghg/> (in German) (Accessed 31 August 2020).

38 See Annex 2.

39 <http://dipbt.bundestag.de/extrakt/ba/WP18/734/73417.html> (in German) (Accessed 31 August 2020).

40 The ICC shall be complementary to national criminal jurisdiction (principle of complementarity according to Art. 17 para. 1 Rome Statute).

CCAIL in 2002, more than 20 public charges for war crimes (Sec. 8 – 12 CCAIL) have been preferred in Germany and about 15 convictions delivered. In addition, war crimes have also been convicted within the framework of criminal proceedings under the offences of forming criminal organisations and foreign criminal and terrorist organisations (Sec. 129 a, 129 b GCC). Germany has further codified the principle of universal jurisdiction with respect to genocide, crimes against humanity and war crimes (Sec. 6 to 12 CCAIL). Sec. 1 CCAIL stipulates that this Act shall apply to these offences even when the offence was committed abroad and bears no relation to Germany. For crimes of aggression that were committed abroad, this Act shall apply independently of the law of the place where the act was committed if the perpetrator is German or if the offence is directed against Germany.

5. Entitlement of an Individual Victim of IHL Violations to claim Compensation and Civil Proceedings

Germany has no specific legislative provisions governing compensation for violations of IHL.⁴¹ Court decisions have dealt with individual compensation claims. This has been the case for war crimes committed during the Second World War on the one hand. It has also been the case for alleged violations of IHL in recent military operations conducted by the German Armed Forces on the other hand. German Courts have held the following: The Federal Court of Justice⁴² and the Federal Constitutional Court⁴³ held

41 A number of foreign and domestic court decisions have addressed the question of a German obligation to pay reparations due to violations of international humanitarian law committed by Germany during the Second World War. In 2008, Germany filed an application instituting proceedings before the International Court of Justice (ICJ), arguing that national judicial bodies disregarded the jurisdictional immunity of Germany as a sovereign State, thus violating international law. The ICJ decided on an infringement of Germany's jurisdictional immunity; it did not decide on the question of a duty to pay reparations.

42 BGH (Federal Court of Justice), Judgment of 2 Nov. 2006 – III ZR 190/05, <https://openjur.de/u/79313.html> (in German) (Accessed 31 August 2020); BGH (Federal Court of Justice), Judgment of 6 Oct. 2016 – III ZR 140/15, <https://openjur.de/u/953787.html> (in German) (Accessed 31 August 2020).

43 BVerfG (Federal Constitutional Court), Order of 15 Feb. 2006 – 2 BvR 1476/03, http://www.bverfg.de/e/rk20060215_2bvr147603.html (in German) (Accessed 31 August 2020); BGH (Federal Court of Justice), Order of 13 Aug. 2013 – 2 BvR 2660/06, 2 BvR 487/07, <https://www.bundesverfassungsgericht.de/SharedDocs/En>

in 2006 that IHL does not grant individuals the right to claim compensation. The courts ruled that the relevant provisions in IHL (in particular Art. 3 Hague Convention (IV) and Art. 91 AP I) only provide a legal basis for compensation claims in the relationship between States, and not for individual remedies. The Federal Court of Justice held in 2016 that the general rules concerning the liability of the State for illegal conduct of its organs (*Amtshaftungsanspruch*) according to Art. 34 Basic Law in conjunction with Sec. 839 *German Civil Code* (*Bürgerliches Gesetzbuch*)⁴⁴ do not apply to damage caused to foreign citizens during armed military deployments abroad.⁴⁵

tscheidungen/DE/2013/08/rk20130813_2bvr266006.html (in German) (Accessed 31 August 2020).

44 https://www.gesetze-im-internet.de/englisch_bgb/index.html (Accessed 31 August 2020).

45 BGH (Federal Court of Justice), Judgment of 6 October 2016 – III ZR 140/15.