

## Germany, International Criminal Code

[Source: Germany, Act to Introduce the Code of Crimes against International Law of 26 June 2002; available in German on <http://bundesrecht.juris.de/bundesrecht/vstgb/index.html>; also available on <http://www.icrc.org/ihl>; footnotes partially reproduced.]

**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

### Act to Introduce the Code of Crimes against International Law of 26 June 2002

The Federal Parliament has passed the following Act:

#### ARTICLE 1: CODE OF CRIMES AGAINST INTERNATIONAL LAW (CCAIL)

##### PART 1: GENERAL PROVISIONS

##### Section 1: Scope of application

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

##### Section 3: Acting upon orders

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

## **Section 4: Responsibility of military commanders and other superiors**

(1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate. [...]

## **Section 5: Non-applicability of statute of limitations**

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

## **PART 2: CRIMES AGAINST INTERNATIONAL LAW**

### **Chapter 1: Genocide and crimes against humanity**

#### **Section 6: Genocide**

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

1. kills a member of the group,
2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code, [Footnote 4: paragraph 226 of the German Code of Crimes addresses grave injury that causes the following damage: loss of sight in one or both eyes, of hearing, speech or the capacity to reproduce; loss of an important limb and definitive loss of its use or definitive disfigurement, becoming disabled, paralysed, psychically ill or handicapped. (unofficial translation)]
3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,
4. imposes measures intended to prevent births within the group,
5. forcibly transfers a child of the group to another group

shall be punished with imprisonment for life. [...]

#### **Section 7: Crimes against humanity**

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

1. kills a person,
2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part,
3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and

in doing so arrogates to himself a right of ownership over that person,

4. deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another State or another area in contravention of a general rule of international law,
5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,
6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
7. causes a person's enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,
  - a. by abducting that person on behalf of or with the approval of a State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person's fate and whereabouts, or
  - b. by refusing, on behalf of a State or of a political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,
8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 of the Criminal Code,
9. severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or
10. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognised as impermissible under the general rules of international law

shall be punished, in the cases referred to under numbers 1 and 2, with imprisonment for life, in the cases referred to under numbers 3 to 7, with imprisonment for not less than five years, and, in the cases referred to under numbers 9 to 10, with imprisonment for not less than three years. [...]

## **Chapter 2: War crimes**

### **Section 8: War crimes against persons**

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

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

4. sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
5. conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups, or uses them to participate actively in hostilities,
6. deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and lawfully present in an area to another State or another area in contravention of a general rule of international law,
7. imposes on, or executes a substantial sentence in respect of a person who is to be protected under international humanitarian law, in particular the death penalty or imprisonment, without that person having been sentenced in a fair and regular trial affording the legal guarantees required by international law,
8. exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health
  - a. by carrying out experiments on such a person, being a person who has not previously given his or her voluntary and express consent, or where the experiments concerned are neither medically necessary nor carried out in his or her interest,
  - b. by taking body tissue or organs from such a person for transplantation purposes so far as it does not constitute removal of blood or skin for therapeutic purposes in conformity with generally recognised medical principles and the person concerned has previously not given his or her voluntary and express consent, or
  - c. by using treatment methods that are not medically recognised on such person, without this being necessary from a medical point of view and without the person concerned having previously given his or her voluntary and express consent, or
9. treats a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner

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

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

(3) Whoever in connection with an international armed conflict

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

2. transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory,
3. compels a protected person within the meaning of subsection (6), number 1, by force or threat of appreciable harm to serve in the forces of a hostile Power or
4. compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country

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

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

1. in an international armed conflict: persons protected for the purposes of the Geneva Conventions and of the Protocol Additional to the Geneva Conventions [...], namely the wounded, the sick, the shipwrecked, prisoners of war and civilians;
2. in an armed conflict not of an international character: the wounded, the sick, the shipwrecked as well as persons taking no active part in the hostilities who are in the power of the adverse party;
3. in an international armed conflict and in an armed conflict not of an international character: members of armed forces and combatants of the adverse party, both of whom have laid down their arms or have no other means of defence.

### **Section 9: War crimes against property and other rights**

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

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

### **Section 10: War crimes against humanitarian operations and emblems**

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

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

emblems of the Geneva Conventions in conformity with international humanitarian law

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

(2) Whoever in connection with an international armed conflict or with an armed conflict not of an international character makes improper use of the distinctive emblems of the Geneva Conventions, of the flag of truce, of the flag or of the military insignia or of the uniform of the enemy or of the United Nations, thereby causing a person's death or serious personal injury (section 226 of the Criminal Code) shall be punished with imprisonment for not less than five years.

### **Section 11: War crimes consisting in the use of prohibited methods of warfare**

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

1. directs an attack by military means against the civilian population as such or against individual civilians not taking direct part in hostilities,
2. directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law, namely buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, or against undefended towns, villages, dwellings or buildings, or against demilitarised zones, or against works and installations containing dangerous forces,
3. carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated,
4. uses a person who is to be protected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets,
5. uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival or impedes relief supplies in contravention of international humanitarian law,
6. orders or threatens, as a commander, that no quarter will be given, or
7. treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party

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

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

## **Section 12: War crimes consisting in employment of prohibited means of warfare**

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

1. employs poison or poisoned weapons,
2. employs biological or chemical weapons or
3. employs bullets which expand or flatten easily in the human body, in particular bullets with a hard envelope which does not entirely cover the core or is pierced with incisions

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

## **Chapter 3: Other crimes**

### **Section 13: Violation of the duty of supervision**

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

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

### **Section 14: Omission to report a crime**

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

## **ARTICLE 3: AMENDMENT TO THE CODE OF CRIMINAL PROCEDURE**

The Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette I page 1074, 1319), as last amended by Article 3 of the Act of 21 June 2002 (Federal Law Gazette I page 2144), shall be amended as follows: [...]

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

### **Section 153 f**

(1) In the cases referred to under Section 153c subsection (1), numbers 1 and 2, [footnote 9: paragraph 153c (1) of the code of criminal procedure looks at the exceptions to the principle of legality of prosecution applied in Germany.] the public prosecution office may dispense with prosecuting an offence punishable pursuant to sections 6 to 14 of the Code of Crimes against International Law, if the accused is not present in Germany and such presence is not to be anticipated. If in the cases referred to under Section 153c subsection (1), number 1, the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a state on whose territory the offence was committed or whose national was harmed by the offence.

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

1. there is no suspicion of a German having committed such offence,
2. such offence was not committed against a German,
3. no suspect in respect of such offence is present in Germany and such presence is not to be anticipated and
4. the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.

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

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

## Discussion

1. a. Is this Code of Crimes against International Law (CCAIL) an application of the so-called principle of “universal jurisdiction”, or of the obligation to prosecute international crimes? Is such a law consistent with international humanitarian law (IHL)? Are States obliged to enact “universal jurisdiction” laws to prosecute war criminals under IHL? Are such laws subject to the requirement of precision in criminal law? Are the provisions of IHL not sufficiently precise? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85) [**See also Criminal Repression**]
- b. Compare the German CCAIL and the Belgian law (BL) of universal jurisdiction (in particular, CCAIL, Arts 1.1 and 3, and BL, Art. 7; CCAIL, Art. 1.3, and BL, Art. 5; CCAIL, Arts 1.4 and 1.13-14, and BL, Arts 4 and 5.3; CCAIL, Art. 1.5, and BL, Art. 8; CCAIL, Art. 1.6, and BL, Art. 1.1; CCAIL, Art. 1.7, and BL, Art. 1.2; CCAIL, Arts 1.8-12, and BL, Art. 1.3). What are the differences between the two laws, and their respective strengths and weaknesses? [**See Belgium, Law on Universal**



Jurisdiction]

- c. Is there a law similar to the German CCAIL in your State? Why is such legislation relatively rare, even today?
2. How do you interpret the first paragraph of the CCAIL, in particular the reference to the “relation to Germany,” in view of the modification of paragraph 153f of the German Code of Criminal Procedure?
3.
  - a. To what extent does the CCAIL draw its inspiration from the Statute of the International Criminal Court (ICC)? Does it go further than the ICC Statute, or is it more cautious? In terms of excluding criminal responsibility? In the definition of crimes? (ICC Statute, Arts 5-8 and 30-33, **see The International Criminal Court [A. The Statute]**)
  - b. With regard to crimes against humanity – and to persecution in particular – what differences are there between the CCAIL and the ICC Statute? Given that certain acts defined as crimes against humanity in Art. 7 of the ICC Statute are not listed as such in the CCAIL and vice versa, what are the consequences in terms of prosecutions? Especially concerning persecution?
4. What is the legal basis for the non-applicability of statutory limitations in IHL? What link is there between the non-applicability of statutory limitations and the fact that crimes under IHL are not subject to amnesty? Is this a customary rule of IHL? (**See** Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968 (<http://www.icrc.org/ihl>); ICC Statute, Art. 29)
5. What is your opinion concerning the possibility that “International Criminal Code” laws will increase in number around the world? Do you think they are indispensable to end the impunity of war criminals?