

II. Status of International Humanitarian Law in the German Legal System

1. Status of relevant IHL Treaties

Under the German constitution, the Basic Law for the Federal Republic of Germany³ (*Grundgesetz* – GG; hereafter: “Basic Law”), the conclusion of international treaties that regulate the political relations of Germany or relate to subjects of federal legislation requires the consent or participation, in the form of a federal law, of the bodies responsible for the enactment of federal law (Art. 59 para. 2 cl. 1 Basic Law). By way of a federal legislative act (*Vertragsgesetz*), the German legislature incorporates international treaties into German law. The treaty in question is published in the Federal Law Gazette (*Bundesgesetzblatt*) as an annex of the *Vertragsgesetz*. Thus, international treaties enjoy the status of a federal law within the German legal system. Accordingly, the four Geneva Conventions and their Additional Protocols received Parliamentary consent by a federal law in 1954 and 1991 respectively and thus have the status of national legislation.

The question of whether or not a treaty provision is directly applicable in Germany is to be distinguished from the process of transposing a treaty into domestic law. Norms of international law may apply directly, if they are by virtue of their wording, their object and purpose and their content sufficiently clear and adapted to apply like national norms without the requirement of further legislative action (self-executing). Art. 75 AP I, for instance, is formulated in terms of unconditional prohibitions and duties and is therefore considered to be self-executing and directly applicable law. Other IHL treaty provisions are, however, interpreted as not being self-executing in this sense, for example Art. 3 Hague Convention (IV) respecting the Laws and Customs of War on Land or Art. 91 AP I.⁴

Since international treaty obligations generally have the same legal status as other federal statutes, the general rules relating to conflicting statutory provisions apply, i.e. the rules of *lex specialis*, *lex superior* and *lex posterior*. While this generally means that specific rules of an international treaty may be set aside by conflicting superior law, such as the Basic Law itself, by

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

4 See VI. 5.

more specific rules or by a conflicting later law, there are important particularities. Chief among them is the principle that the Federal Constitutional Court (*Bundesverfassungsgericht*) consistently emphasises as the principle of the Constitution's openness to international law.⁵ This is based on the objective underlying the Basic Law to avoid conflicts between domestic law and Germany's obligations under international law, wherever possible. This being the case, whenever domestic law is interpreted, it is presumed that the interpretation of the domestic law shall comply with international obligations applicable to the situation at hand, meaning that the national laws have to be construed in line with Germany's international obligations.

2. Status of Customary International Law

According to Art. 25 Basic Law, "general rules of public international law shall be an integral part of federal law", thus customary international law and general principles of law are directly applicable in the German legal system. They take precedence over domestic legislation but are below the level of the constitution, the Basic Law, itself. These rules can also be directly applied by courts provided their content is of a nature that permits direct application.⁶

Art. 100 para. 2 Basic Law provides for a special judicial proceeding, according to which any national court, in cases of doubt as to whether a rule of international law is an integral part of federal law or whether it is possible to derive direct rights or obligations of the individual thereof, can and shall obtain a decision from the Federal Constitutional Court.

5 The latest prominent example is the Judgment of the Second Senate, BVerfG (Federal Constitutional Court), Judgment of the Second Senate of 12 June 2018 – 2 BvR 1738/12; para 69 et seqq.; English translation available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/06/rs20180612_2bvr173812en.html (Accessed 31 August 2020); see also BVerfG (Federal Constitutional Court), Order of the Second Senate of 15 December 2015 – 2 BvL 1/12; para. 58 with further references.

6 See VI. 5.