



Kurzinformation

Legal Regulation and Jurisdiction of Military Courts in Germany

1. Introduction

This brief information answers the questions how the status of military criminal courts is legally regulated in Germany, what the jurisdiction of those courts is that conduct proceedings against soldiers of the German Armed Forces (Bundeswehr), and finally, what type of cases are tried by these courts and who the defendants are.

2. The provisions of the Basic Law on military criminal courts

Although the *Basic Law of the Federal Republic of Germany* (Grundgesetz – GG)¹ has provided for the possibility of establishing military criminal courts exercising criminal jurisdiction over members of the armed forces (Article 96 (2) sentence 1 GG), it has not made such federal courts mandatory. **The Federal Republic of Germany has not yet made use of the right to establish such a court.**

In the 1970s, a **Military Penal Jurisdiction** (Wehrstrafgerichtsordnung – WStGO) **was developed but not enacted**. The Military Penal Jurisdiction was part of the so-called “drawer laws”, which could have been introduced into the legislative process at short notice and passed by the Joint Committee (Gemeinsamer Ausschuss)² in a sudden case of national defence (Article 115a GG). Under the second sentence of Article 96 (2) of the Basic Law, the jurisdiction of the military courts would be limited to cases of national defence or to members of Bundeswehr who are embarked on warships or sent abroad. In the last case, it would not be necessary to perform a special foreign assignment. Participation in exercises, training courses or the occupation of a foreign duty post would suffice.

1 *Basic Law of the Federal Republic of Germany* (Grundgesetz – GG), as amended by the Act of June 28, 2022 (Federal Law Gazette I p. 968), available at: https://www.gesetze-im-internet.de/englisch_gg/ (last retrieved on June 7, 2023)

2 The *Joint Committee* (Gemeinsamer Ausschuss) of the Bundesrat and the Bundestag has 48 members. Pursuant to Article 53a of the Basic Law, two-thirds of its members are members of the Bundestag and one-third are members of the Bundesrat. The Joint Committee shall constitute the emergency parliament in the event of national defence if insurmountable obstacles prevent the Bundestag from convening in due time.

Since no such military courts have been established in Germany until today, **criminal cases involving Bundeswehr soldiers (including military offences) are therefore tried before ordinary courts**. The jurisdiction of the ordinary courts for criminal offences committed by soldiers is derived from Article 1 of the Military Penal Code (Wehrstrafgesetz – WStG)³. Accordingly, the ordinary courts have jurisdiction over all criminal offences committed by soldiers unless the Military Penal Code provides for special jurisdiction.

3. Special jurisdiction for certain criminal and for serious disciplinary offences of Bundeswehr members

Special jurisdiction for certain criminal and for serious disciplinary offences of Bundeswehr members includes:

- **criminal offences** committed during a **foreign deployment**:

For criminal offences committed by soldiers on special foreign assignments, the place of jurisdiction is the city of Kempten (Bavaria) in accordance with Article 11a of Germany's Code of Criminal Procedure (Strafprozessordnung – StPO)⁴,

- **military disciplinary proceedings** pursuant to Article 68 of the Military Disciplinary Code (Wehrdisziplinarordnung – WDO)⁵:

Serious disciplinary offences, i.e. violations of a soldier's duty⁶, are tried by “*courts having jurisdiction over military disciplinary offences and complaints by armed forces' members*”. In Germany, this term refers collectively to the federal courts that rule on cases under the Military Disciplinary Code (WDO) and the Military Complaints Code (WBO)⁷. These courts are

3 *Military Penal Code* (Wehrstrafgesetz – WStG), in the version published on May 24, 1974 (Federal Law Gazette I p. 1213), as last amended by Article 10 (8) of the Act of October 30, 2017 (Federal Law Gazette I p. 3618), available only in German language at: <https://www.gesetze-im-internet.de/wstrg/BJNR002980957.html> (last retrieved on June 7, 2023)

4 *Code of Criminal Procedure* (Strafprozessordnung – StPO), in the version promulgated on April 7, 1987 (Federal Law Gazette I p. 1074, 1319), as most recently amended by Article 2 of the Act of March 25, 2022 (Federal Law Gazette I p. 571), available only in German language at: <https://www.gesetze-im-internet.de/stpo/StPO.pdf> (last retrieved on June 7, 2023)

5 *Military Disciplinary Code* (Wehrdisziplinarordnung – WDO) of August 16, 2001 (Federal Law Gazette I p. 2093), as last amended by Article 13 of the Act of August 20, 2021 (Federal Law Gazette I p. 3932), available only in German language at: https://www.gesetze-im-internet.de/wdo_2002/BJNR209310001.html (last retrieved on June 7, 2023)

6 defined more closely in the *Military Service Act* (Soldatengesetz – SG); see *Military Service Act* (Soldatengesetz – GG) in the version published on May 30, 2005 (Federal Law Gazette I p. 1482), as last amended by Article 5 of the Act of May 31, 2023 (Federal Law Gazette 2023 I No. 140), available only in German language at: <https://www.gesetze-im-internet.de/sg/SG.pdf> (last retrieved on June 7, 2023)

7 *Military Complaints Code* (Wehrbeschwerdeordnung – WBO) in the version published on January 22, 2009 (Federal Law Gazette I p. 81), as last amended by Article 24 (1) of the Act of June 25, 2021 (Federal Law Gazette I p. 2154), available only in German language at: <https://www.gesetze-im-internet.de/wbo/BJNR010660956.html> (last retrieved on June 7, 2023)

- the following *Bundeswehr disciplinary and complaints courts* as courts of first instance:
 - Bundeswehr Disciplinary and Complaints Court North in Münster,
 - Bundeswehr Disciplinary and Complaints Court South in Munich.

Since these courts are disciplinary courts, it can happen that a criminal procedure (either under the *Code of Criminal Procedure* or under the *Military Penal Code*) is tried both before an ordinary court for the criminal offence itself and before one of the Bundeswehr disciplinary and complaints courts for a simultaneous violation of soldierly duties. If this results in a double conviction, it is not a violation of the prohibition of double punishment (*ne bis in idem*). The reason for this is that the punishment by an ordinary court is for retribution and prevention, while the trial before the military service court primarily serves educational purposes.

The Bundeswehr disciplinary and complaints courts are composed of a civilian judge as well as two military personnel as honorary judges. Appeal against rulings of the Bundeswehr disciplinary and complaints courts is permissible. The appeal is then decided at the Federal Administrative Court (Bundesverwaltungsgericht – BVerwG) (see below).

- the two *military affairs divisions* at the Federal Administrative Court in Leipzig as complaints and appeals instance:
 - 1st Military Affairs Division at the Federal Administrative Court (WBO cases),
 - 2nd Military Affairs Division at the Federal Administrative Court (WDO cases).

4. About judicial disciplinary proceedings against Bundeswehr members

So-called instituting authorities are responsible to initiate the judicial disciplinary proceedings against Bundeswehr members. **Instituting authorities are military commanders at division level or higher.** This military commander is **supported by an Armed Forces' Disciplinary Attorney** (Wehrdisziplinaranwalt) assigned to him. This disciplinary attorney is a **civilian lawyer qualified to hold judicial office** and whose main function is that of a legal advisor to the respective military commander.

The function of an Armed Forces' Disciplinary Attorneys in the disciplinary case **corresponds largely to that of the prosecutor in criminal proceedings.** He is tasked with conducting the investigations and drafts a bill of accusation if he thinks that there is evidence of a disciplinary offence and that judicial disciplinary punishment is required. During the main trial at the troop service court the disciplinary attorney then represents the instituting authority. He may appeal against the court's decision. Following the legally binding conclusion of the judicial disciplinary proceedings the disciplinary attorney for the Armed Forces is responsible for the execution of the judgment.

When performing his task, the disciplinary attorney is not **subject to administrative or technical supervision** of the military instituting authority but that **of the Disciplinary Judge Advocate General for the Bundeswehr** at the Federal Administrative Court (Bundeswehrdisziplinaranwalt beim Bundesverwaltungsgericht – BWDA). The Disciplinary Judge Advocate General in return reports to the Federal Minister of Defence and is only bound by his instructions. The Disciplinary

Judge Advocate General and his full-time staff are civilian lawyers qualified to hold judicial office; they represent the Federal Minister of Defence as well as all instituting authorities in appeal proceedings at the Military Affairs Division at the Federal Administrative Court.⁸

In case of judicial disciplinary proceedings, the accused Bundeswehr members **may resort to a (civilian) defence counsel at any time.**

* * *

8 see United Nations / OHCHR (2013): *Military Courts: report*, available at: <https://www.ohchr.org/en/special-procedures/sr-independence-of-judges-and-lawyers/military-courts-report>. The report of the Federal Republic of Germany of June 2013 is available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/IJudiciary/MilitaryCourts/Germany.doc> (last retrieved on June 7, 2023)