Practice relating to Immunity of State officials from foreign criminal jurisdiction:

A. Domestic Law

1. Constitution

Exemption of officials of other States from German jurisdiction results from customary international law and the application of article 25 of the German Basic Law[1]. Pursuant to this provision general rules of international law form an integral part of federal law.[2] According to the Federal Constitutional Court the threshold of "general rules of international law", as used in article 25 of the German Basic Law is met if a rule is recognized as binding by a large majority of States, which need not necessarily include Germany.[3]

If, in the course of litigation, there are doubts as to whether a rule, as a general rule of international law, forms part of federal law, the court shall submit the question to the Federal Constitutional Court for a ruling (article 100 para. 2 German Basic Law).

2. Complementary domestic legal basis

The legal basis as described above is complemented by section 20 of the Courts Constitution Act[4], which reads:

"(1) German jurisdiction also shall not apply to representatives of other States and persons accompanying them who are staying in the territory of application of this Act at the official invitation of the Federal Republic of Germany.

(2) Moreover, German jurisdiction also shall not apply to persons other than those designated in subsection (1) and in Sections 18 [diplomatic immunities] and 19 [consular immunities] insofar as they are exempt therefrom pursuant to the general rules of international law or on the basis of international agreements or other legislation."

B. Decisions of German Courts in regard to immunity of foreign State officials from German criminal jurisdiction

1. Personal immunity

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[1] Basic Law (*"Grundgesetz"*) for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944).

[2] Article 25 Basic Law:
"The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory."

[3] *Inter alia* Federal Constitutional Court, 2 BvM 1/60, of 30 October 1962 and 2 BvM 1/62, of 30 April 1963.

[4] Courts Constitution Act ("Gerichtsverfassungsgesetz") in the version published on 9 May 1975 (Federal Law Gazette [Bundesgesetzblatt] I p. 1077), last amended by Article 4 of the Act of 7 December 2011 (Federal Law Gazette I p. 2582).

a) *Cases before German Courts concerning the application of personal immunity in criminal proceedings*

German case-law concerning the application of the principle of personal immunity can be found only with regard to Heads of State.

In 1984 the Federal Public Prosecutor requested the Federal Supreme Court to determine a legal venue for the proceedings against the sitting Head of State of the then German Democratic Republic.[5] The request was dismissed by the court.

In 1998 a German citizen pressed charges against the then Iraqi President, Mr Saddam Hussein, accusing him of being responsible for his unlawful detention which lasted for nearly five years. Furthermore the Iraqi President should – according to the complainant – be held accountable for the imprisonment of the complainant in buildings targeted by the allied forces during the Gulf war of 1991. The public prosecutor's office and the Prosecutor-General declined to initiate preliminary proceedings against the Iraqi President due to the principle of personal immunity. The complainant contested these decisions by appealing the case to the Cologne Higher Regional Court (*"Oberlandesgericht Köln"*) in 2000, which dismissed his appeal.[6]

b) *The scope of personal immunity*

The Federal Supreme Court in its decision of 1984 acknowledged the absolute immunity of Heads of State from criminal jurisdiction of States other than their own during their terms of office.[7] Hence the meaning given to the phrase "official acts" was not specified and did not need to be. According to the Federal Supreme Court, persons enjoying personal immunity shall not be subject to criminal proceedings. Any police or prosecutorial criminal investigation would be incompatible with the principle of personal immunity.[8] Thus the determination of a legal venue is also ruled out.[9] That is explained by the fact that investigative or prosecutorial measures of any kind would defeat the purpose for which Heads of State enjoy personal immunity, *viz.* the mutual interest of the States in undisturbed inter-State relations.[10]

The Cologne Higher Regional Court also endorsed the absolute immunity of sitting Heads of State.[11] In an *obiter dictum* the court stated that after their tenure former Heads of State continue to enjoy immunity for acts performed in an official capacity.[12] In this context the court also referred to the meaning of "official acts" by stating that under the perspective of international law that term is to be interpreted broadly encompassing all acts attributed to the State in furtherance of its political objectives.[13] The court assumed that the order of the Iraqi President to detain the claimant was given in exercise of his duties and therefore in an official

[5] Federal Supreme Court (*"Bundesgerichtshof"*),2 ARs 252/84 of 14 December 1984.
[6] Cologne Higher Regional Court, 2 Zs 1330/99 of 16 May 2000.
[7] Federal Supreme Court, 2 ARs 252/84 of 14 December 1984, juris, para. 2.
[8] Federal Supreme Court, 2 ARs 252/84 of 14 December 1984, juris, para. 2; Cologne Higher Regional Court, 2 Zs 1330/99 of 16 May 2000, juris, para. 9.
[9] Federal Supreme Court, 2 ARs 252/84 of 14 December 1984, juris, para. 2.
[10] Federal Supreme Court, 2 ARs 252/84 of 14 December 1984, juris, para. 2.
[11] Cologne Higher Regional Court, 2 Zs 1330/99 of 16 May 2000, juris, para. 9.
[12] Cologne Higher Regional Court, 2 Zs 1330/99 of 16 May 2000, juris, para. 9.
[13] Cologne Higher Regional Court, 2 Zs 1330/99 of 16 May 2000, juris, para. 9.

capacity.[14] However, since the decision of the Higher Regional Court was not appealed, its findings have never been confirmed by the Federal Supreme Court.

The Federal Constitutional Court has also had to answer the question of whether immunity of a Head of State could outlast the existence of the State which he or she represented, to which it replied in the negative.[15] Hence neither the scope of personal immunity nor the meaning of official acts was discussed.

2. Functional immunity

a) *Introduction*

There is no German case-law in criminal proceedings available concerning this issue. However, there have been civil and administrative cases which deal with the question of functional immunity of State officials. German courts acknowledge that according to customary international law, sovereign States enjoy absolute immunity with regard to acts *iure imperii*[16] which extends to organs acting on their behalf.[17] The term "organs" in this context includes individuals.[18] Since the principle of functional immunity derives not from the person of the State official itself but from the principle of State immunity, German courts examine the scope of the latter in order to discern whether an action in question has to be perceived as an official act.[19] That is the reason why they regularly refer to a land mark decision on State immunity of the German Federal Constitutional Court of 1963.

b) *The Federal Constitutional Courts land mark decision of 1963*

In its land mark decision of 1963 the Federal Constitutional Court, in dealing with the scope of State immunity,[20] adopted the modern approach that there is no longer a rule of customary international law excluding foreign jurisdiction of acts *iure gestionis*. At the same time the court reaffirmed the unrestricted immunity of States in regard to acts *iure imperii*. The court also elaborated on the delimitation between acts *iure gestionis* and acts *iure imperii*. In order to draw the border-line between the two, the Court had recourse to the *lex fori*, since in its

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[14] Cologne Higher Regional Court, 2 Zs 1330/99 of 16 May 2000, juris, para. 9.

[15] The Federal Constitutional Court decided on 21 February 1992 not to accept a constitutional complaint brought to the court by the former Head of State of the former German Democratic Republic for lack of reasonable prospects of success. Due to the fact that the German Democratic Republic acceded to the Federal Republic of Germany on 3 October 1990 the court stated that the immunity of a Head of State could not outlast the existence of the State which he or she represented. After the disappearance of a State its representatives could therefore be subject to the criminal jurisdiction of other States. This should be in accordance with the rationale of the principle of personal immunity of Heads of State, which would seek to protect the sovereignty of a foreign State and its officials. Since the German Democratic Republic did not exist anymore at the time of the decision its former Head of State was not able to invoke the principle of personal immunity in his case. (Federal Constitutional Court, 2 BvR 1662/91 of 21 February 1992).

[16] *Inter alia* Federal Constitutional Court, 2 BvM 1/62, of 30 April 1963; Federal Supreme Court, VI ZR 267/76 of 26 September 1978; Federal Administrative Court, 9 CB 47.88 of 30 September 1988, juris, guiding principle No. 2 and para. 8.

[17] Federal Supreme Court, VI ZR 267/76 of 26 September 1978; Federal Administrative Court, 9 CB 47.88 of 30 September 1988, juris, guiding principle No. 2 and para. 8.

[18] Federal Supreme Court, VI ZR 267/76 of 26 September 1978; Federal Administrative Court, 9 CB 47.88 of 30 September 1988.

[19] *Inter alia* Federal Administrative Court, 9 CB 47.88 of 30 September 1988, juris para. 30ff.

[20] Federal Constitutional Court, 2 BvM 1/62, of 30 April 1963.

view no general rule on the border-line has been established in international law.[21] The general rule of public international law that foreign States enjoy immunity from domestic jurisdiction for their sovereign action will – according to the court – not become devoid of substance and will not lose its character as a legal norm because it is domestic law that is decisive for this delimitation. The Federal Constitutional Court stated that it is not unusual for norms of international law to refer to municipal law. Abusive shaping of laws could be countered through the *bona fide* principle, recognized in international law. Furthermore, the court stated that the application of the *lex fori* is limited by the fact that international law takes precedence whenever a large majority of States concurs that the act in question must be regarded as an official act. Examples of such generally recognized area of sovereign activity are the exercise of foreign and military power, legislation, the exercise of police power, the administration of justice etc.

According to the Federal Constitutional Court the distinction between acts *jure imperii* and acts *jure gestionis* cannot be drawn based on the purpose of the State's action, nor on the fact whether or not the State's action is recognizably connected with sovereign functions because all State activity serves at least to some extent, if indirectly, that State's sovereign purposes and functions. The court also refuses to take the commercial character of certain acts as a decisive criterion. In its view there is no fundamental difference between commercial acts and other non-sovereign State acts general.

Instead the decisive criterion for the court is the ***nature*** of the State's activity or the resulting legal relationship. The crucial question therefore is whether the State has acted in exercise of sovereign power or in a way in which any private person could act.[22]

c) *The case of the Federal Supreme Court*

In 1978 the principle of functional immunity was applied by the Federal Supreme Court in a case concerning a civil claim against the head of Scotland Yard. Following a request from the German Federal Criminal Police Office, the head of Scotland Yard had transmitted a report on dishonourable conduct of the plaintiff. The plaintiff sought a cease and desist order with regard to the accusations contained in the report. The court rejected the claim due to the application of the principle of functional immunity.

Referring to the ruling of the Federal Constitutional Court presented above the Federal Supreme Court ruled that the measures taken by the head of Scotland Yard were official acts and therefore German jurisdiction was excluded.[23] The court argued that according to German administrative law the execution of police functions is part of the sovereign power of the State. The court stated that these functions even form part of the core area of State sovereignty. It reasoned that the act in question, i.e. transmitting the report, following a request by the German Federal Criminal Police Office was based on an agreement on mutual cooperation in criminal proceedings. Hence, the head of Scotland Yard acted in his capacity as a UK police official fulfilling the State's treaty obligations.

d) *The case of the Federal Administrative Court*

[21] Federal Constitutional Court, 2 BvM 1/62, of 30 April 1963.
[22] Federal Constitutional Court, 2 BvM 1/62, of 30 April 1963.
[23] Federal Supreme Court, VI ZR 267/76 of 26 September 1978, juris para. 16, 17.

In 1988 the Federal Administrative Court ("Bundesverwaltungsgericht") had to decide whether it was permissible to summon the Indian minister of defence as a witness. In its decision the court stated that the principle of functional immunity would oppose such an application. It ruled that a motion to summon the Indian minister of defence as witness was impermissible. The court stated that military action of Indian troops in Sri Lanka, the political motives for the deployment and the conduct of the troops during military action are clearly acts *jure imperii*. Hence, India enjoyed absolute immunity in this regard which encompasses the organs acting for the State.[24] The Federal Administrative Court also clarified in its decision that although functional immunity concerns State officials, it is only the State itself which could waive immunity.[25]

a) *Special Case: Espionage*

According to the German Federal Supreme Court, public international law rules concerning functional immunity do not extend to espionage.[26] Hence, public international law does not prohibit States from punishing aliens for espionage.[27] These rulings were confirmed by the Federal Constitutional Court, which confirmed that there is no general rule of international law under which spies prosecuted by the State affected by espionage could invoke immunity to escape criminal jurisdiction. The court recognized an exception to this rule only if the person in question enjoys special protection as diplomat under the Vienna Convention on Diplomatic Relations of 18 April 1961 or other special agreements.[28]

[24] Federal Administrative Court, 9 CB 47.88 of 30 September 1988, juris, guiding principle No. 2, para. 8.
[25] Cf. *inter alia* Federal Administrative Court, 9 CB 47.88 of 30 September 1988, juris, para. 8, 9.
[26] Federal Supreme Court, StB 11/91 of 29 May 1991, juris, para. 7 and decision of StR 347/92 of 30 July 1993, juris para. 8.
[27] Federal Supreme Court, StB 11/91 of 29 May 1991, juris, para. 10; Decision of the Federal Supreme Court, 3 StR 347/92 of 30 Juli 1993, juris, guiding principle No. 1.
[28] Federal Constitutional Court, 2 BvL 19/91, 2 BvR 1206/91, 2 BvR 1584/91 and 2 BvR 1601/93, juris, para. 174.

Index of Cases

Decision	Guiding Principle
Personal immunity	
Federal Supreme Court, VI ZR 267/76 of 26 September 1978	Under to customary international law, which is binding for German courts according to article 25 Basic Law, sovereign States enjoy absolute immunity with regard to acts of State (acta *jure imperii*), which extends to organs acting on their behalf.
Federal Supreme Court, 2 ARs 252/84 of 14 December 1984	Jurisdiction of the Federal Republic of Germany shall not apply to persons insofar as they are exempt therefrom pursuant to the general rules of international law (Courts Constitution Act para. 20). Thus, if the jurisdiction of the Federal Republic of Germany is not applicable, the determination of a legal venue as a precondition for criminal proceedings is impermissible.
Federal Constitutional Court, 2 BvR 1662/91 of 21 February 1992	The immunity of a Head of State does not outlast the existence of the State which he or she represented.
Cologne Higher Regional Court, 2 Zs 1330/99 of 16 May 2000	The principle of immunity, which is binding for German law enforcement agencies according to article 25 Basic Law in conjunction with section 20 para. 2 of the Courts Constitution Act, excludes the opening of criminal investigations against a foreign Head of State.
Functional immunity	
Federal Constitutional Court, 2 BvM 1/62 of 30 April 1963	A presumed rule of public international law whereby domestic jurisdiction for actions against a foreign State in relation to its non-sovereign activity is ruled out is not an integral part of Federal law. The criterion for distinguishing between sovereign and non-sovereign State activity is the nature of the State's action. Classification as sovereign or non-sovereign State activity is in principle to be done according to *lex fori*.

Federal Administrative Court, 9 CB 47.88 of 30 September 1988	According to customary international law, sovereign States enjoy absolute immunity with regard to acts *jure imperii* which extends to organs acting on their behalf. Thus, the latter may not be summoned as witnesses with regard to such acts.
Federal Supreme Court, StB 11/91 of 29 May 1991	Public international law does not prohibit a State from prosecuting aliens for espionage directed against it. Public international law rules concerning personal or functional immunity (act of State doctrine) do not extend to espionage. The Federal Constitutional Court in its decision of 15 May 1995 (s. below) clarified that there is an exception to this rule if the person in question enjoys special protection as diplomat under the Vienna Convention on Diplomatic Relations of 18 April 1961 or other special agreements.
Federal Supreme Court, 3 StR 347/92 of 30 July 1991	Neither general international law nor the Basic Law prevent the criminal prosecution of full-time agents of the secret service of the former German Democratic Republic for treason and secret service activities even if those agents acted exclusively outside of what was then the territory of the Federal Republic of Germany.
Federal Constitutional Court, Joint cases 2 BvL 19/91, 2 BvR 1206, 1584/91 and 1601/93 of 15 May 1995	There is no general rule of international law under which spies prosecuted by the State affected by their acts of espionage could invoke immunity to escape criminal jurisdiction.