



Permanent Mission  
of the Federal Republic of Germany  
to the United Nations  
New York

Note No. 190/2017

Note Verbale

The Permanent Mission of Germany to the United Nations presents its compliments to the Office of Legal Affairs and, with reference to the request of the International Law Commission in its 2016 report (A/71/10) for input regarding “Immunity of State Officials,” has the honour to communicate the following:

**“Immunity of State officials from foreign criminal jurisdiction**

**35. The Commission would appreciate being provided by States with information on their national legislation and practice, including judicial and executive practice, with reference to the following issues:**

- (a) the invocation of immunity;**
- (b) waivers of immunity;**
- (c) the stage at which the national authorities take immunity into consideration (investigation, indictment, prosecution);**
- (d) the instruments available to the executive for referring information, legal documents and opinions to the national courts in relation to a case in which immunity is or may be considered;**
- (e) the mechanisms for international legal assistance, cooperation and consultation that State authorities may resort to in relation to a case in which immunity is or may be considered.”**

has the honour to communicate the following input:

United Nations Office of Legal Affairs (OLA/COD)  
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## **1. Relevant legal provisions and procedure**

The relevant statutory provisions with regard to immunity of State officials are mainly enacted in the Courts Constitution Act (Gerichtsverfassungsgesetz), which incorporates public international law and provides in sections 18-21:

### *“Section 18*

*The members of the diplomatic missions established in the territory of application of this Act, the members of their families and their private servants shall be exempt from German jurisdiction under the Vienna Convention on Diplomatic Relations of 18 April 1961 (Federal Law Gazette 1964, Part II, pages 957 et seq.). This shall also apply if their sending state is not a party to this Convention; in such case Article 2 of the Act of 6 August 1964 relating to the Vienna Convention on Diplomatic Relations of 18 April 1961 (Federal Law Gazette 1964, Part II, page 957) shall apply mutatis mutandis.”*

### *“Section 19*

*(1) The members of the consular posts established in the territory of application of this Act, including the honorary consular officers, shall be exempt from German jurisdiction under the Vienna Convention on Consular Relations of 24 April 1963 (Federal Law Gazette 1969, Part II, pages 1585 et seq.) This shall also apply if their sending state is not a party to this Convention; in such case Article 2 of the Act of 26 August 1969 relating to the Vienna Convention on Consular Relations of 24 April 1963 (Federal Law Gazette 1969, Part II, page 1585) shall apply mutatis mutandis.*

*(2) Special international agreements concerning the exemption of the persons designated in subsection (1) from German jurisdiction shall remain unaffected.”*

### *“Section 20*

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*(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 and 19 insofar as they are exempt therefrom pursuant to the general rules of international law or on the basis of international agreements or other legislation.”*

*“Section 21*

*Sections 18 to 20 shall not stand in the way of execution of a request for transfer of a person in custody and for mutual judicial assistance communicated by an international criminal court established by a legal instrument that is binding on the Federal Republic of Germany.”*

(Note: The official text of those sections is in German, available under <https://www.gesetze-im-internet.de/gvg/>. The translations provided here have no legally binding effect for German authorities.)

Furthermore, Article 25 of the Basic Law (*Grundgesetz*) lays down that

*“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 ”*

General rules of international law under Article 25 is understood to include customary public international law. Since State immunity is provided by customary international law, as has been recognized by the Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*), it is, accordingly, also part of German national law. Thus, the statutory provision in section 20 (2) GVG, which refers to customary international law, exists in parallel to the incorporation of said customary law under the German constitution.

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National courts are expected to be competent to determine the meaning and scope of the relevant laws. If a court has doubts whether a provision of public international law is part of German national law, it has to submit this question to the Federal Constitutional Court according to article 100 para. 2 of the Basic Law which reads as follows:

*“If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court.”*

Consequently, German law generally recognizes immunity from criminal proceedings for persons mentioned under sections 18-20 of the GVG and heads of State and governments while they are in office. The immunity for heads of State and governments with regard to acts committed while in office endures after the end of their terms.

Any other State official, who is not already covered by the specific provisions of sec. 18-20 GVG, may be entitled to immunity under customary law.

## **2. Invocation of Immunity**

Immunity suspends German jurisdiction and is an impediment to proceedings (BVerfGE 46, 342, 359 = 2 BvM 1/76 of 12 December 1977). It is a basic principle in German law that national courts in a given case and at any stage of proceedings verify if they have jurisdiction. As a consequence it is up to the competent court to decide whether a State official is entitled to immunity.

Furthermore, the state prosecutor will recognize the immunity of a State official and discontinue investigations, if all suspected perpetrators are entitled to immunity.

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### **3. Legal Assistance**

As stated above, under section 21 GVG, if mutual judicial assistance is requested by an international criminal court established by a legal instrument that is binding on the Federal Republic of Germany, official immunity under sections 18-20 GVG is inapplicable. Thus official immunity in those cases is subject to the regulations of the respective international court. This, in particular, refers to the International Criminal Court.

For other matters of legal assistance, the Act on International Cooperation in Criminal Matters (official title: Gesetz über die internationale Rechtshilfe in Strafsachen, available at <https://www.gesetze-im-internet.de/irg/>) in section 77 refers to the Courts Constitution Act:

*“Section 77*

*Application of Procedural Rules*

*(1) To the extent that this Act does not contain any special procedural rules, the provisions of the Gerichtsverfassungsgesetz and the Einführungsgesetz zum Gerichtsverfassungsgesetz, the Strafprozessordnung, the Jugendgerichtsgesetz, the Abgabenordnung, and of the Ordnungswidrigkeitengesetz shall apply mutatis mutandis.*

*(2) In the case of incoming requests, the provisions applicable in German criminal and regulatory fine proceedings relating to immunity, indemnity and the conditions for search and seizure on the premises of a parliament shall apply.”*

### **4. Guidelines published by the Federal Foreign Office**

The Federal Foreign Office publishes guidelines, which are legally non-binding to courts and prosecutors, regarding the treatment of diplomats and other persons entitled

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to certain privileges. Those guidelines elaborate on the immunities to which State officials might be entitled to. A copy of said guidelines, updated in 2015, in German is attached.

#### **5. Aspects not covered**

This response does not cover questions of potential immunities with regard to foreign military members stationed in Germany.

Furthermore, it is understood that the questions forwarded by the ILC solely cover procedural matters. As to the substantive content of customary international law on immunity of state officials, the German government therefore refers to its most recent statements in the 6<sup>th</sup> committee regarding the 67<sup>th</sup> and 68<sup>th</sup> report of the ILC.

#### **6. Communication between the Executive and competent Courts**

German law contains limits for the transmission of information to national courts by the Foreign Office. Article 97 of the Basic Law provides that

*“judges shall be independent and subject only to the law”.*

In addition section 1 of the Courts Constitution Act stipulates (literally only for courts of ordinary jurisdiction, but applicable to all) that

*“judicial power shall be exercised by independent courts that are subject only to the law”.*

On this basis the Federal Constitutional Court emphasized that any “avoidable influence” is prohibited (Judgements BVerfGE 26, 79 = 2 BvR 33, 387/66 of 4 June 1969 and BVerfGE 38, 1 = 2 BvR 429, 641, 700, 813/72 of 27 June 1974). Therefore, any kind of advising on legal issues by the government is illegitimate, unless it is explicitly permitted by law. According to the principle of separation of powers the legal judgment about the question whether there is immunity in a given case lies in the competence of the judicial power. The Foreign Office is insofar not responsible.

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Besides, it could be a violation of Article 6 para. 1 of the European Convention on Human Rights, the right to trial before an independent and impartial tribunal, if a Court had to base its judgment on a binding interpretation of the Ministry of Foreign Affairs. The European Court of Human Rights underlined in this context that “only an institution that has full jurisdiction and satisfies a number of requirements, such as independence of the executive and also of the parties, merits the designation “tribunal” within the meaning of Article 6 para. 1” (Beaumartin v. France, judgement of 24 November 1994, Series A no. 296-B (38)). Furthermore, the European Court of Human Rights with regard to a Government Commissioner under French law contributing to a case highlighted that the appearance of partiality might lead to a violation of Article 6 (Kress v. France, judgement of 7 June 2001 (Grand Chamber), Nr. 39594/98, para. 81).

The Permanent Mission of Germany to the United Nations avails itself of this opportunity to renew to the Office of Legal Affairs the assurances of its highest consideration.

New York, 06 April 2017



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