



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

Note No. 34/2015

The Permanent Mission of the Federal Republic of Germany to the United Nations presents its compliments to the Secretary-General of the United Nations and, with reference to Chapter III.C (para. 28 “Immunity of State officials from foreign criminal jurisdiction”) of the Report of the International Law Commission on its Sixty-sixth Session (05 May-06 June and 07 July-08 August 2014) [United Nations document A/69/10], has the honour to submit the following information requested by the International Law Commission:

Practice on exceptions to immunity of State officials
from foreign criminal jurisdiction

Germany already provided information on practice relating to immunity of State officials for the ILC’s sixty-sixth session (2014). Therefore, we would like to limit ourselves this year to pointing out judgments that discuss exceptions to immunity.

Decisions of German courts on immunity of foreign State officials from criminal jurisdiction are scarce, in particular concerning possible exceptions.

A. Exceptions to personal immunity

The German Federal Constitutional Court (“*Bundesverfassungsgericht*”) did not accept a constitutional complaint by the former Head of State of the German Democratic Republic (GDR), Erich Honecker, in which he appealed against a criminal sentence by

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arguing that he enjoyed immunity *ratione personae* as a former Head of State.¹ The Federal Constitutional Court confirmed the legal view of the Higher Regional Court of Berlin (“*Kammergericht*”) according to which the immunity of former Heads of State and other high-ranking officials does not outlast the existence of the State which they represent.² Hence, since the GDR acceded to the Federal Republic of Germany on 3 October 1990, and therefore no longer existed when the case was brought to court, these officials could no longer rely on immunity to challenge the proceedings.³ According to the Court, this finding complies with the meaning and purpose of immunity, which should protect the sovereignty of a foreign State and its organs. If a State ceases to exist, there is no longer a reason for granting immunity to its officials.⁴

B. Exceptions to functional immunity

1. No functional immunity for acts of espionage

In cases against officers of the Ministry of State Security of the GDR facing criminal charges for espionage operated from the territory of the GDR as well as within the Federal Republic of Germany, the German Federal Supreme Court (“*Bundesgerichtshof*”) has explicitly stated that public international law provisions concerning functional immunity are not applicable to acts of espionage.⁵ In other words, although espionage is surely an official act, such acts fail to convey functional immunity to the actor. It is an established principle that public international law does not prohibit States from punishing aliens for acts of espionage.⁶ Thus, the accused could not invoke protection from criminal prosecution, which derives from the principle of State immunity, for acts of espionage.⁷

The German Federal Constitutional Court later confirmed these rulings, stating that there is no general rule of international law promulgating that spies can rely on immunity in the case of criminal prosecution for acts of espionage by the affected State. However, the court clarified that there are recognised exceptions in the case of special

¹ Federal Constitutional Court, 2 BvR 1662/91 of 21 February 1992.

² Federal Constitutional Court, 2 BvR 1662/91 of 21 February 1992, juris, para. 4.

³ Federal Constitutional Court, 2 BvR 1662/91 of 21 February 1992, juris, para. 4.

⁴ Federal Constitutional Court, 2 BvR 1662/91 of 21 February 1992, juris, para. 4.

⁵ Federal Supreme Court, StR 347/92 of 30 July 1993, juris, para. 8; StB 11/91 of 29 May 1991, juris, para. 7.

⁶ Cf. Federal Supreme Court, StR 347/92 of 30 July 1993, juris, para. 8; StB 11/91 of 29 May 1991, juris, para. 7.

⁷ Federal Supreme Court, StR 347/92 of 30 July 1993, juris, para. 8; see also StB 11/91 of 29 May 1991, juris, para. 7.

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regimes where individuals enjoy immunity, e.g. as diplomats under the Vienna Convention on Diplomatic Relations of 18 April 1961 (Art. 29 et seq.) or based on the Vienna Convention on Consular Relations of 24 April 1963 (Art. 41 et seq.) or other specific treaties.⁸

2. State ceases to exist

The German Federal Constitutional Court also dismissed constitutional complaints raised by former officers of the highest military board of the GDR against their conviction for indirect perpetration of manslaughter by issuing orders to the GDR border guards to shoot at persons trying to flee the GDR by crossing the border between East and West Germany.⁹ The Court stated that the (functional) immunity of State officials does not outlast the existence of the State in whose service they are employed.¹⁰ In consequence, with the accession of the GDR to the Federal Republic of Germany, the complainants no longer enjoyed immunity. The German Federal Constitutional Court therefore also rejected the argument submitted by one of the complainants that his criminal proceedings violated the sovereignty of the former GDR.¹¹

The Permanent Mission of Germany to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

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⁸ Federal Constitutional Court, 2 BvL 19/91, 2 BvR 1206/91, 2 BvR 1584/91 and 2 BvR 1601/93 of 15 May 1995, juris, para. 174.

⁹ Federal Constitutional Court, 2 BvR 1851/94, 2 BvR 1853/94, 2BvR 1875/94, 2 BvR 1852/94 of 24 October 1996.

¹⁰ Federal Constitutional Court, 2 BvR 1851/94, 2 BvR 1853/94, 2BvR 1875/94, 2 BvR 1852/94 of 24 October 1996, juris, para. 127.

¹¹ Federal Constitutional Court, 2 BvR 1851/94, 2 BvR 1853/94, 2BvR 1875/94, 2 BvR 1852/94 of 24 October 1996, juris, para. 127.

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