

## GERMANY

### LEGAL BASIS

1. **Has your State signed and/or ratified the *United Nations Convention on special missions* (1969)? If not, does your State intend to sign/ratify the Convention?**

Germany has not ratified the Convention. Currently there is no intention to do so.

2. **Does your State apply other international legal instruments in this area (ex.: bilateral, multilateral agreements or headquarters agreements)?**

The Agreement on the Status of Missions and Representatives of Third States to the Nord Atlantic Treaty Organization entails provisions on special missions (art. 2 lit. b).

3. **Has your State adopted a specific national legislation in the field of immunities of special missions?**

There is no specific national legislation in the field of immunities of special missions.

- a. **If so, please provide information concerning the relevant legislative provisions (in particular title, source and content; if possible, please provide official translations in French or in English and/or references to online sources);**
- b. **If not, is the issue of immunities of special missions covered by another part of your legislation? If so, please provide information concerning these relevant legislative provisions (in particular title, source and content; if possible, please provide official translations in French or in English and/or references to online sources).**

The issue of immunities of special missions is covered by the Courts Constitution Act (09/05/1975, Federal Law Gazette I, p. 1077) Section 20 (2):

“Moreover, German Jurisdiction also shall not apply to persons other than those designated in subsection (1) and in Section 18 and 19 insofar as they are exempt therefrom pursuant to the **general rules of international law**<sup>1</sup> or on the basis of international agreements or other legislation.”

English online source: [http://www.gesetze-im-internet.de/englisch\\_gvg/index.html](http://www.gesetze-im-internet.de/englisch_gvg/index.html)

Concerning general rules of international law article 25 of the Basic Law of the Federal Republic of Germany stipulates:

“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.”

English online source: [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html)

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.<sup>2</sup>

4. **Have the authorities of your State released official statements, reports or any other document concerning the status and the immunities of special missions? If so, please provide any relevant information relating to these documents.**

The Federal Foreign Office has issued a circular, addressed to all German public authorities including courts on the treatment of diplomats and other privileged persons. This circular contains

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<sup>1</sup> Emphasis added by the author.

<sup>2</sup> *Inter alia* Federal Constitutional Court, 2 BvM 1/60, of 30 October 1962 and 2 BvM 1/62, of 30 April 1963.

a chapter on special missions.<sup>3</sup> The circular states that according to customary international law members of special missions enjoy immunities and inviolability. For details on the scope of their immunity public authorities should refer to the Federal Foreign Office (II, A. para.3 of the circular).

**5. Does your State consider that certain obligations and/or definitions regarding immunity of special missions derive from customary international law? If so, please provide a brief description of the main requirements of customary international law in this respect.**

In the view of the German government, a “special mission” is a temporary mission, representing a State, which is sent by this State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task. The functions of a special mission shall be determined by the mutual consent of the sending and the receiving State. A State may send a special mission to another State with the consent of the latter, previously obtained through the diplomatic or another agreed or mutually acceptable channel. Consent may also be given implicitly, in exceptional cases consent even retroactively.

The German government takes the view that immunity of the members of special missions from judicial, in particular from criminal proceedings, is part of customary international law. Moreover, if there has been explicit consent on transit, customary law also stipulates the granting of privileges necessary for transit. Beyond these core privileges, States enjoy discretion concerning the exact scope of immunities and privileges of individual special missions. The basis for any regime of immunities has to be the mutually agreed function of the individual mission and the necessities arising out of this function.

Customary international law calls for notification of the exact composition of the special mission, travel dates and its seat in the host country in order to enable the latter to guarantee the mission’s privileges and immunities.

**6. Please provide information on the scope of the immunities of special missions, in particular:**

**a. The extent of the privileges and immunities granted to special missions and to their members;**

As stated under 5. the extent of privileges and immunities granted beyond the core requirements of customary international law depends on the individual special mission and its functions. However, the Vienna Convention on Diplomatic Relations should serve as guideline in this regard.

**b. The scope *ratione personae* (categories of individuals who may enjoy an immunity of special mission);**

There are differences between the immunities granted to diplomatic staff of the mission and its technical and administrative personnel. In this regard, too, the Vienna Convention on Diplomatic Relations may serve as guideline.

**c. The scope *ratione materiae*, in particular by specifying if there are exceptions to the granting of the immunity;**

Cf. answer no. 6 lit. a.

**d. The temporal limits of the immunities accorded to special missions.**

Special missions are of a temporary character. Since privileges and immunities are only based on the concrete task of the special mission, immunities are only granted during the official visit itself.

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<sup>3</sup> Rundschreiben vom 15.09.15 Zur Behandlung von Diplomaten und anderen bevorrechtigten Personen in der Bundesrepublik Deutschland, GMBL vom 19.11.2015, S. 1206ff. (1210), [http://www.auswaertiges-amt.de/cae/servlet/contentblob/669230/publicationFile/189128/Rundschreiben\\_Beh\\_Diplomaten.pdf](http://www.auswaertiges-amt.de/cae/servlet/contentblob/669230/publicationFile/189128/Rundschreiben_Beh_Diplomaten.pdf)

Immunities and privileges do not cover subsequent or prior private visits by members of special missions to the host state.

## **NATIONAL PRACTICE AND PROCEDURE**

- 7. Is there national case law in the field of immunities of special missions? If so, please provide information on these decisions (date of the judgment, authority that issued the judgment, name of the parties, main points of law, French or English translation of the judgment or summary of the judgment in English or in French).**

Federal Supreme Court ("*Bundesgerichtshof*", judgment of 27 February 1984 – 3 StR 396/83, Decisions of the Federal Supreme Court in Criminal Law ("*Entscheidungen des BGH in Strafsachen*"), Vol 32 p. 275:

Upon entering the Federal Republic of Germany on 8 January 1983, the Iranian government official Dr. T. was taken into custody after German custom officials had found him to be in possession of illegal narcotics. Dr. T. contested his arrest and claimed immunity as a special envoy of Iran. There had been no prior notification of his mission by the government of Iran, but by letter of 31 January 1983 the Iranian government confirmed to the German Federal Foreign Office Dr. T.'s status as a special envoy and asked for immunities and privileges due to this diplomatic position.

The district court ("*Landgericht*") Düsseldorf issued a warrant of arrest twice, which was each repealed by the higher regional court ("*Oberlandesgericht*") Düsseldorf. Both courts were in disagreement as to whether Dr. T. was exempted from German jurisdiction on the basis of Section 20 (2) of the Courts Constitution Act (cf. answer 3). The district court decided that the immunity of Dr. T. had not been established, arguing that the conditions of his "special task" were not sufficiently substantiated. The Higher Regional Court, however, ruled that Dr. T. was exempted from German jurisdiction, as he had obtained immunity as a special envoy with the acceptance by the Federal Foreign Office of the notification of the Iranian government.

After the arrest warrant was lifted, Dr. T. left the Federal Republic of Germany and was subsequently declared a *persona non grata*. On the day of his departure, the district court Düsseldorf sentenced him in absentia to three years imprisonment.

Dr. T. subsequently appealed to the Federal Supreme Court ("*Bundesgerichtshof*"). The court ruled that the preconditions of diplomatic immunity were met. It argued that "irrespective of the [UN Special Missions Convention], there is a customary rule of international law based on State practice and *opinio juris* which makes it possible for an *ad hoc* envoy, who has been charged with a special political mission by the sending State, to be granted immunity by individual agreement with the host State for that mission and its associated status, and therefore for such envoys to be placed on a par with the members of the permanent missions of State protected by international treaty law." Overruling the district court, the Federal Supreme Court noted that no excessive demands should be made with regard to the specification of the task of the special mission. It further argued that the necessary bilateral consent may even be given retroactively.

- 8. Is there a mechanism of formal agreement of special missions, namely a process under which your State can accept in advance that an official visit constitutes or not a special mission?**

The regular procedure would be a formal notification to the Federal Foreign Office by the foreign state. The notification should encompass the exact composition of the special mission, travel dates and the place of sojourn envisaged for the special mission in the host State.

- a. If yes, which authority delivers these agreements? What weight do the courts attach to such agreements? Is there a formal notification or communication procedure between the governmental authorities and the courts?**

Normally, the Federal Foreign Office is the competent authority to deliver the consent of the Federal Government. The courts attach great weight to such agreement insofar as the consent is a constitutive element of any special mission. However, in the case mentioned under answer no.

7 the Federal Supreme Court made it clear that German courts are not bound by a declaration of the Federal Foreign Office when construing Section 20 of the Courts Constitution Act in order to determine whether an individual enjoys immunity as member of a special mission or not.

**b. In the absence of such a formal agreement, can an implied consent derive from the behaviour of the governmental authorities?**

It is thought that an official reception of a special envoy by competent German officials would normally indicate implied German consent to the mission.