



Permanent Mission  
of the Federal Republic of Germany  
to the Office of the United Nations and  
to the other International Organizations  
Geneva



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### Note Verbale

The Permanent Mission of Germany to the Office of the United Nations and to the other International Organizations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights and, with reference to the Office's facsimile transmission AL DEU 1/2015 has the honour to transmit enclosed the response by the Federal Republic of Germany to the communication sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on 25 September 2015.

The Permanent Mission would be grateful for a confirmation of receipt.

The Permanent Mission of Germany apologizes for the delay in submitting the attached response, which was caused by technical problems of transmission.

The Permanent Mission of Germany to the Office of the United Nations and to the other International Organizations in Geneva avails itself of this opportunity to renew to the Office of the United Nations Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 23 May 2016



To the

Office of the High Commissioner for Human Rights

Palais Wilson

Geneva

1. *Please provide any additional information and any comment you may have on the above-mentioned allegations, including whether the facts summarized above are accurate.*

The Federal Government would like to comment as follows on the summary of facts:

On page 3, first paragraph, it is stated that the BMJV was informed on 13 May 2015. In fact, on 13 May 2015 the Public Prosecutor opened a corresponding investigation against the two journalists. The BMJV received notice thereof only on 27 May 2015.

On page 3, second paragraph, the notification mentioned would more properly be described as notification "of its doubts as to whether the suspects had the intention to harm the Federal Republic of Germany or to benefit a foreign power through the publication of the documents."

The first paragraph on page 4 should read "On 31 July 2015, the Minister informed the Prosecutor General about and expressed his doubts in a statement... Shortly afterwards, on 4 August 2015, the Prosecutor General held-..."

The first sentence of the second paragraph on page 4 should read: "The same day, on 4 August 2015, the Minister suspended the Prosecutor General."

2. *Please provide information regarding the legal grounds for the indictment of Mr. Beckedahl and Mr. Meister on charges of treason; why the subsequent investigation into their activities was conducted for almost three months before they were officially notified; and indicate how these measures are in conformity with international human rights instruments, norms, and standards, in particular those ratified by Germany.*

The Federal Government would like to underline that there has been no indictment of Mr. Beckedahl and Mr. Meister at any time. There has therefore been no "subsequent" investigation. Rather, the authorities have conducted an investigation in order to establish whether there were sufficient grounds for an indictment. Under sections 152 and 160 of the German Code of Criminal Procedure (StPO), the public prosecution office is under a duty to investigate as soon as it becomes aware of a possible criminal offence. The accused has to be informed and given the possibility to comment prior to the conclusion of the investigations

under section 163a of the StPO. This procedure is in accordance with all relevant human rights instruments and standards. The relevant provisions of the StPO are attached.

### **Section 152**

#### **[Indicting Authority; Principle of Mandatory Prosecution]**

- (1) The public prosecution office shall have the authority to prefer public charges.
- (2) Except as otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications.

### **Section 160**

#### **[Investigation Proceedings]**

- (1) As soon as the public prosecution office obtains knowledge of a suspected criminal offence either through a criminal information or by other means it shall investigate the facts to decide whether public charges are to be preferred.
- (2) The public prosecution office shall ascertain not only incriminating but also exonerating circumstances, and shall ensure that evidence, the loss of which is to be feared, is taken.
- (3) The investigations of the public prosecution office shall extend also to the circumstances which are important for the determination of the legal consequences of the act. For this purpose it may avail itself of the service of the court assistance agency.
- (4) A measure shall be inadmissible where special provisions regulating its application, being provisions under Federal law or under the corresponding *Land* law, present an obstacle thereto.

### **Section 163a**

#### **[Examination of the Accused]**

- (1) The accused shall be examined prior to conclusion of the investigations, unless the proceedings result in termination. Section 58a subsection (1), first sentence, sub-

sections (2) and (3) and Section 58b shall apply *mutatis mutandis*. In simple matters it shall be sufficient to give him the opportunity to respond in writing.

(2) If the accused applies for evidence to be taken in his defence, such evidence shall be taken if it is of importance.

(3) The accused shall be obliged to appear before the public prosecution office if summoned. Sections 133 to 136a and Section 168c subsections (1) and (5) shall apply *mutatis mutandis*. On application by the accused, the court competent pursuant to Section 162 shall decide on the lawfulness of his being made to appear. Sections 297 to 300, 302, 306 to 309, 311a and 473a shall apply *mutatis mutandis*. The decision of the court shall be incontestable.

(4) The accused shall be informed of the offence with which he is charged when he is first examined by officials in the police force. In all other cases Section 136 subsection (1), second to fourth sentences, subsections (2) and (3) and Section 136a shall apply to the examination of the accused by officials in the police force.

3. *Please provide information on what measures have been taken in order to safeguard the freedom of the press and to protect whistleblowers in Germany who report on issues relating to mass surveillance national security and law enforcement.*

The freedom of the press is guaranteed not only in Art.5 of the Basic Law (see below), but also in Art. 10 of the European Convention on Human Rights, as well as in other international treaties Germany is a Party to. The Federal Constitutional Court has consistently held the freedom of the media indispensable for a free democratic society (e.g. BVerfGE 107, 299, 329). The freedom of the press under the Basic Law includes the protection of confidentiality between journalists and private informants. Without such confidentiality the press cannot exercise its role as public watchdog.

While restrictions on the publication of official secrets – including criminal sanctions – may be constitutionally acceptable, the imposing of any such sanction has to be carefully weighed against the fundamental importance of the freedom of the press in our democracy (see BVerfGE 20, 162, 178).

Against this background, the Federal Constitutional Court has held in 2007 that “the mere disclosure of an official secret within the meaning of § 353b of the Criminal Code by a journalist is, under Art. 5 para 1, 2nd sentence of the Basic Law, insufficient to establish suspicion that the journalist has aided and abetted the betrayal of an official secret and that the search and seizure can be authorised under criminal procedural law” (BVerfGE 117, 244, 266).

## **Article 5**

### **[Freedom of expression, arts and sciences]**

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.