THEMATIC COMPILATION OF RELEVANT INFORMATION SUBMITTED BY GERMANY

ARTICLE 11 UNCAC

JUDICIAL AND PROSECUTORIAL INTEGRITY

GERMANY (FOURTH MEETING)

I. Information requested from States parties in relation to integrity in the judiciary, judicial administration and prosecution services (Article 11)

1. Has your country adopted and implemented Article 11 of the UN Convention against Corruption?

Germany has not yet ratified UNCAC.

2. Please cite, summarize and, if possible, provide copies of the applicable policy(ies) or measure(s):

In particular, the Secretariat would be grateful for information regarding
a) the constitutional and legal framework applicable in States parties aimed at ensuring the independence and integrity of the judiciary and, where appropriate, the prosecution service

aa) Mechanisms and guarantees on the constitutional level to protect the independence and integrity of the judiciary

On the federal level judges are appointed to their office by a committee consisting of representatives of the governments of all *Länder* and of members chosen by the federal parliament (Article 95 Paragraph 2 of the German Basic Law [*Grundgesetz* - hereinafter: GG]).
The Länder may provide that *Land* judges shall be chosen jointly by the Land Minister of Justice and a committee for the selection of judges (Article 98 Paragraph 4 GG).
Judges enjoy independence both personally as well as in the process of decision-making and are subject only to the law (Article 97 Paragraph 1 GG).
Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws.
The legislature may set age limits for the retirement of judges appointed for life.
In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary (Article 97 Paragraph 2 GG).
Impeachment against a judge on the grounds of infringing the principles of the constitution or the constitutional order of a Land may be brought exclusively to the attention of the Federal Constitutional Court, which by a two-thirds majority may order that the judge be transferred or retired, only in the case of an intentional infringement it may order the judge dismissed (Article 98 Paragraphs 2 and 5 GG).

bb) Legal conditions to ensure the independence and integrity of public prosecution offices

Legal status and structure

The legal status and function of the public prosecution offices are laid down by the Courts Constitution Act (*Gerichtsverfassungsgesetz* - hereinafter: GVG) in its Sections 141 to 151, and in the Code of Criminal Procedure (*Strafprozessordnung - hereinafter: StPO*), e.g. in its Sections 158 to 163. The provisions in the GVG have the character, at least in part, of guiding principles or organisational principles, whereas important allocations of function are provided for in the StPO. An English translation of the GVG can be found under: http://www.gesetze-im-internet.de/englisch_gvg/, an English translation of the StPO can be found under: http://www.gesetze-im-internet.de/englisch_stpo/.

The view is that in principle, the public prosecution offices in Germany are hierarchically structured, independent organs of the administration of criminal justice. They are on an equal level with the courts.
Since the Federal Republic of Germany is a federal state and the responsibility for the administration of criminal justice lies with the Federal *Länder*, there are independent *Land* public prosecution offices in each of the 16 *Länder*. Section 141 GVG states that there should be a public prosecution office at every court. Hence, there is a public prosecution office at every Regional Court in the *Länder*. As a rule, these public prosecution offices also carry out public prosecution functions at the Local Courts.
At every Higher Regional Court, the right of supervision lies with the highest-ranking official of the public prosecution office (Sections 142 and 147 GVG). The public prosecution offices of the *Länder* are subordinate to the respective Ministers of Justice of the *Länder* (Section 147 GVG).

On the Federal level, the Federal Public Prosecution Office exists parallel to the Federal Court of Justice in Karlsruhe; it is “the public prosecution office at the Federal Court of Justice”. It is headed by the Federal Prosecutor General (Section 142 Paragraph 1 first sentence GVG). The Federal Public Prosecution Office is responsible for prosecuting crimes against the state and crimes under Germany’s Code of Crimes against International Law (*Völkerstrafgesetzbuch - VStGB*).

There is no superior/subordinate relationship of any sort between the Federal Public Prosecution Office and *Länder* public prosecution offices. Rather, in cases of “ordinary” offences, prosecution is in principle a matter for the *Länder*.

Integrity of the public prosecution office

Public prosecution offices are bound to maintain objectivity and required by law to fully investigate the offence in question, ascertaining all the incriminating and exonerating circumstances (Section 160 Paragraph 2 StPO). Like the judge in the main proceedings, it is thus obliged to thoroughly investigate the facts of the case.

In investigation proceedings, the public prosecution office alone has the authority to prefer public charges (Section 152 Paragraph 1 StPO). The public prosecution office shall in principle be obliged to take action in relation to all prosecutable criminal offences provided there are sufficient factual indications (Section 152 Paragraph 2 StPO). The principle of mandatory criminal prosecution enshrined here means that there is an obligation to prosecute and, if the relevant conditions have been fulfilled, to bring charges against every suspect.

Public prosecutors also act in their official capacity as deputies of the highest-ranking official of the office under Section 144 GVG. If, following the hearing of the evidence, it is the public prosecutor's conviction that there is no evidence against a defendant, the public prosecutor is bound by the principle of objectivity to apply for an acquittal. The individual public prosecutor is therefore not measured by whether proceedings end in acquittal or conviction.

The public prosecution office operates in the administration of justice and is part of that functional area. Together with the judge, it fulfils the task of providing access to justice within the criminal justice system.

Independence of the individual public prosecutor

In practice, the individual public prosecutor enjoys a large measure of independence in taking decisions in processing individual cases. However, the officials of the public prosecution office must comply with the official instructions of their superiors (Section 146 GVG). The right of supervision and direction lies with the highest-ranking officials of the public prosecution offices and with the Federal Minister of Justice (Section 147 Paragraphs 2 and 3 GVG). These instructions must be lawful and are not to collide with the principle of mandatory criminal prosecution and the relevant regulations under criminal law and under the StPO. The public prosecutor may raise an objection to unlawful instructions (right of remonstration).

Under Section 144 GVG, public prosecutors act in their official function as deputies of the highest-ranking official. Thus, if the public prosecution office consists of a number of civil servants, which is the rule, all the public prosecutors subordinate to the head of the office act as his deputies. That means that a public prosecutor's procedural measures (for example, his agreement to halt proceedings) take full effect even if they contravene a binding instruction by his superior.
The right of the Minister of Justice to issue instructions has practical significance in that it involves the issuing of general guidelines and circulars that do not relate to a specific individual case but to the proper handling of provisions of criminal procedure and of criminal law.
The aim is to guarantee standardised criminal justice measures. Here, reference must be made to

- the Guidelines on Criminal Proceedings and Fines Proceedings (*Richtlinien für das Strafverfahren und das Bußgeldverfahren - RiStBV*), containing in particular detailed instructions on the prosecution of certain criminal offences;

- the Guidelines for the Youth Courts Law (*Richtlinien für das Jugendgerichtsgesetz - RiJGG*), containing requirements relevant to criminal proceedings against young persons;

- the Guidelines on Relations with Foreign Countries in Criminal Matters (*Richtlinien für Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten - RiVASt*) and

- the Directive on Communications in Criminal Matters (*Anordnung über Mitteilungen in Strafsachen - MiStrA*), focusing in particular on which department or other public authority is to be informed on criminal cases.

The permissibility of the ministerial right to issue instructions and recommendations takes account of the fact that the Minister of Justice bears parliamentary responsibility for the

Ministry's activities and portfolio. Hence, he is essentially free to implement his legal policies by issuing instructions in individual cases. In this respect, he is subject to parliamentary control. Clearly, when issuing an individual instruction, he can only move within the parameters of what is legally permissible, i.e. the Minister's right to issue instructions may not to collide with the principle of mandatory prosecution and the relevant provisions of criminal law and criminal procedure law. In order to avoid even the appearance of impermissible political influence being exerted on investigation proceedings, ministerial instructions in specific individual cases are an exception.

b) codes of conduct and disciplinary mechanisms applicable to members of the judiciary and prosecution service, including whether these were developed with reference to international standards such as the Bangalore Principles on Judicial Conduct or the Standards of Professional Responsibilities and Statement of the Essential Duties and Rights of Prosecutors.

aa) Disciplinary proceedings against judges

Supervision

Section 26 Paragraph 1 of the German Judiciary Act (*Deutsches Richtergesetz* - hereinafter: DRiG; an English translation can be found under: http://www.gesetze-iminternet.de/englisch_drig/index.html) provides that judges shall be subject to supervision in principle only in so far as there is no detraction from their independence (Article 97 GG). The administration of justice, a core area of judicial activity, is exempt from supervision; only activities performed by a judge that concern the external form of performing official duties are subject to supervision (e.g. meetings are to be held in meeting rooms, standard forms are to be used etc.). If a judge acts in breach of his duties, supervision has only two measures at its disposal under Section 26 Paragraph 2 DRiG: the judge's improper mode of executing an official duty may be censured, and his proper and prompt attention to official duties may be urged.
If, in view of the misconduct, it is considered necessary to take measures that go beyond the censure and urging within the meaning of Section 26 Paragraph 2 DRiG, these can only be ordered by means of disciplinary proceedings. There is no separate disciplinary law provision for judges either in federal law or in the laws of the *Länder*. For judges in federal service, the Federal Disciplinary Act (*Bundesdisziplinargesetz* - BDG) shall apply mutatis mutandis, in accordance with Section 46 DRiG. Corresponding provisions for judges in Land service are to be found in the Land judiciary acts.

Misconduct

The subject of a disciplinary proceeding is the misconduct that has taken place when a judge is guilty of having acted in breach of his duties (Section 77 Paragraph 1 of the Federal Civil Servants Act (*Bundesbeamtengesetz* - BBG) in conjunction with Section 46 DRiG for federal judges, or Section 71 DRiG in combination with Section 47 Paragraph 1 first sentence of the Act on the Status of Civil Servants (*Beamtenstatusgesetz* - BeamtStG) for *Land* judges).

A decision on whether misconduct has taken place depends on the circumstances of the individual case. Breaches of the following duties may lead to the filing of disciplinary proceedings:

- In and outside office, a judge shall conduct himself, in relation also to political activity, in such a manner that confidence in his loyalty to the constitution and his independence will not be endangered (Section 39 DRiG). In addition, a judge shall carry out

his official duties impartially and unbiasedly and shall consider the public good in performing his official duties.

- In engaging in any political activity, he shall practice the moderation and restraint deriving from his position towards the general interest with regard for his office, both in and outside office.

- Section 40 DRiG limits a judge in acting as an arbitrator, giving an expert opinion in arbitration proceedings or acting as a conciliator.

- Under Section 41 DRiG, a judge shall not draw up expert legal opinions, nor shall he give legal advice for remuneration.

- Insofar as a judge is asked to perform additional activities in the administration of justice and in court administration under Section 42 DRiG (e.g. training post-graduate legal trainees), he is obliged to do so.

- Section 43 DRiG obliges all professional judges to preserve secrecy regarding the course of deliberations and voting also after their service has ended.

By force of the reference in Section 46 DRiG (or Section 71 DRiG for judges in *Land* service), the provisions of the Federal Civil Servants Act (or of the Act on the Status of Civil Servants) on general duties are applicable mutatis mutandis except as otherwise provided in the German Judiciary Act and provided that the application in question is compatible with the judge's legal status. The following provisions derive from due application of civil service regulations:

- the duty of loyalty to the constitution (Section 60 Paragraph 1 third sentence of the Federal Civil Servants Act, Section 33 Paragraph 1 third sentence of the Act on the Status of Civil Servants;

- the duty to preserve secrecy regarding official duties (Section 67 of the Federal Civil Servants Act, Section 37 of the Act on the Status of Civil Servants);

- the duty to perform additional activities only in accordance with the regulations of Sections 97 ff. of the Federal Civil Servants Act;

- the prohibition on accepting rewards or gifts (Section 71 of the Federal Civil Servants Act, Section 42 of the Act on the Status of Civil Servants).

Official/formal disciplinary proceedings

Disciplinary powers are exercised by the judge's superior and by the judicial service courts of the federation and the *Länder*. Upon suspicion of misconduct, the supervisor initiates preliminary investigations. Only a reprimand can be given in a disciplinary ruling, Section 64 Paragraph 1 DRiG (official disciplinary proceedings).

In such case as downgrading, removal of civil service status or loss of pension entitlement is recognised, disciplinary action is to be taken against the judge under Section 34 Paragraph 1 of the Federal Disciplinary Act in conjunction with Section 63 Paragraph 1 DRiG (official disciplinary proceedings). Upon application being made by the highest service authority, the service court shall also give a ruling on a provisional discharge from office, on the withholding of remuneration for service or on the revocation of any of these measures (Section 63 Paragraph 2

DRiG). The Federal Service Court (Section 62 DRiG) or the service courts of the Länder (Section 78 Paragraph 1 DRiG) are competent to take formal disciplinary proceedings.

The service courts were especially created to deal with disputes closely connected with judicial independence arising from judicial service status.

Disciplinary measures

Disciplining involves relevant disciplinary measures intended to encourage judges to appropriately perform their duties.
In accordance with Section 63 DRiG in conjunction with Section 5 of the Federal Disciplinary Act, there are graduated disciplinary measures for judges in federal service, depending in principle on the gravity of the misconduct (reprimand, regulatory fine, withholding of remuneration, transfer to an office in the same career with a lower final basic salary (equivalent to downgrading), removal from office).

The special provision of Section 64 Paragraph 2 DRiG applies that the only disciplinary measures that can be imposed on a judge of one of the supreme courts are a reprimand, a regulatory fine or removal from office.

bb) Impeachment suits

The Basic Law demands greater loyalty to the constitution from judges than it does from other citizens. That topicalises impeachment proceedings, which serve to protect the constitutional order. In such case as a judge's conduct in and out of office involves the breach of the principles of the Basic Law or of the constitutional order of a *Land*, the Federal Constitutional Court may rule in an impeachment suit that the judge be transferred to a different office or, if his conduct was intentional, dismissed; the formal hurdles are high (a two-thirds majority of the German Bundestag in favour of the application is required to initiate proceedings). The high hurdles regarding both the form and content are intended to make it difficult to remove judges from office on account of their – lack of – loyalty to the constitution, ultimately protecting judicial independence. Due to its specific aim, judgement through impeachment is a distinct type of sanction existing alongside criminal or disciplinary liability. However, as long as proceedings are pending before the Federal Constitutional Court, disciplinary proceedings are suspended and in cases where a decision unfavourable to the judge is taken by the Federal Constitutional Court, they are halted (Section 60 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG).

cc) Disciplinary proceedings against public prosecutors

Public prosecutors are civil servants and, as members of the executive, they have the duty to be impartial and unbiased in performing their duties (Section 60 Paragraph 1second sentence of the Federal Civil Servants Act, Section 33 Paragraph 1 second sentence of the Act on the Status of Civil Servants for civil servants of the *Länder*). The specific official duties deriving from the Federal Civil Servants Act or the Act on the Status of Civil Servants correspond to those specified under b) above.

In such case as a civil servant culpably infringes an obligation incumbent on him, he commits official misconduct under Section 77 Paragraph 1 first sentence of the Federal Civil Servants Act (Section 47 Paragraph 1 first sentence of the Act on the Status of Civil Servants), which is subject to disciplinary action. According to Section 17 Paragraph 1 first sentence of the Federal

Disciplinary Act, his supervisor has the duty to initiate official disciplinary proceedings if there is sufficient factual evidence to justify the suspicion that misconduct has taken place. Unless the proceedings are halted under Section 32 of Federal Disciplinary Act, a disciplinary decision is taken at the end of these official disciplinary proceedings or a an impeachment suit is initiated against the civil servant, depending on the nature and gravity of the misconduct and on the civil servant's personality profile. A disciplinary decision is always possible when an admonition, a regulatory fine or a reduction in salary or pension are possible disciplinary measures (Section 33 Paragraph 1 of the Federal Disciplinary Act). Impeachment proceedings are to be initiated when a decision has been taken concerning the removal of civil service status or loss of pension entitlement.

Public prosecutors are subject to supervision under Section 147 GVG. Unlike in the case of judges, this gives the respective supervisor the authority to issue official instructions, also individual cases (Section 146 GVG).

d) measures taken to improve the transparency and efficiency of procedures governing case ssignment and distribution;

In Germany, the transparency of the allocation of tasks among the courts is guaranteed by he principle of the lawful judge enshrined in the constitution (Article 101 Paragraph 1 GG), which constitutes a major element of the rule of law. The guarantee of the lawful judge is realised by means of a regulatory system which determines in advance the judge responsible for the decision in every case.

The presidium of the respective court is responsible for this regulatory system. It determines the allocation of court business to judges for each business year. Which proceedings are allocated to which adjudicating body is decided in advance from the roster allocating court business on the basis of general, factually objective criteria (Section 21e Paragraph 1 GVG).

It is also determined in advance which judges belong to a particular adjudicating body. The individual adjudicating bodies also make binding arrangements prior to the beginning of the business year as to which of the judges belonging to the adjudicating body will work on which incoming proceedings (Section 21g GVG).

In accordance with Section 21e Paragraph 9 GV, the roster allocating court business shall be open for inspection at the office of the court designated by the president or supervising judge. Meanwhile, most courts also publish their roster on their Internet homepage, giving litigants easy access to information about their lawful judge.

e) policies and/or practices aimed at increasing transparency in the court process, for example by allowing public and media access to court proceedings, facilitating access to court judgements and raising public awareness through information sharing and outreach programmes.

According to the basic principle of Section 169 GVG, hearings before the adjudicating court in Germany, including the pronouncement of judgments and rulings, are public. This enables uninvolved third parties to take part in court hearings as members of the public ("direct audience").

The direct audience principle includes the possibility for the press to cover court hearings.

Film, radio or television recordings of court hearings ("indirect audience") are not permitted, however. Under Section 169 second sentence GVG, film, radio and television recordings intended for public presentation or publication of their content are explicitly prohibited. According to the case law of the Federal Constitutional Court, the audience principle derives from the principles of the rule of law and democracy. Its purpose is for the general public to control the course of proceedings.

5. Which challenges and issues are you facing in (fully) implementing Article 11 of the Convention?

Examples of the types of challenges States parties may face in implementing article 11 of the Convention include: (…)

Professional ethics-related subjects are discussed frequently and widely among the German judiciary. As well as initiatives by the *Länder* (e.g. Ethics Groups in Schleswig and Mainz), there is the cross-regional "Network of Judicial Ethics" of the German Judges' Federation (*Deutscher Richterbund* - DRB, http://www.drb.de/cms/index.php). The DRB has drawn up a discussion paper entitled "Judicial ethics in Germany – Theses for discussion relating to the professional ethics of judges and public prosecutors in the German Judges' Federation" and has also compiled a collection of examples of practical cases. Questions of professional ethics are a regular subject of discussion at various events. In 2011, for example, judges and attorneys debated issues relating to the professional ethics of judges and public prosecutors at the 20th German Conference of Judges and Attorneys in a session entitled "Judges play tricks, public prosecutors play poker – Where are the ethics in legal proceedings?"

Many advanced training courses are also offered on the subject of judicial ethics at different locations throughout Germany, both by the *Länder* at regional level and by the German Judges' Academy (*Deutsche Richterakademie*, www.deutsche-richterakademie.de) at crossregional level. The German Judges' Academy, for example, holds an annual one-week seminar entitled "Judicial ethics – bases, perspectives, global comparison of standards of judicial conduct".

In this context, starting from the basic assumption that there is no one right or wrong answer to many ethical conduct issues, any detailed statutory specification of rules and prohibitions concerning ethical conduct is to be rejected. Such specification appears to be impossible in any case, in view of the complexity of imaginable life circumstances. Rather, awareness raising among judges and their discussion of professional ethics issues in the form of discourse is to be advocated. This not only takes account of the subject's complexity, but also increases judges' acceptance of and identification with the discussion results.