

Translated from Russian

A. Immunity of State officials from foreign criminal jurisdiction

The current practice attending the interpretation by Russian Federation authorities of the terms “official acts” and “acts performed in an official capacity” comes down to the following:

I. Legislative regulation

Code of Criminal Procedure of the Russian Federation (Code of Criminal Procedure, article 3 (2)):

“Article 3. Action of criminal-procedure law against foreign nationals and stateless persons

...

“2. The procedural actions stipulated by this Code against persons who enjoy immunity from such actions under universally recognized principles and norms of international law and Russian Federation treaties are carried out with the consent of the foreign State in whose service is or was the person who has the immunity or of the international organization of which the person is or was a staff member. Information regarding whether the person enjoys immunity and the scope of the immunity shall be made available by the Ministry of Foreign Affairs of the Russian Federation.”

That provision was incorporated into the Code of Criminal Procedure by the 4 March 2008 Federal Law No. 26-FZ on the Amendment of article 3 of the Code of Criminal Procedure of the Russian Federation.

II. Legal precedents

Based on the content of article 3 (2) of the Code of Criminal Procedure, if the question of the immunity of a foreign official arises for investigative authorities or the courts, they may request information (regarding the presence and scope of immunity) from the Russian Federation Ministry of Foreign Affairs. Within the confines of the question of the presence of immunity, the question of the criteria for categorizing the activity imputed to the person as being performed in either an “official” or “private” capacity may also arise (in the context of immunity *ratione materiae*). In response to the request, the Russian Federation Ministry of Foreign Affairs provides its opinion, which is then used by authorities to make procedural decisions. At this point in time, the practice amounts to sending an opinion pertaining to the request of the investigative authorities, i.e., in the pre-trial stage of proceedings. Instances of such procedural actions making their way to the public trial stage and the nature of the alleged acts (“official” or “private”) being determined at that stage are unheard of in the Russian Federation.

The Russian Federation Ministry of Foreign Affairs forms its opinion on the basis of a number of criteria, but starts with the facts of each specific case.

In order for the actions of a foreign official to be regarded as “performed in an official capacity” (i.e., “official acts”), they must have been performed in that capacity irrespective of the motives of the person or, as a general rule, the content of

the conduct. The nature of the official's act must be determined ("official" or "private") on a case-by-case basis. Actions outside the realm of the official's functions, but performed by the person in that capacity, are not automatically "private" (that also pertains to wrongful acts).

In that context, some procedural aspects are also relevant. Unlike a situation involving immunity *ratione personae*, when the immunity, according to international law, is deemed as existing automatically without a declaration of immunity of the sending State, immunity *ratione materiae* requires such a declaration from the State that the person represented during the person's time in office. Specifically, that State, within the framework of that declaration, can confirm that the actions performed by the person were performed by that person in an "official capacity", i.e., they are attributed to the sending State. In the absence of such a statement, the presence of immunity cannot be recognized. In order to be able to make such a statement, the sending State must be notified by the State with jurisdiction of potential criminal-procedural actions or must know of them for a fact from public sources. That is why, in the context of the determination of the nature of the alleged activity and the application of the above-mentioned criteria, the position of the sending State, inter alia, is important.