

# *Definition of “State Official” in the Context of Immunity from Foreign Criminal Jurisdiction*

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**Abstract:** As ILC noted, the concept of “State official” is particularly relevant to the topic “Immunity of State officials from foreign criminal jurisdiction”, because it determines the subjective scope of the topic. The concept should meet the following two criteria or characteristics: first, representativeness, i.e., the ability of the State official to act on behalf of the State, regardless of whether the representational relationship is de facto or de jure, temporary or long-term and stable; and secondly, limitations, i.e., the ability to define the relevant person as a State official is limited by the nature of their acts, etc. It is not practical or scientific to make an abstract list of types of State officials. Besides, it is limited, i.e., whether or not the person concerned can be defined as a State official is limited by the nature of his or her behaviour, etc. To sum up, “State official” should be in connection with the State and behave on behalf of the state, these are central elements in defining the concept. Accordingly, in addition to government personnel, political party personnel and foreign military personnel have a theoretical and practical basis for being defined as State officials.

**Keywords:** State official, immunity from foreign criminal jurisdiction, representation, political party personnel, foreign military personnel

## 1. Introduction

Under existing international law, it is generally accepted by the international community that senior State officials such as Heads of State, Heads of Government and Ministers for Foreign Affairs are covered by the concept of “State official”. [1] It is not clear whether other State agents are “State official”. In other words, the scope of “State official” has not been clearly defined in international law. [2] Under such circumstances, when a State official commits a crime abroad, confusion arises as to whether or not immunity from jurisdiction should be granted to him or her, thus affecting diplomatic relations between States. Therefore, a scientific definition of the concept of “State official” in the context of immunity from foreign criminal jurisdiction has important theoretical value and practical significance. The present paper examines the definition of the concept of “State official” on the basis of existing controversies.

As the International Law Commission (ILC) had pointed out, given the differences in the modes of political systems of various countries, it was impossible to provide an exhaustive list of all the functions or office-holders to which the term “State official” referred. Therefore, to clarify the criteria for determining the concept of “State official” and apply it on a case-by-case basis is a feasible way

to scientifically define the concept of “State official”. This paper will focus on a number of criteria for “State official”.

## 2. “Representation” of “State official”

“State official” means any individual who represents the State or exercises its functions. [3] In other words, in exercising elements of governmental authority, State officials are in fact acting on behalf of the State, and their execution of the will of the State symbolises the sovereignty and dignity of the State. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in its judgement in the case of Prosecutor v. Tihomir Blaškić, stated that State officials as instruments of the State, the acts they perform in their official capacity can only be attributed to the State; they should not therefore be the object of sanctions or penalties. [4] Thus, immunity from foreign criminal jurisdiction in respect of acts performed by State officials in the performance of their duties on behalf of the State is in fact immunity from the jurisdiction of the State “standing behind” the State official. Accordingly, only the State has the right to waive the immunity of its officials from foreign criminal jurisdiction, not the individual official. [5] Further, the essence of immunity is the respect of a State for the sovereignty of another State on the basis of the principle of the sovereign equality of States, and the immunity of State officials from foreign criminal jurisdiction is a necessary component of the sovereign immunity of a State; important interests such as the preservation of the sovereignty and security of the State should be demonstrated by respecting and preserving the immunity of its officials from foreign jurisdiction to a certain extent.

What, then, are “State functions”? It should be understood in a broad sense, including legislative, judicial, executive or other functions performed by the State. Of these, the present paper focuses on the differing views of the international community as to whether those who fulfil the judicial functions of the State are State officials. In view of the fact that judges, prosecutors and other judicial officers are generally considered to be faithful only to the facts and the law and not to the will of the State, some States have argued that they should not be included in the category of State officials and enjoy immunity from foreign criminal jurisdiction. [6] In this regard, the author is of the view that judicial officers do not have absolute independence, and the judicial functions they perform are the judicial functions of the State. Judges, prosecutors and other judicial officers of a State inevitably represent the State in the opinion of other States, especially in foreign legal relations, and the outcome of the cases handled by the judicial officers may have a direct and important impact on the diplomatic relations between the States. At the same time, the impartiality of judicial officers in the adjudication of cases plays an important role in maintaining the authority of a country’s laws and the stability of its society. Consequently, judicial officers are inextricably linked to the functioning of the State, both in terms of the process and the outcome of their duties, and should therefore be regarded as an object of the State, and as such should be included in the category of State officials enjoying immunity from foreign criminal jurisdiction.

Furthermore, how is the representative relationship between State officials and the State established? Such a link can be established in a variety of ways: it can be established through the Constitution and laws and regulations, or through a contract; it can be stable and permanent, or temporary; it can be legal, or it can be factual. [2] For example, in the context of the exercise of public power delegated by the Government, the person to whom the power is delegated should, in the course of exercising it on behalf of the Government, be appropriately included in the category of State officials on a case-by-case basis, so that he or she is entitled to immunity from jurisdiction. At the same time, this type of delegation has a temporary character in comparison with the regular representative relationship between the State official and the State, which is expressly provided for in national law. It should be noted that before deciding on the immunity of such a person, it is necessary to ascertain his or her identity, i.e., whether he or she possesses the relevant power of

attorney or power of attorney issued by, inter alia, a State organ, and whether there is any other evidence of authorisation or delegation of authority by, inter alia, a State organ.

For example, where the State has not legally authorised a person to exercise its functions, a de facto representative relationship is created between that person and the State if the State ratifies that person's conducts and its results. The conduct of a State official who exceeds his or her authority in the performance of State functions in the course of an emergency mission without having had the opportunity to obtain the authorisation of the State may also be attributed by the State to acts performed de facto on behalf of the State if the State acknowledges such conduct. Where the law of a State does not provide for the validity of an act performed by a person on behalf of the State in either case, the representative relationship between that person and the State is de facto, and that de facto, rather than de jure, representative relationship does not affect the determination of the legal status of the State official concerned. On the contrary, as some scholars have pointed out, it may not only affect the diplomatic relations of the State, but may also result in the State's avoidance of its responsibility for public interest guarantees and the occurrence of many cases of unlawful infringement of the interests of the "contractual personnel" at the domestic level.[7]

### 3. The "restricted" nature of the status of State officials

The term "restricted" in this context refers to the fact that the status of a State official is limited by the scope and duration of the official's acts. As has been noted, the two are understood to be mutually inclusive and inseparable. [8] As far as the scope of the acts of State officials was concerned, it should be discussed on the basis of a distinction between immunity *ratione personae* and immunity *ratione materiae*. Generally speaking, the scope of subjects enjoying immunity *ratione personae* is limited to three categories of persons: Heads of State, Heads of Government and ministers for foreign affairs.[9] These three categories of persons, because of the special importance of their status, are not subject to criminal prosecution by a foreign State for any acts performed during or prior to their term of office. In contrast, persons other than those in the three categories enjoy immunity from foreign criminal jurisdiction only in respect of acts performed by them "in their official capacity", but not in respect of acts performed by them "in their private capacity". However, the immunity of the State from foreign criminal jurisdiction in respect of acts performed by it "in an official capacity" is not limited in time, i.e., the results of the acts of a State official in this case are permanently attributed to the State. In contrast, a person who enjoys immunity *ratione personae* does not continue to enjoy immunity from foreign criminal jurisdiction for acts performed in a non-official capacity during and around the time he or she is in office.[10]

The act of a State official performing official duties "in an official capacity" is, in other words, the performance of a "State function", and the legal basis for determining a "State function" needs to be further clarified. The legal basis for the identification of "State functions" needs to be further clarified. Specifically, whether the legal basis is international law or domestic law; if it is international law, what is it and how does it comprehensively take into account and deal with the differences in State functions arising from the differences in the systems of different States; and if it is domestic law, whether it is based on the national law of the forum State or the national law of the State of which the State official is a member, and so on. In this regard, the author believes that the scope of State functions should be determined on the basis of international law.

The reason for this is that, as mentioned above, differences in State functions resulting from differences in national systems may make the definition of State functions in the domestic law of one State significantly different from the relevant legal provisions of other States, and the choice between the domestic law of the forum State and that of the State of the State official may lead to a more intense conflict of laws and values between the two States. In such circumstances, it would be unrealistic to expect judges in the forum State to apply the domestic law of the State of the State

official. If only the law of the forum State is applied and the provisions of the law of the State official's State are ignored, the examination of whether the relevant person has performed official acts "in an official capacity" is by no means comprehensive and reasonable, and there may be an unreasonable expansion of the application of the law of the forum State, which will lead to unilateralism that will further undermine diplomatic relations between States and the stable environment of international peace. The resulting unilateralism would further undermine diplomatic relations between States and the environment of international peace and stability.

To this end, the study and codification of international law should be accelerated and strengthened, and the common criteria for determining the official acts of State officials in different countries should be refined and summarised, while the different criteria should be coordinated and harmonized, so as to unify as far as possible the relevant norms and practices of States through legal interpretation, thereby providing clear and scientific criteria for the application of the above-mentioned determinations. In this regard, the National Law Commission, in its further work on the immunity of State officials from foreign criminal jurisdiction, should pay more attention to the detailed study and codification of the above-mentioned issues, so as to provide a clearer and more operational basis for the application of the relevant legal issues in judicial practice.

In view of the foregoing, the status of a State official is enjoyed only when the person concerned is performing official functions on behalf of the State; when he or she performs private acts, he or she is not a State official and does not enjoy immunity from foreign criminal jurisdiction. The subject of immunity *ratione personae* also enjoys immunity from foreign criminal jurisdiction after he has left office only in respect of acts performed in the exercise of his official functions, and he no longer retains his status as a State official in respect of acts performed outside his official functions. This was the view taken by the International Court of Justice in the famous *Congo v. Belgium Arrest Warrant* case and by the British courts in the famous *Pinochet* case.[11]

## **4. Discussion of the status of "State officials" for specific categories of persons**

### **4.1. Staff of State organs**

A staff member of a State organ is a person who holds a position in a State organ unit. Staff members of State organs are the typical type of State officials. According to the International Law Commission's definition, State organs "are not limited to organs of central government, high-ranking officials or those responsible for the external relations of the State, but include governmental organs of any kind, exercising any function and at any level". [2] This definition of State organs does not emphasise such factors as the hierarchy of State organs, and therefore the scope of State organs under this definition is broad, which in turn determines the scope of the staff of State organs. Such persons, by virtue of their employment in State organs, have the status of representatives of the State in the performance of matters within the scope of their duties. A State official who engages in foreign activities in a foreign State enjoys immunity from criminal jurisdiction in that foreign State if he or she is able to produce to the foreign State a document attesting to his or her status.

### **4.2. Political party personnel**

The term "party personnel" is used here to refer to the group of people who have significant decision-making capacity in the work of political parties. Political parties are prevalent in international societies and countries, and their national governance systems are closely linked. While the ruling party is directly in charge of state power, non-ruling parties, such as senatorial or opposition parties, often have the ability to have a significant or even decisive influence on important matters and state behaviour, such as the political landscape of a country. Therefore, members of political parties should be included in the category of State officials entitled to immunity from foreign criminal jurisdiction.

In addition, when a member of a political party commits an offence, his or her actions are often also punished, for example, by the internal regulations of the party. Penalties based on national law and sanctions based on party norms are parallel procedures, each with its own characteristics. In this case, if political party members are not given the status of “state officials”, when they have already received a criminal trial in a foreign court and have served their sentence, they will still need to be re-examined to determine whether or not they should be subjected to internal party discipline upon their return to their home country, thus making the legal punishment process and the internal party discipline process completely separate, resulting in a waste of resources, affecting the efficiency of case handling, and wasting the resources of the judiciary and others. This results in a complete separation of the legal punishment procedure from the Party disciplinary procedure, causing a waste of judicial and other resources and affecting the efficiency of case handling. In this sense, political party members should be granted immunity from foreign criminal jurisdiction.

### 4.3. Foreign military personnel

The term “foreign military personnel” in this paper refers to “members of the military forces of a foreign State who are temporarily, semi-permanently or permanently present or stationed in the territory of the receiving State with the express or implied consent of that State”. [12] It should be noted that the discussion here is not concerned with issues such as innocent passage through the proposed territory, and does not include military personnel of United Nations peacekeeping forces, but is limited to the question of whether the receiving State can exercise criminal jurisdiction on the basis of the principle of territoriality over the military personnel of the sending State who have been stationed there on the basis of the military needs of the State.

Obedience to orders is the vocation of military personnel. In order to ensure the accuracy and timeliness of the execution of orders, military personnel need to be resolutely obedient to the command, and in the execution of foreign public affairs, military personnel embody the significant national will. For this reason, the customary international law mechanism of command responsibility (superior responsibility) has been developed since the Second World War, with the intention of avoiding the irrational phenomenon of individuals being responsible for the behaviour of the State. In addition, state secrets cover national security strategy, foreign policy, military deployment, core scientific and technological research and development and other fields, which are very important to safeguard the core interests of the country, and the state secrets held by military personnel are directly related to national security and even the survival of the country, therefore, in order to avoid the leakage of state secrets, it is necessary to maintain the independence of the exercise of authority of military personnel and other state officials, so as to prevent them from being treated unfairly and interfered with by foreign countries, and to effectively safeguard the national interests. To avoid the disclosure of state secrets, the independence of military personnel and other state officials in the exercise of their functions should be maintained, and unfair treatment and unreasonable interference by foreign countries should be avoided, so as to effectively safeguard the interests of the state. In this regard, whether or not a person is in possession of State secrets should be an important factor in determining whether or not he or she is a “State official”. The granting of immunity from foreign criminal jurisdiction to members of the military is therefore necessary.

## 5. Conclusion

In the light of the foregoing, the definition of the concept of a “State official” in the context of immunity from foreign criminal jurisdiction needs to be centred on the central feature of whether the person in question can act on behalf of the State - whether he or she is “representative” - and this determination needs to be made in the context of a specific scenario, taking into account the specific



circumstances. This is a central feature, and the determination needs to be made on a case-by-case basis, taking into account the specific circumstances of the situation, and is limited by factors such as the nature of the behaviour of the person concerned. The granting of immunity from foreign criminal jurisdiction to State officials does not exempt them from criminal responsibility, but is intended to make the acts of State officials retroactive by reasonable means, based on considerations of the maintenance of national security and diplomatic relations between States. In conjunction with the reasonable application of exceptions to immunity from jurisdiction, the definition of the concept of a State official should therefore give due, but not excessive, consideration to the phenomenon of “impunity”.

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