



# General Assembly

Distr.: Limited  
19 July 2021  
English  
Original: Spanish

---

## International Law Commission

### Seventy-second session

Geneva, 26 April–4 June and  
5 July–6 August 2021

## Draft report of the International Law Commission on the work of its seventy-second session

*Rapporteur:* Mr. Juan José Ruda Santolaria

### Chapter VI

## Immunity of State officials from foreign criminal jurisdiction

### Addendum

- C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission
2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-second session

#### Draft article 12 [13]\*

##### Requests for information

1. The forum State may request from the State of the official any information that it considers relevant in order to decide whether immunity applies or not.
2. The State of the official may request from the forum State any information that it considers relevant in order to decide on the invocation or the waiver of immunity.
3. Information may be requested through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.
4. The requested State shall consider any request for information in good faith.

#### Commentary

(1) Draft article 12 provides that both the forum State and the State of the official may request information from the other State. It is the last of the procedural provisions under Part Four of the draft articles before reference is made to the determination of whether immunity applies or not. This is the subject of draft article 13, which has not yet been considered by the Drafting Committee. Draft article 12 consists of four paragraphs referring to the

---

\* The number between square brackets indicates the original number of the draft article in the report of the Special Rapporteur.



recognition of the right of the States concerned to request information (paras. 1 and 2), the procedure for requesting information (para. 3) and the manner in which the requested State should consider the request (para. 4).

(2) Paragraphs 1 and 2 indicate that both the forum State and the State of the official may request information. Although the Commission takes the view that requests for information follow the same logic regardless of whether they come from one State or the other, for the sake of clarity it preferred to address the two situations in separate paragraphs. The two paragraphs use similar wording, the only difference being the ultimate objective pursued by the requesting State, which is, for the forum State, “to decide whether immunity applies or not” and, for the State of the official, “to decide on the invocation or the waiver of immunity”.

(3) The request for information referred to in paragraphs 1 and 2 is made with such an ultimate purpose in mind and should be understood as part of the process that a State must follow in order to decide on immunity in a specific case, from the perspective of either the forum State (examination and determination of immunity) or the State of the official (invocation or waiver of immunity). This is why the expression “in order to decide” is used in both paragraphs, to show that in both cases the situation is fluid and the final decision will be the outcome of a process that may involve different phases and acts, depending on the circumstances of each case.

(4) When it adopted draft article 12, the Commission took account of the fact that, in order to form a proper judgment as to whether or not immunity applies, the forum State will need information on the official in question (name, affiliation with the State, scope of authority, etc.) and on the connection between the State of the official and the acts of the official that may give rise to the exercise of criminal jurisdiction. This information is essential for enabling the forum State to take a decision on immunity, especially in the case of immunity *ratione materiae*, but it may be known only to the State of the official. The same is true in cases where the State of the official must decide whether to invoke or waive immunity, since that State may need to obtain information on the law or the competent organs of the forum State or on the stage reached in the activity undertaken by the forum State. Draft article 12 is intended to facilitate access to such information.

(5) The information referred to in the preceding paragraph may already be in the possession of the forum State or the State of the official, especially if the provisions of draft articles 9 (on notification), 10 (on invocation) or 11 (on waiver) have been applied prior to the request for information. In acting under those provisions, the forum State and the State of the official undoubtedly will have provided information to each other. However, it is still possible that the information received by these means may in some cases be insufficient for the purposes of the aforementioned objectives. In these circumstances, in particular, requests for information become a necessary and useful tool for ensuring the proper functioning of immunity, while also strengthening cooperation between the States concerned and building confidence between them. The system for requesting information provided for in draft article 12 therefore serves as a procedural safeguard for both States.

(6) The request may relate to any item of information that the requesting State considers useful for the purpose of taking a decision on immunity. Given the variety of items of information that may be taken into account by States for the purpose of deciding on the application, invocation or waiver of immunity, it is not possible to draw up an exhaustive list of such items. The Commission opted to use the expression “any information that it considers relevant”, in preference to “the necessary information”, as the adjective “necessary” could be understood in a narrow, literal sense, especially in English. Conversely, the use of the qualifier “relevant” acknowledges that the requesting State (be it the forum State or the State of the official) has the right to decide what information it wishes to request in each case, as provided in a number of international instruments.<sup>1</sup> The Commission is aware that the phrase

<sup>1</sup> See, for example, the European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959), United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185, art. 3; the Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992), Organization of American States, *Treaty Series*, No. 75, art. 7; the Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries (Praia, 23

“that it considers relevant” adds a subjective element to the draft article, since the question of what information is to be requested is left for the requesting State to determine. However, this subjective dimension merely reflects the margin of discretion that is reasonably allowable in this case, given that it is necessarily the requesting State that must assess whether or not a particular piece of information may be useful for the purpose of taking one of the decisions referred to at the end of paragraphs 1 and 2.

(7) Paragraph 3 refers to the channels through which information may be requested. This paragraph is modelled on paragraph 3 of draft articles 9, 10 and 11, the wording of which it reproduces *mutatis mutandis*. The commentaries to those draft articles are thus applicable to this paragraph.

(8) The Commission nonetheless wishes to draw attention to its decision not to include in draft article 12 a paragraph on internal communication between authorities of the forum State or the State of the official, similar to paragraph 4 of draft articles 10 and 11. This is because the request for information should be understood to refer essentially to information that, in many cases, will be complementary or additional to the information already in the possession of the forum State or the State of the official, and that therefore will usually be sought at a more advanced stage of the process. Thus, it is likely that the competent decision-making authority in each State will already be known to the other and that it is therefore not necessary to introduce this element, which operates as a safeguard clause. In any event, if the request for information is made at a time when the authorities are only beginning to deal with the question of immunity, there is no reason not to apply the principle that the competent authorities of the same State have an obligation to communicate with each other.

(9) Paragraph 4 replaces paragraphs 4 and 5 originally proposed by the Special Rapporteur, which listed the possible grounds for refusal of the request and the conditions to which both the request for information and the information provided could be subject, including confidentiality.<sup>2</sup> The Commission considered it preferable to include in draft article 12 a simpler paragraph merely setting out the principle that any request for information must be considered in good faith by the requested State, be it the forum State or the State of the official. There are several reasons for this. First, the original proposal listing the permitted grounds for refusal could be interpreted *a contrario* as recognizing an obligation to provide the requested information. Such an obligation, however, does not exist in international law, except in respect of specific obligations that may be laid down in international cooperation and mutual legal assistance agreements or other treaties. Second, the original proposal could conflict with any systems for requesting and exchanging information that may be established in international cooperation and mutual legal assistance treaties, which would in any case apply between the States parties. Third, the establishment of a confidentiality rule could conflict with State rules governing confidentiality. Fourth and last but not least, the purpose of draft article 12 is to promote cooperation and the exchange of information between the forum State and the State of the official, but this purpose could be undermined or called into question if the draft article expressly listed grounds for refusal and rules of conditionality.

(10) In the Commission’s view, however, the above considerations do not give grounds for ignoring the question of the criteria that States should follow in assessing requests for information. It therefore opted for wording that sets out, in a simple manner, the obligation of the requested State to consider in good faith any request that may be addressed to it. The term “requested State” reflects the terminology commonly used in international cooperation and mutual legal assistance treaties, which is familiar to States.

(11) The expression “shall consider ... in good faith” refers to the general obligation of States to act in good faith in their relations with third parties. The scope of this obligation, by its very nature, cannot be analysed in the abstract and must be determined on a case-by-case basis. Its inclusion in draft article 12 should be understood in the context defined by the draft article itself: as a procedural tool for promoting cooperation between the forum State and the

November 2005), *Diário da República I*, No. 177, 12 September 2008, p. 6635, art. 1, paras. 1 and 2; and the Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990, annex (subsequently amended by General Assembly resolution 53/112 of 9 December 1998, annex I), art. 1, para. 2.

<sup>2</sup> See the seventh report of the Special Rapporteur (A/CN.4/729), annex II.

State of the official to enable each of them to form a sound judgment to serve as a basis for the decisions referred to in paragraphs 1 and 2. Accordingly, the expression “shall consider ... in good faith” should be interpreted in the light of two elements operating together: first, the obligation to examine the request; and second, the requirement to do so with the intention of helping the other State to take an informed and well-founded decision on whether or not immunity applies, or on the invocation or waiver of immunity. The expression “shall consider ... in good faith” thus reflects an obligation of conduct and not an obligation of result, since it cannot be interpreted as implying an automatic obligation to provide the requested information, but should rather be seen as expressing an obligation not to ignore the request for information.

(12) The requested State should take these elements into account as a starting point for the examination of any request for information, but nothing prevents it from also considering other elements or circumstances in reaching a decision on the request. The Commission did not consider it necessary to refer expressly to these elements, recognizing that it is for the requested State to identify the reasons justifying its decision. However, for indicative purposes only, it may be noted that the grounds that would justify the refusal of a request for information have been expressly stated in various international cooperation and mutual legal assistance instruments, which provide for refusal if the request concerns political or related offences; if the execution of the request is likely to prejudice the sovereignty, security, public order or other essential interests of the State; or if the investigation has been initiated for the purpose of prosecuting, punishing or discriminating in any way against a person or group of persons on account of sex, race, social status, nationality, religion or ideology.<sup>3</sup> Such grounds are included in legal instruments that assume the existence of an obligation to provide the requested information, which is not the case in relation to draft article 12. However, these grounds can certainly be taken into account by the requested State for the purpose of “considering in good faith” a request for information.

(13) The Commission did not consider it necessary to refer expressly, in paragraph 4, to the possibility of attaching conditions to the provision of the requested information. However, nothing would prevent the requested State from assessing whether to formulate conditions as part of the process of “considering in good faith” a request for information, especially if this would facilitate or encourage the provision of the requested information.

(14) Finally, the Commission did not consider it necessary to refer in this draft article to the potential effects of a decision not to provide the requested information. This issue will be discussed later in the context of the determination of immunity, to which it is more closely related.

---

<sup>3</sup> See, by way of example, the following instruments: European Convention on Mutual Assistance in Criminal Matters, art. 2; Inter-American Convention on Mutual Assistance in Criminal Matters, art. 9; Convention on Mutual Assistance in Criminal Matters between the Member States of the Community of Portuguese-speaking Countries, art. 3, para. 1; and Model Treaty on Mutual Assistance in Criminal Matters, art. 4.