



General Assembly

Distr.: Limited
31 May 2022

Original: English, French and
Spanish

International Law Commission

Seventy-third session

Geneva, 18 April–3 June and 4 July–5 August 2022

Immunity of State officials from foreign criminal jurisdiction

Texts and titles of the draft articles adopted by the Drafting Committee on first reading*

Part One Introduction

Draft article 1 Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.
2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.
3. The present draft articles do not affect the rights and obligations of States Parties under international agreements establishing international criminal courts and tribunals as between the parties to those agreements.

Draft article 2 Definitions

For the purposes of the present draft articles:

- (a) “State official” means any individual who represents the State or who exercises State functions, and refers to both current and former State officials;
- (b) an “act performed in an official capacity” means any act performed by a State official in the exercise of State authority.

* The numbers appearing in square brackets refer to the numbers of the draft articles as previously adopted by the Commission.



Part Two

Immunity *ratione personae*

Draft article 3

Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Draft article 4

Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.
2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.
3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

Part Three

Immunity *ratione materiae*

Draft article 5

Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Draft article 6

Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Draft article 7

Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
 - (a) crime of genocide;
 - (b) crimes against humanity;
 - (c) war crimes;
 - (d) crime of *apartheid*;
 - (e) torture;
 - (f) enforced disappearance.
2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Part Four

Procedural provisions and safeguards

Draft article 8 [8 *ante*]

Application of Part Four

The procedural provisions and safeguards in the present Part shall be applicable in relation to any exercise of criminal jurisdiction by the forum State over an official of another State, current or former, that concerns any of the draft articles contained in Part Two and Part Three of the present draft articles, including to the determination of whether immunity applies or does not apply under any of the present draft articles.

Draft article 9 [8]

Examination of immunity by the forum State

1. When the competent authorities of the forum State become aware that an official of another State may be affected by the exercise of its criminal jurisdiction, they shall examine the question of immunity without delay.
2. Without prejudice to paragraph 1, the competent authorities of the forum State shall always examine the question of immunity:
 - (a) before initiating criminal proceedings;
 - (b) before taking coercive measures that may affect an official of another State, including those that may affect any inviolability that the official may enjoy under international law.

Draft article 10 [9]

Notification -to the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.
2. The notification shall include, inter alia, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.
3. The notification shall be provided 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.

Draft article 11 [10]

Invocation of immunity

1. A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible.
2. Immunity shall be invoked in writing, indicating the identity of and the position held by the official, and the grounds on which immunity is invoked.
3. Immunity may be invoked 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 authorities before which immunity has been invoked shall immediately inform any other authorities concerned of that fact.

Draft article 12 [11]**Waiver of immunity**

1. The immunity of a State official from foreign criminal jurisdiction may be waived by the State of the official.
2. Waiver of immunity must always be express and in writing.
3. Waiver of immunity may be communicated 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 authorities to which the waiver has been communicated shall immediately inform any other authorities concerned that immunity has been waived.
5. Waiver of immunity is irrevocable.

Draft article 13 [12]**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.

Draft article 14**Determination of immunity**

1. A determination of the immunity of a State official from the foreign criminal jurisdiction shall be made by the competent authorities of the forum State according to its law and procedures and in conformity with the applicable rules of international law.
2. In making a determination about immunity, such competent authorities shall take into account in particular:
 - (a) whether the forum State has made the notification provided for in draft article 10 [9];
 - (b) whether the State of the official has invoked or waived immunity;
 - (c) any other relevant information provided by the authorities of the State of the official;
 - (d) any other relevant information provided by other authorities of the forum State;and
 - (e) any other relevant information from other sources.
3. When the forum State is considering the application of draft article 7 in making the determination of immunity:
 - (a) the authorities making the determination shall be at an appropriately high level;
 - (b) in addition to what is provided in paragraph 2, the competent authorities shall:
 - (i) assure themselves that there are substantial grounds to believe that the official committed any of the crimes under international law listed in draft article 7;
 - (ii) give consideration to any request or notification by another authority, court or tribunal regarding its exercise of or intention to exercise criminal jurisdiction over the official.

4. The competent authorities of the forum State shall always determine immunity:
 - (a) before initiating criminal proceedings;
 - (b) before taking coercive measures that may affect the official, including those that may affect any inviolability that the official may enjoy under international law. This subparagraph does not prevent the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.
5. Any determination that an official of another State does not enjoy immunity shall be open to challenge through judicial proceedings. This provision is without prejudice to other challenges to any determination about immunity that may be brought under the applicable law of the forum State.

Draft article 15

Transfer of the criminal proceedings

1. The competent authorities of the forum State may, acting *proprio motu* or at the request of the State of the official, offer to transfer the criminal proceedings to the State of the official.
2. The forum State shall consider in good faith a request for transfer of the criminal proceedings. Such transfer shall only take place if the State of the official agrees to submit the case to its competent authorities for the purpose of prosecution.
3. Once a transfer has been agreed, the forum State shall suspend its criminal proceedings, without prejudice to the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official.
4. The forum State may resume its criminal proceedings if, after the transfer, the State of the official does not promptly and in good faith submit the case to its competent authorities for the purpose of prosecution.
5. The present draft article is without prejudice to any other obligations of the forum State or the State of the official under international law.

Draft article 16

Fair treatment of the official

1. An official of another State over whom the criminal jurisdiction of the forum State is exercised or could be exercised shall be guaranteed fair treatment, including a fair trial, and full protection of his or her rights and procedural guarantees under applicable national and international law, including human rights law and international humanitarian law.
2. Any such official who is in prison, custody or detention in the forum State shall be entitled:
 - (a) to communicate without delay with the nearest appropriate representative of the State of the official;
 - (b) to be visited by a representative of that State; and
 - (c) to be informed without delay of his or her rights under this paragraph.
3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the forum State, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights referred to in paragraph 2 are intended.

Draft article 17

Consultations

The forum State and the State of the official shall consult, as appropriate, at the request of either of them, on matters relating to the immunity of an official covered by the present draft articles.

Draft article 18
Settlement of disputes

1. In the event of a dispute concerning the interpretation or application of the present draft articles, the forum State and the State of the official shall seek a solution by negotiation or other peaceful means of their own choice.
2. If a mutually acceptable solution cannot be reached within a reasonable time, the dispute shall, at the request of either the forum State or the State of the official, be submitted to the International Court of Justice, unless both States have agreed to submit the dispute to arbitration or to any other means of settlement entailing a binding decision.

Annex

List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

- International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.
-