

Review Article

Somali Law on Service of Documents Abroad

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Abstract: The execution of international requests for service of procedural documents in the requested country is an old and necessary modality of international judicial cooperation. It supports not only criminal proceedings but also civil cases as well. The importance of this modality increases as a result of the greater mobility of people, nowadays. This research paper describes the current situation from the Somali legal point of view. It resorts to the comparative law approach, mainly. This paper aims at explaining the Somali legal framework for the execution of international requests for service of procedural documents in another country. It reveals the hurdles and gaps of the Somali law on this modality of international cooperation to eventually, facilitate the process of turning Somalia into a more predictable international partner in the common struggle of nations against crime.

Keywords: Somalia, procedural documents, request, letter rogatory, international legal assistance.

I. INTRODUCTION

The execution of international requests for service of procedural documents is a well-known modality of international judicial cooperation in criminal matters. It is regulated by Somali domestic law, in Book V of the Criminal Procedure Code of Somalia, as well as by the Somali international law, in Part IV of the 1983 Riyadh Arab Agreement for Judicial Cooperation, mostly.

The execution of requests for service of procedural documents abroad is the second typical kind of international legal assistance in criminal matters. The other kind is the execution of letters rogatory. Compared to letters rogatory, the preparation of requests for service of procedural documents abroad and their execution in the requested countries is less difficult. Nevertheless, the importance of this modality of international judicial cooperation shall not be underestimated as it brings significant results to criminal justice. It ensures the lawful progress and/or conclusion of crime-related legal proceedings. In view thereof, the domestic legal framework for this modality of international judicial cooperation, which is incomplete now, should be improved in line with the modern developments of legal theory and the legislative experience of other countries.

II. The Essence of this Modality of International Judicial Cooperation

Two types of procedural documents may be served by Somali judicial authorities in another country, namely: documents proper (e.g. judgments, court orders, prosecutor order, indictment, writ of summons) and notifications (written information that some procedural document has been issued in the requesting country). By obtaining the service of such documents the magistrate (prosecutor or judge) in charge of the respective case has his/her procedural obligations under the Criminal Procedure Code {CPC} towards different persons, participating in the proceedings, fulfilled.

The outgoing requests by Somalia for the service of both documents (the proper ones and the notifications) abroad are envisaged by Article 276 [Letters Rogatory to foreign Judicial Authorities], Paragraph 3 of the Somali CPC. It reads: "*Summons to a witness resident in a foreign country shall be transmitted in the same way*" (like letters rogatory as

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prescribed in the two previous paragraphs¹). This text is placed in the Article on letters rogatory. Its location there makes sense as it indicates that the legal regime of this modality of cooperation is quite close to the regime of letters rogatory [Abbel, 2010: 145; Fowler, 2016: 297; McClean, 2002: 7]. After all, the notion of the international (or mutual) legal assistance in criminal matters comprises both letters rogatory and service of procedural documents abroad.

These two modalities of cooperation are similar. They both serve criminal justice. As in the case with letters rogatory, the international legal agreements, to which Somalia is a Party, override conflicting national law on service of procedural documents abroad [Girginov, 2016: 71]. Pursuant to Article 275 (2) of the Somali CPC, “*International letters rogatory on criminal matters, recognition of foreign the criminal judgments and other relations with foreign judicial authorities regarding criminal matters shall be governed by international conventions and customs and, where no provisions are made therein, in accordance with the rules of this Part.*” Requests for service of procedural documents abroad are undoubtedly such “*other relations with foreign judicial authorities regarding criminal matters*”. Given the similarity with letters rogatory if something, which concerns service of procedural documents abroad, is not regulated by law (domestic or international) the rules on letters rogatory might be applied, accordingly.

However, some differences exist as well. When it comes to channels of transmission, the procedural documents to be served must arrive at the addressee in original (hard copy). This is why, unlike letters rogatory, the Interpol channel cannot be used for them; if used the service may not be accepted as validly performed and its result – recognized by the competent judicial authorities in the requesting country, including Somalia. Also, the service of documents may be performed by the Consul of the interested country, especially to its nationals - Article 5 (j) (i) of the 1963 Vienna Convention on Consular Relations. By contrast, the Consul of the interested country is not, usually, allowed to execute letters rogatory, even to interview own nationals. His/her country shall turn to the receiving country for obtaining of the evidence, which it needs.

Finally, the request for service of procedural documents abroad is generally executed in accordance with the law of the requested country. Exceptions in favour of the requesting country’s law exist (e.g. Article 12, para. 3, letter “a” of the IGAD Convention on Mutual Legal Assistance in Criminal matters and Article 10, para. 2. ii of the West African Convention on Mutual Assistance in Criminal Matters) but they are not so common as possible for the execution of letters rogatory. Usually, all foreign countries have and follow a domestic legal rule, such as Article 277 (3) (ii) of the Somali CPC that “*summons shall be served in conformity with the general provisions of this Code*”.

Lastly, the two modalities of cooperation look alike because no country in the world requires that they are treaty-based. As a general rule, reciprocity with the requesting country is sufficient [Parisi& Ghei, 2003: 93; Марышева, 1998: 95].

Letter Rogatory - vs. - Service of Procedural Documents Abroad

COMMON FEATURES	The criminal law of the requesting country must be applicable to the crime in respect of which assistance is sought. Otherwise, the assistance cannot serve any justice.	
	Serves justice by the execution of a request for legal assistance, issued in an interested country	
	Pending criminal or enforcement proceedings in the requesting country	
	Resorting to each of them is a matter of the interested country's discretion	
	No transfer of competence takes place	
	In most cases, the lapse of time for the proceedings continues to run in the requesting country, during the execution of the request by the requested country	
<u>DIFFERENCES</u>	LETTER ROGATORY	SERVICE OF PROCEDURAL DOCUMENTS ABROAD
NEED OF DUAL CRIMINALITY	Dual criminality is required in some cases	Dual criminality is never required
NEED OF OFFENCE'S DESCRIPTION	Description of the criminal offence is required	No description of the criminal offence is required

¹They read as follows:

“1. Letters rogatory to foreign judicial authorities regarding evidence to be taken in a foreign country shall be transmitted through diplomatic channels.

2. In urgent cases, the Court may transmit such request directly to Diplomatic and Consular Agents of the Republic in a foreign country, informing the Ministry of Grace and Justice”.

As per Article 5 (j) (i) of the 1963 Vienna Convention on Consular Relations [ratified by Somalia on 29 March 1968], “*Consular functions consist in ... transmitting judicial and extrajudicial documents...*”

NEED OF INVESTIGATIVE ACTIONS	It is executed through investigative actions, undertaken by the requested country for collection of evidence in its territory	Neither investigative actions are undertaken, nor any evidence is gathered in the territory of the requested country
INVOLVEMENT OF INTERESTED PERSONS	It is not necessarily executed with the participation of person(s) involved or interested in the proceedings in the requesting country	It is always executed with the participation of person(s) involved or interested in the proceedings in the requesting country
APPLICABLE PROCEDURAL LAW	The criminal procedure law of the requesting country or the international criminal court may be applied	The criminal procedure law of the requesting country or the international court is not applicable, in general
USE OF THE INTERPOL CHANNEL	Yes	No

Article 276 (3) of the Somali PC is the only domestic text on requests by Somalia for service of procedural documents abroad. There are no domestic rules on the consequences and specifically, on the legal status of the summoned witness (material or expert witness) who comes to Somalia to testify. In particular, no immunity is provided for him/her.

Rules, providing immunity to witnesses summoned from abroad, exist only in the international agreements ratified by Somalia, e.g. Article 22 [Immunity of witnesses and experts] of the 1983 Riyadh Arab Agreement for Judicial Cooperation {the Riyadh Convention}. The problem is that not every international agreement in the penal field contains such rules; some agreements, especially multilateral conventions (e.g. the UN Convention against Transnational Organized Crime and the UN Convention against Corruption), redirect to the domestic law of the requested country on the issue. Also, the service of procedural documents may be carried out without any agreement at all. **Per argumentum afortiori**, in such situations, the domestic law of the requested country should provide some immunity to the witness (material or expert witness) who is ready to come to Somalia to testify. Otherwise, s/he will not come. Thus, all efforts are in vain. To prevent this result from occurring, the Somali legislation is strongly advised to produce, like most other countries, domestic rules on the immunity of summoned witnesses who decide to come to Somalia.

Somali law does not require and is not in the position to prescribe to request countries how to prove the service of the document sent them by Somalia. This is an issue within the subject-matter of the requested countries' laws – their domestic rules and international legal instruments that these countries have ratified. Interesting provisions in this regard might be found in Article 12 (4) of the IGAD Convention on Mutual Legal Assistance in Criminal matters, Article 7 (2) of the European Convention on Mutual Assistance in Criminal Matters and also Article 10 (2) of the West African Convention on Mutual Assistance in Criminal Matters which reads:

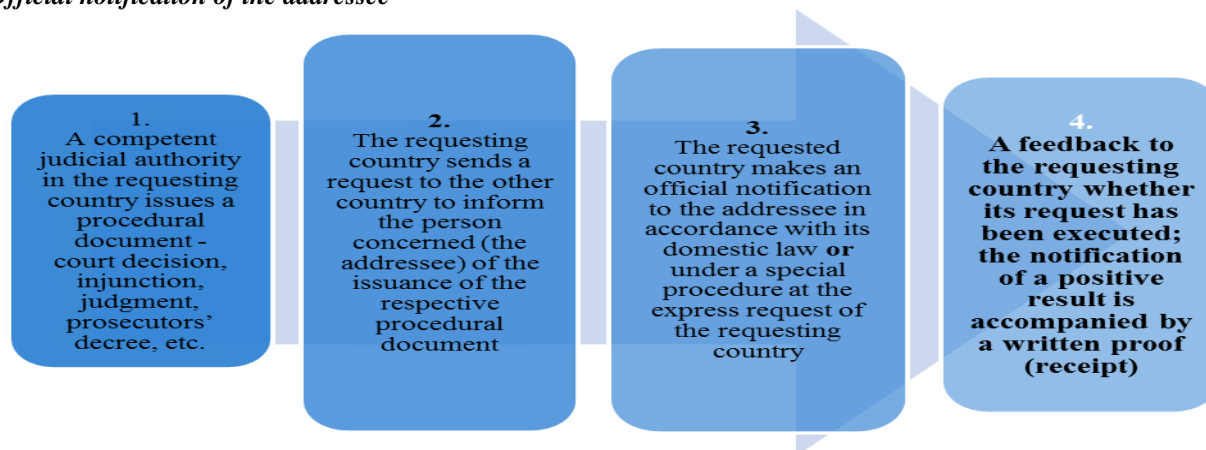
„Proof of service shall be given by means of a receipt dated and signed by the person served or by means of a declaration made by the requested Member State that service has been effected and stating the form and date of such service. One or the other of these documents shall be sent immediately to the requesting Member State. The requested Member State shall if the requesting Member State so requests, state whether service has been effected in accordance with the law of the requested Member State. If service cannot be effected, the reasons shall be communicated immediately by the requested Member State to the requesting Member State. “

Lastly, it is to be remembered that unlike summoning in the territory of Somalia, the international summoning and the appearance before the competent magistrate (judicial investigator, prosecutor or judge/court) take a longer time. This is why many international agreements and requested countries have established (in national laws and declarations to multilateral conventions) a minimal period of time between the time when the request, with the summons to be served, is received and the time when the summoned person should appear, if s/he so voluntarily decides, before the competent magistrate in the requested country. Thus, pursuant to Article 10 (4) (i) of the West African Convention on Mutual Assistance in Criminal Matters, *„A request to effect service of summonses shall be made to a requested Member State not less than 60 days before the date on which the appearance of a person is required.“*²

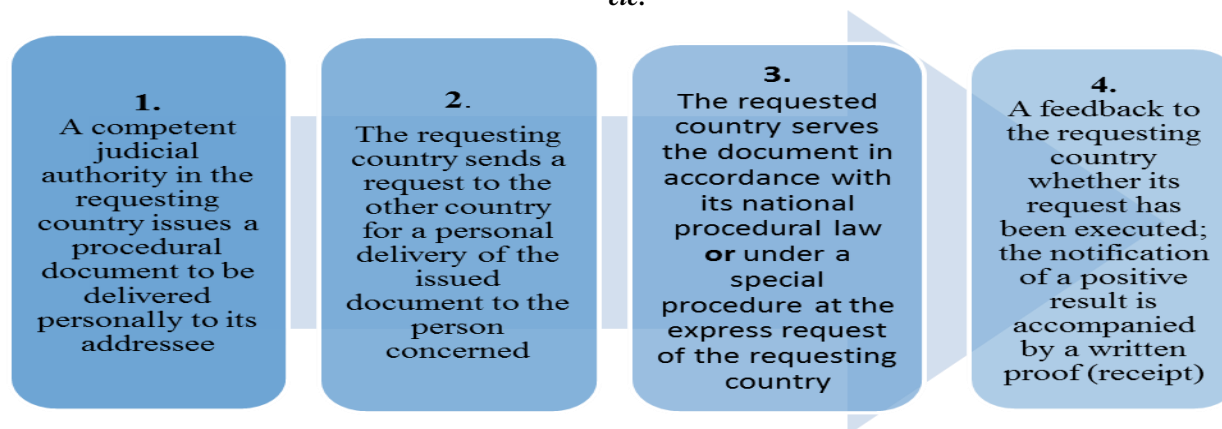
²In Europe, the Parties to the European Convention on Mutual Assistance in Criminal Matters made declarations to Article 7(3) on the deadline when a request for servicing of a summons on an accused person has to be received by them before the date set for the appearance in the requesting country. This time has to be specified in a declaration and may not exceed 50 days. Some examples: **Armenia** - at least 50 days before the date set for appearance; **Bulgaria** - at least 50 days before the date set for appearance; **Cyprus** - at least 40 days before the date set for appearance; **Croatia** - at least 30 days before the date set for appearance; **Israel** - at least 40 days before the date set for appearance; **Poland** - at least 30

PROCEDURES FOR SERVICE OF PROCEDURAL DOCUMENTS ABROAD

1. Official notification of the addressee



2. Personal delivery of a procedural document - court decision, injunction, judgment, prosecutors' decree, summons, etc.



III. The Consequences of the Execution of the Request for Service of Documents

The service of procedural documents in another country, in case that the document served is a writ of summons, entails specific consequences. Thanks to them the bulk of the problems come after the execution, namely: once the witness takes the summons of the foreign judicial authority.

A. The first legal consequence of the service concerns the summoned person. S/he has to decide whether or not s/he should go to the country where he has been summoned to. Unlike national summons and procedures, this is a matter of personal discretion (Article 22, Para. 1 of the Riyadh Convention); the person is not obliged to go and become a witness in Somalia even if s/he is a Somali national or a national of the requested country. The consent of the person is needed even if s/he is a detainee (deprived of liberty) in the requested country – see, for example, Article 13 (1) of the West African Convention on Mutual Assistance in Criminal Matters and Article 11 (1), letter “a” of the European Convention on Mutual Assistance in Criminal Matters.

Any summoned person shall be free of any negative pressure to become a witness in a foreign country, including Somalia. This is why Article 19 of the Inter-American Convention on Mutual Assistance in Criminal Matters stipulates that, *the requested state shall invite the witness or expert witness to appear voluntarily, without the use of threats or coercive measures, before the appropriate authority in the requesting state*. The executing authorities of the requested country can solely stimulate the summoned person's positive decision to go to Somalia by explaining to him/her that s/he would enjoy immunity from prosecution trial and/or punishment (safe conduct) there. Thus, Article 22 (2) of the Riyadh Convention stimulates the attendance of the summoned person in the requesting (summoning) country by contemplating

days before the date set for appearance; **Portugal** - at least 50 days before the date set for appearance; **Romania** - at least 40 days before the date set for appearance; **Russia** - at least 50 days before the date set for appearance; **Serbia, Montenegro and Monaco** - at least 30 days before the date set for appearance; **Sweden and Switzerland** - at least 30 days before the date set for appearance; **Ukraine** - at least 40 days before the date set for appearance.

that „*The body serving a witness or an expert with a subpoena ad testificandum must inform them in writing of such immunity before their first appearance*“.

If, nevertheless, the person fails to answer a summons to appear, s/he shall not, even if the Somali summons contains a notice of penalty, be subjected to any punishment or measure of restraint, unless subsequently s/he voluntarily enters the territory of Somalia and is there again duly summoned (Article 80.7 of the Somali CPC) – see also Article 15 (3) of the West African Convention on Mutual Assistance in Criminal Matters and Article 8 of the European Convention on Mutual Assistance in Criminal Matters.

Lastly, as many summoned persons are not likely to appear in Somalia, it does not make much sense to solely rely on this modality of cooperation. It is advisable to also dispatch (attach to the initial request for Somalia for service of summons) a subsidiary request in the form of a letter rogatory for interviewing the person with the questions that might be posed to him/her if s/he voluntarily arrives in Somalia.

B. The second legal consequence of the service of the procedural document, in case it is a writ of summons, concerns the requesting (summoning) country, if the summoned person appears in its territory. According to Article 22 (1 and 3) of the Riyadh Convention,

„Any witnesses or experts - regardless of their nationality - served notice to attend in the territory of any contracting Party, and doing so voluntarily for this purpose before the judicial bodies of the requesting party, shall enjoy immunity of penal action against them, or arrest, or imprisonment on the basis of previous actions in their part, or in the execution of convictions made prior to their entry to the territory of the requesting Party...

The immunity of the witness or expert shall lapse after 30 days of the date on which the judicial bodies of the requesting party dispense with his presence in the said Party's territory - provided that no reasons beyond the person's control arise to prevent his departure - or if he voluntarily returns to such territory after having departed.“

The immunity is granted *ex officio* (also Article 15, Para. 1 of the West African Convention on Mutual Assistance in Criminal Matters and Article 12 of the European Convention on Mutual Assistance in Criminal Matters). The requested country or/and the summoned person do not need to require it or respectively, insist on obtaining it. However, exceptions are not ruled out. Some laws may trigger the immunity of the summoned person on the grounds of his/her request or on the grounds of an additional request of the requested country. Thus, pursuant to Article 22 (1) of the Inter-American Convention on Mutual Assistance in Criminal Matters, *„the appearance or transfer of the person who agrees ... to testify under the provisions of this convention shall require, **if the person or the sending state so requests** prior to such appearance or transfer, that the receiving state grant safe-conduct under which the person, while in the receiving state, shall not ... be detained or prosecuted for offences committed prior to his departure from the territory of the sending state“*.

Finally, if the person is a detainee, Article 24 [Detained witnesses and experts] of the Riyadh Convention is applicable. It reads as follows:

„Each contracting Party undertakes to transport persons detained by them - if they are duly notified under the provisions of this agreement - to appear before a judicial body of any other contracting party requesting to hear their testimony or opinion as witnesses or experts, and the requesting Party shall bear the costs of transporting such persons.

The requesting Party undertakes to keep such persons in detention and to return them as soon as possible or within the time period prescribed by the contracting Party receiving such requests...“, that is to say – within the time period prescribed by the requested Party.

Similar are the provisions of Article 13 of the West African Convention on Mutual Assistance in Criminal Matters and Article 20 (2) of the Inter-American Convention on Mutual Assistance in Criminal Matters.

Regretfully, there is no provision in the Somali domestic law, CPC, in particular to contemplate immunity to summoned witness (material or expert witness) who appears in Somalia to testify. In particular, no immunity is provided for him/her. Rules, providing immunity to witnesses summoned from abroad, exist only in the international agreements ratified by Somalia, e.g. the above-quoted Article 22 [Immunity of witnesses and experts] of the Riyadh Convention.

The problem is that not every international agreement in the penal field contains such rules; some agreements, especially multilateral UN conventions (e.g. the Convention against Transnational Organized Crime and the Convention against Corruption), refer to the domestic law of the requested country on the issue. Also, the service of procedural documents may be carried out without any agreement at all. Obviously, in such situations, the domestic law of the

requested country should provide some immunity to the witness (material or expert witness) who is ready to come to Somalia to testify. Otherwise, s/he will not come. Thus, all efforts are in vain. To prevent this result from occurring, the Somali legislation is strongly advised to produce, like in most other countries, domestic rules on the immunity of summoned witnesses who decide to come to Somalia. Article 63 of the UAE Law on International Judicial Co-operation might be an appropriate example as it reasonably protects accused persons (defendants) also³.

For the purposes of providing guarantees for the aforementioned immunity of the summoned detainee in the requesting country, both Article 18 (11), letter „c“ of the UN Convention against Transnational Organized Crime and Article 46 (11), letter „c“ of the UN Convention against Corruption prescribe that the country, to which the person is transferred, shall not require the country, from which the person was transferred, to initiate extradition proceedings for the return of the person. Even such persons are free from any extradition detention (provisional or full) and proceedings. **Per argumentum a fortiori**, this freedom from extradition is valid also for all summoned non-detainees who appear to testify in the requesting country [Bassiouni, 2014].

Moreover, within the timeframe of the immunity, no extradition proceedings shall be allowed against the summoned persons at the request of any third country either. Their immunity protects them also from being subject to any other legal proceedings for international judicial cooperation, especially those which involve personal restriction. Such legal proceedings at the request of a foreign country might be instituted for the transfer of criminal proceedings from the requesting country to the requested one or for the recognition and enforcement by the requested country of a criminal judgment issued in the requesting country⁴. Both legal proceedings may include even detention of the person concerned – see, for example, Article 27 of the European Convention on the Transfer of Proceedings in Criminal Matter and respectively, Article 32 (2) of the European Convention on the International Validity of Criminal Judgments [Voynova, 2015: 178].

IV. Non-compliance with (non-consideration or rejection of) the Somali Request

Refusals to consider requests for international legal assistance (letters rogatory and/or requests for service of procedural) are not well accepted by any requesting country. If a Somali request has been turned down, the potential reaction of Somalia would depend on the relation of this country with the requested one.

If the request is not treaty-based and Somalia has relied on comity alone, then the requested foreign country could be only in breach of its own domestic law if the law does not impose any restrictions to consideration of incoming requests but, on the contrary, requires their consideration. Either way, the typical Somali reaction would be to reciprocate by not considering future requests for international legal assistance from that foreign country.

When the requested country considers the request from Somalia but refuses to execute it, that foreign country could break its own law only if no legal ground justifying the rejection exists. Either way, the Somali reaction might, again, be to reciprocate in the future.

³This Article reads as follows:

“If the object of the judicial assistance is to request a witness, expert or defendant to attend before any of the judicial parties, it is not allowed to prosecute or detain him or limit his personal freedom regarding criminal acts or convictions previous to his departure from the territory of the requesting State.

It is also not allowed to litigate, detain or penalize him for his testimony or the expertise report submitted by him.

It is not allowed to subject the witness or expert who failed to attend despite his notification of the obligation of attendance to any penalty or compulsory procedure even if this obligation includes a condition of penalty.

The immunity granted to the witness or expert provided for in the preceding two paragraphs shall terminate after the elapse of consecutive thirty days starting from the date of his notification in writing from the party which required his attendance of that his presence is no more required and he had the opportunity to leave the State territory, but remained therein or if he has returned to it voluntarily; the period in which the witness or expert was unable to depart from the State territory for reasons beyond his will shall not be included.”

⁴It is noteworthy that the Somali domestic law contains rules only for the recognition and enforcement of foreign criminal judgments (Articles 282 – 286 of the CPC). There are no domestic legal provisions for the transfer of criminal proceedings. This is difficult to understand because the recognition and enforcement of foreign criminal judgments is a modality of cooperation which entails a stronger intervention in the justice system, whereas the transfer of criminal proceedings gives only the results of the investigative actions undertaken in the requesting (sending) foreign country within the proceedings, prior to forwarding them to Somalia. It is up to the Somali judiciary to decide how to make use of these results.

If, however, the Somali request is based on an international agreement (bilateral treaty or multilateral convention) with the requested country, then a failure to comply, not justified by any legal ground for rejection, would put that foreign country in breach of its obligations. In such a situation, three options are available to the requesting country, including Somalia:

- first, it might prompt executive or diplomatic pressure to honour the request;
- second, it may bring an action before the International Court of Justice, e.g. Djibouti against France in 2006 [International Court, 2019], and
- third, terminate the existing agreement with regard to the foreign country in question: denounce the bilateral treaty with it or declare non-cooperation with that country under the multilateral convention.

CONCLUSION

The execution of requests for service of procedural documents abroad is the second typical kind of international legal assistance in criminal matters. The other kind is the execution of letters rogatory. Beyond the international legal assistance are the other modalities of international judicial cooperation, such as extradition, international transfer of criminal proceedings, recognition and enforcement of foreign penal judgments. Unlike the letter rogatory, the request for service of any procedural document abroad does not need to contain the description of the crime for which the supported legal proceedings are conducted. In most cases, the service may be performed by the Consul of the interested country whereas the Consul is customarily not authorized to execute letters rogatory. His/her country shall turn to the receiving country for obtaining of the evidence, which it needs.

Persons, summoned to attend criminal proceedings abroad, shall enjoy full immunity from any penal or related repression in the requesting country, even if they are its nationals. Within the timeframe of their immunity, such persons are protected from being extradited even to the requesting country.

Somalia has announced its intention to accede to the UN Convention against Transnational Organized Crime and the UN Convention against Corruption. Both Conventions require the domestic introduction of the above-mentioned immunity for persons, summoned to attend Somali criminal proceedings. If Somalia does become a Party to any of them, its legislation shall produce such immunity.

Lastly, Somalia must always find some way to explain to its potential partners in legal assistance its domestic mechanisms for rendering such assistance. It must be a predictable partner. Otherwise, the level of its reliability would stay low.

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