

**BRIEFING NOTE:
IMMUNITY OR JURISDICTIONAL PRIVILEGE
AS A SHIELD FROM LEGAL PROCEEDINGS**

Ask 9: Concerning UNCAC Article 30(2), calling for States Parties to ensure that immunities for public officials are strictly limited and there are transparent and effective procedures for suspending immunities for public officials as well as ensuring that immunities are not used to shield individuals from being held to account for corruption offences. Also requesting the IRG to build on the thematic report by UNODC and in consultation with an expert group develop standards on this subject for approval at the 6th COSP.

I. What is the problem or issue?

It is a fundamental principle that all persons are equal before the law. However, immunity or jurisdictional privileges can be a license provided to public officials to shield them from responsibility and accountability regarding corrupt activity, together with a reduced risk of legal consequences. Immunities from jurisdiction confer an exemption from penalties, payments or legal requirements, granted by authorities or statutes upon a specified group of people.

Immunities and jurisdictional privileges are in some circumstances a necessary means to safeguard the functioning of State institutions. However, they can create difficulties as they can appear to render public officials effectively above and beyond the reach of the law. There have been too many examples where public officials asserted *immunities of convenience*, i.e. those immunities created for the sole purpose of escaping legal proceedings.

Where immunity is used improperly, it has a negative effect on the administration of justice and on citizens' trust of officials as credible representatives, as well as citizen's faith in democracy overall. More specifically, it can be highly damaging to the legitimacy of an overall anti-corruption strategy, public perceptions of justice, private business functioning and international cooperation.

One relevant recent example is the scandal involving allegations of the abuse of immunity by Teodorin Nguema Obiang, son of the President of Equatorial Guinea.¹ Mr. Obiang is the subject of corruption investigations in France and the United States.² In May 2012, after the French investigation was opened, the President appointed his son as second vice-president of the Republic of Equatorial Guinea, a position not provided for in the country's Constitution. The son of the President now claims immunity.

II. Background on immunities and jurisdictional privileges

Immunity comes in many different forms and exists for a number of different reasons. For example, immunity under international law is based on respect for sovereign equality and the need for States to function effectively. More specifically, under international law there is

- sovereign (or State) immunity;
- diplomatic and consular immunity;
- Head of State immunity;
- immunities of international organisations and (limited) immunity for its officials.

¹ <http://www.uncaccoalition.org/learn-more/articles/181-equatorial-guinea-takes-france-to-the-international-court-of-justice>
Accessed 10 May 2013.

² <http://star.worldbank.org/corruption-cases/node/18586> Accessed 10 May 2013.

Under domestic/national law there is immunity in some countries for

- the judiciary;
- ministers;
- parliamentarians; or
- other public officials.

The different types of immunity have been considered necessary to safeguard the functioning of State institutions. Legislative immunity, for example, is intended to allow lawmakers to work independently and unimpeded by the threat of intervention from the other branches of government in the discharge of their legislative duties. The purpose of judicial immunity is twofold: it encourages judges to act in a "fair and just" manner, without regard to the possible extrinsic harms their acts may cause outside of the scope of their judicial work. It protects government workers from harassment from those whose interests they might negatively affect. Parliamentary immunity reduces the possibility of pressing a member of the parliament to change his vote by fear of prosecution. Immunity for public officials aims to protect civil servants from the fear of litigation in performing discretionary functions entrusted to them by law.

Immunity falls into two principal categories: non-liability and inviolability. The first type of immunity is understood to apply to members of legislative bodies (e.g. parliamentarians) with the purpose to guarantee their independence. The second type of immunity concerns the protection of various categories of public officials, such as discharging their duties from legal procedures, detention and prosecution, as well as, in some countries, even from police investigation and the use of special investigative techniques.

III. What does the Convention and relevant related texts say?

Article 30 (2) of the UN Convention against Corruption (UNCAC) deals with some of the most important aspects of enforcing the law. It encompasses provisions with regard to the investigation and prosecution and the important as well as complex issue of immunities.³ UNCAC Article 30 also requires that States Parties properly balance the immunities their public officials enjoy with their ability to investigate and prosecute corruption offences:

Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

Similar language can be found in Resolution 3/3 of the Conference of the States Parties (CCSP) to the UNCAC on asset recovery:

11. Also encourages States Parties to limit, where appropriate, domestic legal immunities, in accordance with their legal systems and constitutional principles

UNCAC Article 11 describes measures relating to the judiciary and prosecution services. Although the Article itself does not specifically mention immunities, the legislative guide does further explain the context in which this article should be understood.⁴ The guide clearly defines the scope of the immunity afforded to members of the judiciary:

If immunity is afforded to members of the judiciary, that it be restricted to functional immunity and that it not last indefinitely. An effective and transparent process for lifting immunity for corruption offences would protect against abuses and ensure accountability.

In addition, with the adoption of the UNCAC, the UN General Assembly Resolution 58/4 of 31 October 2003 requested "the Conference of the States Parties to the Convention to address the criminalisation of

³ Technical Guide UNCAC, UNODC (2009), p. 82. Available here:

https://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395_Ebook.pdf. Accessed 10 May 2013.

⁴ Legislative Guide UNCAC, UNODC (2009), p. 35. Available here:

http://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf Accessed 10 May 2013.

*bribery of officials of public international organisations, including the United Nations, and related issues, taking into account questions of privileges and immunities, as well as of jurisdiction and the role of international organisations, by, inter alia, making recommendations regarding appropriate action in that regard.*⁵ The UN General Assembly wanted to prevent the abuse of immunities by public officials in international organisations, such as the UN itself.

At its first session, the UNCAC COSP adopted Resolution 1/7 recalling this paragraph of UNGA Resolution 58/4 and requesting “*the UNODC to invite relevant public international organisations to participate with States parties in an open-ended dialogue on the issues of privileges and immunities, jurisdiction and the role of international organizations and to report to the COSP at its second session on efforts to address the concerns of the General Assembly expressed in its resolution 58/4 of 31 October 2003.*”⁶ However, the second COSP session did not receive such a report but did adopt Resolution 2/5 in order to again recall the specific paragraph of the UNGA Resolution.⁷ The third COSP adopted Resolution 3/3 encouraging States Parties to limit, where appropriate, domestic legal immunities, in accordance with their legal systems and constitutional principles.⁸

Additionally, the UN has previously discussed the issue of criminal accountability of UN staff and experts on mission.⁹ These discussions were initially related to sexual exploitation and abuse scandals by UN staff during peacekeeping missions. These discussions on criminal accountability are however equally relevant and applicable regarding other criminal acts, such as corruption, committed by UN staff.

One of the latest adopted resolutions on this topic was General Assembly Resolution 66/93. It recalled an earlier Resolution endorsing the recommendation that a group of legal experts be established to provide advice on the best way to proceed so as to ensure that the original intent of the UN Charter can be achieved, namely that UN staff and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station, not unjustly penalised, without due process. Paragraph 2 of 66/93 strongly urged for States to take all appropriate measures to ensure that crimes by UN officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice, without prejudice to the privileges and immunities of such persons and the United Nations under international law, and in accordance with international human rights standards, including due process. While upholding the privileges and immunities of UN officials and experts on mission, it is expected that international law and national legislation of the host State shall be respected by such personnel and no crime committed by them should go unpunished.

Member States individually have expressed similar considerations. Governments of Canada, Australia and New Zealand have called for UN staff to be accountable for criminal acts as this is critical to the integrity, credibility and effectiveness of the UN.¹⁰ The EU delegation to the UN has also underlined their continued support for a zero tolerance policy for crimes committed by UN officials and experts on mission.¹¹

IV. Implementation Review Group report

The UNCAC Implementation Review Group (IRG) has recently produced a report containing information on the implementation of UNCAC Chapter III and, more specifically, analyses the implementation of Article 30(2) of the Convention.¹² The report identifies the balance of immunities and jurisdictional privileges as

⁵ UN General Assembly Resolution, A/RES/58/4, paragraph 6. Available here:

http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/58/4&Lang=E Accessed 10 May 2013.

⁶ <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session1-resolutions.html> Accessed 10 May 2013.

⁷ <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session2-resolutions.html> Accessed 10 May 2013.

⁸ <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session3-resolutions.html> Accessed 10 May 2013.

⁹ For example, UNGA Resolutions 60/9, 65/185 and 66/193.

¹⁰ <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2010/0-8-October-2010.php> Accessed 10 May 2013.

¹¹ http://www.eu-un.europa.eu/articles/en/article_12714_en.htm Accessed 10 May 2013.

¹² Implementation Review Group, *Implementation of chapters III (Criminalisation and law enforcement) and IV (International cooperation) of the UNCAC (Review of articles 30-39)*, (CAC/COSP/IRG/2013/7). Available here:

<http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/27-31May2013/V1382050e.pdf> Accessed 10 May 2013.

one of the most common challenges in the implementation of UNCAC Article 30. The IRG report describes issues concerning immunities and privileges in several States Parties. In one of the studied jurisdictions, a suspension of immunities by Parliament was needed to investigate these officials, though there was no legal procedure to resolve cases where requests to suspend immunities remained unanswered. Relaxation of the relevant standards and procedures for lifting immunities was recommended. In another State Party, the law conveyed immunities to a number of high-ranking officials, but the anti-corruption authority, unlike other law enforcement agencies, was not required to seek permission to investigate certain categories of officials.

V. Other international organizations and bodies

There is consensus among international organizations and bodies along their adopted legislation that immunities have to be limited to allow effective prosecution of corruption offences.

The Commonwealth Working Group on the Recovery and Repatriation of Assets of Illicit Origin recommended that Commonwealth Heads of State/Government, ministers and other public officials should not have immunity from prosecution for alleged criminal activity. Heads of Government should commit themselves to take active steps to ensure the removal of these immunities. This recommendation was accepted for implementation by the 2005 Commonwealth Heads of Government Meeting in Malta.¹³

The Group of States against Corruption (GRECO) issued a report in which they discussed immunities of public officials as possible obstacles in the fight against corruption.¹⁴ The Council of Europe's Committee of Ministers had earlier adopted the twenty guiding principles, one of which aimed to limit immunity from investigation, prosecution or adjudication of corruption offences to a degree necessary in a democratic society.¹⁵

The OECD Working Group on Bribery has also made recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences. The Working Group recommended to consider, within the constitutional principles of the State, measures that may be taken in order to ensure that immunity does not impede effective investigation, prosecution and adjudication in foreign bribery cases.¹⁶ And, in this respect, to consider clearly limiting the immunity applicable to them, to acts done in performance of the office holder's duties (i.e. functional immunity).¹⁷

VI. How can this issue be addressed?

It is crucial to eliminate the possibility to be shielded from legal proceedings with an assertion of immunity. States Parties may consider that legitimate immunities and other privileges are only those that are necessary means to safeguard the functioning of the State. Consequently, States Parties may take into account a number of aspects in order to provide for an appropriate balance between immunities or jurisdictional privileges and the possibility of effective investigations and prosecution.

Immunities may have to be limited to allow effective prosecution of corruption offences.¹⁸ States Parties should consider limiting the scope of protection as officials should not be completely inviolable and should not be exempt from criminal proceedings in a broad range of issues.

¹³ Key recommendations 2 and 3 of the Report of the Commonwealth Working Group on Asset Repatriation (August 2005). Available here: http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/E6642A80-04E0-4848-A2FE-0397BADBC2DE_LMM05_AssetRepatriationReport.pdf. Accessed 10 May 2013.

¹⁴ GRECO, Lessons learnt from the three Evaluation Rounds (2000-2010), p. 41. http://www.coe.int/t/dghl/monitoring/greco/general/Compendium_Thematic_Articles_EN.pdf. Accessed 10 May 2013.

¹⁵ Guiding principle 6 of Resolution (97) 24 on the twenty guiding principles for the fight against corruption. [http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution\(97\)24_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Resolution(97)24_EN.pdf) Accessed 10 May 2013.

¹⁶ Compilation of Recommendations made in the Phase 2 Reports, Recommendation 3 (f) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45605080.pdf>. Accessed 10 May 2013.

¹⁷ *Id.*, p. 115.

¹⁸ "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law"; the Institute of International Law (2001). Available here: http://www.idi-ii.org/idiE/resolutionsE/2001_van_02_en.PDF. Accessed 10 May 2013.

Additionally, States Parties should wish to limit immunity in its timeframe. Most constitutions include criminal acts or proceedings from before entering office. Such wide timeframes should be and can be very easily limited. A simple way of limiting immunities concerning corruption offences is to adopt an explicit exemption for certain categories of criminal offences (such as “grave” crimes) in the constitution.

States Parties may wish to bear in mind that UNCAC Articles 11 and 30 follow a “functional” notion of immunities or jurisdictional privileges. In other words, immunities or privileges attach to the office, not the office holder.¹⁹ At the very least, States Parties should consider limiting immunity and jurisdictional privileges to acts related to an official’s duties (functional immunity) as in accordance with the sphere of the UNCAC. Moreover, States Parties should consider establishing objective criteria for the procedure of lifting or suspending immunities.

In practice this means that States Parties may recognize that sovereign and diplomatic immunity available to foreign public officials should not prevent the prosecution of offences established in accordance with the Convention whenever the official in question took his/her office after the commencing of the proceeding.

SUMMARY OF KEY RECOMMENDATIONS:

Immunities and jurisdictional privileges are a necessary means to safeguard the functioning of State institutions. However, they can create difficulties as they can appear to render public officials effectively above and beyond the reach of the law. Immunity or jurisdictional privileges can be a license provided to public officials to shield them from responsibility and accountability regarding corrupt activity, together with a reduced risk of legal consequences.

States Parties should implement Article 30(2), in particular to ensure strict limits on immunities and effective and transparent procedures for suspending them as well as ensuring that immunities are not used to shield individuals from being held to account for corruption offences.

¹⁹ Technical Guide UNCAC, UNODC (2009), p. 82. Available here:

https://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395_Ebook.pdf. Accessed 10 May 2013.