

**Statement by Maud Perdriel-Vaisssiere, UNCAC Coalition
for the discussion panel on ‘Special Measures against grand corruption’
at the UNCAC Implementation Review Group Briefing for NGOs
in Vienna, Austria on 4 June 2015**

“International immunities & impunity for grand corruption: Breaking the link”

Mr. President, Distinguished Delegates, Ladies and Gentlemen,

First of all, let me thank you for the opportunity to contribute to this IRG Briefing.

I’d like to address the issue of international immunities which has been identified in a recent StaR publication as a key barrier to the prosecution of grand corrupters – and, as a result, as an obstacle to the effective enforcement of UNCAC provisions.

UNCAC encompasses a broad set of corrupt behavior on the part of public officials: in addition to obligating states parties to criminalize bribery of national public officials - both active and passive, embezzlement, misappropriation or other diversion of property by a public official; the convention further encourages states parties to criminalize passive bribery of foreign public officials, trading in influence; abuse of functions; and illicit enrichment.

The convention further lays out a comprehensive framework to support international anti-corruption and related asset recovery efforts. In particular, UNCAC contains key provisions aimed at facilitating and enhancing the pursuit of foreign corruption and the recovery of related illegal proceeds by domestic jurisdictions: for example, while Article 23.2.c) requires states parties to criminalize money laundering irrespective of the place where the predicate corruption offence was committed, Article 54.1 encourages states parties to allow the confiscation of assets of foreign origin through the involvement of money laundering or any other appropriate offences.

The general idea behind those provisions was to ensure that there will be no more impunity for corrupt officials nor safe haven for their ill-gotten gains: in other words, even though perpetrators of corruption could be safe at home, the money laundering frequently associated with their conduct will be pursued abroad.

Is it really the case? It is only possible?

While it is now well established that ordinary state officials as well as former senior officials cannot hide behind their immunity privilege to escape foreign prosecutions in cross-border corruption cases; rules are quite different with respect to high ranking officials. And yet, Grand Corruption typically takes place at the top levels of the public sphere.

Ordinary state officials as well as former senior officials only enjoy functional immunity: also known as immunity *ratione materiae*, it only prohibits states from the exercise of criminal jurisdiction in relation to acts performed by foreign state officials in an official capacity.

In other words, as long as the illegal conduct was performed in a private capacity, nothing prevents jurisdictions from bringing criminal proceedings against foreign state officials.

Moreover, it results from states judicial practices that functional immunity does not apply where corrupt acts are involved:

- For example, in June 2000, former Ukrainian Prime Minister Pavlo Lazarenko was found guilty of money laundering by a Geneva court: he was given an 18-month suspended sentence and \$6.5m was confiscated from his Swiss accounts. Pavlo Lazarenko was also sentenced by the US in 2004 to nine years in prison for money laundering, corruption and fraud.
- More recently, in March 2012, Jean Rene Duperval, a Haitian official at the center of the DOJ's Haiti Telco prosecution, was sentenced to nine years in prison for money laundering.
- Likewise, in April 2012, James Ibori, former governor of Delta state in Nigeria, was jailed for 13 years for money laundering by a court in London; all his properties in the UK were also confiscated.

In definitive, it seems that, just as the international crimes that are within the jurisdiction of the International Criminal Court, corruption practices, even facilitated by the office, are not regarded as "official acts" covered by functional immunity.

Those rulings make a lot of sense. As the House of Lords put it in its Pinochet II judgement: *"how can it be for international law purposes an official function to do something which international law itself prohibits and criminalizes?"*

Rules however are, as I said, quite different regarding high-ranking officials.

According to customary international law, heads of state and other high-ranking officials (such as Head of Government and Minister for Foreign Affairs) are, by virtue of their office, entitled to personal immunity from criminal jurisdiction in foreign domestic courts. Also known as immunity *ratione personae*, personal immunity is broad since it prohibits foreign states from the exercise of criminal jurisdiction against him/her while he/she is in office. In other words, whenever a senior public official is entitled to personal immunity, no criminal proceedings may be brought abroad against him/her no matter if the illegal conduct was performed prior to taking the office, nor if it was performed in a private capacity and bears no relation with his/her official functions, no matter how serious the illegal conduct is nor if said conduct is prohibited under international (criminal) law.

In fact, to date, no criminal proceedings have ever been successfully brought against high-ranking officials in foreign jurisdictions.

As a consequence, most grand corruption and related asset recovery cases initiated so far have targeted former or deposed heads of states.

This is especially problematic when dealing with grand corrupters who have remained in power for decades. Past cases have shown that, the longer it takes for enforcement authorities to institute proceedings, the smaller the chance that they will manage to secure a criminal conviction against the defendant and/or to recover the assets. In fact, as a result of the passage of time, the expiration of the statutes of limitation is likely to reduce the

possible avenues for prosecution, supporting evidence may not be available any more while potential witnesses may have passed away. As for the corrupt assets, they will have certainly been concealed and layered, likely in multiple jurisdictions, mixed up with legitimate income – making it even more difficult (if not impossible) to recover. Tunisia, Libya, Egypt and now Ukraine are most likely facing these challenges in their ongoing international asset recovery efforts.

In definitive, it appears that the worst perpetrators of corruption are the least likely to be called to account.

This legal cause of impunity is all the more scandalous that, despite the fact that it is well established in customary international law that immunities accorded to public officials are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States, they are often abused by corrupt agents seeking to escape foreign proceedings.

For example, the son of the president of an oil-rich West African country, has made every attempt to escape money laundering proceedings in France and to protect his ill-gotten wealth by abusing the international law rules on immunity. First, he vainly tried to join the UNESCO as a Deputy Permanent Delegate – a position which comes with the immunity privilege. Then, in May 2012 (shortly after the seizure of his assets in France), he got appointed Second Vice President of the Republic - a high-ranking position susceptible to hamper the proper course of the proceedings in France...

The case is still ongoing but it raises important policy questions as to whether crimes of grand corruption committed by foreign Heads of State and other high ranking officials should continue to enjoy personal immunity from the criminal process – especially when said immunities were “made up” for the sole purpose of escaping foreign proceedings?

During the last Conference of States Parties in Panama, States Parties adopted a resolution on asset recovery in which they expressed their concern that some persons accused of crimes of corruption had managed to escape justice and stressed the need to hold corrupt officials accountable. The question therefore is: how to make that happen without reevaluating the international rules on immunity?

While a recent study by the Institute for Economics and Peace (IEP) based in Sydney found strong statistical evidence that high levels of corruption is a leading indicator for political instability and insecurity, the UNCAC Coalition believes that time has come to change the rules of the game.

Therefore, the UNCAC Coalition wishes to call on the IRG to recommend the upcoming CoSP in St Petersburg the adoption of a resolution to address this issue.

The resolution should call for States Parties to ensure that immunities and other privileges enjoyed by foreign public officials are not abused and, in particular, are not used to shield individuals from accountability for corruption offences.

These measures, which are in strict line with the spirit of UNCAC Article 30.2, are, we believe, of critical importance to ensure proper accountability for corrupt officials and effective recovery of their ill-gotten gains.

Thank you for your attention.