CONTEMPORARY ISSUES IN INTERNATIONAL LAW

Kenneth Mwenda

Contemporary issues in **international law**

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Foreword

Public international law norms and standards have over centuries been developed to shape the interaction and behaviour of nation states and international organisations *inter se*, as well as the relationships between nation states and international organisations with other subjects of international law. Fundamentally, the development of international law is underpinned by treaty law, customary rules of international law and acceptable state practice. Under international law, states have the obligation to agree to all monitoring and enforcement mechanisms.

Enforcing rules of international law is one of the challenging aspects in today's global village where all states are interconnected and interdependent. While all states are equal and sovereign and participate in international relations as equal parties, it often is intriguing that states with strong economic and political powers sometimes willy-nilly disregard internationally-agreed norms and standards. This has led to some international law commentators questioning whether international law really is law equivalent to municipal law, which is backed by effective sanctions for non-compliance.

The present book is a scholarly contribution to this enduring debate. It puts forth the thesis that although there is no central authority with sufficient power to issue sanctions against states that violate rules of international law, presently there are sufficient enforcement mechanisms under international law. This book distinctly and succinctly demonstrates through existing literature that international law is real law and should be respected in practice by its subjects. In that regard, the book contains a commendably useful collection of literature on the subject matter, to explain the underlying question. The book effectively tackles the vexing question of consequences for non-compliance with rules of international law.

The general introductory part of the book provides an introduction to the rules and principles of international law; taking account of the various theories and schools of thought on the nature and character of international law. It also provides the sources of international law with the purpose of demonstrating that international law really is law. After discussing the general concepts of international law, the author proceeds to examine rules of international law in the context of deep sea-bed mining. The author thereafter turns to examining illicit financial outflows and international debt, and concludes his own assessment of the impact

which these economic activities have had on human rights and freedoms. The author then deals with the question of whether or not international law can protect a corrupt diplomat relying on the shield of diplomatic immunity. In the process of this discussion, the author provides some limitations to the concept of diplomatic immunity with reference to a third state in which the diplomat does not enjoy diplomatic privileges. The book ends with the chapter on the pillar of conventional international law focusing treaty that provides for the establishment and operations of the Common Market for Eastern and Southern Africa (*COMESA*) Court of Justice in Eastern and Southern Africa.

The book has been deliberately written in a manner that makes it comprehensible and appealing to all readers. As the coverage of the topics is constrained by limitations of space, the author has referred readers to academic texts and articles that provide a more comprehensive discussion of the issues. The author has included case law into the text so as to facilitate a better understanding of the rules and principles of international law, and their application.

I have no doubt that this book will serve the needs and interests of those in academia. It is also my view that it will be an invaluable source of information to those who make appearing in courts their business. It will also be a useful reference material to persons who preside over international tribunals and domestic courts seized with the intricacies of the enforcement of international law. It is further hoped that the book will appeal to those outside the legal fraternity, for instance, diplomats and students of international relations. Doubtless, the book is a valuable addition to the growing body of legal literature in the field.

Hon Mr Chief Justice Peter S Shivute
Chief Justice of the Supreme Court for the Republic of Namibia

Preface

It is a truism that public international law lacks a centralised policing and enforcement mechanism for the arrest of erring states or the issuance of sanctions against such subjects of international law. However, does that feature alone rob public international law of the true character of law? In this book I have drawn extensively from the inspiration of my Oxford days more than 20 years ago when I read public international law as a Rhodes Scholar at the University of Oxford. I arrived at Oxford in 1992 after having completed my first degree in law, with honours, at the University of Zambia Law School, followed by a one-year graduate Bar admission programme at the then Law Practice Institute (LPI) that has since been renamed the Zambia Institute of Advanced Legal Studies (ZIALE). At LPI I graduated as the best student and was admitted to the Zambian Bar on first attempt. As a Rhodes Scholar at Oxford I pursued the two-year graduate Bachelor of Civil Law (BCL), the curriculum of which has now been split into a one-year graduate BCL, followed by a one-year Master of Philosophy (MPhil) in Law degree. On the BCL, I read, among other courses, public international law under the able guidance and tutelage of the distinguished and eminent British legal scholar, Sir Professor Ian Brownlie. Professor Brownlie was then serving as the Chichele Professor of Public International Law and a Fellow of All Souls College at the University of Oxford.

Every morning I would get on my bicycle in the cold Michaelmas winters to ride quietly from my graduate student residence, Exeter House, located on Iffley Road, to the Oxford Law Faculty building or All Souls College for lectures and seminars in public international law. I would repeat the rides in the Hilary and Trinity terms. Looking back, it all seems like yesterday. I would park my bicycle at my college, Exeter College, and then walk down Turl Street to All Souls College on High Street for my graduate seminars in public international law. The seminars would be held on Saturday mornings from around 08:30 to around 11:30. Professor Brownlie would chair those seminars. The depth of erudition on those BCL seminars was like nothing pedagogical that I have ever experienced in the entire 40 years of my academic life. You had to be extremely well-prepared to avoid being exposed. His lectures, too, were very illuminating and would be held at the Law Faculty building during working days of the week.

I recall that in one of my seminar presentations on the United Nations Convention on the Law of the Sea 1982, I thought that I had scored a touchdown, having studied all night before the seminar, when Professor Brownlie thoughtfully guided me to the relevance of weaving together a mosaic of conventional international law, customary international law and state practice. All the three pieces had to come together nicely. Suddenly, it dawned on me that what seemed to be an almost impeccable presentation had room for improvement. Those BCL lectures and seminars cast a new light on my understanding of public international law. I had studied public international law in the final year of my first law degree, but not as insightful as the Oxford BCL experience. At Oxford, it all seemed totally new and very illuminating. Indeed, it was an honour to study under such a fine legal scholar as Professor Brownlie. His reputation always preceded him.

When I graduated from Oxford and took up an academic post as Assistant Professor of Law at the University of Warwick in England, I taught, among other courses, public international law. At Warwick I also taught other international law-related courses both on the undergraduate and Master of Laws (LLM) degree programmes. I also supervised and examined several LLM dissertations.

Over the years my understanding of international law, through my extensive experience in academia and at the World Bank, has grown exponentially against the backdrop of the aforesaid Oxford experience. Indeed, I have taught as Extraordinary Professor of Law at the University of Pretoria in South Africa as well as Adjunct Professor of Law at the American University Washington College of Law (WCL) in Washington DC, USA. I have also served as Visiting Full Professor of Law at a number of leading universities in Europe and South Africa, including the University of Miskolc in Hungary and the University of Cape Town (UCT). Further, I continue to serve as Extraordinary Professor of Law both at the University of Pretoria, South Africa, and the University of Lusaka, Zambia. I have also given lead lectures and presentations at major US universities, including Duke University, George Washington University, the University of Maryland, Temple University, Howard University, and the University of South Florida. A number of my former law students have proceeded to become judges of the Supreme Court, the Constitutional Court, the Court of Appeal and the High Court of their respective countries. Others have served as Attorneys-General for their governments. Notable among my former law students is the distinguished Chief Justice of the Supreme Court for the Republic of Namibia, Hon Mr Chief Justice Peter Shivute, who has graced this book with a foreword. Indeed, I am ever grateful to him for the friendship and warm camaraderie

over the years. My other former law students continue to serve as law professors and prominent cabinet ministers in their respective countries.

What started as a small journey at Oxford grew into monumental erudite footprints, traversing some of the coveted academic terrains at the frontiers of legal knowledge. In 1998 Yale University Law School awarded me a highly competitive fellowship. I accepted the Yale offer, but just before proceeding to Yale from Warwick, the World Bank came through with a very attractive offer under the World Bank Young Professionals Programme (YPP). I had to withdraw from Yale to accept the World Bank offer. In my time as Senior Counsel in the Legal Vice-Presidency of the World Bank, I became arguably the first and only lawyer there, since the early 1990s, to join the Legal Vice-Presidency via the prestigious YPP track.

Over the years I have maintained a parallel academic and professional life, publishing academic books and other scholarly work in top journals and law reviews as well as holding various senior academic appointments at leading universities internationally, while serving with the World Bank. In 2008 I was admitted to the rarely-awarded higher doctorate degree of Doctor of Laws (LLD) at Rhodes University following examination of selected scholarly books and peer-refereed journal articles that I have authored. In 2014, following a similar process, I was awarded a second higher doctorate degree, the Doctor of Science in Economics (DSc (Econ)), by the University of Hull. Until late 2019 there was no other known legal scholar in the entire English-speaking community with two higher doctorates in two disciplines, namely, law and a cognate discipline such as economic science. These higher doctorates are in addition to my PhD in Law from the University of Warwick. Higher doctorates, it should be emphasised, are very rarely awarded. They are reserved for those senior scholars that have made exceedingly significant contributions to a science or body of knowledge through exceptionally insightful and distinctive scholarly publications, earning them recognition as international authorities in the field of research that forms the basis of the degree. The concept of an earned higher doctorate that is very significantly higher than a PhD is one that is rare in the United States and Canada, but more established in the United Kingdom, Ireland and other Commonwealth countries.

At the World Bank I have served for a decade as Senior Counsel in the Legal Vice-Presidency, as well as Senior Counsel in the World Bank's Integrity Vice-Presidency, before taking up my current role as the Executive Head of the World Bank Voice Secondment Programme (VSP). I have also been invited and interviewed, as a thought leader and public

intellectual, by numerous print and broadcast media, including the *New York Times* (USA); the *Voice of America* (VOA, USA); *CCTV* (USA); the *Times* (UK); the *British Broadcasting Corporation* (BBC, UK); and *Sky TV* (UK). All these experiences add an indelible and valuable context to my journey in the field of public international law.

On Saturday 25 May 2019 the President of the Republic of Zambia, Dr Edgar C Lungu, conferred on me the prestigious Presidential Insignia of Meritorious Achievement (PIMA), the nation's highest civilian honour for meritorious achievement. The PIMA award ranks as the equivalent of the US Presidential Medal of Freedom, and it was conferred on me in recognition of my distinguished scholarly achievements in the field of law, as evidenced by my extensive body of scholarly publications. A few years before that, President Lungu's predecessor, Mr Rupiah Banda, through his Minister of Tourism, conferred on me the lifetime achievement award of Honorary Tourism Ambassador for the Republic of Zambia, in recognition of my distinguished thought leadership and scholarship.

I am mindful that, in a work of this kind, I owe my gratitude to many people. Indeed, it is not without difficulty that I record my indebtedness to all the people to whom I owe my gratitude. If I omit or forget to mention anyone, please forgive me. Let me start by thanking the good Lord, God Jehovah Almighty, and my dearest parents, Mr Joseph T Mwenda and Mrs Esther M Mwenda. To God, our Father, His mercy endures forever. The fear of the Lord is the beginning of wisdom. To my dearest parents, though you have crossed over, your fatherly and motherly love endures forever. Your words of wisdom will forever remain indelible in my heart, edifying my thoughts and aspirations. I thank you for everything. The time we spent together in England in the summer of 1996 seems like yesterday. Continue to rest in peace and to pray for us.

Here, I would be remiss if I did not mention the late Professor Ian Brownlie for revitalising and helping to shape my scholarly interest in public international law while I was a Rhodes Scholar at Oxford. Indeed, it was an honour to study under such an intellectual luminary. Equally I would be failing in my duty if I did not register my indebtedness to my good learned brother and friend, the Chief Justice of the Supreme Court for the Republic of Namibia, Mr Chief Justice Peter Shivute, for honouring this book with an inspiring foreword. Indeed, I am ever grateful.

Let me now turn to thank the peer-reviewers of this book as well as colleagues who provided some insightful comments on the

earlier drafts of the book. In particular, the comments received from the Director of the Legal Department of the Common Market for Eastern and Southern Africa (COMESA), Mr Brian Chigawa, and the Chief Counsel for Environmental and International Law matters in the Legal Vice-Presidency of the World Bank, Dr Victor B Mosoti, provided valuable tools to bring the ship safely to shore. When I taught at the University of Warwick in the 1990s, Brian was one of my best graduate law students. He has remained a wonderful and reliable friend. Then, Victor, with whom I have collaborated on many academic projects, starting from the time when he was at *the United Nations* Food and Agriculture Organisation (FAO) in Italy, is another wonderful colleague. Victor, a prolific writer and scholar, joined the Legal Vice-Presidency of the World Bank as counsel when I was senior counsel in the said Vice-Presidency.

On the home front, my lovely wife, Dr Judith Mvula-Mwenda, and my adorable son, Joseph, have been my rock. I cannot thank them enough. I am grateful for their patience, understanding and support, as I tirelessly worked long hours in the night and on weekends to bring this book to fruition. My son is an American citizen and was born here in the US. As a mark of solidarity, I decided to take up US permanent residency a few years ago under the highly prestigious Einstein visa, based solely on my extraordinary skills and abilities. Both my wife and I started our professional and academic journeys as graduates of the University of Zambia several decades ago. Judith read medicine at the University of Zambia while I read law. She then practised medicine briefly before proceeding to further studies to pursue a Master of Business Administration (MBA) degree at the University of Leicester in the United Kingdom. Her second Master's degree, a Master of Public Health (MPH) degree, is from the University of Manchester, also in the United Kingdom. Judith is also a published author and has completed post-doctoral education at Harvard University Medical School and Cornell University, respectively. Her hard work inspired me to complete leadership and management studies at Harvard University Business School, Stanford University Graduate School of Business, Harvard University John F Kennedy School of Government, Wharton Business School at the University of Pennsylvania, INSEAD (Institut Européen d'Administration des Affaires) in France, MIT (Massachusetts Institute of Technology) Sloan School of Management, London Business School, Saïd Business School at the University of Oxford, Yale University School of Management, Cornell University, Georgetown University and Northwestern University in Chicago, USA.

The interpretations and conclusions expressed in this book are entirely those of the author. They do not necessarily represent the views of the World Bank, its executive directors or the countries they represent. All the facts and the law presented in this book are as at the date of publication of the book.

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1 February 2021

1 Introduction

That international law sometimes is not followed by some states does not mean that international law is not really law. Even in the case of municipal law, one finds criminals and other law offenders who sometimes go unpunished if the law does not catch up with them. To contend that all forms of law must emanate from a central authority or command that has power to issue sanctions against the law offenders is nothing but a red herring. Even in the case of religion, especially in much of Christianity where there are hardly any imminent threats of sanctions from some mortal central command or authority, many Christians still take the Bible seriously. How can we explain that? One could speculate that perhaps Christians are afraid of missing out on heaven or going to hell. Be that as it may, in the same way that religion appeals to the inner self (moral conscious) of man, the law appeals to the external self. Both law and morality regulate the behaviour of their subjects, with or without sanctions. We shall explore this idea further in chapter 2. Here, suffice it to say, African customary law, for example, though evolving in a flux in accordance with the emerging customs of the people, is often obeyed by its subjects. The courts of law, too, recognise and enforce African customary law where it is applicable. Yet, African customary law does not emanate from a central authority or command. So, the key research questions that this book addresses are the following:

(1) Is international law really law and, if so, how does it operate and why do states follow it?
(2) If state practice departs from customary international law (that is, not as persistent objector) or conventional international law (that is, not as reservations to a treaty), does that imply that international law is not really law, and what is the implication?
(3) How do some powerful subjects of international law influence the development of international law in a globalised world where the weak often find themselves entrapped in unfavourable economic relations, and what impact does this have on the realisation of human rights?
(4) If international law really is law, to what extent can it pierce the impenetrable shield of the inviolability of diplomatic immunity, in order to allow for justice, in a situation where a serious crime or felony is suspected?

(5) How is treaty law often adopted and enforced at the state and sub-regional levels?

This book examines contemporary issues in public international law. As is evident from the bibliography of the book, the literature reviewed is quite extensive. For lack of space here, no elaborate literature review is provided. However, the reader is encouraged to refer to the works in the bibliography. It is important to add that, as subsequent chapters in the book make their original contributions to the discourse on international law, they also acknowledge arguments of other publicists.

This book, however, takes a departure from many standard textbooks on international law. Instead of repeating what others have written in their introductory and standard textbooks on international law, the book focuses on three core pillars that shape the development of public international law. International law in this book is viewed through the prism of these pillars. It is argued that a proper understanding of public international law should be anchored around three core pillars, namely, conventional international law, customary international law and state practice. These three pillars shape the development of public international law. Indeed, what the law is and what it ought to be is not always consistent. State practice can, and sometimes does, depart from the norms of customary international law or conventional international law. International law is not always free of politics. Sometimes the interests of the powerful shape the normative landscape underpinning international law. At other times, international law can be prescriptive, yet the practice of some states remains defiant. Thus, certain sectors of the public wonder if international law really is law or not.

Chapter 2 of the book examines the issue of whether international law really is law or not. It sets the discussion in context. Chapter 2 is developed around the three pillars identified above and makes a case that international law indeed is law. Various theories and schools of thought on the nature and character of public international law are explored. Chapter 2 also addresses the issue of sources of international law while making a case that international law really is law. Various theories on sources of international law are examined to demonstrate that international law really is law. Chapter 2 makes a case of how international law operates and why many states follow it. Customarily international law and conventional international law are both highlighted as the two main traditional sources of public international law and that the other stipulations in article 38(1) of the Statute of the International Court of Justice merely fill in the gap where these two sources appear silent. Chapter 2 also identifies institutions of the state through which international law is often enforced.

Chapter 3 builds on the arguments made in chapter 2 and focuses on deep sea-bed mining. Underpinning the discourse in chapter 3 is the thesis that international law indeed is law and that there arguably is no other area of public international law that is as rich as the law of the sea when it comes to principles of public international law. Chapter 3 examines the question of whether or not customary international law permits a state to make unilateral claims to deep sea-bed mining. The doctrine of the common heritage of mankind is explored, together with pertinent aspects of treaty law on the matter. Also, the state practice of certain powerful nations is examined to show how state practice sometimes can depart from customary international law and conventional international law.

Chapter 4 builds on the thesis that international law really is law by examining the legal aspects of illicit financial outflows and international debt, showing how these economic activities often impact on the realisation of human rights. The chapter brings out evidence of state practice in various parts of the world, showing how capitalist institutions in the West often occupy a vantage position in a globalised world. Indeed, the impact of globalisation on international law is demonstrated in that chapter. Chapter 4 examines, *inter alia*, factors that facilitate illicit financial outflows and measures that have been taken by some states, individually and collectively, to tackle these. The chapter makes an argument that illicit financial outflows from many developing nations and certain forms of international debt owed by these nations continue to impact negatively on human rights standards, especially social, economic and political rights.

Chapter 5 turns to the question of whether or not international law can protect a corrupt diplomatic relying on the shield of diplomatic immunity. Again, the underlying thesis here is whether international law really is law or not. The provisions of the Vienna Convention on Diplomatic Relations 1961 are dissected, together with the attendant customary international law and state practice. Evidence of state practice is also provided to demonstrate some limitations to the concept of diplomatic immunity. While it is true that international law really is law, states and diplomats are expected to apply international law in good faith, not for actualising criminal intent, even though they may continue to enjoy diplomatic immunity in the latter case. It is important to add that where a corrupt diplomat is found wanting in a third state to which he or she is not accredited, he or she may not be afforded the same type of privileges and immunities as in the state where he or she is accredited. A lot depends on the state practice of the third state.

Chapter 6 builds on the preceding chapters to focus on the pillar of conventional international law. The pertinent provisions of the treaty

that provides for the establishment and operations of the COMESA Court of Justice in Eastern and Southern Africa are examined, together with the COMESA Court of Justice Rules of Procedure 2016.[1] The chapter argues that given that the COMESA Court of Justice Rules of Procedure 2016 only came into effect a few years ago, it is too early to determine their efficacy, notwithstanding the fact that they supplement the relevant provisions of the COMESA Treaty 1994. Indeed, customary international law here is yet to crystallise. However, one thing remains clear: International law, whether treaty law or customary international law, or both, really is law.

1 The acronym COMESA stands for Common Market for Eastern and Southern Africa.

2 Is international law really law?

2 Introduction

Guzman makes an argument that international law works because of the 'three Rs of compliance', namely, reciprocity, retaliation and repudiation.[1] On the one hand, Guzman contends that reciprocity is about a state honouring its obligations to avoid other states not honouring their obligations.[2] On the other hand, Guzman proffers that retaliation is about the threat of sanctions from other states if a state does not honour its obligations.[3] Then, repudiation, according to Guzman, is about a state suffering 'reputational pay-offs' if it violates its obligations under international law.[4] However, when the first democratically-elected Prime Minister of the Democratic Republic of the Congo (DRC), Mr Patrice Émery Lumumba, was assassinated on 17 January 1961, the world begun to question whether or not international law really is law, especially that the assassination was orchestrated by some Western powers, as they meddled and interfered in the internal affairs of a sovereign state, the DRC.[5]

1 AT Guzman *How international law works – A rational choice theory* (2008) 33-48; M Klamert 'Review of AT Guzman *How international law works – A rational choice theory* (2008)' (2010) 4 *ICL Journal* 320. See also generally G Ulrich & I Ziemele (eds) *How international law works in times of crisis* (2019).

2 Klamert (n 1) 320.

3 As above.

4 As above.

5 S Kendall 'Postcolonial hauntings and Cold War continuities: Congolese sovereignty and the murder of Patrice Lumumba' in M Craven, S Pahuja & G Simpson (eds) *International law and the Cold War* (2019) 533-558. See also CM Sternat 'Assassination as a means of intervention – The death of Lumumba – The Rule of Amin' (1978) 10 *Case Western Reserve Journal of International Law* 198: 'In analyzing the consequences of foreign assassination in international law, there are two factors which must be evaluated: morality and practicality. The act which requires the taking of a human life cannot be legitimized purely on a basis of expediency. However, practicality cannot be overlooked since it is possible that assassination may not provide the desired ends of political change or the correction of human injustice. An assassination cannot be found morally justifiable if it fails to provide a benefit for the common good.' See also generally S Marks (ed) *International law on the left: Re-examining Marxist legacies* (2008); R Higgins *Problems and process: International law and how we use it* (1996); A Roberts & B Kingsbury (eds) *United Nations, divided world: The UN's roles in international relations* (1994).

Undeniably, international law has historically been associated with imperialism and colonialism.[6] As Klabbers observes, 'the powerful can use international law to create structures that keep their power in place'.[7] To date, nobody has ever been arrested or sent to any war crimes tribunal or the International Criminal Court (ICC) to account for that heinous crime in the DRC. As Nzongola-Ntalaja observes:[8]

> Cold War geopolitical maneuvering and well-coordinated efforts by Lumumba's domestic adversaries culminated in his assassination at the age of thirty-five, with the support or at least the tacit complicity of the US and Belgian governments, the CIA, and the UN Secretariat. Even decades after Lumumba's death, his personal integrity and unyielding dedication to the ideals of self-determination, self-reliance, and pan-African solidarity assure him a prominent place among the heroes of the twentieth-century African independence movement and the worldwide African diaspora.

This chapter examines the question of whether or not international law really is law. At the outset, it must be pointed out that the chapter does not delve into the intricacies of jurisprudential and philosophical arguments of what constitutes law.[9] Rather, the chapter proceeds on the assumption that contemporary legal practice in many states follows a positivist notion of law.[10] So, real law will be assumed to be the positivists' notion of law. The positivist school of thought contends that law is a matter of what has been posited (ordered, decided, practised, tolerated, and so forth).[11]

In this chapter we argue that international law really is law and that the enforcement mechanism of municipal law, as seen from a positivist view, need not necessarily be the benchmark of assessing whether or not

6 J Klabbers *International law* (2013) 6.

7 Klabbers (n 6) 308.

8 G Nzongola-Ntalaja *Patrice Lumumba* (2014), https://www.ohioswallow.com/book/Patrice+Lumumba (accessed 16 September 2020). See also generally E Gerard & B Kuklick *Death in the Congo: Murdering Patrice Lumumba* (2015); *L de Witte Assassination of Lumumba* (2001).

9 On jurisprudential and philosophical arguments pertaining to the concept of law, see generally HLA Hart *The concept of law* (2012); J Coleman & SJ Shapiro (eds) *The Oxford handbook of jurisprudence and philosophy of law* (2004); LL Fuller *The morality of law* (1969).

10 See below.

11 Stanford Encyclopedia of Philosophy 'Legal positivism' *Stanford encyclopedia of philosophy*, https://plato.stanford.edu/entries/legal-positivism/ (accessed 20 September 2020). See also generally T Campbell *The legal theory of ethical positivism (1996); J Finnis Natural law and natural rights* (2011); KE Himma *Morality and the nature of law* (2019); MH Kramer *In defence of legal positivism: Law without trimmings* (1999); WL Morison *John Austin* (1982); J Raz *The authority of law* (2009).

international law really is law. That the international community does not have a constitution to curb excesses of any state does not mean that international law is not really law. We shall explore below the theories of monism and dualism to demonstrate how international law relates to municipal law. Here, suffice it to say that we ought to distinguish international law from mere state practice which could include the municipal law or foreign policy of a particular state. That said, in many cases international law often is enforced by states through their respective municipal laws, judicial bodies and law enforcement agencies.[12] That international law generally does not have a central command or authority to issue sanctions against the subjects of international law does not mean that international law is not really law. Indeed, the absence of a constitution for the international community and a central command to issue sanctions does not deprive international law of the character of law.[13] As D'Amato observes:[14]

> International law is enforced by the process I describe as reciprocal-entitlement violation. The violation may be of the same entitlement or, more likely, of a different entitlement. But it is on the whole an effective process – as effective for the international legal system as is the enforcement of most laws in domestic systems via the state-sanctioned deprivation of one or more entitlements held by individual citizens or corporations. It is impossible to understand why nations do or refrain from doing the things they do without understanding what the entitlements are and how nations act to preserve their full complement of existing entitlements.

We argue further that the debate between monism and dualism to determine the relationship between international law and municipal law is an admission that international law really is law. Further still, the reference by the International Court of Justice (ICJ) to 'general principles of law recognised by civilised nations' under article 38(1)(c) of the Statute of the ICJ in determining international law disputes confirms that international law really is law. For, why would municipal law be compared to something

12 Klabbers (n 6) 287-288.

13 Klabbers (n 6) 9.

14 A d'Amato 'Is international law really "law"?' Faculty Working Papers (Paper 103) (2010) 1, https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1102&context=facultyworkingpapers (accessed 30 August 2020). See also A d'Amato 'Is international law really "law"?' (1984/1985) 79 *Northwestern University Law Review* 1293-1314; AH Kwarteng 'Is international law really law?' (2018) 5 *Asian Research Journal of Arts and Social Sciences* 1-9.

that is not really law? Let us take a more reasoned look at how international law relates to municipal law.

2.1 The relationship between international law and municipal law

A question can be posed: What is the relationship between international law and municipal law? Malanczuk observes that international law does not entirely ignore municipal law.[15] We will demonstrate below that international law really is law. However, before doing so, let us turn to cases where a gap exists in a state's municipal law or where the municipal law of a state disagrees with international law. Indeed, this discussion will put in context the relationship between international law and municipal law to help us appreciate that international law really is law.

As a general rule, a state cannot rely on a rule of or a gap in its own municipal law as a defence to a claim based on customary or conventional international law.[16] In short, a state cannot invoke its municipal law as a justification for not complying with its *erga omnes* obligations.[17] Rather, the state must perform those obligations in good faith, although it is free to decide on the modality of such performance in accordance with its own municipal law.[18]

In addressing the link between state practice and customary international law, we contend that state practice, where it exists as a general practice,[19] together with *opinio juris*,[20] forms the corpus of customary international law.[21] Indeed, state practice, as often evidenced in the municipal laws of various states, demonstrates how municipal law, to some degree, can contribute to the development of international law. The ICJ ruled in the *North Sea Continental Shelf* cases of 1969 that '[n]ot only must the acts concerned amount to a settled practice, but they must

15 P Malanczuk *Akehurst's modern introduction to international law* (1997) 63.

16 Art 27 Vienna Convention on the Law of Treaties 1969 (Vienna Convention). Closely related to that, art 46 of the treaty provides: '(1) A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. (2) A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.'

17 Arts 27 & 46 Vienna Convention.

18 Malanczuk (n 15) 64.

19 *North Sea Continental Shelf* case (Judgment) ICJ Reports 1969 3, 45, para 77.

20 See below.

21 See below.

also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[22]

Further, article 38(1)(c) of the Statute of the ICJ provides that the Court 'whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply (*inter alia*) ... the general principles of law recognised by civilised nations'.[23] In essence, article 38(1)(c) recognises the relationship between international law and municipal law as a symbiotic one, confirming that international law, indeed, really is law. On the one hand, a principle of municipal law, often expressed as state practice, can crystallise into customary international law if it is supported by general state practice[24] (that is, the material and objective element) and *opinio juris*[25] (that is, the psychological and subjective element) of various states.[26] Indeed, the practice of states need not be 'universal' but, rather, 'general'.[27]

On the other hand, many states enact legislation to domesticate treaty and customary norms of international law.[28] In the United States (US), for example, international law is recognised explicitly as law under the US Constitution. Article 6, paragraph 2, of the US Constitution provides in part that '[t]his Constitution, and the Laws of the United states which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United states, shall be the supreme Law of the Land'.[29]

By parity of reasoning, a general practice of states based, say, on the municipal laws of those states, can crystallise into customary international law if there is supporting evidence of *opinio juris*.[30] It is important, however, to add that a state that has been a persistent objector to such a norm of customary international law will not be bound by the custom if

22 *North Sea Continental Shelf* case (n 19) 3, 45, para 77.

23 Statute of the International Court of Justice, art 38(1)(c).

24 *Asylum* case ICJ Rep 150 266. In that case (277) the ICJ held that before state practice can be considered as law, there had to be evidence that that practice was in line with a 'constant and uniform usage' practised by the states in question.

25 *SS Lotus* case 1927 PCIJ (Ser A) No 10 (*France v Turkey*).

26 RMM Wallace *International law* (1997) 9.

27 Wallace (n 26) 11. See also *Fisheries Jurisdiction* case (*United Kingdom v Iceland*) Merits [1974] ICJ Rep 3.

28 See below.

29 Constitution of the United States of America art 6(2).

30 A d'Amato *The concept of custom in international law* (1971) 88.

that custom does not qualify as *jus cogens*.[31] Only a custom that qualifies as *jus cogens* is binding on all states without exception.[32] Closely related to this, international law can also drive the development of municipal law where states codify or domesticate norms of international law.[33] It is our submission, therefore, that the reference by the ICJ to 'general principles of law recognised by civilised nations' under article 38(1)(c) of the Statute of the ICJ in determining international law disputes confirms that international law really is law. As noted above, international law often imports and incorporates elements of municipal law in its corpus.

Following below is an examination of the monist and dualist schools of thought on how international law relates to municipal law.

2.1.1 Dualism and monism

Britannica provides:[34]

> In principle, international law operates only at the international level and not within domestic legal systems – a perspective consistent with positivism, which recognises international law and municipal law as distinct and independent systems. Conversely, advocates of natural law maintain that municipal and international law form a single legal system, an approach sometimes referred to as monism. Such a system, according to monists, may arise either out of a unified ethical approach emphasising universal human rights or out of a formalistic, hierarchical approach positing the existence of one fundamental norm underpinning both international law and municipal law.

Closely related to this, Brownlie contends that the theoretical issue is normally presented as a clash between dualism (or pluralism) and

31 *Fisheries* case (*United Kingdom v Norway*) [1951] ICJ 3; JI Charney 'The persistent objector rule and the development of customary international law' (1985) 56 *British Yearbook of International Law* 1-24; TL Stein 'The approach of the different drummer: The principle of the persistent objector in international law' (1985) 26 *Harvard International Law Journal* 457; B Lepard 'The persistent objector exception' in B Lepard (ed) *Customary international law: A new theory with practical applications (ASIL Studies in International Legal Theory)* (2010) 229-242. See also generally JA Green *The persistent objector rule in international law* (2016). Cf P Dumberry 'Incoherent and ineffective: The concept of persistent objector revisited' (2010) 59 *The International and Comparative Law Quarterly* 779-802.

32 See, generally, A Orakhelashvili *Peremptory norms in international law (*2006); R Kolb *Théorie du* ius cogens *international: Essai de relecture du concept* (2001); JA Frowein '*Ius cogens*' in R Wolfrum *Max Planck encyclopedia of public international law* (2013).

33 See below.

34 Britannica *International law*, https://www.britannica.com/topic/international-law/International-law-and-municipal-law#ref794916 (accessed 31 August 2020).

monism.[35] According to Brownlie, both these schools of thought assume that there is a common field in which the international and municipal legal orders can operate simultaneously with regard to the same subject-matter, but that the issue is which of the two, dualism or monism, takes precedence over the other.[36]

Examining various ways in which the judiciary acts as a gatekeeper between the national and international legal orders, Williams, Charlesworth, Chiam and Hovell note that the orthodox view of monism and dualism, as fixed and rigid categories of interactions between international law and municipal law, does not hold.[37] The authors contend instead that the categories of 'national', 'international' and the 'state' are fluid.[38]

By contrast, observing that the two schools of thought, namely, dualism and monism, do not offer much insightful explanatory power, Denza steps back from the traditional debate and examines instead the closely-related issues of whether or not international law is directly applicable to states and if it is directly effective.[39] Denza delves further into whether or not a treaty can prevail over a national constitutional norm.[40] A related argument is made by Higgins, observing that the differences between international and municipal law in domestic courts are 'substantially conditioned' by whether the concerned state is more monist or dualist in approach.[41] Shaw, however, argues as follows:[42]

> Positivism stresses the overwhelming importance of the state and tends to regard international law as founded upon the consent of states. It is actual practice, illustrated by custom and by treaty, that formulates the role of international law, and not formalistic structures, theoretical deductions or moral stipulations. Accordingly, when positivists such as Triepel and Strupp consider the relationship of international law to municipal law, they do so upon the basis of the supremacy of the state, and the existence of wide differences between the two functioning orders. This theory is known as

35 I Brownlie *Principles of public international law* (1996) 32.

36 As above.

37 See, generally, H Charlesworth et al (eds) *The fluid state: International law and national legal systems* (2005).

38 As above.

39 E Denza 'The relationship between international and national law' in M Evans (ed) *International law* (2006) 412–440.

40 As above.

41 See, generally, R Higgins *Problems and process: International law and how we use it* (1994).

42 MN Shaw *International law* (1997) 100.

> *dualism* (or sometimes as *pluralism*) and stresses that the rules of the systems on international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other.

Shaw posits further that pundits who disagree with the dualist theory and who adopt the monist approach tend to fall into 'two distinct categories: those who, like Lauterpacht, uphold a strong ethical position with a deep concern for human rights, and others, like Kelsen, who maintain a monist position on formalistic logical grounds'.[43] According to Shaw, monists are 'united in accepting a unitary view of law as a whole and are opposed to the strict division posited by the positivists'.[44]

Malanczuk, in the seventh edition of *Akehurst's modern introduction to international law*, posits that there are two basic theories, with a number of variations in the literature, on the relationship between international and domestic law, and that these theories are the dualist (or pluralist) and monist viewpoints.[45] According to Malanczuk, the dualist theory assumes that international law and municipal law are two separate legal systems that exist independently of each other,[46] whereas the monist theory assumes a unitary perception of the 'law' and that both international and municipal law form part of one and the same legal order.[47]

Chiam observes that the validity of international law in a dualist system is determined by a rule of municipal law authorising the application of that international norm.[48] According to Chiam, because of the variety of ways in which domestic systems incorporate international law, some scholars have preferred the term 'pluralism' to 'dualism'.[49] Chiam contends further:[50]

> There are multiple forms of both monism and dualism. Indeed, one of the main critiques of both theories is that no state's system is strictly monist or dualist. Instead, international law may be treated in a variety of ways by the different institutions of a state. For example, courts may use international

43 Shaw (n 42) 100-101.

44 Shaw (n 42) 101.

45 Malanczuk (n 15) 63.

46 As above.

47 As above.

48 M Chiam 'Monism and dualism in international law' *Oxford Bibliographies*, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml, (accessed 26 August 2020).

49 As above.

50 As above.

> law in ways that a parliament does not. Or a state may allow for the direct incorporation of customary international law, but require international treaties to be transformed into domestic legislation before they can have direct effect within a state.

This debate between monism and dualism in international law also confirms that international law really is law. For, as we noted above, why would municipal law be compared to something that is not really law? Let us now turn to examine the middle ground between dualism and monism before we turn to sources of the law and how the sources provide a prism through which to view the relationship between international law and municipal law.

2.1.2 Theories of coordination

Brownlie argues that an increasing number of jurists tend to avoid the dichotomy of monism and dualism and hold that 'the logical consequences of both theories conflict with the way in which international and national organs and courts behave'.[51] Sir Gerald Fitzmaurice, for example, posits that international law and municipal law work in different spheres and that they are each supreme in their respective fields.[52] Rousseau provides a similar argument, contending that international law is a law of coordination which does not provide for 'automatic abrogation of internal rules in conflict with obligations on the international plane'.[53]

In examining the issue of whether or not international law really is law, we turn to look at pertinent aspects of the sources of international law that inform the inquiry as to whether international law really is law. The discussion below focuses only on those aspects of the sources that are relevant to our inquiry,[54] as opposed to a general discussion of the sources.

51 Brownlie (n 35) 34-35.

52 Brownlie (n 35) 35.

53 As above.

54 Thus, an examination of the differences, say, between 'soft law' and 'hard law' is outside the scope of this study. Suffice it to say that the term 'soft law' refers to agreements, principles and declarations that are not legally binding and these include the UN General Assembly resolutions. By contrast, hard law refers to obligations that are legally binding on the parties concerned, which obligations can be legally enforced before a judicial body. M Olivier 'The relevance of "soft law" as a source of international human rights' (2002) 35 *Comparative and International Law Journal of Southern Africa* 289, who argues: 'The greater part of international human rights consists of either conventional or customary international law and falls within the scope of section 38(1) [of the ICJ Statute]. Certain internationally acknowledged international human rights documents, however, do not meet the international law requirements for treaties and custom, for example human rights resolutions of the

Here, the examination of pertinent aspects of the sources serves as a prism through which to demonstrate that international law, indeed, really is law.

2.2 Pertinent aspects of sources of international law and the relationship of international law to municipal law

Many publicists turn to article 38(1) of the Statute of the ICJ as an authoritative source of international law.[55] Shaw argues, for example, that article 38(1) is widely recognised as the most authoritative statement as to the sources of international law.[56] Malanczuk makes a similar argument, contending that article 38(1) of the Statute of the ICJ is usually accepted as constituting a list of the sources of international law.[57] To the contrary, Wallace submits that article 38 does not mention the word 'sources', but rather spells out how the ICJ is to decide disputes that may come before it for settlement.[58] According to Wallace, '[a]rticle 38 is therefore primarily a direction to the International Court of Justice on how disputes coming before it should be tackled … Article does not stipulate that it is establishing a hierarchy.'[59]

The text of article 38(1) of the Statute of the ICJ provides as follows:

> 1 The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;

United Nations General Assembly, in particular the Universal Declaration of Human Rights. It is suggested that the notion of "soft law" may be used to explain the legal status and political relevance of such resolutions. It appears from the authority consulted that the term "soft law" refers to non-law and can therefore not be regarded as a new and separate source of international law. The value of "soft law" lies on the moral and political level. "Soft law" further plays an important role in facilitating and mobilising the consent of states required to establish binding international law. "Soft law", though not a source of law, remains legally relevant and is therefore a matter governed by international law. Customary international law is suggested as an alternative method to account for the status of international human rights resolutions. International authority is referred to, suggesting that a non-conventional approach to the traditional requirements of usus and opinio iuris is justified in order to lend legal status to human resolutions.'

55 See eg L Henkin et al *International law: Cases and materials* (1993) 51-52; Malanczuk (n 15) 36.

56 Shaw (n 42) 55.

57 Malanczuk (n 15) 36.

58 Wallace (n 26) 8.

59 As above.

(c) the general principles of law recognised by civilised nations;
(d) subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Indeed, as Wallace observes,[60] we submit that article 38(1) of the Statute of the ICJ does not profess to be a source of international law.[61] We concur that article 38 merely spells out how the ICJ should decide disputes that come before it. Be that as it may, many publicists maintain that article 38 of the Statute of the ICJ does provide a source of international law.[62] Malanczuk, for example, argues that some writers have criticised article 38 on the grounds that it does not list all the sources of international law, or that it includes aspects that are not genuine sources.[63] According to Malanczuk, none of the alternative lists which have been suggested has won general approval.[64]

Closely related to the discussion above, Henkin, Pugh and Smit bring out two interesting schools of thought on the sources of international law, namely, voluntarism and positivism.[65] They argue that 'voluntarism' is the classic doctrine of state sovereignty applied to the formation of international law and that it holds that international legal rules emanate exclusively from the free will of states as expressed in conventional and customary international law.[66] Turning to 'positivism', they observe that it emphasises the obligatory nature of legal norms and the fixed authoritative character of formal sources.[67] We will examine below the concept of 'formal sources'. Here, suffice it to say, Henkin, Pugh and Smit note that positivism tends to consider that to be 'law', an international norm must be capable, in principle, of application by a judicial body.[68]

Describing formal sources of law, Wallace contends that 'formal sources constitute what the law is'.[69] She argues that sources of international

60 As above.
61 *Cf* H Thirlway *Sources of international law* (2019) 24-29.
62 Wallace (n 26) 8.
63 Malanczuk (n 15) 36.
64 As above.
65 Henkin et al (n 55) 51-52.
66 Henkin et al (n 55) 53.
67 As above.
68 As above.
69 Wallace (n 26) 8. See also Thirlway (n 61) 6-8.

law are in two categories, namely, formal sources and material sources.[70] According to Wallace, 'material sources only identify where the law can be found'.[71] Brownlie, however, maintains that the distinction between formal and material sources of international law is difficult to maintain.[72] He begins by observing:[73]

> It is common for writers to distinguish the formal sources and the material sources of law. The former are those legal procedures and methods for the creation of rules of general application which are legally binding on the addressees. The material sources provide evidence of the existence of the rules, which, when proved, have the status of legally binding rules of general application.

Drawing analogies from municipal law, Brownlie makes the following persuasive argument:[74]

> In systems of municipal law the concept of formal source refers to the constitutional machinery of law-making and the status of the rule is established by constitutional law: for example, a statute is binding in the United Kingdom by reason of the principle of the supremacy of Parliament. In the context of international relations the use of the term 'formal source' is awkward and misleading since the reader is put in mind of the constitutional machinery of law-making which exists within states. No such machinery exists for the creation of rules of international law.

Brownlie further contends that decisions of the ICJ, unanimously supported resolutions of the General Assembly of the United Nations (UN) concerning matters of law, and important multilateral treaties concerned to codify or develop rules of international law, all lack the quality to bind states generally in the same way that Acts of Parliament bind the people of the United Kingdom.[75]

Taking into consideration Brownlie's assertion that the distinction between formal and material sources of international law is difficult to maintain, and if we agree that article 38(1) of the Statute of the ICJ does not provide a list of sources of international law, we submit therefore that, based on the practice of the ICJ and many other international law

70 Wallace (n 26) 8.

71 As above.

72 Brownlie (n 35) 2.

73 Brownlie (n 35) 1.

74 As above.

75 Brownlie (n 35) 2.

dispute settlement bodies,[76] there primarily are two traditional sources of international law, namely, conventional international law (that is, treaties and agreements) and customary international law.[77] The rest of what is contained in article 38(1) simply complements these two traditional sources.[78] That said, the significance of article 38(1)(c) is that it reaffirms that international law really is law by bringing into the picture 'general principles of law recognised by civilised nations', that is, general principles of law drawn from the municipal law of various states, as evidence of international law. Let us take a more reasoned look at article 38(1)(c) of the Statute of the ICJ.

First, the scope of the general principles of law referred to in article 38(1)(c) is unclear, although the said article 38(1)(c) covers, *inter alia*, legal principles that are common to many systems of municipal law. Second, these principles include good faith and estoppel,[79] and can be applied to 'fill the gap' where there is no provision in a treaty, or in the absence of a recognised customary principle of international law, to apply to an international dispute. The question of what constitutes 'civilised nations' under article 38(1)(c) is a moot one. Sloan observes, for example:[80]

> The phrase 'civilized nations' (also known as 'civilized peoples', 'civilizsed countries', or, collectively, as the 'civilizsed world') has long served to distinguish European Christian states from states not thought to possess similar legal systems or values. Those states which were not considered to possess the attributes of 'civilized nations' have been variously described as

76 Eg, the International Tribunal for the Law of the Sea (ITLOS), the World Trade Organisation (WTO) Appellate Body, the European Court of Human Rights, the COMESA Court of Justice, and many others.

77 This view is in line with Cassese's argument (A Cassese *International law in a divided world* (1994) 169): 'Ever since the beginning of the international community states have spontaneously evolved two methods for creating legally binding rules: treaties and custom.' Cf Thirlway (n 61) 24-34.

78 Cf D Kennedy 'The sources of international law' (1987) 2 *American University Journal of International Law and Policy* 1; LB Sohn 'Sources of international law' (1995-1996) 25 *Georgia Journal of International and Comparative Law* 399.

79 See *North Sea Continental Shelf* cases (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) [1969] ICJ Reports 26; *Flegenheimer* Claim 25 ILR 91; *Case Concerning the Temple of Preah Vihear* (*Cambodia v Thailand*) (Merits) [1962] ICJ Reports 32-33; *Nuclear Tests* cases (*Australia v France; New Zealand v France*) [1974] ICJ Reports 268.

80 J Sloan 'Civilised nations' *Oxford Public International Law: Max Planck Encyclopedia of International Law* (April, 2011), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1748#:~:text=1%20The%20phrase%20'civilized%20nations,similar%20legal%20systems%20or%20values (accessed 29 August 2020).

> 'uncivilized nations', 'semi-civilized nations', 'rude nations', or 'enslaved nations' and their inhabitants as 'barbarians' or 'savages'.

However, since Christianity has now spread to all corners of the world, Sloan's definition of 'civilised nations' cannot hold. Besides, are Christian values the only benchmark of civilisation? Furthermore, the English common law is now practised in many parts of the world. So, a definition of civilised nations cannot be confined to those Western countries that espouse Christian values. We submit that any state recognised by other states as a state,[81] but excluding states deemed by much of the international community as rogue states, is a civilised nation. But what is a rogue state? Put simply, a rogue state is one that not only disregards the dictates of international law but also violates the same with impunity. In essence, a rogue state has a tendency to act rogue, irrespective of its size, economic power and political standing in the international community. Indeed, a rogue state can be any European, Asian, North American, African, Middle Eastern, South American, Caribbean or Pacific state.

2.3 The enforcement argument against international law

Examining the issue that international law might not really be law because, unlike municipal law, it has no central policing mechanism to issue sanctions, Turner argues: 'What do we mean when we inquire whether International Law is *law*? Over the centuries the term "law" has been used to identify some quite different concepts. The Old Testament tells us that "law" is "the will of God" – as in the Ten Commandments.'

Beginning about three centuries ago, writers such as Thomas Hobbes argued that 'law' was but a *command* of a *sovereign* enforced by a *sanction*. In this tradition, more than a century ago John Austin wrote in *The province of jurisprudence determined* that '[t]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a *state of subjection* to its author'.[82]

According to Turner, by this definition 'international law' admittedly is *not* 'law'.[83] He argues further that such a narrow definition would exclude *much* of what Americans regard as 'law', as it would exclude, for

81 On the concept of *de facto* and *de jure* recognition of states, see Brownlie (n 35) 87-106.

82 RF Turner 'International law really is law' The Federalist Society: International and National Security Law Practice Group Newsletter Vol 2, Issue 1 (Spring 1998), https://fedsoc.org/commentary/publications/international-law-really-is-law (accessed 1 September 2020).

83 As above.

example, the US Constitution and Bill of Rights, which are designed in no small part to constrain government power rather than to issue *commands* to individual subjects or citizens.[84]

Closely related to Turner's submission, D'Amato observes that the fact that some states periodically disobey some rules of international law does not in itself mean that those rules are not rules of 'law', because even in domestic society some people (for instance, criminals) break the law from time to time.[85] D'Amato posits further that, on the other hand, the fact that most states obey most rules of international law most of the time is not enough to call those rules 'legal' because we are especially concerned with 'important' cases where states may get away with violating rules of international law.[86] According to D'Amato:[87]

> If states can violate rules with impunity when it is in their national interest to do so, how can we call those rules 'law'? We recognise, even though it makes us somewhat uncomfortable, that international law is more properly analogised to domestic cases where the state is a party than to domestic cases where one citizen sues another. Under this conception, we concede that our usual notions of 'enforcement' are not appropriately applied to the state.

D'Amato contends further:[88]

> But because we recognise as 'law' those domestic cases involving the state as a party, we should also recognise as 'law' those international controversies involving states as parties. We further concede that physical coercion is not a necessary component of 'law'. However, we are reluctant to conclude that it is totally unnecessary, because we have seen too many cases where a nation violates international law and gets away with it because of the lack of an effective enforcement mechanism. Hence, we are somewhat, though not totally, persuaded that international law can properly be labelled 'law' for most purposes. But we may remain unconvinced, at this point, that it is really 'law'.

It is important to note that many states have municipal laws that domesticate or internalise dictates of international law.[89] So, if international law is not

84 As above.

85 D'Amato (n 14) 6.

86 As above.

87 As above.

88 As above.

89 Examples of treaties the provisions of which are reflected in the municipal laws of many states (eg in their constitutions) include the United Nations (UN) Convention on

really law, why do states bother to observe it or reflect it in their municipal laws? In fact, in the absence of a model law, states often resort to principles of public international law for best practices when developing certain pieces of national legislation.[90] The courts of law in many states do actually enforce opposable rules of international law. Indeed, why would the domestic courts be enforcing rules of international law if international law was not really law? Closely related to this argument is our submission that when states sign, ratify or accede to a treaty, they signal their intent that they consider the treaty as creating legal obligations and rights for all state parties to that treaty. States generally do not enter into treaties just to walk away the next day. Indeed, let us now turn to the doctrines of *pacta sunt servanda* ('agreements must be kept') and *erga omnes* ('towards all' or 'towards everyone') in international law.

2.4 The doctrine of *pacta sunt servanda*

The doctrine of *pacta sunt servanda* is provided for in article 26 of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention).[91] Article 26 stipulates that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.[92] In essence, article 26 not only talks about the binding nature of treaties, but also imports the concept of 'good faith' from the municipal law of several states[93] into

the Prevention and Punishment of the Crime of Genocide 1948; the UN International Convention on the Elimination of All Forms of Racial Discrimination 1965; the UN International Covenant on Civil and Political Rights 1966; the UN International Covenant on Economic, Social and Cultural Rights 1966; the UN Convention on the Elimination of All Forms of Discrimination against Women 1979; the UN Convention on the Law of the Sea 1982; the UN Convention on the Rights of the Child 1989; and the UN Convention on the Rights of Persons with Disabilities 2006.

90 See eg Australia's Seas and Submerged Lands (Limits of Continental Shelf) Proclamation 2012; Australia's Seas and Submerged Lands Act 1973 (as amended by the Maritime Legislation Amendment Act 1994); Bahamas' Archipelagic Waters and Maritime Jurisdiction (Archipelagic Baselines) Order, 8 December 2008; Barbados Territorial Waters Act (Chapter 386 of the Law of Barbados); Belgium's Act concerning the exclusive economic zone of Belgium in the North Sea, 22 April 1999; Belgium's Act of October 6, 1987, establishing the breadth of the territorial sea of Belgium; Brazil's Law 8617 of 4 January 1993, on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf; People's Republic of China Exclusive Economic Zone and Continental Shelf Act 1998; and the United Kingdom Territorial Sea Act 1987.

91 Thirlway (n 61) 37-41.

92 Vienna Convention on the Law of Treaties 1969, art 26.

93 Eversheds 'Good faith in English law: What does it mean?' https://www.eversheds-sutherland.com/documents/services/construction/ConstructionGoodfaithinEnglishlaw.pdf (accessed 20 October 2020: 'Many countries have good faith as a concept in their civil code such that it applies to all contracts (whether expressly included in a contract or not). For example, the European Court

international law, confirming the nexus between international law and municipal law. Indeed, international law really is law and it is regularly enforced by states through their respective municipal laws, judicial bodies and law enforcement agencies.[94]

Under conventional and customary international law, states are bound to act in 'good faith', not bad faith, when performing their obligations pertaining to a treaty.[95] The concept of 'good faith', as it applies to treaties, also entails that a state party to a treaty cannot invoke the provisions of its municipal law to justify its violation of provisions of the treaty.[96] It is important to stress that the Vienna Convention is largely a codification of customary international law on treaties.[97] As the University of Vienna notes:[98]

> The Vienna Convention on the Law of Treaties (VCLT), adopted in Vienna in 1969, is frequently called the most important instrument governing treaty law, largely codifying customary international law. state and judicial practice are guided by the authoritative rules of the VCLT. Accordingly, over the last five

of Justice has referred to good faith as a "principle of civil law" and the proposed Common European Sales Law includes a definition of "good faith and fair dealing" as 'a standard of conduct characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.' In France, the Civil Code relating to contract implementation includes good faith provisions. This extends to the duty of the contractor to advise the employer, the obligation being of different magnitude depending on the strength of the parties' knowledge. This is not exclusive to Europe; in Japan, one of the Fundamental Principles of the Civil Code is that "the exercise of rights and performance of duties must be done in good faith". However, English law is a common law system, and is not based on a civil code. This means that the position is far less clear in English law and is dependent on precedent.'

94 Klabbers (n 6) 287-288.

95 Vienna Convention on the Law of Treaties 1969, art 26. See also below.

96 Arts 27 & 46.

97 Wallace (n 26) 224, who observes: 'The Convention is regarded as essentially codifying customary international law though some of the provisions are seen as representing progressive development, for example Article 53.' The said art 53 deals with treaties conflicting with a peremptory norm of general international law (*jus cogens*), stressing that '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

98 University of Vienna Rechtswissenschaftliche Fakultät '50 Years Vienna Convention on the Law of Treaties', https://juridicum.univie.ac.at/news-events/news-detailansicht/news/50-years-vienna-convention-on-the-law-of-treaties/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=c429b920a208a21200d829194f27c907 (accessed 2 October 2020).

> decades, the VCLT has become a 'pillar' of the law of treaties. It incorporates crucial rules of the law of treaties, including the interpretation of treaties, reservations, and the competence to conclude treaties.

Because of the doctrine of *pacta sunt servanda*, states party to a treaty are expected to honour, not violate, the provisions of the relevant treaty.[99] An exception, however, exists where *jus cogens*[100] under customary international law, or a peremptory norm under article 53 of the Vienna Convention, is in disagreement with the provisions of a treaty. A state party to such treaty can ignore or disregard that treaty. Article 53 of the Vienna Convention provides:[101]

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Also, a state party to a treaty is no longer bound by the treaty where there is a fundamental change in circumstances.[102] Here, the treaty becomes inapplicable.[103] There is no specific list of incidents that

99 Thirlway (n 61) 37-41.

100 On the concept of *jus cogens* in international law, see generally A Verdross '*Jus dispositivum* and *jus cogens* in international law' (1966) 60 *American Journal of International Law* 55; G Schwarzenberger 'International jus cogens' (1964-1965) 43 Texas Law Review 455; MC Bassiouni 'International crimes: "*Jus cogens*" and "*Obligatio erga omnes*"' (1996) 59 *Law and Contemporary Problems* (Accountability for International Crimes and Serious Violations of Fundamental Human Rights) (Autumn 1996) 63-74; J Allain 'The jus cogens nature of non-refoulement' (2001) 13 *International Journal of Refugee Law* 533-558; G Danilenko 'International *jus cogens*: Issues of law-making' (1991) 2 *European Journal of International Law* 42; MW Janis 'Nature of *jus cogens*' (1987-1988) 3 *Connecticut Journal of International Law* 359; K Parker '*Jus cogens*: Compelling the law of human rights' (1988-1989) 12 *Hastings International and Comparative Law Review* 411; E Schwelb 'Some aspects of international jus cogens as formulated by the International Law Commission' (1967) 61 *American Journal of International Law* 946.

101 Vienna Convention on the Law of Treaties 1969 art 53.

102 Art 62 Vienna Convention.

103 As above.

comprise a fundamental change of circumstances under conventional or customary international lawn, and this doctrine of 'fundamental change of circumstances', or *clausula rebus sic stantibus*, as it is often known, is rarely invoked by states in international law.[104] Suffice it to say that, under customary international law, the doctrine of *clausula rebus sic stantibus*[105] may be said to be equivalent to the doctrine of frustration in municipal law (that is, under contract law).[106] Again, here we see the nexus between international law and municipal law,[107] confirming that international law, indeed, really is law. As noted above, many general principles of international law are regularly enforced by states through their respective municipal laws, judicial bodies and law enforcement agencies.[108]

2.5 The doctrine of *erga omnes*

In pronouncing the doctrine of *erga omnes* more publicly, the ICJ ruled in the *Barcelona Traction* case[109] that

> an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature, the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general

104 By contrast, under the parallel doctrine of frustration in contract law, that is, with regard to municipal law, incidents such as destruction of the subject matter, supervening illegality, incapacity or death and excessive delay can frustrate a contract.

105 E Lauterpacht *International law: Disputes, war and neutrality* (Parts IX-XIV) (2004) 14-15.

106 *Taylor v Caldwell* [1863] EWHC J1 (QB), (1863) 3 B & S 826, 122 ER 309 (6 May 1863), Court of Queen's Bench; *Krell v Henry* [1903] 2 KB 740; *Bank Line Ltd v Arthur Capel and Co* [1919] AC 435.

107 Compare generally, for example, the English Law Reform (Frustrated Contracts) Act 1943 with art 62 of the Vienna Convention.

108 As above.

109 *Barcelona Traction, Light and Power Company Limited* (*Belgium v Spain*) (1962–1970) (Second Phase Judgment) ICJ Rep 1970 3.

> international law … others are conferred by international instruments of a universal or quasi-universal character.[110]

Ragazzi examines the doctrine of *erga omnes*, as popularised by the ICJ ruling in the *Barcelona Traction* case.[111] In his thesis Ragazzi also addresses the relationship between *erga omnes* and *jus cogens*, and between *erga omnes* and *actio popularis*.[112] That many states in the international community observe the dictates of *erga omnes* and *jus cogens* demonstrates that international law really is law. We have already examined above the doctrine of *pacta sunt servanda* as a norm of conventional and customary international law requiring states to adhere to their treaty obligations. Here, suffice it to say, *jus cogens* and *erga omnes* provide states with international law obligations towards the international community. These duties or obligations, indeed, are law. The ICJ highlighted four *erga omnes* obligations of states in international law, namely, (a) the outlawing of acts of aggression; (b) the outlawing of genocide; (c) the protection from slavery; and (d) the protection from racial discrimination.[113] All these international law obligations of states are also found in the municipal laws of various states, confirming that international law, indeed, really is law. Further, these international law obligations are regularly enforced by states through their respective municipal laws, judicial bodies and law enforcement agencies.[114]

In international law, *erga omnes* are obligations in the fulfilment of which all states have a legal interest because their subject-matter is of importance to the international community as a whole.[115] Oxford Reference posits that the breach of such an obligation is of concern not only to the victimised state but also to all the other members of the international community.[116] According to Oxford Reference, in the event of a breach of these obligations, every state must be considered justified in invoking (probably through judicial channels) the responsibility of the culpable state committing the internationally wrongful act.[117] More

110 *Barcelona Traction* (n 109) 3 para 33.

111 See, generally, M Ragazzi *The concept of international obligations* erga omnes (1997). See also Thirlway (n 61) 162-186.

112 See, generally, Ragazzi (n 111). The Latin term *actio popularis* refers to legal action brought by a third party in the interests of the public as a whole.

113 *Barcelona Traction* (n 109) 3 para 34.

114 Klabbers (n 6) 287-288.

115 Oxford Reference '*Erga omnes* obligations' (2020), https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095756413 (accessed 1 September 2020).

116 As above.

117 As above.

recently, it has been suggested that an example of an *erga omnes* obligation is that of a people's right to self-determination.[118]

Examining developments relating to the *erga omnes* doctrine, Memeti and Nuhija argue:[119]

> Since the right to self-determination, according to some scholars, is a *jus cogens* norm (Brownlie 2003: 489) and since the ICJ has clearly referred to it as an *erga omnes* obligation, by drawing an analogy with the other *erga omnes* obligations in the *Barcelona Traction* case deriving from *jus cogens* norms, it is safe to regard the obligation to respect the right to self-determination as an *erga omnes* obligation.

Furthermore, in the *Furundzija* case,[120] as Memeti and Nuhija observe,[121] the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in paragraph 151 of its ruling:[122]

> The prohibition of torture imposes upon states obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.

Memeti and Nuhija contend that the ICTY clearly referred to the prohibition of torture as an *erga omnes* obligation and that this prohibition is also frequently referred to as a *jus cogens* norm (a norm of a peremptory character) in international law.[123] Thus, Memeti and Nuhija conclude that, by drawing an analogy with the obligations specified in the *Barcelona* case, it is safe to add the *erga omnes* obligation of the prohibition of torture to the

118 A Cassese *International criminal law* (2003) 98.

119 A Memeti & B Nuhija 'The concept of *erga omnes* obligations in international law' (2013) 14 *Journal of Politics: New Balkan Politics* 43. See also ICJ Reports 2003 (Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory) para 155.

120 *Prosecutor v Anto Furundzija* International Criminal Tribunal for the Former Yugoslavia (ICTY) Decision of December 1998.

121 Memeti & Nuhija (n 119) 43.

122 Memeti & Nuhija (n 119) 43-44.

123 Memeti & Nuhija (n 119) 44.

group of well-established *erga omnes* obligations in international law.[124] Let us now turn to examine state practice that indicates that international law really is law, notwithstanding some occasional violations of international law by some states.

2.6 State practice

Posner and Sykes posit that there is a tendency to condemn violations of the law and to leave it at that.[125] If all violations of international law indeed were undesirable, Posner and Sykes contend, this tendency would be unobjectionable.[126] The two authors argue that a variety of circumstances arise under which violations of international law are desirable from an economic standpoint.[127] According to Posner and Sykes, the reasons why are much the same as the reasons why non-performance of private contracts is sometimes desirable – the concept of 'efficient breach', familiar to modern students of contract law, has direct applicability to international law.[128] This view, however, is not free from illogical difficulties. To reduce relations between and among states to mere contractual rights between two private parties to a contract is somewhat a superficial understanding of international law. Let us take a more reasoned view.

Whereas international law, on the one hand, has concepts such as state immunity, comity, diplomatic immunity, the recognition of states, and the recognition of governments, on the other hand, contract law under municipal law has no such equivalent. The concepts of state immunity and state recognition, for example, entail that a sovereign state cannot be sued before the courts of another sovereign state without its consent or, put simply, that a sovereign state is exempt from the jurisdiction of foreign national courts.[129] By contrast, we cannot say the same for two private parties to a dispute relating to breach of contract even if each one of them is domiciled or resident in a different state.

124 As above.

125 E Posner & AO Sykes 'Efficient breach of international law: Optimal remedies, "legalized non-compliance" and related issues' (2011) 110 *Michigan Law Review* 243-294.

126 As above.

127 As above.

128 As above.

129 X Yang 'Sovereign immunity' *Oxford bibliographies*, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0018.xml#:~:text=Sovereign%20immunity%2C%20or%20state%20immunity,jurisdiction%20of%20foreign%20national%20courts (accessed 5 September 2020).

Posner and Sykes maintain, however, that, as in the case of private contracts, it is important for international law to devise remedial or other mechanisms that encourage compliance where appropriate and facilitate non-compliance where appropriate.[130] The two authors make a spirited argument, contending:[131]

> To this end, violators ideally should internalise the costs that violations impose on other nations, but should not be 'punished' beyond this level. We show that the (limited) international law of remedies, both at a general level and in certain subfields of international law, can be understood to be consistent with this principle. We also consider other mechanisms that may serve to 'legalise' efficient deviation from international rules, as well as the possibility that breach of international obligations may facilitate efficient evolution of the underlying substantive law.

In order to situate the discussion on state practice in context, let us look at some real-life examples of how state practice sometimes runs contrary to public international law. As noted above, even in municipal law, people sometimes commit crimes contrary to the law. However, the occurrence of criminal acts does not mean that there is no law or that law is not real. The real-life examples provided below are in the form of questions and guidance notes for the reader to reflect on. But, by no means should the reader consider the guidance notes as model answers to the questions. The guidance notes are not model answers. Rather, they simply assist the reader to focus on the right issues when reflecting on the questions.

We have structured the guidance notes for each question in three parts, namely, (a) state practice; (b) conventional international law; and (c) customary international, principally because any inspiringly erudite analysis of public international law, whether it is a judicial ruling, legal opinion, legal commentary, public policy pronouncement or piece of scholarly work, should lend itself not only to state practice or conventional

130 Posner & Sykes (n 125) 243-294.

131 Posner & Sykes (n 125) 243.

international law, but also to customary international law. Against this background, let us now turn to the real-life examples.

Question 1: To what extent does public international law permit a foreign state to use force against a state suspected of using banned weaponry on its own citizens?

I Guidance notes

(a) State practice

In 2017 President Donald J Trump authorised the US to launch a cruise missile strike on Syria.[132] The US carried out the missile strike against a Syrian air base in response to a suspected chemical weapons attack on a rebel-held town.[133]

(b) Conventional international law

Article 2(4) of the UN Charter 1945 requires all UN member states to refrain 'from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'.

The use of force is only permitted under articles 51, 52 and 53 of the UN Charter where a state acts in 'collective or individual self-defence' or where, pursuant to article 42 of the UN Charter, the UN Security Council authorises states to use force in order to 'maintain or restore international peace and security'.[134]

The United States is a UN member state and ratified the UN Charter in 1945. The implication of this is that the UN Charter is part of US law under the US constitutional provision that recognises treaties as part of the 'law of the land'.[135]

132 J Ku 'Trump's Syria strike clearly broke international law — and no one seems to care' *Vox* 19 April 2017, https://www.vox.com/the-big-idea/2017/4/19/15345686/syria-un-strike-illegal-un-humanitarian-law (accessed 10 September 2020).

133 *BBC News* 'Syria war: US launches missile strikes in response to "chemical attack"' *BBC News* 7 April 2017, https://www.bbc.com/news/world-us-canada-39523654 (accessed 2 September 2020).

134 See, generally, C Gray *International law and the use of force* (2018); M Weller (ed) *The Oxford handbook of the use of force in international law* (2015) M O'Connell *International law and the use of force: Cases and materials* (2008).

135 Art 6 para 2 US Constitution.

(c) Customary international law

Czapliński examines the law of war, or *jus in bello*, contending that in the pleadings of the *Corfu Channel* case[136] the UK presented an argument on the alleged customary right to self-protection, intervention and self-defence.[137] The ICJ rejected the British justification of the Operation Retail, invoking arguments as to their incompatibility with international law.[138] Czapliński observes further that, interestingly, the ICJ did not refer to a standard of the UN Charter since Albania was not at the time a UN member state.[139] Czapliński posits that the ICJ

> based its argument on the principle of sovereign equality, as the respect for territorial sovereignty is an essential foundation of international relations. As to the intervention, the Court repudiated the British argument on intervention stating that it was suspected to be the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and as such could not, whatever the present defects in international organisation, find a place in international law. The judgment of the ICJ seems to reflect customary law of the time.[140]

Closely related to the ICJ ruling in the *Corfu Channel* case, Dörr contends that the prohibition of the threat or use of force spelt out in article 2(4) of the UN Charter and referred to in many other treaties today is universally accepted as a norm of customary international law.[141] According to Dörr, 'it is agreed by many to belong to the special category of international *jus cogens*, which gives expression to the fundamental importance of the prohibition, as well as to its general acceptance by the international community'.[142]

136 *Corfu Channel* case (*United Kingdom v Albania*) ICJ 1949 ICJ 4 22. In this case the fact that the Albanian (plaintiff) authorities did not make known the presence of mines in its waters was the basis of the United Kingdom (defendant) claim against them.

137 W Czapliński 'Customary international law on the use of force' (2018) 8 *Wroclaw Review of Law, Administration and Economics* 97.

138 Czapliński (n 137) 98.

139 As above.

140 As above.

141 O Dörr 'Prohibition of use of force' *Oxford Public International Law: Max Planck Encyclopedias of International Law August* 2019, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427 (accessed 4 October 2020).

142 As above.

Czapliński outlines some forms of use of force (military activities) the legality of which in international law remains unclear today, and that these comprise the following:[143]

(i) humanitarian intervention;
(ii) intervention upon invitation of the legitimate government concerned;
(iii) armed intervention (including the intervention by a regional organisation without the prior consent of the Security Council);
(iv) intervention to protect own nationals;
(v) intervention to support the right to self-determination; this category covers the case of the Russian intervention in the Ukraine including the annexation of the Crimea. Corresponding emotions followed the intervention of India in Eastern Pakistan (Bangladesh);
(vi) preventive self-defence; and,
(vii) coalitions of goodwill, reacting to serious violations of international law.

In conclusion, it is important to point out that the unilateral action of a state (that is, state practice) that runs contrary to international law does not water down the efficacy of international law. Even in municipal law, some individuals take the law into their own hands, but such action or conduct does not mean that there is no law.

Question 2: Critically examine the extent to which legal agreements entered into between a state and a multilateral development bank for the purposes of the latter providing a loan, grant, or other form of financing to the state can be considered treaties in international law.

II Guidance notes

(a) State practice

States often enter into legal agreements with various international organisations such as the *European Bank for Reconstruction and Development, the* African Development Bank, the Asian Development Bank and the Inter-American Development Bank for the purpose of securing finance to support their socio-economic development programmes. These agreements, as in the case of treaties, are legally binding on the contracting parties.

143 Czapliński (n 137) 100.

(b) Conventional international law

Whereas the constitution or articles of agreement of a multilateral development bank, as agreed to by various member states of that organisation, may be construed as a constitutive treaty, any legal agreement entered into between the organisation, as a separate legal person, and a state cannot be construed as a treaty. There is a difference in international law between the constitutive treaty entered into by various states to give birth to a multilateral development bank or organisation and the legal agreements that that organisation enters into in pursuance of its own objectives.[144]

Article 5 of the Vienna Convention is very clear and instructive on the matter. It stipulates that 'the present Convention applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation'. As noted above, the Vienna Convention is largely a codification of customary international law on treaties.[145] Following from this, what then constitutes a treaty in public international law?

Article 2(1)(a) of the Vienna Convention defines a treaty as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Article 6 of that Convention states that every state possesses the capacity to conclude treaties. So, while some international organisations may have some powers that appear akin to the treaty-making powers of states, they lack *jus tractatuum* or the right to conclude treaties in international law. It is clear from article 2(1)(a) of the Vienna Convention that a treaty is an agreement between or among states, but not between a state and an international organisation or multilateral development bank. Therefore, to argue that the shareholder-states of a multilateral development bank act through a proxy, namely, the multilateral development bank, and that that proxy relationship entails that the shareholder-states are themselves entering into the legal agreement with the borrower-state, would be pursuing a red herring. Under a constitutive treaty or articles of agreement of a multilateral development bank, the concept of separate legal personality often is explicitly enshrined to give the organisation its own separate

144 See, generally, R Kolb *The law of treaties: An introduction* (2016); DB Hollis *The Oxford guide to treaties* (2020); O Corten & P Klein (eds) *The Vienna Conventions on the Law of Treaties: A commentary* (2011).

145 As above.

legal personality. It is that separate legal personality that empowers the multilateral development bank to enter into legal agreements in its own name and right, and not as a proxy.

Thus, while the constitutive treaty of a multilateral development organisation clothes it with the legal authority in international law to carry out its mandate, the financing or loan agreement entered into between a state and the multilateral development bank is purely a contractual arrangement between the two even if such agreement were to be deposited, say, with the UN in New York. The mere act of depositing a contractual deed or debenture with the UN does not elevate that legal instrument to the status of a treaty.

Here, we are cognisant of the fact that the Vienna Convention on the Law of Treaties between States and International Organisations or Between International Organisations 1986 has not yet come into force.[146] So, even though article 2(1)(a) of this 1986 Convention defines a 'treaty' as 'an international agreement governed by international law and concluded in written form (i) between one or more states and one or more international organisations; or (ii) between international organisations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation', the said 1986 Vienna Convention has not yet entered into force, neither is there compelling evidence to suggest that the provisions of this 1986 Convention reflect existing customary international law or have generated customary international law.

The significance of distinguishing a treaty from a legal agreement entered into between a state and a multilateral development bank is that the law of treaties generally does not apply to those legal agreements that are entered into by a state and a multilateral development bank. Also, it is important to recall that treaties are a source of international law,[147] unlike many other agreements.

146 United Nations Treaty Collection, 'Chapter XXIII, Law of Treaties – Vienna Convention on the Law of Treaties between states and international organisations or between international organisations 1986', United Nations; https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en (accessed 2 October 2020).

147 *Nottebohm* case [1955] ICJ Rep 4; *Asylum* case [1950] ICJ Rep 266. Cf A d'Amato 'Treaties as a source of general rules of international law' (1962) 3 *Harvard International Law Journal* 1; DB Hollis 'Why state consent still matters – Non-state actors, treaties, and the changing sources of international law' (2005) 23 *Berkeley Journal of International Law* 137; Thirlway (n 61) 37-51.

(c) Customary international law

We have already established that the Vienna Convention is largely a codification of customary international law on treaties.[148] Therefore, article 2(1)(a) of the Vienna Convention, which defines a treaty as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation', is reflective of customary international law.

What this discussion shows is that even though a state, through its state practice or municipal law, might labour under the mistaken impression that the legal agreements into which it enters with international organisations or a multilateral development bank are treaties, international law does not consider such instruments treaties.

Question 3: Critically examine the position of individuals as subjects of international law, highlighting an area(s) of the law where individuals feature more prominently in international law.

III Guidance notes

(a) State practice

A good example of state practice relating to individuals as subjects of international law is in the field of human rights, in particular, the issue of asylum seekers. It is not unusual for individuals fleeing from political turmoil or persecution in their home country to seek asylum in a foreign state.[149] State practice on granting asylum varies widely across states.[150] Some asylum seekers are granted asylum while others are denied this.[151] Then, there are also those who are detained and then deported back to the

148 As above. See also, generally, M Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009).

149 See eg US Department of Homeland Security, Office of Immigration Statistics and Office of Strategy, Policy and Plans, 'Annual Flow Report – Refugees and asylees: 2017' (March 2017), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf (accessed 1 November 2020).

150 See below on the three common categories of asylum granted by states.

151 See, generally, MJ Gibney & R Hansen 'Deportation and the liberal state: The forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom' UNHCR – the UN Refugee Agency, Evaluation and Policy Analysis Unit (February 2003), https://www.unhcr.org/en-us/research/working/3e59de764/deportation-liberal-state-forcible-return-asylum-seekers-unlawful-migrants.html (accessed 1 November 2020).

state from where they come or are denied admission to the state where they are seeking asylum.[152]

In 2017 a total of 53 691 persons were admitted to the US as refugees.[153] The leading countries of nationality for refugees admitted during that period were the DRC, Iraq and Syria.[154] The US Department of Homeland Security observes:[155]

> An additional 26 568 individuals were granted asylum during 2017, including 16 045 individuals who were granted asylum affirmatively by the US Department of Homeland Security (DHS), and 10 523 individuals who were granted asylum defensively by the US Department of Justice (DOJ). The leading countries of nationality for persons granted either affirmative or defensive asylum were China, El Salvador, and Guatemala. Travel documents were issued to 3 831 individuals who were approved for derivative asylum, allowing their admission to the United States. In addition to those approved overseas, 3 735 individuals were approved for derivative asylum status while residing in the United States.

The concept of asylum in international law generally falls into three basic categories, namely, (i) territorial, (ii) extraterritorial and (iii) neutral. Andreopoulos contends that territorial asylum is granted within the territorial bounds of the state offering asylum and is an exception to the practice of extradition.[156] He further contends that territorial asylum is designed and employed primarily for the protection of persons accused of political offences such as treason, desertion, sedition and espionage.[157] Andreopoulos is quick to caution, however, that there is a widespread practice to exclude from this category persons accused of the murder of a head of state, certain terrorist acts, collaboration with the enemy in time of war, crimes against peace and against humanity, and war crimes.[158]

Turning to extraterritorial asylum, Andreopoulos argues that this refers to asylum granted in embassies, legations, consulates, warships and merchant vessels in foreign territory and thus is granted within the

152 As above.

153 US Department of Homeland Security (n 149) 2.

154 As above.

155 As above.

156 GJ Andreopoulos 'Asylum' *Britannica*, https://www.britannica.com/topic/asylum (accessed 20 September 2020).

157 As above.

158 As above.

territory of the state from which protection is sought.[159] Neutral asylum, by contrast, is employed by states exercising neutrality during a war to offer asylum within its territory to troops of belligerent states, provided that the troops submit to internment for the duration of the war.[160]

(b) Conventional international law

Under the Universal Declaration of Human Rights 1948, a state has the right to grant asylum to an individual, but it is not the right of an individual to be granted asylum by the state.[161] The individual can only request asylum and wait for the receiving state to respond.[162]

Andreopoulos argues that, similarly, recognising that 'the grant of asylum may place unduly heavy burdens on certain countries', the Convention Relating to the Status of Refugees, which was adopted by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons in 1951, did not create a right of asylum for those seeking it, and the impressive array of rights it enumerates pertains only to those refugees 'lawfully in' or 'lawfully staying in' the sheltering state.[163]

According to Andreopoulos,

> [s]ubsequent unsuccessful efforts to articulate an individual's right of asylum included (1) the UN General Assembly Declaration on Territorial Asylum (1967), which contained substantive exceptions to its non-refoulement (non-return) provision (pertaining to national security and to the safeguarding of its national population), and (2) a proposed Convention on Territorial Asylum, which never materialised.[164]

159 As above.

160 As above.

161 See the Universal Declaration of Human Rights 1948 art 14 which provides: '1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'

162 As above.

163 Andreopoulos (n 156).

164 As above.

(c) Customary international law

In the *Asylum* case[165] the ICJ ruled that the custom of asylum was not uniformly or continuously executed to demonstrate that the custom was of a generally applicable character.[166] Generally, many states consider individuals as having limited international legal personality, although contemporary international law increasingly recognises that an individual may possess both international rights and duties.[167]

Giorgetti observes that individuals have become international law subjects in their own rights in some international legal areas, including those of human rights and international criminal law.[168] According to Giorgetti, this development affords individuals substantive rights and obligations, as well as procedural rights.[169] In most legal areas, however, Giorgetti notes, individuals acquired substantive rights but not direct procedural rights. In those instances, individuals need the filter of a nationality to enforce their claim and remedy in international proceedings. [170]

Cassese provides a somewhat contrasting view from that of Giorgetti, arguing that some of the limitations facing individuals as subjects of international law include the fact that (i) individuals are given only procedural rights to initiate international proceedings before an international body (for the purpose of ascertaining whether the state complained of has violated the treaty providing for substantive rights benefitting individuals); (ii) the procedural right in question is only granted by treaties (or, in a few instances, by international resolutions); and (iii) not all states that are parties to treaties that deal with human rights have accepted being made accountable to individuals.[171] In the field of human rights, the notable treaties include the Optional Protocol to the UN Covenant on Civil and Political Rights 1966; the Convention on the Elimination of Racial Discrimination 1965; the Inter-American Convention on Human Rights 1969; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1969; the International Covenant on Economic, Social and Cultural Rights 1966; the Convention on the Elimination of All Forms of

165 *Colombia v Peru* [1950] ICJ 6.

166 As above.

167 Wallace (n 26) 74.

168 C Giorgetti 'Rethinking the individual in international law' (2019) 22 *Lewis and Clark Law Review* 1085.

169 As above.

170 As above.

171 A. Cassese (n 77) 100-101.

Discrimination against Women 1979; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; the Convention on the Rights of the Child 1989; the International Convention for the Protection of All Persons from Enforced Disappearance 1992; and the African Charter on Human and Peoples' Rights 1981.

Question 4: Compare and contrast the right of innocent passage and the right of transit passage in the law of the sea.

IV Guidance notes

(a) State practice

Telesetsky observes that in May 2016, the US military vessel USS William P Lawrence operated within the 12 nautical miles limit of Yongshu Jiao in the Nansha archipelago as a demonstration of the right to freedom of navigation of the US.[172] When the Peoples' Republic of China protested the incident as it involved a US military vessel operating in waters over which China asserted maritime jurisdiction, the US is said to have countered that it was exercising its customary rights of innocent passage as codified by the UN Convention on the Law of the Sea.[173]

Telesetsky posits:[174]

> Protecting freedom of navigation is a hallmark of US maritime policy. In spite of the disapproval of some states, the United States has been engaged proactively since 1979 in promoting and protecting global navigational freedoms both within its own maritime jurisdiction and abroad. The US freedom of navigation policy is based on comity. The policy is best summarised in the 1983 statement on US Oceans Policy whereby 'the United states will recognise the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognised by such coastal states.

In a related topic, Kleemola-Juntunen observes that Åland is an area that is demilitarised, neutralised and enjoys wide autonomy under Finnish sovereign rule.[175] According to Kleemola-Juntunen, the demilitarised

172 A Telesetsky 'United States practice regarding innocent passage and navigational transit' in TL McDorman, K Zou & S Lee (eds) *Regulation on navigation of foreign vessels: Asia-Pacific state practice* (2019) 180.

173 As above.

174 As above.

175 P Kleemola-Juntunen 'The right of innocent passage: The challenge of the proliferation

regime is governed through a multi-level legal framework, and Finland's sovereign rights as a coastal state are significantly restricted by the 1921 Åland Convention.[176] Notwithstanding the fact that the UN Convention on the Law of the Sea 1982 contains specific provisions on the right of innocent passage, the Proliferation Security Initiative launched by the United States in 2004 raises questions on the right of innocent passage of a foreign ship in the territorial sea of another state.[177]

(b) Conventional international law

Whereas the right of innocent passage of vessels is regulated under both the Convention on the Territorial Sea and the Contiguous Zone 1958 and the UN Law of the Sea Convention 1982, the right of transit passage is only found in the latter treaty.[178]

Under the Convention on the Territorial Sea and the Contiguous Zone 1958, the passage of a vessel is considered innocent so long as it is not prejudicial to the peace, good order or security of the coastal state.[179] Once the passage becomes prejudicial to the peace, good order or security of the coastal state, it ceases to be innocent, and the coastal state can take the necessary steps in its territorial sea to prevent passage which is not innocent.[180]

Passage under the 1958 Convention is defined as navigating through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters, including stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.[181] The 1958 Convention also establishes a duty on the coastal state not to hamper innocent passage through the territorial sea.[182] The coastal state is required to give appropriate

security initiative and the implications for the territorial waters of the Åland islands' in G Andreone (ed) *The future of the law of the sea: Bridging gaps between national, individual and common interests* (2017) 239.

176 As above.

177 As above.

178 See, generally, KM Burke & DA DeLeo 'Innocent passage and transit passage in the United Nations Convention on the Law of the Sea' (1983) 9 *Yale Journal of World Public Order* 389.

179 Convention on the Territorial Sea and the Contiguous Zone 1958 art 14(4).

180 Convention (n 180) art 16(1).

181 Convention (n 180) arts 14(2) & (3).

182 Convention (n 180) art 15(1).

publicity to any dangers to navigation, of which it has knowledge, within its territorial sea.[183]

In contrast to the 1958 Convention, article 8(2) of the UN Law of the Sea Convention 1982 extends the right of innocent passage to areas where the establishment of a straight baseline in accordance with the method set forth in article 7 of the said 1982 Convention has the effect of enclosing as internal waters areas that had not previously been considered such. Indeed, this aspect of the law is a notable departure from the Convention on the Territorial Sea and the Contiguous Zone 1958.

Furthermore, the UN Convention on the Law of Sea 1982 clarifies that passage does not only mean navigating through the territorial sea for the purpose of traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters, or proceeding to or from internal waters or a call at such roadstead or port facility, but that passage must also be continuous and expeditious.[184] The criteria of continuous and expeditious passage here is only found in the 1982 Convention, not in the 1958 Convention.

Article 19 of the UN Convention of the Law of the Sea 1982 not only provides for a definition of 'innocent passage' similar to that found in the 1958 Convention, but goes further to enumerate instances when innocence can be lost, stipulating:[185]

> Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in any of the following activities:
> (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
> (b) any exercise or practice with weapons of any kind;
> (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal state;
> (d) ny act of propaganda aimed at affecting the defence or security of the coastal state;
> (e) the launching, landing or taking on board of any aircraft;
> (f) the launching, landing or taking on board of any military device;

183 Convention (n 180) art 15(2).

184 UN Law of the Sea Convention 1982 arts 18(1) & (2).

185 UN Law of the Sea Convention (n 184) art 19(2).

(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal state;
(h) any act of wilful and serious pollution contrary to this Convention;
(i) any fishing activities;
(j) the carrying out of research or survey activities;
(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal state;
(l) any other activity not having a direct bearing on passage.

Articles 24(1) and 25(1) of the UN Convention on the Law of Sea 1982 repeat the obligation of coastal states under the Convention on the Territorial Sea and the Contiguous Zone 1958 not to hamper the innocent passage of foreign ships through the territorial sea except in accordance with the said 1982 Convention, highlighting also the right of the coastal state to take the necessary steps in its territorial sea to prevent passage which is not innocent. Howver, while the right of innocent passage under both treaties covers also straits, article 53 of the UN Convention on the Law of the Sea 1982 extends the right of innocent passage to archipelagic waters. This is another departure from 1958 Convention.

As noted above, the UN Convention on the Law of Sea 1982 introduced the right of transit passage in straits that are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.[186] By contrast, there is no right of transit passage under the Convention on the Territorial Sea and the Contiguous Zone 1958.

Suffice it to say that article 38 of the UN Convention on the Law of the Sea 1982 defines transit passage as follows:[187]

2 Transit passage means the exercise in accordance with this part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a state bordering the strait, subject to the conditions of entry to that state.

186 UN Law of the Sea Convention (n 184) art 37.

187 UN Law of the Sea Convention (n 184) arts 38(2) & (3).

> 3 Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

A closer examination of the treaty provisions on transit passage and innocent passage in the UN Convention on the Law of the Sea 1982 shows that transit passage need not be innocent.[188] It simply has to be 'freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait'. Interestingly too, the right of transit passage extends to airplanes or helicopters flying over the strait, and not just to shipping vessels traversing the waters. The 1982 Convention establishes obligations of states bordering straits not to hamper transit passage, stressing that

> ships and aircraft enjoy the right of transit passage which shall not be impeded; except that, if the strait is formed by an island of a state bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.[189]

(c) Customary international law

The ruling of the ICJ in the *Corfu Channel* case[190] spells out the customary international law position on the right of innocent passage and is reflected in the UN Convention on the Law of Sea 1982 and the Convention on the Territorial Sea and the Contiguous Zone 1958.[191] Following below is an overview of the ICJ's ruling.

The dispute in the *Corfu Channel* case gave rise to three judgments by the ICJ.[192] The dispute arose from the explosions of mines by which some British warships suffered damage while passing through the Corfu Channel in 1946, in a part of the Albanian waters which had previously

188 See, generally, N Oral 'Transit passage rights in the Strait of Hormuz and Iran's threats to block the passage of oil tankers' (2012) 16 *ASIL Insights*, https://www.asil.org/insights/volume/16/issue/16/transit-passage-rights-strait-hormuz-and-iran%E2%80%99s-threats-block-passage (accessed 17 October 2020).

189 UN Law of the Sea Convention (n 184) art 38(1).

190 *United Kingdom v Albania* ICJ, 1949, ICJ 4, 22.

191 RR Churchill & AV Lowe *The law of the sea* (1992); DR Rothwell & T Stephens *The international law of the sea* (2010).

192 International Court of Justice '*Corfu Channel* (*United Kingdom of Great Britain and Northern Ireland v Albania*) – Overview of the case', https://www.icj-cij.org/en/case/1 (accessed 15 October 2020).

been swept.[193] The ships were severely damaged and members of the crew were killed. The United Kingdom seized the ICJ of the dispute by an Application filed on 22 May 1947, and accused Albania of having laid or allowed a third state to lay the mines after mine-clearing operations had been carried out by the Allied naval authorities.[194] The case had previously been brought before the UN and, in consequence of a recommendation by the Security Council, had been referred to the ICJ.

As the ICJ reports, in a first judgment rendered on 25 March 1948, the ICJ dealt with the question of its jurisdiction and the admissibility of the application which Albania had raised.[195] The ICJ found, *inter alia*, that a communication dated 2 July 1947, addressed to it by the government of Albania, constituted a voluntary acceptance of its jurisdiction. It recalled on that occasion that the consent of the parties to the exercise of its jurisdiction was not subject to any particular conditions of form and stated that, at that juncture, it could not hold to be irregular a proceeding not precluded by any provision in those texts.

A second judgment, rendered on 9 April 1949, related to the merits of the dispute. The ICJ found that Albania was responsible under international law for the explosions that had taken place in Albanian waters and for the damage and loss of life that had ensued.[196] It did not accept the view that Albania had itself laid the mines or the purported connivance of Albania with a mine-laying operation carried out by the Yugoslav navy at the request of Albania.[197] On the other hand, it held that the mines could not have been laid without the knowledge of the Albanian government.[198] On that occasion, it indicated in particular that the exclusive control exercised by a state within its frontiers might make it impossible to furnish direct proof of facts incurring its international responsibility. The state that is the victim must, in that case, be allowed a more liberal recourse to inferences of fact and circumstantial evidence; such indirect evidence must be regarded as of special weight when based on a series of facts, linked together and leading logically to a single conclusion. Albania, for its part, had submitted a counter-claim against the United Kingdom. It accused the latter of having violated Albanian sovereignty by sending warships into Albanian territorial waters and of carrying out mine-sweeping operations

193 As above.
194 As above.
195 As above.
196 As above.
197 As above.
198 As above.

in Albanian waters after the explosions.[199] The ICJ did not accept the first of these complaints but found that the United Kingdom had exercised the right of innocent passage through international straits.[200] On the other hand, it found that the mine-sweeping had violated Albanian sovereignty, as it had been carried out against the will of the Albanian government.[201] In particular, it did not accept the notion of 'self-help' asserted by the United Kingdom to justify its intervention.[202]

In a third judgment, rendered on 15 December 1949, the ICJ assessed the amount of reparation owed to the United Kingdom and ordered Albania to pay £844 000.[203]

Closely related to the position of innocent passage in customary international law, Mahmoudi argues that the right of transit passage provided for in the UN Law of the Sea Convention 1982 has now crystallised into customary international law.[204] By contrast, Treat observes that the US makes a similar claim to Mahmoudi's thesis, although most nations believe that this customary right is conferred only on signatories to the said 1982 Convention.[205] Zuleta posits that '[i]t has been suggested that most provisions of the [1982] Convention, including those parts dealing with navigation and overflight, reflect prevailing international practice and, therefore, can be invoked by non-parties as representing new customary international law. This view does not seem to command broad support.'[206]

Burke concludes that to secure the protection afforded by the transit passage and archipelagic sea lane provisions of the UN Law of the Sea

199 As above.

200 As above.

201 As above.

202 As above.

203 As above.

204 S Mahmoudi 'Customary international law and transit passage' (1989) 20 *Ocean Development and International Law* 157.

205 DL Treat 'The United States' claims of customary legal rights under the Law of the Sea Convention' (1984) 41 *Washington and Lee Law Review* 260. See also B Zuleta 'The law of the sea after Montego Bay' (1983) 20 *San Diego Law Review* 475.

206 Zuleta (n 205) 478.

Convention 1982, the US maintains that such provisions are already customary international law.[207]

2.7 Conclusion

This chapter has examined the question of whether or not international law really is law. That state practice sometimes runs contrary to public international law, the chapter argued, does not mean that international is not really law. Even in municipal law people sometimes commit crimes contrary to the law. However, the occurrence of criminal acts does not mean that there is no law or that law is not real.

The chapter argued that international law indeed is law and that the enforcement mechanism of municipal law, as seen from a positivist view, need not necessarily be a benchmark of assessing whether or not international law really is law. A further argument was made that international law is often enforced by states through their respective municipal laws, judicial bodies and law enforcement agencies. The chapter demonstrated that even if international law generally does not have a central command or authority to issue sanctions against the subjects of international law, this does not mean that international law is not really law. It was also submitted that the debate between monism and dualism to determine the relationship between international law and municipal law is an admission that international law really is law and that the reference by the ICJ to 'general principles of law recognised by civilised nations' under article 38(1)(c) of the Statute of the ICJ in determining international law disputes confirms that international law really is law.

207 WT Burke 'Customary law of the sea: Advocacy or disinterested scholarship?' (1989) 14 *Yale Journal of International Law* 512.

3 Deep sea-bed mining under customary international law

3 Introduction

In chapter 2 we examined the question of whether or not international law really is law. In chapter 3 we turn to examine the legal basis, if any, under customary international law, of a state acting unilaterally to engage in deep sea-bed mining. Much has been written on the developments relating to treaty law on deep sea-bed mining,[1] yet little ink has been expended on the position under customary international law.[2] In this chapter we argue that there is no right under customary international law for a state to make unilateral claims to a right to explore and exploit the resources of the sea-bed in the high seas. The 'common heritage of mankind' doctrine, as promulgated in article 136 of the United Nations Law of the Sea Convention 1982 (UNCLOS),[3] stresses that the

1 See generally RR Churchill & AV Lowe *The law of the sea* (1999); Y Tanaka *The international law of the sea* (2015); DR Rothwell & T Stephens *The international law of the sea* (2016); RR Churchill & AV Lowe *The law of the sea* (1992); JS Patil Legal regime of the sea-bed (1981); E Luard *The control of the sea-bed* (1994); S Markus *Common heritage or common burden: The United States position on the development of a regime for deep sea-bed mining in the Law of the Sea Convention* (1989); JB Morell *The law of the sea: An historical analysis of the 1982 treaty and its rejection by the United States* (1992); R Brooke 'The current status of deep sea-bed mining' (1984) 24 *Virginia Journal of International Law* 361; J Charnley 'US provisional application of the 1994 Deep Seabed Agreement' (1994) 88 *American Journal of International Law*; C Joyner 'Legal implications of the concept of the common heritage of mankind' (1986) 35 *International and Comparative Law Quarterly* 429; M Mashayekhi 'The present legal status of deep-seabed mining' (1985) 19 *Journal of World Trade Law* 229; B Oxman 'The 1994 Agreement and the Convention' (1994) 88 *American Journal of International Law* 687; LDM Nelson 'The new deep sea-bed mining regime' (1995) 10 *International Journal of Marine and Coastal Law* 189; C Welling 'Mining of the deep seabed in the year 2010' (1985) 45 *Louisiana Law Review* 1249; R Young 'The legal regime of the deep-sea floor' (1986) 62 *American Journal of International Law* 641.

2 *Cf* S Burton 'Freedom of the seas: International law applicable to deep seabed mining claims' (1977) 29 *Stanford Law Review* 1135.

3 Arts 136 & 137 of the United Nations Law of the Sea Convention 1982 provide as follows: '*Article 136 Common heritage of mankind* The Area and its resources are the common heritage of mankind. *Article 137 Legal status of the Area and its resources* 1. No state shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any state or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized. 2. All rights in the resources of the area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only

deep sea-bed and its resources can only be mined 'for the benefit of mankind as a whole, irrespective of the geographical location of states'.[4] This doctrine provides for a collective mechanism of exploring and exploiting resources of the sea-bed and must be understood as the guiding principle upon which further developments under international law should proceed.

This first part of the chapter lends itself to the salient features of both treaty law and customary international law. The second part looks at the practice of maritime powers such as the United States (US)[5] whilst the third part addresses the concept of the legal vacuum theory on deep sea-bed mining.

3.1 Salient features of treaty law and customary international law

Scharf contends that prior to conclusion of the 1958 Law of the Sea Conventions,[6] the high seas were governed mainly by customary international law.[7] The Romans, according to Scharf, considered the seas *res communis* – belonging to everyone and, therefore, open to use but not appropriation.[8]

> After the fall of Rome, state practice tended toward an alternate approach, treating the seas as *res nullius* – belonging to no one, and therefore open to claim. This approach reached its zenith in 1493, when the major powers

be alienated in accordance with this Part and the rules, regulations and procedures of the Authority. 3. No state or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.'

4 See Preamble to the United Nations Law of the Sea Convention 1982 as well as arts 136, 140, 143 and 149 of the said treaty.

5 RG Almond 'US ratification of the Law of the Sea Convention: Measuring the *raison d'état* in the Trump era' *The Diplomat* 24 May 2017, https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/ (accessed 10 August 2020) who observes: 'Following nearly a decade of negotiations, UNCLOS was completed on December 10, 1982 at Montego Bay, Jamaica. Even at that time, the United States refused to sign the treaty. The United States, along with other industrialized states, took issue with aspects of the treaty (Part XI), which dealt with deep seabed resources beyond national jurisdiction. Largely at Washington's instigation, negotiations continued and resulted in the Agreement relating to Implementation of Part XI of the Convention (1994 Agreement), completed in New York, July 28, 1994.'

6 That is, the Convention on the Territorial Sea and the Contiguous Zone 1958; the Convention on the High Seas 1958; the Convention on the Continental Shelf 1958; and the Convention on Fishing and Conservation of the Living Resources of the High Seas 1958.

7 M Scharf 'The Truman Proclamation on the Continental Shelf' in M Scharf *Customary international law in times of fundamental change: Recognizing Grotian moments* (2013) 107.

8 As above.

> of the day, Spain and Portugal, purported to divide most of the world's oceans between them, claiming exclusive navigation rights in a joint act of appropriation ratified by Pope Alexander VI.[9]

Historically, the bed and sub-soil of the high seas have remained free from regulation by multilateral treaties.[10] It was not until the entry into force of the United Nations Law of the Sea Convention 1982 that there was some significant effort by the international community to recognise a regulatory framework for the exploration and exploitation of mineral resources in the deep sea-bed.[11] The United Nations (UN) points out:[12]

> The Convention was opened for signature on 10 December 1982 in Montego Bay, Jamaica. This marked the culmination of more than 14 years of work involving participation by more than 150 countries representing all regions of the world, all legal and political systems and the spectrum of socio/economic development. At the time of its adoption, the Convention embodied in one instrument traditional rules for the uses of the oceans and at the same time introduced new legal concepts and regimes and addressed new concerns. The Convention also provided the framework for further development of specific areas of the law of the sea. The Convention entered into force in accordance with its article 308 on 16 November 1994, 12 months after the date of deposit

9 As above.

10 Encyclopedia Britannica 'High seas: Maritime law' https://www.britannica.com/topic/high-seas#ref215901 (accessed 11 August 2020) provides: 'The doctrine that the high seas in time of peace are open to all nations and may not be subjected to national sovereignty (freedom of the seas) was proposed by the Dutch jurist Hugo Grotius as early as 1609. It did not become an accepted principle of international law, however, until the 19th century. Freedom of the seas was ideologically connected with other 19th-century freedoms, particularly laissez-faire economic theory, and was vigorously pressed by the great maritime and commercial powers, especially Great Britain. Freedom of the high seas is now recognized to include freedom of navigation, fishing, the laying of submarine cables and pipelines, and overflight of aircraft … The first United Nations Conference on the Law of the Sea, meeting at Geneva in 1958, sought to codify the law of the high seas but was unable to resolve many issues, notably the maximum permissible breadth of the territorial sea subject to national sovereignty. A second conference (Geneva, 1960) also failed to resolve this point; and a third conference began in Caracas in 1973, later convening in Geneva and New York city.'

11 See below.

12 See Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations 'United Nations Convention on the Law of the Sea of 10 December 1982: Overview and full text', https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm (accessed 5 August 2020).

of the sixtieth instrument of ratification or accession. Today, it is the globally recognized regime dealing with all matters relating to the law of the sea.

Closely related to the 'common heritage of mankind' doctrine promulgated in article 136 of the United Nations Law of the Sea Convention 1982,[13] article 2 of the High Seas Convention 1958 provides that '[t]he high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty'.[14]

Article 2 goes further to highlight the following freedoms of the high seas:[15]

(a) freedom of navigation;
(b) freedom of fishing;
(c) freedom to lay submarine cables and pipelines; and
(d) freedom to fly over the high seas.

Although these freedoms are enjoyable by both coastal states and landlocked states, the High Seas Convention 1958 says nothing about deep sea-bed mining. In spite of this, the international community has not been deprived of multilateral means to regulate deep sea-bed mining. The doctrine of 'common heritage of mankind', as enshrined in the United Nations Law of the Sea Convention 1982, can be traced to two important United Nations General Assembly resolutions.[16] The first of these resolutions was Resolution 2574.[17] This Resolution, passed with 62 votes in favour and 28 against (developed states mainly) declared that pending the establishment of an international regime for the deep sea-bed, states and persons, physical or judicial, were bound to refrain from all activities of exploitation of the resources of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction and no claim to any part of that area or its resources were to be recognised.[18]

A year later, in 1970, despite the continued disagreement over the kind of regime that was to govern the deep sea-bed, Resolution 2749 of the UN

13 See below.

14 Art 2 High Seas Convention 1958.

15 As above.

16 See Brooke (n 1) 379; Mashayekhi (n 1) 229.

17 As above.

18 See United Nations General Assembly Resolution 2574 (Question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind) 15 December 1969.

General Assembly was passed.[19] The General Assembly Committee on Peaceful Uses of the Sea-Bed adopted Resolution 2749 of 17 December 1970, with 108 votes and 14 abstentions.[20] The abstentions came mainly from Eastern European states, especially the Soviet Union.[21] In general, Resolution 2749 contained a declaration of principles governing the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.[22] The Resolution represented a substantial consensus that

(i) the area shall not be subject to appropriation by states or by natural or legal persons;
(ii) an international regime should be created to govern the management of the natural resources; and
(iii) the area shall be open to use for exclusively peaceful purposes.[23]

Relying on Resolution 2749, a number of developing countries in Africa and Latin America considered the Resolution as having declared a moratorium on the exploitation of resources on and in the sea-bed.[24] In a letter dated 29 August 1980, signed by the Chairperson of the Group of 77 and addressed to the president of the third UN Conference on the Law of the Sea, the Group of 77 argued as follows:[25]

> The Declaration of Principles (Resolution 2749) affirms the existence of an international Area free from State Sovereignty, which cannot be subject to appropriation by any means, by States or private persons. This Area constitutes the Common Heritage of Mankind, and its resources must be exploited for the benefit of mankind as a whole and, in particular, of developing countries.

Thus, the Declaration of 1970 cannot be reduced to mere political choices of various developing countries. Rather, the consensus drawn at the

19 Churchill & Lowe (n 1) 180, on the United Nations General Assembly Resolution 2749 (Declaration of principles governing the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction 17 December1970.

20 Churchill & Lowe (n 1) 180.

21 As above.

22 See, generally, United Nations General Assembly Resolution 2749 (n 19).

23 Churchill & Lowe (n 1) 180.

24 Churchill & Lowe (n 1) 181. See also United Nations General Assembly Resolution 2749 (n 19).

25 See Letter from the Group of 77, signed on 29 August 1980 by EK Wapenyi, Representative of Uganda to the Third United Nations Conference on the Law of the Sea and Chairman of the Group of 77 (Legal position of the group of 77 on the question of unilateral legislation concerning the exploration and exploitation of the seabed and ocean floor and subsoil thereof beyond national jurisdiction) (Document a/conf.62/106) 111.

General Assembly continued to attract active compliance by developing countries, thus pointing to evidence of state practice and *opinio juris* for the crystallisation or formation of a rule of customary international law.[26] In the *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*[27] the International Court of Justice ruled:[28]

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, eg, in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

Indeed, the Group of 77 viewed the Declaration as having formed a moratorium on unilateral claims to deep sea-bed mining.[29] Hence, the Chairperson of the Group of 77 declared in his letter that '[t]he principle of the common heritage of mankind is a customary rule which has the force of a peremptory norm'.[30]

Article 53 of the Vienna Convention on the Law of Treaties 1969 defines a 'peremptory norm' as 'a norm accepted and recognized by the international community of states as a whole as a norm from which no

26 On *opinio juris* and state practice, see eg *The Paquete Habana v the United States of America* 175 US 677 20 S Ct 290; 44 L. Ed. 320; 1900 US LEXIS 1714. See also *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* [1969] ICJ 1 44.

27 [1969] ICJ 1; ICJ Reports 1969 3; [1969] ICJ Rep 3 (20 February 1969).

28 *North Sea Continental Shelf* (n 27) 44. See also the ruling of the Permanent Court of International Justice in the *Lotus* case (PCIJ Series A, No 10, 1927 28): 'Even if the rarity of the judicial decisions to be found … were sufficient to prove … the circumstances alleged ... it would merely show that states had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that states have been conscious of having such a duty; on the other hand … there are other circumstances calculated to show that the contrary is true.'

29 See above.

30 Letter from the Group of 77 (n 26) 111.

derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[31]

Churchill and Lowe contend, however, that although customary international law is usually created by state practice coupled with *opinio juris*, it is difficult to see what 'practice' there could be in the case of a prohibitive rule.[32] This view is not free from illogical difficulties. States, indeed, can practise to refrain from carrying out certain acts. Refraining itself is a practice. States can 'practise' to refrain from engaging, for example, in slavery. A 'practice' of states needs not necessarily point to active steps to carry out something. Rather, it can also be about passive steps to refrain from engaging in certain acts.

Although closely related to a peremptory norm, the concept of *jus cogens* is slightly different from a peremptory norm.[33] Notwithstanding that the title of article 53 of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention) reads as 'treaties conflicting with a peremptory norm of general international law ('*jus cogens*')', with the term *jus cogens* appearing in parenthesis, nowhere in the text of article 53 is the term *jus cogens* mentioned. Under customary international law, however, *jus cogens* prohibits acts such as genocide, maritime piracy, slavery, wars of aggression, territorial aggrandisement and, arguably, torture and *refoulement*.[34] By contrast, the concept of a peremptory norm under article 53 of the Vienna Convention, allowing of no derogations, Churchill and Lowe argue, has little relevance to the law of the sea.[35] Also, the definition of peremptory norms in the said treaty, although also codifying aspects of customary international law, appears broader in scope than the concept of *jus cogens*. Indeed, it is not confined to any particular acts. Let us now look at pertinent aspects of the Continental Shelf Convention 1958 and how they relate to deep sea-bed mining.

3.2 The Continental Shelf Convention 1958

It is important to point out that the Continental Shelf Convention 1958 codified much of what was customary international law at the time that that treaty came into force.[36] Article 1 of the Continental Shelf Convention provides that the continental shelf refers to

31 Vienna Convention on the Law of Treaties 1969, art 53.

32 Churchill & Lowe (n 1) 200.

33 Churchill & Lowe (n 1) 5.

34 As above.

35 As above.

36 *See page 3 of the legal note by T Treves, judge of the International Tribunal for the Law of the*

(a) the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of superjacent waters admits of the exploitation of the natural resources of the said areas;
(b) the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands'.[37]

Unlike the definition of continental shelf found in article 76 of the Law of the Sea Convention,[38] the definition in article 1 of the Continental

Sea and Professor of Law at the University of Milan, Italy, to the United Nations on the 1958 Geneva Conventions on the Law of the Sea, https://legal.un.org/avl/ha/gclos/gclos.html (accessed 1 October 2020), where he observes: 'The importance of the Geneva Conventions is currently mostly historical, as an expression of the "traditional law of the sea", namely, the law prevailing before the transformations in the international community and in its assessment of the uses of the seas that brought about the Third United Nations Conference on the Law of the Sea. The Conventions were adopted less than a decade before the famous speech by Arvid Pardo at the General Assembly in 1967 that started the process for the complete renewal of the law of the sea, and entered into force just a few years before that event.'

37 Continental Shelf Convention 1958, art 1.

38 Art 76 of the United Nations Law of the Sea Convention 1982 defines a continental shelf as follows: '1. The continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. 2. The continental shelf of a coastal state shall not extend beyond the limits provided for in paragraphs 4 to 6. 3. The continental margin comprises the submerged prolongation of the land mass of the coastal state, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof. 4. (a) For the purposes of this Convention, the coastal state shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base. 5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres. 6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural 54 components of the continental margin, such as its plateaux, rises, caps, banks and spurs. 7. The coastal state shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles

Shelf Convention does not place distance limitations on the outer limit of the shelf. Therefore, under the Continental Shelf Convention, as long as the floor of the high seas adjacent to the territorial sea is exploitable it would be treated as part of the continental shelf.[39] The significance of this distinction is that the definition in the Continental Shelf Convention permits states to claim large parts of the deep sea-bed as part of their continental shelf. For example, the US (which is a party to the Continental Shelf Convention) declared in the Truman Proclamation 1945 (the Proclamation is the formal basis of the term 'continental shelf')[40] that 'the government of the US regards the natural resources of the subsoil and the sea-bed of the Continental Shelf beneath the high seas but contiguous to the coasts of the US as appertaining to the US, subject to its jurisdiction and control'.[41]

Indeed, many provisions of the Continental Shelf Convention discussed above are in line with the Truman Proclamation of 1945, except that the Continental Shelf Convention provides only for slight deviations from the Truman Proclamation on matters pertaining to rights of coastal states over the continental shelf. The Convention grants coastal states sovereign rights, and not jurisdiction, over resources on and in the continental shelf. The absence of any provisions permitting the coastal state to exercise jurisdiction over the continental shelf, in contrast to sovereign rights, is important in that it accommodates the sovereign rights of landlocked states and other coastal states. To illustrate, article 5 of the Continental

from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude. 8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal state to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal states on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal state on the basis of these recommendations shall be final and binding. 9. The coastal state shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto. 10. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.'

39 See above.

40 See below.

41 US Presidential Proclamation 2667, 28 September 1945 (Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental – Truman Proclamation on the Continental Shelf), https://www.presidency.ucsb.edu/documents/proclamation-2667-policy-the-united-states-with-respect-the-natural-resources-the-subsoil (accessed 31 July 2020.

Shelf Convention refers to restrictions on unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea or fundamental oceanographic research. Indeed, landlocked states and other coastal states would ordinarily desire to enjoy such rights and the Continental Shelf Convention provides for their protection.

3.3 The Law of The Sea Convention 1982

Culminating from the work of the third United Nations Conference on the Law of the Sea, and reflecting a number of provisions of the two General Assembly resolutions discussed above,[42] article 153 of the Law of the Sea Convention provides for a legal framework for exploring and exploiting resources on and beneath the bed of the high seas.[43] Activities in the 'Area' are to be organised, carried out and controlled by the 'Authority' which is the competent body in as far as regulating deep sea-bed mining and the exploitation of resources is concerned.[44] Article 153(2) permits the 'Enterprise', an organ of the Authority, to exploit and explore resources in the Area.[45] Similarly, state parties to the Law of the Sea Convention, in association with the Authority, and state enterprises or natural or juridical persons that possess the nationality of state parties or are effectively controlled by them or their nationals, when sponsored by such states may exploit the Area in association with the Authority.[46]

To strengthen the role of the Authority, article 136 provides that the Area and its resources are the common heritage of mankind.[47] Further, article 137 adds that no state can claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor will any state or natural or juridical person appropriate any part thereof.[48] Consequently, no such claim or exercise of sovereignty or sovereign rights nor such appropriation is recognisable or opposable in international law.[49]

42 See above.

43 See generally Burton (n 2) 1135-1180; JA Ardronab, HA Ruhlb & DOB Jones 'Incorporating transparency into the governance of deep-seabed mining in the area beyond national jurisdiction' (2018) 89 *Marine Policy* 58-66; G Biggs 'Deep seabed mining and unilateral legislation' (1980) 8 *Ocean Development and International Law* 223-257.

44 United Nations Law of the Sea Convention 1982, art 153.

45 United Nations Law of the Sea Convention (n 45) art 153(2).

46 United Nations Law of the Sea Convention art 153.

47 United Nations Law of the Sea Convention art 136.

48 United Nations Law of the Sea Convention art 137.

49 *Cf* MC Bassiouni 'International crimes: "*Jus cogens*" and '*obligatio erga omnes*"' (1996) 59 *Law and Contemporary Problems* 63-74.

It could be argued, however, that since the US is not a state party to the United Nations Law of the Sea Convention, the relevant provisions of that treaty do not apply to the US. Also, a closely-related argument could be that some state parties to the United Nations Law of the Sea Convention might decide to express a reservation to article 137 when signing, ratifying or acceding to the treaty. However, what is a 'reservation'? The Vienna Convention, codifying customary international law on treaties, defines a reservation as 'a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state'.[50]

If, however, the doctrine of 'common heritage of mankind',[51] as enshrined in article 136 of the United Nations Law of the Sea Convention, is taken as a peremptory norm under article 53 of the Vienna Convention, or as *jus cogens* under customary international law,[52] an argument can be made that the US or any other state has no right to unilateral claims to deep sea-bed mining, cannot claim to be a persistent objector under customary international law,[53] and cannot express a reservation to article 137 of the United Nations Law of the Sea Convention when signing, ratifying or acceding to the said 1982 treaty. As established above,[54] the deep sea-bed

50 Vienna Convention on the Law of Treaties 1969, art 2(1)(d).

51 On this doctrine, see arts 136 & 137 of the United Nations Law of the Sea Convention 1982.

52 See above.

53 See *Asylum* case 1950 ICJ 275-78; *Fisheries* case 1949 ICJ 131; JI Charney 'The persistent objector rule and the development of customary international law' (1985) 56 *British Yearbook of International Law* 1-24. See also generally JA Green *The persistent objector rule in international law* (2016), where he argues that the persistent objector rule is said to provide states with an 'escape hatch' from the otherwise universal binding force of customary international law. Green observes that the rule provides that if a state persistently objects to a newly-emerging norm of customary international law during the formation of that norm, then the objecting state is exempt from the norm once it crystallises into law. According to Green, the conceptual role of the rule may be interpreted as straightforward, to preserve the fundamentalist positivist notion that any norm of international law can only bind a state that has consented to be bound by it. In reality, however, Green argues, numerous unanswered questions exist about the way that it works in practice. Through focused analysis of state practice, Green provides a detailed understanding of how the rule emerged and operates, how it should be conceptualised, and what its implications are for the binding nature of customary international law. He argues that the persistent objector rule ultimately has an important role to play in the mixture of consent and consensus that underpins international law.

54 See above.

and its resources can only be mined 'for the benefit of mankind as a whole, irrespective of the geographical location of states'.[55]

Indeed, article 309 of the United Nations Law of the Sea Convention makes it clear that reservations to provisions of the said treaty are not permitted. Thus, the treaty provisions of the Law of the Sea Convention are not subject to reservations by any state party to the treaty. This prohibition means that the 'doctrine of common heritage of mankind' applies to all state parties to the treaty. In a sense, given that the 'doctrine of common heritage of mankind' has acquired a universally-accepted norm in customary international law, it may be argued that this doctrine (which, under the Law of the Sea Convention, permits no derogation) is a peremptory norm.

That the Area and its resources are regarded as 'common heritage of mankind' entails that both the Area and its resources are not susceptible to unilateral state appropriation. The Area and its resources can, nonetheless, be explored and exploited by state parties to the Law of the Sea Convention in accordance with the provisions of the Convention; that is, as authorised by the International Sea-Bed Authority.[56]

3.4 Practice of the United States

Bromund et al provide seven reasons why they think that the US should not ratify the Law of the Sea Convention.[57] They argue that 'US membership

55 See Preamble to the United Nations Law of the Sea Convention 1982 as well as arts 136, 140, 143 and 149 of the said treaty.

56 The International Sea-Bed Authority (ISA) 'About ISA', https://www.isa.org.jm/about-isa (accessed 4 June 2020), posits: 'The International Seabed Authority (ISA) is an autonomous international organization established under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (1994 Agreement). ISA is the organization through which States Parties to UNCLOS organize and control all mineral-resources-related activities in the Area for the benefit of mankind as a whole. In so doing, ISA has the mandate to ensure the effective protection of the marine environment from harmful effects that may arise from deep-seabed related activities. ISA which has its headquarters in Kingston, Jamaica, came into existence on 16 November 1994, upon the entry into force of UNCLOS. ISA became fully operational as an autonomous international organization in June 1996, when it took over the premises and facilities in Kingston, Jamaica previously used by the United Nations Kingston Office for the Law of the Sea. In accordance with article 156 (2) of UNCLOS, all States Parties to UNCLOS are ipso facto members of ISA. As of 1 May 2020, ISA has 168 members, including 167 member States and the European Union. The Area and its resources are the common heritage of mankind. The Area covers around 54 per cent of the total area of the world's oceans.'

57 See TR Bromund, JJ Carafano & BD Schaefer 'Seven reasons US should not ratify UN Convention on the Law of the Sea' *The Heritage Foundation: Global Politics* 4 June

in the Convention would not confer any maritime right or freedom that the US does not already enjoy. The US can best protect its rights by maintaining a strong US navy, not by acceding to the Convention.'[58]

This argument, unfortunately, lacks merit and provides no legal basis in international law of unilateral claims to deep sea-bed mining by the US. Maintaining a strong naval presence has nothing to do with the *erga omnes* of states pertaining to the 'common heritage of mankind'.[59] In the *Barcelona Traction* case[60] the International Court of Justice (ICJ) held:[61]'

> An essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature, the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ... others are conferred by international instruments of a universal or quasi-universal character.

Bromund et al, however, continue:[62]

> 2 For more than 30 years, through domestic law and bilateral agreements, the US has established a legal framework for deep-seabed mining. US accession would penalize US companies by subjecting them to the whims of an unelected and unaccountable bureaucracy and would force them to pay excessive fees to the International Seabed Authority for redistribution to developing countries.

Again, it is difficult to appreciate why the authors would deem governments of other states as 'unelected and unaccountable'. Regrettable as it may be, the authors argue further:[63]

2018, https://www.heritage.org/global-politics/commentary/7-reasons-us-should-not-ratify-un-convention-the-law-the-sea (accessed 16 September 2020).

58 As above.

59 See below.

60 *Belgium v Spain* (Second Phase) ICJ Rep 1970 3 para 33.

61 As above.

62 Bromund et al (n 59).

63 As above.

3 As a sovereign nation, the US can – and has – secured title to oil and gas resources located on the US extended continental shelf without acceding to the convention or seeking the approval of an international commission based at the United Nations.
4 If the US accedes to the convention, it will be required to transfer a large portion of royalties generated on the US extended continental shelf to the International Seabed Authority, and, through the authority, to corrupt and undemocratic nations. The US should instead retain these royalties and use them for the benefit of the American people.
5 The US does not need to join the convention in order to access oil and gas resources on its extended continental shelf, in the Arctic, or in the Gulf of Mexico. To the extent necessary, the US can and should negotiate bilateral treaties with neighboring nations to demarcate the limits of its maritime and continental shelf boundaries.
6 If the US accedes to the convention, it will be exposed to climate change lawsuits and other environmental actions brought against it by other members of the convention. The US should not open the door to such politically motivated lawsuits that, if resulting in an adverse judgment against the US, would be domestically enforceable and harm our environmental, economic, and military interests.
7 The US has successfully protected its interests in the Arctic since it acquired Alaska in 1867 and has done so during the more than 30 years that the convention has existed. The harm that would be caused by the convention's controversial provisions far outweighs any intangible benefit that allegedly would result from US accession.

Time and again, the US has argued that deep sea-bed mining is a freedom of the high seas under customary international law.[64] Under this view, the US contends that its nationals enjoy a right of access to sea-bed minerals and that this right can only be altered by the US's acceptance of a different legal regime through the processes of conventional or customary international law.[65] As Henkin et al observe:[66]

> Under the law of the United States, a citizen of the United States may engage in activities or exploration for, or exploitation of, the mineral resources of the area of the sea-bed and subsoil beyond the limits of national jurisdiction only

64 See, generally, Morell (n 1). See also L Henkin et al *International law: Cases and materials* (1993) 1308-1321.

65 See below.

66 Henkin et al (n 66) 1314.

> in accordance with a license issued by the Federal Government pursuant to law or international agreement.

Groves also maintains:[67]

> The United States can mine the deep seabed without acceding to the United Nations Convention on the Law of the Sea (UNCLOS). For more than 30 years, through domestic law and bilateral agreements, the US has established a legal framework for deep seabed mining. In fact, US accession would penalize US companies by subjecting them to the whims of an unelected and unaccountable international bureaucracy. US companies would be forced to pay excessive fees, costs, and royalties to the International Seabed Authority for redistribution to developing countries. US interests are better served by not acceding to UNCLOS.

The 1980 Seabed Act of the US affirms that 'it is the legal opinion of the US that exploration for and commercial recovery of hard mineral resources of the deep sea-bed are freedoms of the high seas',[68] but denies any claim to sovereign or exclusive rights or jurisdiction over sea-bed minerals.[69] Instead, the Act treats nodules as analogous to high seas fisheries, title to which has historically rested upon capture.[70]

Closely related to that, the US Commission on Oceans Policy, appointed by President Bush under the Oceans Act 2000, as the privately-appointed Pew Oceans Commission, unanimously recommended US ratification of the Convention on the Law of the Sea.[71] Although the High Seas Convention does not specify that deep sea-bed mining is a freedom of the high seas, the US maintains that deep sea-bed mining is a freedom of the high seas under article 2 of the High Seas Convention.[72] Article 2 of that Convention provides that every freedom of the high seas must be exercised 'with reasonable regard to interests of other states in their exercise of the freedom of the high seas'. Although the US places greater

67 S Grove 'The US can mine the deep seabed without joining the UN Convention on the Law of the Sea' *The Heritage Foundation: Backgrounder* 2746 4 December 2012 1-18, http://thf_media.s3.amazonaws.com/2012/pdf/bg2746.pdf (accessed 10 August 2020.

68 See para 1401(a)(12) of the US Deep Seabed Hard Mineral Resources Reauthorization Act of 1986.

69 See, generally, US Deep Seabed Hard Mineral Resources Reauthorization Act (n 70).

70 See, generally, the US Seabed Act of 1980.

71 See DB Sandalow 'Law of the Sea Convention: Should the US join?' Brookings Policy Brief Series, Policy Brief 137 19 August 2004 7-8, https://www.brookings.edu/research/law-of-the-sea-convention-should-the-u-s-join/ (accessed 10 August 2020).

72 See, generally, Morell (n 1).

emphasis on 'reasonableness' here, contending that deep sea-bed mining is a reasonable use of the high seas,[73] the US disregards the part of that treaty provision that refers to 'regard to interests of other states'. In so doing, the US continues to claim that deep sea-bed mineral exploration and exploitation constitute a reasonable use of the high seas.[74]

While deep sea-bed mining is not expressly provided for under the High Seas Convention, it certainly is not prohibited by that treaty either. In the *SS Lotus* case[75] it was held that restrictions on the exercise of maritime jurisdiction must be established 'by the most conclusive evidence'.[76] The US has relied on this position in their interpretation of the High Seas Convention. Similarly, and as will become clearer in the latter parts of this chapter, proponents of the legal vacuum theory with respect to deep sea-bed mining have relied on the *Lotus* case.[77] That said, the US has itself declined to subscribe to the legal vacuum theory, remaining insistent on the interpretation of 'reasonableness' in article 2 of the High Seas Convention.[78] The US relies also on some special arrangements made for it to come on board the UN Law of the Seas Convention 1982 (see the 1994 Agreement Relating To The Implementation of Part XI of the UN Convention on the Law of the Sea). Against this background, it could be argued that there are two possible routes for non-state parties to the Law of the Sea Convention to avoid the provisions of this treaty, and that the two routes are the following:

(i) The legal framework for the continental shelf under United Nations Law of the Sea Convention 1982 which provides that the shelf extends to a breadth of 200 nautical miles from the baseline from which the territorial sea is measured. This regime permits non-state parties to the United Nations Law of the Sea Convention 1982 to claim a greater breadth of the Continental Shelf based on the 'exploitability test' under the Continental Shelf Convention 1958.
(ii) The legal framework governing the International Seabed Authority is only found under the United Nations Law of the Sea Convention 1982,

73 As above.

74 As above.

75 1927 PCIJ (ser A) No 10 (7 September).

76 SS Lotus (*Fr v Turk*) 1927 PCIJ (ser A) No 10 (7 September) para 67.

77 See below.

78 See, generally, Morell (n 1).

and this entails that non-state parties to the convention are not bound by decisions of the International Seabed Authority.

3.5 The legal vacuum theory

Some publicists argue that deep sea-bed mining is governed by the legal vacuum theory.[79] This theory posits that if there is an occurrence that is not covered by existing international law, then the state affected by this transpiration is free to formulate rules to meet the problems thus created.[80] Examining the legal vacuum theory, Morton observes:[81]

> Classical realists and Utopian idealists have long disagreed over the nature of international law. While classical realists from EH Carr to Hans Morgenthau contend that law is the product of power realities in international relations, Utopian idealists reject such power explanations, focusing instead on the institutions that create international law. This study addresses that theoretic struggle by empirically examining the intervention of world politics in the debate process of the International Law Commission. A data base is created from the debate record of Law Commission members from 1983 to 1989. Content analysis is performed to test explicit hypotheses that examine the Utopian assumption of an apolitical Law Commission found in the Commission's Statute. The findings indicate that the Law Commission functions in a manner that is greatly constrained by global politics and power realities. The focus on institutions, prevalent in the literature, is misleading and fails to capture the essence of the debate process in the Commission. The strength of the findings underscores the necessity for students of international law to employ a more empirical, systematic methodology in their research.

In a sense, proponents of the legal vacuum theory assert that[82] '(a) the regime of the high seas as a *res communis* does not provide a sufficiently stable legal basis for extensive development and competing claims, and (b) the provisions of the Continental Shelf Convention 1958 relating to the definition of the outer limit of the shelf area are in need of clarification'.[83]

79 As above.

80 As above.

81 JS Morton 'The international law commission of the United Nations: Legal vacuum or microcosm of world politics?' (1997) 23 *International Interactions* 37.

82 See, generally, Morell (n 1).

83 *Cf* the Law of the Sea Convention 1982 which provides an option of 200 miles (that is, breadth-wise) Economic Exclusive Zone that may be of the same breadth as the Continental Shelf. However, the alternative option under the 1982 Convention replicates the exploitability criteria under the Continental Shelf Convention 1958.

The US, however, does not subscribe to the legal vacuum theory.[84] We also contend that there is no legal vacuum in international law concerning deep sea-bed mining.[85] The doctrine of 'common heritage of mankind' under the Law of the Sea Convention provides a legal basis both in conventional and customary international law for a state to engage in deep sea-bed mining. Indeed, this doctrine is a refined restatement of Grotius's principle of *res communis* of the high seas.[86] Grotius argued that the sea is and has always been *res communis*, noting that its legal status was determined by a law derived from nature, 'the common mother of us all, whose bounty falls on all and whose sway extends over those who rule nations'.[87] Morell observes that a reformulation of the Grotian *res communis* principle thus would emphasise that the oceans, as a collective resource of the world community, may be used freely for any purpose, provided such use does not impair the interests of others users.[88] Where such impairment occurs, the use of the sea must be allocated through regulation express or implied, by the international community.[89] It is this reformulation of the Grotius principle, we contend, that the Law of the Sea Convention conveys.

Under the Law of the Sea Convention, the regulation of the exploration and exploitation of the deep sea-bed and its resources is mandatory for all state parties.[90] Indeed, no derogation is allowed.[91] In essence, the concept of *res communis*, the doctrine of 'common heritage of mankind' and the relevant UN General Assembly resolutions examined above all point to evidence of customary international law on the matter. Thus, the principle of *res nullius*, suggesting that everything in the high seas is open to effective occupation, is not sustainable if a state making unilateral claims to deep sea-bed mining has no title to those resources being mined. As Henkin et al observe on the customary international law position applying to non-state parties to the Law of the Sea Convention, 'no state may claim or exercise sovereignty or sovereign or exclusive rights over any part of the sea-bed and subsoil beyond the limits of national jurisdiction, or over its

84 See arguments presented above on the position of the US on deep seabed mining.

85 See above.

86 See, generally, K Baslar *The concept of the common heritage of mankind in international law* (1997).

87 H Grotius *The freedom of the high seas* (1916) 5.

88 See, generally, Morell (n 1).

89 As above.

90 As noted above, art 309 of the United Nations Law of the Sea Convention 1982 makes it clear that reservations to provisions of the said treaty are not permitted.

91 See above.

mineral resources, and no state or person may appropriate any part of that area'.[92]

3.6 Conclusion

This chapter has examined the legal basis in international law, if any, of a state making unilateral claims to a right to deep sea-bed mining. This first part of the chapter looked at the salient features of both treaty law and customary international law. The second part examined the practice of maritime powers such as the US, while the third part addresses the concept of the legal vacuum theory on deep sea-bed mining.

An argument was made that there is no right under customary international law for states to make unilateral claims to a right to explore and exploit resources of the seabed in the high seas. The doctrine of 'common heritage of mankind', it was argued, provides a multilateral framework for deep sea-bed mining both under customary international law and the United Nations Law of the Sea Convention.

We further contend that this doctrine of 'common heritage of mankind' has now crystallised into *jus cogens* under international customary law and that it should also be treated as a peremptory norm under the Law of the Sea Convention, allowing for no derogation or reservations. Therefore, any enactment of municipal law by a state to permit its nationals to engage in unilateral deep sea-bed mining is a breach of that State's *erga omnes in international law.*

92 Henkin et al (n 66) 1314.

4 Illicit financial outflows, debt and human rights

4 Introduction

In chapter 3 we examined the legal basis, if any, under customary international law, of states acting unilaterally to engage in deep sea-bed mining. Chapter 4 builds on that analysis to examine contemporary issues in international law pertaining to illicit financial outflows, debt and human rights. The Office of the United Nations Human Rights Commissioner observes:[1]

> During its 25th Session, the Human Rights Council adopted resolution 25/9 in which it requested the Independent Expert on the effects of foreign debt to undertake a study to analyse the negative impact of illicit financial flows on the enjoyment of human rights in the context of the post 2015 development agenda. In March 2015 the Independent Expert presented an interim study (A/HRC/28/60) to the 28th session of the Human Rights Council. The study stressed that illicit financial flows generated from crime, corruption, embezzlement and tax evasion represent a major drain on the resources of developing countries, reducing tax revenues and the scope for progressive taxation, hindering development and the rule of law, exacerbating poverty and inequality, and undermining the enjoyment of human rights. Tax evasion and abuse are considered to be responsible for the majority of all illicit financial outflows, followed by illicit financial flows relating to criminal activities, such as drug and human trafficking, the illicit arms trade, terrorism and corruption-based illicit financial flows.

In recent years, there has been increasing attention to the problem of illicit financial outflows – broadly defined as funds that are illegally earned, transferred and utilised outside the country of origin in contravention of that country's relevant legal framework.[2] Illicit financial outflows divert

1 Office of the United Nations Human Rights Commissioner 'Illicit financial flows and human rights: Reports by the Independent Expert: Interim study (A/HRC/28/60) and Final Study (A/HRC/31/61), http://www.ohchr.org/EN/Issues/Development/IEDebt/Pages/Consultation.aspx (accessed 9 February 2017).

2 United Nations General Assembly Human Rights Council (31st session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development) 'Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development of the Independent Expert on the effects of foreign debt and other related international

resources away from activities that are essential for poverty reduction, sustainable development and the realisation of human rights. They also contribute to the accumulation of external debt as governments that lack domestic resources as a result of these outflows may resort to costly external borrowing. This chapter examines the nature of illicit financial outflows, the factors that facilitate these and the measures taken by states, individually and collectively, to tackle them. It also discusses the impact of these outflows on the realisation of human rights in the countries of origin, and proposes concrete measures by which to curb illicit financial outflows. The chapter argues that illicit financial outflows from many developing nations and certain forms of international debt owed by these nations continue to impact negatively on the human rights standards, especially the social, economic and political rights, of the said nations.

In a 2015 study by Global Financial Integrity, Kar and Spanjers observe that from 2004 to 2013 (that is, a ten-year period) the developing world as a whole lost US $7,8 trillion (see Table X1 below).[3] In real terms, as the study concludes, these outflows increased at a rate of 6,5 per cent per annum, and that after a slowdown during the global financial crisis, illicit outflows have been rising, topping US $1 trillion since 2011 and reaching a new peak of US $1,1 trillion in 2013 (see Table X1).[4]

financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights (A/HRC/31/61)' (United Nations, 15 January 2016) 4: 'Illicit financial flows can be defined narrowly or broadly. In their narrow sense, they refer to unrecorded financial flows involving funds that are illegally earned, transferred or utilised, for example, the profits of illegal activities, such as crime and corruption. Even if the funds originate from legitimate sources, however, their transfer abroad in violation of domestic laws, such as tax regulations, would render the capital illicit. Funds with a legitimate origin that are used for unlawful purposes, such as terrorist financing, would also be considered illicit. In their broader sense, illicit financial flows refer also to funds that, through legal loopholes and other artificial arrangements, circumvent the spirit of the law, including, for example, tax avoidance schemes used by transnational corporations.'

3 D Kar & J Spanjers *Illicit financial flows from developing countries: 2004-2013* (2015) vii.

4 Kar & Spanjers (n 3) vii.

Region	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	Cumulative	Average Share
Sub-Saharan Africa	32.5	51.9	56.4	77.0	78.6	85.0	78.0	74.3	66.7	74.6	675.0	8.6%
Asia	174.6	191.9	209.1	236.5	277.5	277.1	381.7	361.1	456.7	482.0	3048.3	38.8%
Developing Europe	107.3	118.4	133.8	190.6	233.8	204.9	221.8	295.5	242.5	250.4	1998.9	25.5%
MENA+AP	29.9	31.0	33.3	57.4	80.3	51.9	53.0	81.1	68.2	70.3	556.5	7.1%
Western Hemisphere	120.9	131.4	111.0	137.7	157.8	128.1	172.0	195.8	201.8	212.8	1569.3	20.0%
All Developing Countries	**465.3**	**524.6**	**543.5**	**699.1**	**828.0**	**747.0**	**906.6**	**1007.7**	**1035.9**	**1090.1**	**7847.9**	

Source: D Kar & J Spanjers Illicit financial flows from developing countries: 2004-2013 (2015) vii

4.1 Outline of the chapter

The first part of this chapter is the introduction. Part II of the chapter follows hereunder, examining the doctrine of odious debts, and how it relates to illicit financial outflows. The impact of these outflows on human rights standards is also examined. The third part looks at vulture funds as another form of illicit financial outflows that offends the concept of human rights. This issue of vulture funds is often overlooked by contemporary literature. So, in an important way, the study contributes to filling a gap in the literature on illicit financial outflows and their impact on human rights standards.

Money laundering and corruption are subsequently addressed in the fourth part of the chapter. At the outset, it should be stressed that this chapter focuses on salient aspects of illicit financial outflows that result

from 'hot money' and not those that result from trade-related malpractices such as import over-invoicing and export under-invoicing.

Part II: Odious debts as illicit financial outflows

There is a lively discussion as to whether debts incurred by despotic regimes and used to the detriment of the population are legally valid … a legal solution is not only desirable, but feasible. Subsequently, international human rights are identified as the missing link between the behaviour of the debtor state and the assessment of individual debts. Consequently, a human rights-based mechanism for the prevention of odious agreements is developed … Agreements concluded with an odious debts-prone state are void, unless the agreement complies with principles of responsible contracting.[5]

4.2 Odious debts

This part of the chapter examines the doctrine of odious debts and how the pursuit of such debts by a creditor or vulture fund could lead to illicit financial outflows from the state whose political elite has committed it to odious debts. The chapter posits that, as a deterrent, under international conventional law, a head of state or such other political elite who commits a state to odious debts should be made criminally liable. An argument is made that while most international efforts to bring liability on a former head of state have focused on the abuse of state resources and the recovery or forfeiture of such stolen assets,[6] not much attention has been paid to the liability of a head of state or former head of state who has committed the state to odious debts.

We contend that international treaties such as the 2002 Rome Statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute), a treaty that established the International Criminal Court (ICC), should provide for the criminal liability of a head of state or former head of state for engaging in serious

5 FB Schneider 'The International Convention on the Prevention of Odious Agreements: A human rights-based mechanism to avoid odious debts' (2015) 28 *Leiden Journal of International Law* 557.

6 See eg the Stolen Asset Recovery Initiative (StAR) 'Stolen Asset Recovery Initiative (StAR): The World Bank and UNODC – Our vision' http://star.worldbank.org/star/about-us/our-vision (accessed 2 January 2017), stipulating: 'The Stolen Asset Recovery Initiative (StAR) is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) that supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and financial centers to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets.'

economic crimes such as committing a state to odious debts. That way, a culpable head of state or former head of state will not be able to hide behind the shield of head-of-state immunity to avoid prosecution in a domestic court of law. Odious debts, when recovered by a creditor or vulture fund, can deprive a state of resources required to progressively realise human rights, including economic, social and cultural rights, such as health, education, social protection, water, sanitation, as well as civil and political rights, including access to justice, free and fair elections, freedom of expression and personal security.[7] Let us now take a more reasoned look at the concept of odious debts.

4.3 A conceptual understanding of odious debts

In a technical paper prepared for the United Nations Conference on Trade and Development (UNCTAD), Howse argues that the modern concept of odious debts was first articulated in the post-World War I context by the jurist, Alexander Nahun Sack, in his 1927 book *The effects of state transformations on their public debts and other financial obligations*.[8] According to Howse,

> [f]or Sack, odious debts were debts contracted and spent against the interests of the population of a state, without its consent, and with full awareness of the creditor. Sack (1929) wrote as follows: 'If a despotic power incurs a debt not for the needs or in the interest of the state, but to strengthen its despotic regime, to repress its population that fights against it, etc, this debt is odious for the population of the state. The debt is not an obligation for the nation; it is a regime's debt, a personal debt of the power that has incurred it, consequently it falls within this power … The reason these "odious" debts cannot be considered to encumber the territory of the state, is that such debts do not fulfill one of the conditions that determines the legality of the debts of the state, that is: the debts of the state must be incurred and the funds from it employed for the needs and in the interest of the state. "Odious" debts, incurred and used for ends which, to the knowledge of the creditors, are contrary to the interests of the nation, do not compromise the latter – in the case that the nation succeeds in getting rid of the Government which incurs

7 *Cf* Office of the United Nations Human Rights Commissioner (n 1) 7.

8 R Howse *The concept of odious debt in public international law* (2007) 2.

> them – except to the extent that real advantages were obtained from these debts.'[9]

Sack divides odious debts into several categories, namely, war debts; subjugated or imposed debts; and regime debts.[10] Howse contends that other jurists have used slightly different taxonomies, and that[11]

> O'Connell (1967) referred to 'hostile debts' in addition to war debt; others have referred to 'profligate debts'. Still others refer to a new category of 'developing world debts not spent in the interests of the population' framing the concept in terms of irresponsible or odious lending (Khalfan et al 2003). The most common classical types of odious debts are hostile debts and war debts. 'Hostile debts' can be defined as debts incurred to suppress secessionist movements, to conquer peoples and so forth. 'War debts' are debts contracted by the state for the purpose of funding a war which the state eventually loses and whereby the victor is not obliged to repay the debt.[12]

Other publicists such as Jayachandran and Kremer postulate that the legal doctrine of *odious debt* holds that debt should not be transferable to successor regimes if (a) it was incurred without the consent of the people; and (b) it was not for their benefit.[13] They argue:[14]

> The underlying principle is that just as an individual does not have to repay money that someone fraudulently borrows in her name, and a corporation is not liable for contracts that its chief executive officer enters into without authority to bind the firm, a country should not be responsible for debt that was incurred without the people's consent and was not used for their benefit.

Let us now turn to look at how the concept of odious debts gained prominence in public international law.

4.4 International law and odious debts

Jayachandran and Kremer posit that the doctrine of odious debts arose after the Spanish-American War when the United States contended that neither the United States nor Cuba should be responsible for debt that

9 As above.

10 As above.

11 As above.

12 Howse (n 8) 2-3.

13 S Jayachandran & M Kremer 'Odious debt' (2006) 96 *American Economic Review* 82.

14 Jayachandran & Kremer (n 13) 82-83.

Cuba's colonial rulers had run up in Cuba's name.[15] The concept, it is argued, attracted considerable attention in 2003 when the Secretary of the Treasury and other senior US officials suggested that debts incurred by Saddam Hussein should perhaps be considered odious, and not the new Iraqi government's obligation to repay.[16]

But how can we tell if a debt was incurred without the consent of the people and if it was not for their benefit? Is there an objective test? In some policy and academic circles the doctrine of odious debts has not attracted much following, and US policy makers eventually backed away from the odious debt rationale when arguing for debt relief for Iraq.[17] Commenting on the US policy makers' position, Jayachandran and Kremer observe:[18]

> This is largely out of concern that the concept of odious debt could prove a slippery slope. Countries could claim that previous debt was odious as an excuse to renege on legitimate debt. More generally, any adjudicating body that had the power to declare debt void might nullify legitimate debt if it placed a high value on the welfare of the debtor country. If creditors anticipated being unable to collect on legitimate loans, the debt market would shut down.

There are several examples where the issue of odious debts has come up. An illustrative United Nations (UN) report provides as follows:19

> *Soviet repudiation of Tsarist debts:* After the Revolution of 1917, the Provisional Soviet Government initially agreed to repay the outstanding debt of the Tsarist Government. However, by 1918, the Soviet Government had repudiated the debt. Sack, who himself was a former minister in the Tsarist regime, notes a particular Soviet doctrine that regards acts of previous Governments as incurring personal obligations only, and not ones that bind the State (Sack, 1929: 68). Nevertheless even for Sack, it could be argued that the repudiated debts were 'odious' and therefore were unenforceable against the successor regime, given the evidence that Tsarist Russia did not rule in the interests of its population (Sack, 1929: 157).

The UN report continues:[20]

15 Jayachandran & Kremer (n 13) 83.

16 As above.

17 As above.

18 As above.

19 Howse (n 8) 11.

20 Howse (n 8) 11-12: '*Tinoco arbitration – 1923* (*Great Britain and Costa Rica 1923*): In 1922 Costa Rica refused to honour loans made by the Royal Bank of Canada to the former dictator Federico Tinoco. This is an example of state practice with respect to a change

Treaty of Versailles of 1919 and Polish debts: Article 254 of the Treaty of Versailles exempted Poland from the apportionments of those debts which 'in the opinion of the Reparation Commission are attributable to the measures taken by the German and Prussian Governments for the German colonisation of Poland' (O'Connell, 1967: 189). Article 254 then set out the manner in which German public debts contracted prior to 1 August 1914 were assumed

of government and not state succession. It is also an example of an instance where the issue of odiousness of the debt became salient in a claim espoused on behalf of a private creditor. In 1917 Federico Tinoco overthrew the government of Costa Rica and later held an election to ratify the 'revolution'. During the summer of 1919 the Banco Internacional de Costa Rica issued several 'bills' of credit to the Royal Bank of Canada, in respect of which the Royal Bank paid several cheques drawn by the Tinoco government. The money was used personally by Tinoco and his brother and for no public purpose. By August 1919 Tinoco and his brother had left the country and the government fell in September. The restored government of Costa Rica enacted a law which invalidated all transactions between the state and the holders of the 'bills' issued by the Banco Internacional. Chief Justice William Howard Taft was the sole arbitrator for the dispute. Taft agreed that the Tinoco government was a *de facto* government capable of binding the state to international obligations. Despite this, Taft emphasised the fact that the debt in question did not create a valid public debt, nor was it in the public interest. The evidence established that the funds were used for the personal enrichment of the Tinoco brothers and that the bank was aware of this, since the transactions 'were made at a time when the popularity of the Tinoco government had disappeared, and when the political and military movement aiming at the overthrow of that government was gaining strength' (*Great Britain and Costa Rica 1923*: 176). Taft required the Royal Bank to discharge the burden of proving that the Costa Rican governments had used the money for legitimate purposes, something which it could not do. Accordingly, Taft found that the legislation invalidating the transactions in question did not constitute an international wrong. Meron (1957) has a different take on the arbitration. He argues that Taft dismissed the claim of Great Britain on behalf of the Royal Bank of Canada because the contract was *ultra vires* the Constitution in force at the time. The contract contained provisions regarding taxes, and therefore to be valid required the approval of both Houses of Congress, not the Chamber of Deputies alone. It can be argued that the Tinoco arbitration establishes some authority for the existence of *opinio juris* with respect to the doctrine of odious debt. Taft's judgment adopts a consistent approach confirming the rule on the non-transferability of 'odious debts'. Buchheit et al (2006) disagree, arguing that Tinoco should be narrowly interpreted as depending on the particular facts that the Tinocos appropriated the whole of the debt. The result might have been different had the debt only been partially odious (Buchheit et al 2006). But this does not reduce the value of the Tinoco arbitration as a source of law on odious debt. The concept of odiousness of debt is sufficiently flexible to address situations where debt is only partly odious – for example, where part of the funds may have been used for legitimate purposes to benefit the population. In such a circumstance, and depending on the exact factual matrix, it might be appropriate to maintain that there is a continuing obligation, at least with respect to that part of the total amount that is non-odious. *German repudiation of Austrian debts – 1938*: The Government Austria was heavily indebted to foreign creditors at the time of the German annexation of Austria in 1938, when loans from creditors had been expressly designed to prevent union with Germany. Germany repudiated the debt, citing prior American and British practice and arguing that it was contracted against the interests of the Austrian people (Hoeflich 1982: 63–64). To no avail, the Americans tried to argue that much of the debt had been used for the purchase of food.'

> by successor States. O'Connell and others agreed that the Treaty of Versailles effectively applied the odious debt test used by the American Commissioners in the Cuban debt controversy.

Against this background, we submit that where a state is made to incur debt obligations by a head of state or such other political elite for his or her personal gain, the culpable individual should be made criminally liable under international conventional law for committing the state to odious debts while in office so that he or she does not hide behind the shield of immunity against prosecution in a domestic court of law. As noted above, illicit financial outflows and certain forms of international debt continue to impact negatively on the human rights standards of many developing nations. Financial resources which should have been used for national development end up in wrong hands, thereby depriving the citizenry of their socio-economic, cultural and political rights.

4.5 Challenges to introducing liability for odious debts: The case of Africa

Although the International Criminal Court (ICC) would be the ideal forum on which to extend the criminal liability of a sitting or former head of state for committing a state to odious debts, the ICC continues to experience a number of challenges. In 2016 South Africa indicated its intention to withdraw from the ICC, that is, as a state party to the ICC Statute.[21] The *New York Times* reports:[22]

> South Africa has become the second African country to announce that it plans to leave the International Criminal Court, a decision that campaigners for international justice say could lead to a devastating exodus from the embattled institution. The move … came three days after Burundi's president signed a decree making his country the first to withdraw from the court, which had planned to investigate political violence that followed the president's decision last year to pursue a third term.

However, as Woolaver observes, on 22 February 2017 the South African High Court handed down a significant decision invalidating South Africa's notice of withdrawal from the ICC.[23] The case, as posited by Woolaver,

21 See S Chan & M Simons 'South Africa to withdraw from International Criminal Court' *New York Times* 21 October 2016, http://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html?_r=0 (accessed 20 November 2016).

22 As above.

23 H Woolaver 'Unconstitutional and invalid: South Africa's withdrawal from the ICC barred (for now)' Blog of the European Journal of International Law 27 October 2017,

was brought by the official opposition party, the Democratic Alliance, and joined by a number of civil society actors.[24] The Court's conclusion was that 'prior parliamentary approval was necessary before South Africa could withdraw from the ICC bears similarities to the recent decision of the UK Supreme Court on the UK's withdrawal from the European Union'.[25]

Be that as it may, shortly after Burundi and South Africa gave notice to withdraw from the ICC, The Gambia followed in line, withdrawing its membership from the ICC with a strong condemnation of the international body. The *Voice of America* reports:[26]

> Gambia accused the International Criminal Court of ignoring 'war crimes'… as it withdrew from the institution … following in the footsteps of South Africa and Burundi, which withdrew from the court earlier this month. Gambia's Information Minister Sheriff Bojang accused the court system of being racist and unfairly targeting Africans for prosecution. 'This action is warranted by the fact that the ICC, despite being called the International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of color, especially Africans', he said on state television.

All but one of the ten investigations so far launched by the ICC have focused on African states, leading some in The Gambia to believe that the ICC was ignoring crimes taking place elsewhere outside Africa.[27] 'There are many Western countries, at least 30, that have committed heinous war crimes against independent sovereign states and their citizens since the creation of the ICC and not a single Western war criminal has been indicted', the Gambian government said in a statement.[28]

Many African states today are raising concerns individually as well as collectively through the African Union (AU), that the ICC targets mainly African heads of state.[29] To illustrate, in an extraordinary session of the

http://www.ejiltalk.org/unconstitutional-and-invalid-south-africas-withdrawal-from-the-icc-barred-for-now/ (accessed 3 March 2017).

24 As above.

25 As above.

26 VOA News 'Gambia latest African country to withdraw from International Criminal Court' *Voice of America* 26 October 2016, http://www.voanews.com/a/gambia-latest-african-country-to-withdraw-from-icc/3566570.html (accessed 23 November 2016).

27 As above.

28 As above.

29 L Miyandazi, P Apiko & F Aggad-Clerx 'Why an African mass withdrawal from the ICC is possible' *Newsweek* 2 November 2016, http://www.newsweek.com/icc-international-criminal-court-africa-gambia-south-africa-burundi-515870 (accessed 12

Assembly of the AU held on 12 October 2013, African leaders, with a dissenting vote from Botswana,[30] passed a resolution regarding Africa's relationship with the ICC.[31] While reiterating the AU's commitment to fight impunity, the Assembly resolved that sitting African heads of state will not appear before any international court during their term of office,[32] adding that the AU resolution outlines plans to consult with the United Nations Security Council (UNSC) to take measures to suspend such cases.[33]

Recently, in an exclusive interview with FRANCE 24, Kenyan President Uhuru Kenyatta repeated his call for African states to pull out of the ICC unless it reforms in the wake of the ICC's decision to drop crimes against humanity charges against Kenya's Deputy President William Ruto and to declare a mistrial.[34] In this chapter, however, we stand back and submit that pulling out of the ICC should be the last resort after all possible options to reform this international body have been exhausted so that, when reformed, the ICC can prosecute also (sitting and former) heads of state of Western countries for committing those crimes that are covered under the International Criminal Court Statute.

4.6 Personal, as opposed to functional, immunity of a head of state

Generally, a head of state enjoys personal immunity (immunity *ratione personae*) as opposed to merely functional immunity (immunity *ratione materiae*) for acts or omissions done while in office.[35] Arguably, this type of immunity should be restricted to proceedings brought before foreign

November 2016).

30 M Kersten 'Backing the ICC: Why Botswana stands alone amongst AU states' *Justice in Conflict* 13 June 2013, https://justiceinconflict.org/2013/06/13/backing-the-icc-why-botswana-stands-alone-amongst-au-states/ (accessed 1 November 2016).

31 See K Doty 'International law in brief: African Union adopts resolution regarding the International Criminal Court' *American Society of International Law* 25 October 2013, https://www.asil.org/blogs/african-union-adopts-resolution-regarding-international-criminal-court-october-12-2013 (accessed 30 November 2016).

32 As above.

33 As above.

34 M Perelman 'Kenyan president urges ICC "reform" after Ruto mistrial' *FRANCE* 24 7 April 2016, http://www.france24.com/en/20160406-interview-uhuru-kenyatta-kenya-president-icc-ruto-panama-papers-terrorism (accessed 22 November 2016).

35 S Zappala 'Do heads of state in office enjoy immunity from jurisdiction for international crimes: The Ghaddafi case before the French Cour de Cassation' (2001) 12 *European Journal of International Law* 595. See also *Lafontant v Aristide* 844 F Supp 128 (EDNY 1994).

domestic courts, or for acts or omissions done within the scope of a head of state's authority,[36] although state practice has not been consistent.[37]

In *Lafontant v Aristide*[38] a law suit was brought in a New York district court by the widow of an imprisoned political opponent killed by Haitian soldiers allegedly acting on the orders of the then President of Haiti, Jean-Bertrande Aristide.[39] At the time of the suit, Aristide was living in exile in the United States. When intervening on behalf of Aristide, the State Department issued a letter to the court suggesting immunity. The court found the State Department's suggestion of immunity binding and dismissed the case against Aristide.

In *Hilao v Marcos* the US Court of Appeals for the Ninth Circuit dismissed the view that the US Foreign Sovereign Immunity Act (FSIA) confers foreign official immunity for acts of torture and execution.[40] As Chok observes:[41]

> The court remarked that the acts were not 'within any official mandate' and therefore did not constitute the acts of an 'agency or instrumentality' as defined under the FSIA. In addition, the court opined that its previous rejection that the conduct in question was a state act and that equating the acts in dispute with sovereign's public acts is unmeritorious. Other domestic courts have decided otherwise. In *Doe v Liu Qi*, the District Court for the Northern District of California rejected the fact that the Chinese officials' acts became non-official only because they engaged in international crimes against Falun Gong practitioners. In *Matar v Dichter*, the District Court for the Southern District of New York held that the fact that the former Director of Israel's General Security Service participated in *jus cogens* crimes, namely extrajudicial

36 SV George 'Head-of-state immunity in the United States' (1995) 64 *Fordham Law Review* 1051.

37 See eg *Lafontant v Aristide* (n 35); *cf Hilao v Marcos* (*In re Estate of Marcos*) 25 F 3d 1467 (9th Cir 1994), cert denied, 115 S Ct 934 (1995).

38 *Lafontant v Aristide* (n 35).

39 *Lafontant v Aristide* (n 35) 130-131.

40 *Hilao v Marcos* (n 37).

41 BM Chok 'Let the responsible be responsible: Judicial oversight and over-optimism in the arrest warrant case and the fall of the head of state immunity doctrine in international and domestic courts, (2015) 30 *American University International Law Review 511.*

> killings, did not necessarily mean that the impugned acts fell outside the scope of an official's lawful authority under FSIA.

Akande and Shah observe that personal immunity continues to apply even where prosecution is sought for international crimes.[42] Akande and Shah contend that instead of a single category of personal immunity, there in fact are two types of such immunity, and that one type extends beyond senior officials such as the head of state and head of government.[43] They stress further that functional immunity does not apply in the case of domestic prosecution of foreign officials for most international crimes.[44]

Let us now turn to examine how vulture funds play a role in illicit financial outflows from developing nations, and sometimes going after odious debts.

Part III: Vulture funds and illicit financial outflows

> Vulture funds are inherently exploitative, since they seek to obtain disproportionate and exorbitant gains at the expense of the full realisation of human rights, particularly economic, social and cultural rights, and the right to development, the UN Human Rights Council Advisory Committee has said. In its latest report on the activities of vulture funds and their impact on human rights, the Advisory Committee said that seeking the repayment in full of a sovereign debt from a State that has defaulted, or is close to default, is an illegitimate outcome.[45]

4.7 The concept of vulture funds

The African Development Bank observes that vulture funds are 'entities that purchase distressed debt on the secondary market, where it trades significantly below its face value, and then seek to recover the full amount, often through litigation.'[46] These intransigent creditors, according to the African Development Bank, are able to litigate because 'most debt relief initiatives such as that for HIPCs do not alter the legal rights and obligations

42 D Akande & S Shah 'Immunities of state officials, international crimes, and foreign domestic courts' (2010) 21 *European Journal of International Law* 815.

43 As above.

44 As above.

45 Social Watch 'Rights: Vulture funds inherently exploitative at expense of human rights' 12 August 2016, http://www.socialwatch.org/node/17409 (accessed 9 February 2017).

46 African Development Bank 'Vulture funds in the sovereign debt context', https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-support-facility/vulture-funds-in-the-sovereign-debt-context/ (accessed 2 February 2017).

between HIPCs and their external creditors'. Accordingly, until the HIPC debtors and their creditors reach bilateral legal agreements in line with the HIPC initiative, creditors are legally entitled to use available legal mechanisms to enforce their credit claims against heavily indebted poor countries (HIPCs). In some instances, prior to decision point some HIPCs have paid commercial creditors in full either because of the litigation or the threat of litigation, a desire to avoid disrupting a commercial relationship, or the fear of losing productive assets in cases where commercial debt was secured by collateral.[47] In many cases, where a vulture fund learns that multilateral debt relief has put a state or government of a HIPC in a better position to pay off its debts, the vulture fund will buy that nation's commercial debts from a creditor at a discount price, and then claim for the full amount from the economically-distressed debtor state or government.

In general, vulture funds are companies that buy up the debt of poor nations cheaply when it is about to be written off.[48] They then sue for the full value of the debt plus interest. There have been a number of court cases in the US, UK, France and other nations where vulture funds have sought to enforce the debt obligations of some impoverished and financially-distressed debtor nations. These cases include *Allied Bank Int'l v Banco Credito Agricola de Cartago*;[49] *Lordsvale Finance v Bank of Zambia*;[50] *Elliott Associates LP v Banco de la Nacion and the Republic of Peru;*[51] *Donegal International Ltd v Republic of Zambia & Another*;[52] *FG Hemisphere Associated v Democratic Republic of Congo & China Railway Group*;[53] *FG Hemisphere Associated v Rep of Congo;*[54] and *Af-Cap Inc v Rep of Congo*.[55]

In pursuing their creditor enforcement rights, vulture funds have often relied on such international legal instruments as the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. This treaty was concluded on 1 February 1971 and entered into force on 20 August 1979. titled 'Vulture Funds: Ugly Name for an Ugly Reality', Puopolo observes in an article:[56]

47 As above.

48 See generally H Rosenberg *The vulture investors* (2000).

49 566 F Supp 1440 (SDNY,'83) aff'd, 757 F 2d 516 (2nd Cir '85).

50 1996 QB 752.

51 194 F 3d 363 (2nd Cir 1999).

52 [2007] EWHC 197 (Comm).

53 (HK App Ct Feb 10, 2010).

54 455 F 3d 575 (5th Circ 2006).

55 462 F 3d 417 (5th Circ 2006).

56 R Puopolo 'Vulture funds: Ugly name for an ugly reality', http://afjn.org/vulture-funds-ugly-name-for-an-ugly-reality/ (accessed 22 September 2017).

> Vulture funds, often called 'distressed debt funds', are predatory hedge funds that siphon off newly freed resources from poor-country debt cancellation efforts. They do this by buying up a poor country's debt in default for pennies on the dollar and then engaging courts in US, Britain and beyond to sue for the full amount of the debt plus exorbitant interest rates and court fees. Instead of this newly freed up money in a poor country going to poverty alleviation projects like building schools and treating HIV/AIDS, it goes into the bank accounts of these greedy vultures.

Puopolo's criticism of vulture funds provides some helpful context to the way in which vulture funds sometimes operate. Part of the reason why vulture funds are rather unpopular is that they make large profits, sometimes three to five times more than the amount at which they bought the actual debt.[57] Vulture funds also seek to recover not only the principal, but also interest on the said principal as well as associated costs. The strategy of many vulture funds is to closely follow debt reduction negotiations with distressed nations, hold out from participating in those negotiations and then demand full payment from the debtor when they have a sense that money is available through the debt reduction negotiations.

4.8 Vulture funds and the doctrine of freedom of contract

Contractually, under the doctrine of freedom of contract, is it not legally permissible for a creditor to assign his or her right of pursuit in a debt to a third party?[58] For example, under the concept of novation, there can be replacement of an obligation to perform with a new obligation or the replacement of a party to an agreement with a new party.[59] And in an assignment, in contrast to novation, the obligee (the person receiving the benefit of the bargain) can get creditor preference by virtue of earlier notice.[60]

That said, under novation there has to be consent of all parties to the original agreement – that is, the obligee must consent to the replacement of the original obligor with the new obligor.[61] So, why then should there

57 *Cf Donegal International Ltd v Republic of Zambia & Another* [2007] EWHC 197 (Comm).

58 Although in jurisdictions that recognise the concept of unconscionable bargains, the courts will not uphold or seek to enforce a contract that is based on unfair terms, such as buying a property from an expectant heir at a grossly undervalued price, or a loan made at extortionate terms to someone in dire need.

59 See *Chatsworth Investments v Cussins* (*Contractors*) [1969] 1 All ER 143; *Argo Fund v Essar Steel* [2006] EWCA Civ 241 [2006] 2 All ER (Comm) 104.

60 *Tito v Waddell* [1977] 3 All ER 129; *Linden Gardens Trust v Lenesta Sludge Disposals* [1993] 3 All ER 417.

61 *Chatsworth Investments v Cussins* (n 59).

be an issue when vulture funds pursue their contractually-earned rights to enforce a debt owed by a financially-distressed nation? A plausible argument here is that such contractual rights, albeit earned under the veil of freedom and sanctity of contract, are somewhat offensive to public policy in that they provide unconscionable bargaining power to the vulture fund. But then, what is public policy? Should the law concern itself with moral choices or should it focus solely on what the letter of the law says?

4.9 Vulture funds and debt relief

Over the years, concerns have been expressed that vulture funds are wiping out the benefits that international debt relief was supposed to bring to poor countries.[62] There are instances, for example, where a vulture fund will also buy securities in distressed investments, such as high-yield bonds in or near default, or equities that are in or near bankruptcy. Even highly-leveraged firms may be targeted by vulture funds if there is a chance that the owners will not be able to make all required debt payments. Some cautious and prudent creditors have bargained with debtor countries to include negative pledge clauses in their loan agreements, hoping to avoid the problem of vulture funds taking creditor preference and swooping all the major assets of the debtor nation.[63]

What would happen, for example, where a floating charge holder registered his security first, with the floating charge containing a negative pledge clause, and subsequently a fixed charge holder registers his fixed charge and then sells it later to a vulture fund? Can the floating charge holder claim priority over the fixed charge holder or can the floating charge holder invoke the negative pledge clause in order to stop the vulture fund from helping itself to the encumbered assets of the debtor country? It is trite law that a negative pledge clause in support of a floating charge cannot block the enforcement of a fixed charge even though the latter security was created and registered later. So, the vulture fund could succeed at racing to the top of security claims in spite of the negative pledge clause in the competing floating charge.

Generally, the goal of a vulture fund is to seek high returns at bargain prices. In 2006 Zambia was forced to pay a vulture fund $15 million, constituting over 60 per cent of Zambia's debt cancellation savings that year.[64] But, how did this happen? In 1979 the Romanian government

62 See eg African Development Bank (n 46).

63 A negative pledge clause is not uncommon in many international financing agreements between a multilateral development bank and a debtor state.

64 See *Donegal International* (n 57).

lent Zambia $15 million to buy Romanian tractors. Zambia was unable to keep up the payments, and in 1999 Romania and Zambia negotiated to liquidate the debt for $3 million. However, before the deal could be finalised, Donegal International, which is partly owned by US-based Debt Advisory International, stepped in and bought the debt from Romania for $3,3 million. Thereafter, Donegal International sued Zambia, in the British courts, for $55 million, eventually winning $15 million in 2007, despite the judge expressing deep concern about the dishonesty involved in the case. Debt Advisory International founder Michael Sheehan was confronted by the BBC's Newsnight programme before the court ruling, but said only: 'No comment. I'm in litigation. It's not my debt.'[65]

In 2002 Gordon Brown told the United Nations that vulture funds were perverse and immoral: 'We particularly condemn the perversity where vulture funds purchase debt at a reduced price and make a profit from suing the debtor country to recover the full amount owed – a morally outrageous outcome.'[66]

Jubilee Debt campaigner, Caroline Pearce, said that vulture funds 'made a mockery' of the work done by governments to write off the debts of the poorest – a key theme of 2005's Live8 concert.[67] 'Profiteering doesn't get any more cynical than this,' Ms Pearce said.[68] She added further: 'Zambia has been planning to spend the money released from debt cancellation on much-needed nurses, teachers and infrastructure. This is what debt cancellation is intended for, not to line the pockets of businessmen based in rich countries.'[69]

Similar to Zambia's case, the Democratic Republic of the Congo (DRC) (formerly Zaire) began receiving debt relief from the World Bank and the International Monetary Fund (IMF) as part of the HIPC Initiative in 2003 and continued to work to meet the conditions for full cancellation.[70] A lawsuit was brought against the DRC by FG Hemisphere, a known vulture fund, threatening to swoop in to profit off of this critical debt

65 'Zambia loses "vulture fund" case' *BBC News* 15 February 2007, http://news.bbc.co.uk/2/hi/business/6365433.stm (accessed 11 November 2017).

66 As above.

67 As above.

68 As above.

69 As above.

70 See *FG Hemisphere Assoc v Democratic Republic of Congo & China Railway Group* HK App Ct 10 February 2010; *FH Hemisphere Associated v Rep of Congo* 455 F 3d 575 (5th Circ 2006); *Af-Cap Inc v Rep of Congo* 462 F 3d 417 (5th Circ 2006).

relief at the expense of the impoverished people of the DRC.[71] In 1980 the then Zairean President, Mobutu, obtained a $30 million loan from the Sarajevo-based company, ENERGOINVEST, to supposedly construct a hydro-electric facility and an electric power line. The debt remained in default for more than 20 years. After the DRC qualified for debt relief, FG Hemisphere bought ENERGOINVEST's claim for an undisclosed amount. FG Hemisphere pursued the claim in the Washington, DC court system, suing the DRC for $105 million – more than three times the original price of the debt. As partial payment, FG Hemisphere tried to seize the DRC's embassy properties in DC. The Washington DC courts rejected this claim, but ordered the DRC to document all of its assets outside the country. The DRC failed to locate all the documents, arguing that the court's demands were overly broad and burdensome, and now faces the threat of fines of an additional $4 million per year.[72]

4.10 State legislative efforts to control vulture funds

Around the world, people have been protesting the role of vulture funds in preying on the world's poorest. In 2010 the UK enacted a law to protect poor countries against vulture funds profiteering off of debt relief resources. The UK law, the Debt Relief (Developing Countries) Act 2010, bans vulture funds from pursuing in the UK courts the world's poorest countries for debts. On 12 July 2015 the Belgian Parliament passed an anti-vulture funds law (the Anti-Vulture Funds Law), which entered into force on 21 September 2015. This piece of legislation aims at limiting actions by creditors having acquired debt of states in financial difficulties, in particular in the context of debt restructurings.[73]

In the US House of Representatives, the Stop Vulture Funds Act (HR 2932) failed to attract much support for enactment into law when it was presented. Had it passed into law, the Stop Vulture Funds Act would have placed a limit on the profits that a vulture fund can make, reducing the incentive to sue. But, then, the Stop Vulture Funds Act remains a

71 *FH Hemisphere Associated v Rep of Congo* (n 70).

72 Jubilee USA 'Vulture funds swoop in on Congo' (Fall 2009 Newsletter), https://snddenjpic.org/2009/09/16/vulture-funds-swoop-in-on-congo/ (accessed 1 November 2016).

73 S Lawyers 'Belgian 2015 anti-vulture funds law' February 2016, http://www.strelia.com/sites/strelia.com/files/strelia_-_belgian_2015_anti-vulture_funds_law.pdf (accessed 1 June 2017).

pipedream, especially given that some of these vulture funds are known to be effective financiers of some election campaigns.

Part IV: Money laundering and corruption and their role in illicit financial outflows

In April 1990, the Financial Action Task Force on Money-Laundering (FATF) issued a set of 40 Recommendations for improving national legal systems, enhancing the role of the financial sector and intensifying cooperation in the fight against money-laundering. These Recommendations were revised and updated in 1996 and in 2003 in order to reflect changes in money-laundering techniques and trends. The 2003 Recommendations are considerably more detailed than the previous ones, in particular with regard to customer identification and due diligence requirements, suspicious transactions reporting requirements and seizing and freezing mechanisms.

The FATF extended its mandate in October 2001 to cover the fight against terrorist financing and issued 8 Special Recommendations on combating the financing of terrorism. A 9th Special Recommendation was adopted in October 2004. These new standards recommend the criminalisation of the financing of terrorism in accordance with the UN Convention for the Suppression of the Financing of Terrorism, address practices used by terrorists to finance their activities (such as the misuse of wire transfers, alternative remittance systems and non-profit organisations) and call for the implementation of specific asset freezing, seizing and confiscation mechanisms.[74]

4.11 The concept of money laundering

Elsewhere, I have examined the salient aspects of anti-money laundering and anti-corruption as well as the international legal, regulatory and institutional framework for the combating and prevention of such crimes.[75] Here, suffice it to say, a link between money laundering and corruption, on the one hand, and human rights, on the other, is examined. The overriding objective of the money laundering process is to disguise the source of ill-gotten wealth so that it cannot be attributed to predicate criminality.[76] In order to achieve these primary objectives a launderer must

74 United Nations Office on Drugs and Crime 'UN instruments and other relevant international standards on money-laundering and terrorist financing: Financial Action Task Force (FATF) standards', https://www.unodc.org/unodc/en/money-laundering/Instruments-Standards.html (accessed 2 February 2017).

75 See generally KK Mwenda *Anti-money laundering law and practice: Lessons from Zambia* (2005); KK Mwenda *Legal aspects of combating corruption: The case of Zambia* (2007).

76 International Compliance *Association International diploma in anti-money laundering manual* (2002) 73.

first achieve a number of secondary laundering objectives, including (a) disguising their own identity; (b) concealing the fact that they own the property; (c) concealing the fact that they may, in fact, manage and control the property; and (d) placing as much distance between themselves and the property, both physically and 'on paper'.[77]

Generally, money laundering may be defined in various ways.[78] A number of states subscribe to the definition of money laundering adopted by the United Nations in the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Pyschotropic Substances 1988.[79] Article 3(b) of this treaty points out that money laundering involves

> (a) the conversion or transfer of property, knowing that such property is derived from any [drug trafficking] offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions; or,
> (b) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences or from an act of participation in such an offence or offences.

Article 3(c)(i) of the same treaty adds that money laundering includes the acquisition, possession or use of property, knowing at the time of receipt that such property was derived from an offence or offences, or from an act of participation in such an offence or offences. Closely related to this definition, Ofosu-Amaah et al define money laundering as the process of transformation of the form or usage of ill-gotten proceeds of economic crimes, with a view to obscuring the source or origin of such proceeds.[80] These authors argue that although the term 'money laundering' has traditionally been associated with drug-trafficking offences,[81] money laundering has now come to be regarded as an essential element in the fight against corruption.[82] Its scope, they argue, has been extended to apply generally to all economic crimes, including corruption offences.[83] Ofosu-Amaah et al argue further that, as in the case of drug trafficking,

77 As above.

78 Eg, see generally Mwenda (n 75).

79 See eg the number of states that signed and ratified this treaty.

80 P Ofosu-Amaah, R Soopramanien & K Uprety *Combating corruption: A comparative review of selected legal aspects of state practice and major international initiatives* (1999) 53-55.

81 As above.

82 As above.

83 As above.

the purposes of money laundering legislation are to ensure that crime does not pay and that no amnesty is provided after the fact to perpetrators of serious economic crimes.[84] In the United Kingdom, for example,

> legislation creating money-laundering offences in connection with drug-trafficking was first introduced in 1986. But it was not until the Criminal Justice Act of 1993, amending the Criminal Justice Act of 1988, that money-laundering provisions were extended generally to cover other forms of criminal conduct … The Swiss Criminal Code now makes it an offence for anyone to commit an act the effect of which is to impede the identification of the source, discovery, or confiscation of assets that he knows, or should have known, came from a crime … The offence is punishable in Switzerland, even if the underlying crime has been committed abroad, provided, of course, that the set of circumstances that constitute the underlying crime amounts to a crime under both Swiss law and the foreign law.[85]

Following below is an examination of how money laundering and corruption impact negatively on the human rights standards of a nation.

4.12 Money laundering and corruption: A weak culture of human rights

Transparency International (TI) defines 'corruption' as 'the abuse of entrusted power for private gain'.[86] Corruption, according to TI, may be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.[87] TI postulates:[88]

> Grand corruption consists of acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good. Petty corruption refers to everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services in places like hospitals, schools, police departments and other agencies. Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political

84 As above.

85 As above.

86 Transparency International (TI) 'How do you define corruption', http://www.transparency.org/what-is-corruption#define (accessed 20 January 2017).

87 As above.

88 As above.

> decision makers, who abuse their position to sustain their power, status and wealth.

In many states corruption, including tax evasion and bribery, constitutes some of the predicate offences of money laundering. All these illicit activities lead to illicit financial outflows. The United Nations Convention against Corruption (UNCAC) 2003, adopted by more than 160 states, calls for state parties to the treaty to adopt preventive and punitive measures against corruption as well as to cooperate with non-state parties. Then, the African Union (AU) Convention on Preventing and Combating Corruption 2006 facilitates state co-operation in the African region against corruption.

Other international instruments that have been entered into for the prevention of and fight against corruption include the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1999, signed by all OECD countries as well as by five non-OECD countries. However, unlike UNCAC, the OECD Anti-Bribery Convention criminalises the bribery of foreign officials and prohibits accounting manipulation. The Organisation of American States (OAS) Convention against Corruption 1997 is another international legal instrument for the prevention and fight against corruption. It represents a regional consensus on what state parties should do in the areas of prevention, criminalisation, international cooperation and asset recovery. Then, there is the Council of Europe (CoE) Criminal Law Convention on Corruption 2002, signed by all CoE member states as well as Belarus, Canada, the Holy See, Japan, Mexico and the US. This Convention is now complemented by the Additional Protocol to the Criminal Law Convention on Corruption (2003) and the Civil Law Convention on Corruption (2003).

Wouters et al argue that pundits that draw a nexus between human rights infringements and corruption are not simply engaging in an academic pastime, and that they are highlighting various practical advantages of framing corruption as a human rights issue, especially with regard to developing countries and those lacking effective governance mechanisms.[89] According to Wouters et al:[90]

89 J Wouters, C Ryngaert & AS Cloots 'The international legal framework against corruption: The achievements and challenges' (2013) 14 *Melbourne Journal of International Law* 67.

90 Wouters et al (n 89) 67-68.

> First, human rights framing might arguably garner more institutional and popular support for anti-corruption measures as it draws attention to the plight of victims of corruption. Secondly, in the face of inaction of the public prosecutor, a human rights approach may allow individual victims of corruption to avail themselves of specific constitutional rights-based remedies against the government and government officials – particularly in common law countries. Or, alternatively, victims may seek human rights-inspired tort remedies against private actors complicit in official corruption (such as via the US *Alien Tort Statute*). Thirdly, framing corruption as violating human rights may empower human rights monitoring bodies, including national human rights institutions, to look into issues of corruption, thus further strengthening the fight against corruption. And fourthly, as a related monitoring, which is currently perceived by pundits as overly subjective, inaccurate and insufficiently action-oriented. Integrating corruption into human rights monitoring may notably allow for a human rights-based disaggregation of the 'composite indexes' typically used by anti-corruption watchdogs such as TI. In particular, the impact of corruption on the most vulnerable groups could be introduced as a variable. This could in turn inform policy strategies that specifically target those groups, who arguably suffer most from corrupt practices.

Wouters et al maintain that as far as the link between human rights infringements and corruption is concerned, the 2009 report of the International Council on Human Rights Policy (ICHRP) distinguishes between direct human rights violations through corruption, indirect violations and remote violations.[91] They contend:[92]

> A straightforward example of the first category – direct violation – is where a party to a court dispute bribes a judge with a view to obtaining a favourable judgment, thereby putting the opposing party at a disadvantage. The latter party could reasonably argue that the act of bribing violated their right to a fair trial, as enshrined in art 14 of the International Covenant on Civil and Political Rights (ICCPR) or art 6 of the European Convention on Human Rights.

By contrast, remote violations could include the deprivation of economic rights for the citizenry where corruption is rife.

Regarding money laundering through, say, tax evasion, a notable violation of human rights could occur where the treasury is deprived of some of the revenues that should have been applied to the realisation of social, economic, cultural and political rights of the citizenry. Some public

91 Wouters et al (n 89) 68.

92 As above.

schools could have been built. Medicines could have been bought for public hospitals. Road infrastructure to support a number of development projects could have been improved. The International Monetary Fund (IMF) observes:[93]

> Money laundering and the financing of terrorism are financial crimes with economic effects. They can threaten the stability of a country's financial sector or its external stability more generally. Effective anti-money laundering and combating the financing of terrorism regimes are essential to protect the integrity of markets and of the global financial framework as they help mitigate the factors that facilitate financial abuse. Action to prevent and combat money laundering and terrorist financing thus responds not only to a moral imperative, but also to an economic need.

Sometimes laundered money is used to finance terrorism, thus offending the rights of the citizens through such terrorist activities that could involve abductions, murders, mass bombings and other security threats. Also, in geographical areas that are deeply affected by terrorist activities, it is not easy for the inhabitants to enjoy the right to education or health services.

4.13 Conclusion

This chapter has examined the salient aspects of illicit financial outflows that result from such 'hot money' activities as money laundering, corruption, the pursuit of odious debts and the activities of vulture funds. An argument was made that illicit financial outflows from many developing nations as well as certain forms of international debt owed by these nations continue to impact negatively on prospects for the realisation of human rights, especially social, economic and political rights. In 2011 the AU)and the United Nations Economic Commission for Africa (UNECA) observed:[94]

> Over the last 50 years, Africa is estimated to have lost in excess of $1 trillion in illicit financial flows (IFFs) (Kar and Cartwright-Smith 2010; Kar and Leblanc 2013). This sum is roughly equivalent to all of the official development assistance received by Africa during the same timeframe. Currently, Africa

93 IMF 'Fact sheet: The IMF and the fight against money laundering and the financing of terrorism' 6 October 2016, http://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/31/Fight-Against-Money-Laundering-the-Financing-of-Terrorism (accessed 2 February 2017).

94 United Nations Economic Commission for Africa (UNECA) 'Illicit financial flows' Report of the High-Level Panel on Illicit Financial Flows from Africa (Addis Ababa, Ethiopia: UNECA, 2011) 13, https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf (accessed 4 November 2017).

> is estimated to be losing more than $50 billion annually in IFFs. But these estimates may well fall short of reality because accurate data do not exist for all African countries, and these estimates often exclude some forms of IFFs that by nature are secret and cannot be properly estimated, such as proceeds of bribery and trafficking of drugs, people and firearms. The amount lost annually by Africa through IFFs is therefore likely to exceed $50 billion by a significant amount.

The chapter noted further that there has been increasing attention to the problem of illicit financial outflows, and that such outflows from developing nations divert resources away from activities that are essential for poverty reduction, sustainable development and the realisation of human rights. It was submitted that financial outflows contribute to the accumulation of external debt as governments that lack domestic resources as a result of these flows tend to resort to costly external borrowing.

5 INTERNATIONAL LAW AND THE DIPLOMATIC IMMUNITY OF CORRUPT DIPLOMATS

5 Introduction

In chapter 4 we examined contemporary issues in international law pertaining to illicit financial outflows, debt and human rights. Chapter 5 turns to examine the concept of diplomatic immunity in international law where there is evidence of corrupt practice by an erring diplomatic agent of a state.[1] In a recent study by Raymond Fisman and Edward Miguel, researchers at Columbia University and the University of California, Berkeley, regarding traffic offences committed by a number of foreign diplomats accredited to the United Nations (UN) headquarters in New York, the authors note that there is a correlation between the diplomats' abuse of diplomatic immunity and the level of corruption in their home countries.[2] The Economist reports that Fisman and Miguel observe that during the period between 1997 and 2002, for instance, diplomats from Chad averaged 124 unpaid parking violations whereas diplomats from Canada and the United Kingdom had none.[3] Fisman and Miguel's study also shows that results from 146 countries were strikingly similar to the Transparency International (TI) Corruption Index, which rates countries by their level of perceived sleaze.[4] In the case of parking violations, for example, diplomats from countries with low levels of corruption are said to have behaved well, even when they could get away with breaking the rules.[5] The culture of their home country, it is argued, was imported to New York, and they acted accordingly.[6] The pattern is similar in the

1 An earlier version of this chapter appears as KK Mwenda 'Diplomatic immunity of corrupt diplomats: When the shield can no longer hold' (2014) 18 *Southwestern Journal of International Law*.

2 See R Fisman & E Miguel 'Cultures of corruption: Evidence from diplomatic parking tickets' NBER Working Paper 12312, issued in June 2006. See also '"Corrupt culture" revealed among African diplomats' *Afrol News* 9 October 2006, http://www.afrol.com/articles/21829 (accessed 8 February 2013).

3 See 'Diplomats and parking fines: A ticket for corruption – Sleazy countries are best at breaking New York City's parking rules' *The Economist* 10 August 2006, http://www.economist.com/world/united-states/displaystory.cfm?story_id=7281145 (accessed 8 February 2013).

4 As above.

5 As above.

6 As above.

case of high-corruption countries. Their diplomats became increasingly comfortable with parking where they liked.[7] As they spent more time in New York, their number of violations increased by 8 to 18 per cent.[8] Overall, Fisman and Miguel argue that diplomats accumulated 150 000 unpaid parking tickets during the five years under review.[9]

It is interesting to note that Chad also appeared at the bottom position of TI's 2005 Corruption Index, 'earning the dishonourable title of being the world's most corrupt country'.[10] One report points out that 'Chadian UN diplomats obviously have brought their attitude to New York, being number three on the list of parking violators. Each Chadian diplomat in New York has committed 124 unpaid parking violations between 1997 and 2002, the report showed.'[11]

Be that as it may, Kuwait topped the list, with 246 unpaid violations per diplomat, for which the oil-rich emirate had not paid its fines.[12] Egypt narrowly beat the Chadians, with 140 violations per diplomat.[13] At the time Fisman and Miguel wrote their report, Egypt had relatively 24 diplomats at the UN headquarters compared to Chad's only two.[14] However, going by Fisman and Miguel's methodology, the following could be noted:[15]

> 'Cultures of corruption' seem to be especially present in Africa, as 14 out of the 20 heaviest parking sinners are African countries. Chad is followed by Sudan (fourth, 119 unpaid violations per diplomat), Mozambique (sixth, 111 violations), Angola (eighth, 82 violations) and Senegal (ninth, 79 violations). Between positions 11 and 19, one also finds Côte d'Ivoire, Zambia, Morocco, Ethiopia, Nigeria, Benin, Zimbabwe and Cameroon. But the study also discovered honest and polite African diplomats in the UN office. Diplomats from Burkina Faso and the Central African Republic had not been involved in any wrongdoing at all during the five-year period. Equally, representatives

7 As above.

8 As above.

9 As above.

10 *Afrol News* (n 2).

11 As above.

12 As above.

13 As above.

14 As above.

15 As above. Additionally, *Afrol News* (n 2) points out: 'A surprising finding was the actuation of several Middle East diplomats – with the noteworthy exception of Kuwait – that had very high rates of parking violations but did pay all their fines although they have immunity. These were in particular Bahrain, Malaysia, Oman and Turkey. The researchers, obviously surprised about this finding, said they had yet to find an explanation to this honest behaviour.'

from Eritrea, The Gambia and Gabon had been involved in close to no incidents. Most of these African countries have a middle-ranking on TI's Corruption Index as well.

The first part of this chapter provides an introductory background. It outlines the underlying arguments and delineates the scope of the study. The second part examines the concept of diplomatic immunity while the third part deals with the concept of diplomatic démarche as it applies to different contexts of erring diplomatic agents of states. Expounding on the provisions of article 1 of the Vienna Convention on Diplomatic Relations 1961, Brownlie observes that a 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission; and the 'head of the mission' is 'the person charged by the sending state with the duty of acting in that capacity'.[16]

The fourth part of the study, preceding the conclusion, examines the concept of diplomatic immunity as it applies to erring diplomats involved in such criminal conduct as drug trafficking, money laundering and smuggling of prohibited pornographic material. In this work, it is important to distinguish between diplomatic immunity enjoyed by diplomats of sovereign states and the type of immunity enjoyed by such public international organisations as the UN.[17] With regard to the latter, except for a few senior staff and those representing political constituencies of member states, most regular staff and employees of public international organisations do not enjoy diplomatic immunity.[18]

Many sovereign states that are member states of the UN have diplomats accredited to the organisation, in the same way as other multilateral bodies, such as the African Union (AU) and the European Union, have

16 I Brownlie *Principles of public international law* (1996) 349-350. See also art 1 of the Vienna Convention on Diplomatic Relations 1961 which spells out the following categories of staff of a diplomatic mission: (a) the 'head of the mission' is the person charged by the sending state with the duty of acting in that capacity; (b) the 'members of the mission' are the head of the mission and the members of the staff of the mission; (c) the 'members of the staff of the mission' are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission; (d) the 'members of the diplomatic staff' are the members of the staff of the mission having diplomatic rank; (e) a 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission; (f) the 'members of the administrative and technical staff' are the members of the staff of the mission employed in the administrative and technical service of the mission; (g) the 'members of the service staff' are the members of the staff of the mission in the domestic service of the mission; and (h) a 'private servant' is a person who is in the domestic service of a member of the mission and who is not an employee of the sending state.

17 T Hillier *Sourcebook on public international law* (1998) 319.

18 See eg the Convention on the Privileges and Immunities of the United Nations 1946.

diplomats of their member states accredited to them although, generally, diplomatic agents of sovereign states often enjoy immunities and privileges that are somewhat different from those afforded to public international organisations.[19] To illustrate, a Bangladeshi woman by the name of Shamela Begum was a live-in domestic maid in New York for an official at the Bahrain Mission to the United Nations.[20] Upon her arrival in the US, her passport was taken away by her employer.[21] Over the ten months that she worked for him, she worked seven days a week, 12 to 15 hours a day, and was paid only $100 a month, which was sent by her employer to Begum's husband in Bangladesh.[22] When her employers left town, they left Begum no food or money to buy food.[23] She was twice assaulted by her employer's wife and confined to the house, leaving only twice, both times with the wife.[24] The second time, Begum overheard a conversation in Bengali among some sidewalk vendors.[25] When her employers left town later that day, she left the apartment alone for the first time.[26] Not knowing how to use the elevator, she had to ask a boy to help her get downstairs.[27] She retraced her steps to the vendor and told him her tale.[28] The vendor contacted a Bengali language newspaper, which contacted Andolan, a South Asian workers' rights group.[29] On 30 August 1999 Andolan brought the police to the apartment and Begum was freed.[30] However, because Begum's employers had diplomatic immunity, they were not arrested.[31]

By contrast, if Begum's employers were not serving as diplomatic agents of a sovereign state accredited to the UN, but were simply working as regular staff of the UN, without any diplomatic immunity, they would

19 See, generally, eg, Convention (n 18).

20 S Sengupta 'An immigrant's legal enterprise: In suing her employer, maid fights diplomatic immunity' *New York Times* 12 January 2000, reproduced from LJ Foo 'The trafficking of Asian women' in LJ Foo *Asian American women: Issues, concerns, and responsive human and civil rights advocacy* (2002), http://www.modelminority.com/joomla/index.php?option=com_content&view=article&id=461:the-trafficking-of-asian-women-&catid=47:society&Itemid=56 (accessed 4 July 2012).

21 As above.

22 As above.

23 As above.

24 As above.

25 As above.

26 As above.

27 As above.

28 As above.

29 As above.

30 As above.

31 As above.

have been arrested and prosecuted.[32] Understandably, the concept of diplomatic immunity is broader than its variant of functional immunity enjoyed by employees of many public international organisations when carrying out official functions of the organisation. This explains why the former managing director of the International Monetary Fund, Dominique Strauss-Kahn, was not able to invoke diplomatic immunity when he was arrested in New York in 2011 on criminal charges of trying to rape a hotel maid.[33] His lawyers, however, later tried to invoke diplomatic immunity in civil proceedings brought by the hotel maid against Dominique Strauss-Kahn.[34] As a recent report shows:[35]

> On the afternoon of May 14, moments after authorities pulled Dominique Strauss-Kahn off an Air France flight on suspicion that he had tried to rape a hotel maid, the former International Monetary Fund chief pulled rank. 'I have diplomatic immunity,' he told police, and asked to speak with the French consulate, according to court papers. Hours later, as police questioned him about his diplomatic status, and whether he was claiming immunity, Strauss-Kahn did an about-face. 'No, no, no. I am not trying to use that,' he said. 'I just want to know if I need a lawyer.' More than four months on, with the criminal case now behind him, Strauss-Kahn is taking another crack at invoking diplomatic immunity – this time to fend off a civil suit filed by Nafissatou Diallo, the maid who accused him of sexually assaulting her in his suite at the Sofitel Hotel in Manhattan.

The report continues:[36]

> Mr Strauss-Kahn did not invoke diplomatic immunity in the criminal case because he was not a diplomat under any applicable treaty or law … He was on 'personal' business at the time and was acting in his personal capacity when he attacked Ms Diallo. The IMF, the United States State Department and the New York Police Department all agree that Mr Strauss-Kahn lacks immunity … Even if Strauss-Kahn is able to persuade a judge that international law entitles him to immunity, legal experts say he still could lose the argument, since it is the IMF's decision whether to support an immunity

32 Cf F Klopott 'World Bank economist paying $41k back to servant' *The Examiner* (washingtonexaminer.com) 18 June 2010 http://www.washingtonexaminer.com/local/crime/World-Bank-economist-paying-_41k-back-to-servant-96607914.html (accessed 4 July 2012).

33 'Analysis: Experts skeptical of Strauss-Kahn immunity claim' Reuters 28 September 2011, http://www.reuters.com/article/2011/09/28/us-strausskahn-immunity-idUSTRE78R0LS20110928 (accessed 14 November 2012).

34 As above.

35 As above.

36 As above.

> claim for one of its employees … The immunity attaches as the result of the work [he is] doing for the organisation or the country, and the organisation or the country retains the right to waive that immunity.

Closely related to the foregoing, under article 105 of the Charter of the United Nations 1945, the UN, as a public international organisation, enjoys immunities and privileges as follows:

1 The Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
2 Representatives of the Members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.
3 The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

As we shall see below, it is, however, not clear whether customary international law clothes public international organisations with the same kind of immunities and privileges as those afforded to diplomatic agents of sovereign states.[37] Under the Vienna Convention on Diplomatic Relations 1961, public international organisations cannot be parties to that treaty.[38] The Preamble to the Vienna Convention on Diplomatic Relations 1961 gives an indication that only states can be parties to the treaty.[39]

As a general rule, diplomatic agents enjoy immunity from the jurisdiction of the local courts, but not an exemption from the substantive law.[40] This means that the immunity of a diplomat from the jurisdiction of the receiving state does not exempt him or her from the jurisdiction of the sending state.[41] The sending state can recall that diplomat to have him or her prosecuted in its courts of law.[42] Also, in cases of universal jurisdiction,

37 See also generally *Reparations for Injuries Suffered in Service of the United Nations* case, Advisory Opinion of the International Court of Justice, 1949 ICJ Reports 174-188.

38 Preamble to the Vienna Convention on Diplomatic Relations 1961.

39 As above.

40 *Empson v Smith* [1966] 1 QB 426, CA; *Dickinson v Del Solar* [1930] 1 KB 376; *Fatemi v US* 192 A 2d 525 (1963); ILR 34, 148. *Cf Regele v Federal Ministry* ILR 26 (1958) II 544. See also Brownlie (n 16) 356.

41 Vienna Convention on Diplomatic Relations 1961, art 31(4).

42 As above.

a diplomat can be extradited back to the sending state or to any impartial third state to face criminal charges. In a House of Lords ruling in the English case of *Regina v Evans*[43] Lord Millet ruled as follows:[44]

> In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria. The first criterion is well attested in the authorities and text books: for a recent example, see the judgment of the international tribunal for the territory of the former Yugoslavia in *Prosecutor v Anto Furundzija* (unreported) given on 10 December 1998, where the court stated: 'At the individual level, that is, of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.'

Lord Millet continued: 'The second requirement is implicit in the original restriction to war crimes and crimes against peace, the reasoning of the court in *Eichmann*, and the definitions used in the more recent Conventions establishing ad hoc international tribunals for the former Yugoslavia and Rwanda.'[45]

Every state, according Lord Millet, has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes that satisfy the relevant criteria.[46] Lord Millet observed that whether or not the courts of a particular state have extra-territorial jurisdiction under its internal domestic law, of course, depended on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts.[47] According to Lord Millet, the jurisdiction of the English criminal courts is

43 *Regina v Evans & Another and the Commissioner of Police for the Metropolis & Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division) [1999] UKHL 17, http://www.hrothgar.co.uk/WebCases/hol/reports/01/13.htm#J1 (accessed 18 February 2013).

44 As above.

45 As above.

46 As above.

47 As above.

usually statutory, but it is supplemented by the common law.[48] Customary international law, Lord Millet observed, is part of the common law, and accordingly the English courts have, and always have had, extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.[49]

Against this background, we could ask the following question in the context of our study: Who is a 'corrupt diplomat'? The phrase 'corrupt diplomat' is being used to refer broadly to acts or omissions of a diplomat involving such fraudulent conduct as money laundering, human trafficking or smuggling of prohibited goods. We will explain below the reasons for limiting the scope of the study to such corrupt practices. Closely related to that, the term 'corruption' should be understood broadly as depravity, perversion, tainting, or an impairment of integrity, virtue, or moral principle, especially the impairment of a public official's duties by bribery or such other unethical means.[50] Most diplomatic agents of sovereign states are considered public officials in their respective sovereign states.[51] Here, to set the discussion in context, let us take a reasoned look at the following June 2010 article in the United Kingdom's *Daily Mail*:[52]

> Foreign diplomats have got away with a series of serious crimes on British soil, including a threat to kill, sexual assaults and human trafficking. Figures released by ministers have revealed an extraordinary crime spree carried out by embassy workers under the cloak of diplomatic immunity. In the last five years, the diplomats carried out a total of 78 serious crimes – including 54 driving offences. In the most worrying cases, envoys from Saudi Arabia and Sierra Leone were accused of human trafficking, while a Pakistani diplomat was alleged to have made a threat to kill. A Saudi Arabian envoy allegedly

48 As above.

49 As above.

50 BA Garner (ed) *Black's law dictionary* (1999) 348. For a detailed discussion of what in legal terms constitutes 'corruption' or 'corrupt practices', see in general KK Mwenda 'Can "corruption" and "'good governance" be defined in legal terms?' (2008) 2 *Rutgers University Journal of Global Change and Governance*; KK Mwenda *Legal aspects of combating corruption: The case of Zambia* (2007).

51 Since, as diplomats, they work for and report to their home governments.

52 K Walker 'Crimes of untouchable diplomats accused of sex assaults, human trafficking and £36 million in unpaid fines' *Mail Online* 29 June 2010, http://www.dailymail.co.uk/news/article-1290341/Diplomats-accused-sex-assaults-human-trafficking-36m-unpaid-fines.html (accessed 4 July 2013).

> committed sexual assault while another of his colleagues was accused of domestic violence.

The article continues:[53]

> Diplomats from Nigeria and Jordan were linked to two cases of actual bodily harm. Under the 1961 Vienna Convention, foreign officials and their families and staff are protected from prosecution in their host country – effectively putting them above the law. Unless their home country agrees to waive their immunity from prosecution, there is nothing the British government can do except risk a diplomatic incident by ordering their expulsion. Some 25 000 people are entitled to diplomatic immunity in the UK. Serious crimes are defined as offences which would carry a 12-month jail sentence. According to the list published by the Foreign Office, the most common offence was drink-driving with 48 diplomats accused. In 2009, a total of 18 alleged offences were committed. There were also ten carried out in 2008, 20 in 2007, 15 in 2006 and 15 in 2005. A list of the worst offenders over the five years is headed by diplomats from Saudi Arabia who were accused of eight offences, followed by South Africa, five, then Kazakhstan, Ghana and Cameroon, four; Nigeria, Malawi and Russia, three.

So, what to do now, as they would say in Russia? The *Daily Mail* article points out that a Green Party London Assembly member, Jenny Jones, said: 'It's time for the Foreign Office to renegotiate the terms of diplomatic immunity. It seems ludicrous that so many people get away with so many crimes.'[54]

Diplomatic missions also owe £36 million in unpaid London congestion charge fines, £526 300 in parking and traffic violations, and more than £480 000 in unpaid rates. The US, which is in a long-running dispute over payment of the congestion charge, has an unpaid bill of £3,8 million. One of eight nations which owe more than £1 million, the US is followed by Russia (£3,2 million), Japan (£2,8 million) and Germany (£2,6 million).

In our study we will look critically at the issue of diplomatic immunity where some diplomats engage in corrupt practices. An argument is made that whereas a diplomat enjoys diplomatic immunity in the state to which he or she is accredited, thus shielding him or her from criminal prosecution in that jurisdiction, the diplomat will have limited jurisdictional immunity

53 As above.

54 As above.

in a third state to which he or she has not been accredited.[55] If the diplomat is arrested in that third state for an offence under the laws of that state, he or she may not be allowed to invoke diplomatic immunity by the third state since such immunity, it is argued, should apply only when the diplomat is passing through the territorial zone of the said state with innocent passage analogous to that postulated under article 19(2) of the United Nations Convention on the Law of the Sea 1982.[56] The said

55 On what constitutes 'accreditation' of a diplomatic agent, see arts 4 and 13 of the Vienna Convention on Diplomatic Relations 1961. See also, generally, *United States v Sissoko* 995 F Supp 1469 (1997). In some instances state practice on certain procedures for accrediting diplomatic agents tends to vary between and among states. In the US, eg, the case of *United States v Sissoko* (above) helps to shed light on this issue. Sissoko pled guilty to a charge of paying a gratuity in violation of 18 USC sec 201(e)(1)(A). Sissoko never stepped foot in the US. Before he could be sentenced, the Republic of The Gambia filed a motion to dismiss the case against Sissoko on the grounds of diplomatic immunity pursuant to the Vienna Convention on Diplomatic Relations 1961 and the US Diplomatic Relations Act (22 USC sec 254d.) The Republic of The Gambia had designated Sissoko as a 'Special Advisor to a Special Mission to the United States,' which designation the United States appeared to 'accept', at least to the extent that the United States, through the US Embassy in Banjul, issued an A-2 visa to Sissoko and wrote on the visa application 'Diplomatic: Official mission' when issuing the visa. The issue was whether the US 'acceptance' of such designation entitled Sissoko to diplomatic immunity. The magistrate found the following: (a) that Sissoko's status as 'Special Advisor' did not entitle him to diplomatic immunity, because he had not been submitted to the US state department for certification (the United States has issued a diplomatic note setting forth the accreditation process for diplomats assigned to permanent missions. See Circular Diplomatic Note dated 1 May 1985 and attachments (Government Exh.1 at hearing); see also transcript at 264-65 (testimony of Lawrence Dunham, noting that the US generally accredit advisors to special missions); (b) that the Republic of The Gambia never notified the US state department of Sissoko's diplomatic status and that Sissoko had only applied for a visa; and (c) that any expectation that Sissoko would be afforded full diplomatic immunity was unreasonable, especially in light of the fact that the Republic of The Gambia was aware of and had used the mechanism to certify a diplomat pursuant to the Circular Diplomatic Note.

56 Here, some analogies could be drawn: first, with the concept of 'innocent passage' in the territorial waters of a coastal state (see art 19(2) of the United Nations Convention on the Law of the Sea 1982); and, second, with the concept of 'transit passage' in straits (which are not 'territorial zones' of a state) under art 38(2) of the Law of the Sea Convention 1982. That said, we will not draw analogies with the jurisdictional powers of a coastal state in its internal waters since passage in those waters is pretty much controlled by the territorial sovereignty of the coastal state. In the case of 'transit passage', the passage will not be in the internal waters or the territorial zone. The term 'transit' passage refers to continuous and expeditious transit through a strait between one area of the high seas or economic zone and another, or in order to enter or leave a state bordering the strait. Also, for 'transit passage', there is no criterion of 'innocence' required of the transiting ship or aircraft. However, ships and aircrafts exercising this right to transit passage are bound to refrain from the threat or use of force against states bordering the straits or in any manner which violates the principles of international law embodied in the United Nations Charter 1945 (as per art 39(1)(b) of the Law of the Sea Convention 1982). For further reading, see RR Churchill & AV Lowe *The law of*

treaty provision, codifying customary international law,[57] postulates that innocent passage must not be prejudicial to the peace, good order and security of the coastal state.[58] By parity of reasoning, the same analogy should be extended to the case of diplomats passing through a third state. Their passage must not be prejudicial to the peace, good order and security of the third state. However, if the criminal conduct of a diplomat occurs in the accrediting or receiving state, then the receiving state can issue a diplomatic démarche to the state being represented by the erring diplomat, protesting the criminal activities of the diplomat. Also, in extreme but rare cases, the accrediting or receiving state can declare the diplomat *persona non grata*. However, the declaration of a diplomat *persona non grata* does not in itself entail that the diplomat can now be prosecuted by the receiving state. In cases of universal jurisdiction, for example, the receiving state can arrest a culpable diplomat and have him or her extradited to the sending state or to any impartial third state to stand trial.[59] The sending state, on the other hand, can recall a diplomat to stand trial in its courts of law even though the diplomat enjoys diplomatic immunity in the receiving state.[60] The sending state can also waive the immunity of its diplomat to allow the receiving state to prosecute him or her.[61] In essence, the study demonstrates the prospects of using public international law on diplomatic immunity to

the sea (1992) 59. See also generally R McLaughlin *United Nations naval peace operations in the territorial sea* (2009), where the author observes that, because the judgment of the International Court of Justice (ICJ) in the *United Kingdom v Albania* (*Corfu Channel* case ([1949] ICJ Reports 4) was limited to the issue of warship passage through international straits, the subject matter of the *Corfu Channel* case is now governed by the regime of transit passage (under the United Nations Convention on the Law of the Sea 1982) and not of that of innocent passage.

57 On the concept of 'innocent passage' as an established norm under customary international law, see *Corfu Channel* case (n 56).

58 See art 19(2) of the United Nations Convention on the Law of the Sea 1982.

59 See, eg, the Princeton Principles on Universal Jurisdiction 28 (2001), http://www1.umn.edu/humanrts/instree/princeton.html (accessed 17 February 2013).

60 See Vienna Convention on Diplomatic Relations 1961, art 31(4).

61 Under para 2 of art 32 of the Vienna Convention on Diplomatic Relations 1961, such a waiver must always be express. See *Armon v Katz* ILR 60, 374 (Ghana CA); and *Nzie v Vessah* ILR 74, 519. For a similar position under English law, see *Engelke v Musmann* [1928] AC 433; *Regina v Madan* [1961] 2 QB 1 (see also 33 ILR 368, CCA; Diplomatic Privileges Act 1964 sec 2(3)).

strengthen the international legal framework for fighting and preventing corruption.[62]

5.1 The concept of diplomatic immunity

As noted above, this chapter focuses on the concept of diplomatic immunity of a corrupt diplomatic agent who, accredited to a host/receiving state, is found in possession of such illegal substance as marijuana or cocaine. While the fight against corruption internationally does not necessarily entail that such established norms of international law as diplomatic immunity should be watered down as a way of preventing corrupt diplomats from abusing their immunities and privileges, we recognise that both customary international law and conventional international law provide for some safeguards to prevent a corrupt diplomat from abusing his or her immunities and privileges.[63] For example, although a diplomat may enjoy diplomatic immunities and privileges under both customary international law and the Vienna Convention on Diplomatic Relations 1961,[64] the diplomat is required to (a) respect the laws and regulations of the receiving state; and (b) not interfere in the internal affairs of the receiving state.[65] Overall, there is an element of both reciprocity and reprisals in the way diplomatic immunity functions. On the one hand, the element of reciprocity is enshrined in article 2 of the Vienna Convention on Diplomatic Relations 1961, stipulating that the establishment of diplomatic relations between states, and of permanent diplomatic missions, has to take place by mutual consent of the states concerned. On the other hand, the element of reprisals is evident, for example, in the concepts of *persona non grata* and diplomatic démarche.

62 Other public international law instruments for combating and preventing corruption include the United Nations Convention against Corruption 2003; the United Nations Declaration against Corruption and Bribery in International Commercial Transactions 1996; the United Nations International Code of Conduct for Public Officials 1996; the Convention against Transnational Organised Crime 2000 (Palermo Convention); the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997; the Convention of the European Union on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States 1995; the Convention of the European Union on the Protection of its Financial Interests (1995) (including the two Protocols thereto (1996 and 1997)); the Council of Europe's Twenty Guiding Principles for the Fight against Corruption 1997; the Council of Europe's Criminal Law Convention against Corruption 2002; the Council of Europe's Civil Law Convention against Corruption 2003; the Inter-American Convention Against Corruption 1997; and the African Union Convention on Preventing and Combating Corruption 2003.

63 See below.

64 See below.

65 See art 41(1) of the Vienna Convention on Diplomatic Relations 1961.

While there are many forms of conduct that could fit the broad definition of corrupt practice by a diplomat, as set out below, the chapter focuses primarily on three major types of conduct that involve abuse of inviolability principles pertaining to diplomatic missions, diplomatic agents, diplomatic bags, private residences of diplomatic agents as well as property and documents of diplomatic agents. The said three types of conduct relate to situations where (a) a diplomat is found to have used a diplomatic bag to conceal and/or transport illegal drugs or prohibited pornographic material; (b) a diplomat is found to have used his or her private residence to carry out illegal activities such as prostitution or the production of prohibited pornographic videos; and (c) a diplomat is carrying out money-laundering activities at his private residence or through the use of diplomatic bags. In all these instances, the diplomatic bag, the private residence of a diplomat, as well as his or her own person, are mediums through which a corrupt diplomat can act to abuse his or her diplomatic immunity. The term 'diplomatic immunity' here should be understood to mean 'the general exemption of diplomatic ministers from the operation of local law, the exception being that a minister who is plotting against the security of the nation to which he or she is accredited may be arrested and sent out of the country'.[66] A further exception could be seen where a diplomatic agent or diplomatic minister is accused of having committed a serious crime that invites universal jurisdiction of any state.[67] Under the concept of universal jurisdiction, the erring diplomat can be arrested and extradited to the sending state or to any impartial third state to stand trial.[68] As noted above, the concept of universal jurisdiction is well enshrined in customary international law.[69]

Principle 2 of the Princeton Principles of Universal Jurisdiction 2001 – these principles were concluded at Princeton University in 2001 by leading jurists and legal experts to guide the prosecution of war crimes and other serious crimes under international law when there are no traditional jurisdictional links to the victims or perpetrators[70] – postulates as follows:[71]

66 Garner (n 50) 753.

67 See generally the Princeton Principles (n 59).

68 As above.

69 See *Regina v Evans* (n 43).

70 Office of Communications of Princeton University 'Jurists demand end to impunity: Announce "Princeton Principles" on universal jurisdiction for heinous crimes' 23 July 2001, Princeton, NJ: Princeton University, 2001, http://www.princeton.edu/pr/news/01/q3/0723-principles.htm (accessed 17 February 2013).

71 See the Princeton Principles (n 59) Principle 2.

1 For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.
2 The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.

Under Principle 3 of the Princeton Principles, regarding serious crimes under international law as specified in Principle 2(1) highlighted above, national judicial organs can rely on universal jurisdiction even if their national legislation does not specifically provide for it. In essence, Principle 3 eliminates arguments for an arresting state to satisfy first a dual criminality test that, although the offence was committed outside the arresting state, that offence could be treated as an offence in the arresting state too since it is also a crime there.

Augmenting dictates of Principle 3, Principle 5 spells out that, with respect to serious crimes under international law as specified in Principle 2(1), the official position of any accused person, whether as head of state or government or as a responsible government official, should not relieve such person of criminal responsibility nor mitigate punishment. Even amnesties to excuse or exonerate the accused are discouraged,[72] and any statutes of limitations or other forms of prescription will not apply.[73] That said, an exception that could save an erring diplomat from deportation where universal jurisdiction is invoked lies in Principle 10 which provides as follows:[74]

1 A state or its judicial organs shall refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face a death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person sought will be subjected to sham proceedings in which international due process norms will be violated and no satisfactory assurances to the contrary are provided.
2 A state which refuses to extradite on the basis of this Principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in Principle 2(1)

72 Princeton Principles (n 59) Principle 7.
73 Princeton Principles (n 59) Principle 6.
74 Princeton Principles (n 59) Principle 10.

> or extradite such person to another state where this can be done without exposing him or her to the risks referred to in paragraph 1.

The Princeton Principles are proposals that are reflective of customary international law for advancing the continued evolution of international law and for the application of international law in national legal systems.[75] Generally, there are three fundamental theories justifying diplomatic immunity in international law, being (a) personal representation; (b) extra-territoriality; and (c) functional necessity.[76]

Under the first theory, personal representation, the immunity attaching to diplomatic representatives was seen as an extension of sovereign immunity.[77] With regard to the second theory, extra-territoriality, it was founded on the belief that the offices and homes of the diplomat were to be treated as though they were the territory of the sending state.[78] That theory, according to Hiller, always rested on a fiction and is no longer respected.[79] The third theory, functional necessity, is often the preferred rationale for granting privileges and immunities to diplomats.[80] It postulates that the privileges and immunities of a diplomat are necessary to enable the diplomat to perform his or her diplomatic functions.[81] Indeed, 'modern diplomats need to be able to move freely and be unhampered as they report to their governments',[82] and they also 'need to be able to report in confidence and to negotiate on behalf of their governments without fear of let or hindrance'.[83]

While it is recognised that public international organisations may also require the same immunities and privileges as diplomatic missions of sovereign states if they are to carry out their functions effectively in the international community, there is no general law applicable to the relations between public international organisations and host states.[84] In the case of *Giovanni Porru v FAO*[85] the Rome Court of First Instance dismissed a claim

75 Princeton Principles (n 59) Preamble.

76 Hillier (n 17) 315.

77 As above.

78 As above.

79 As above.

80 As above.

81 As above. See also M Dixon & R McCorquodale *Cases and materials: International law* (1995) 388; L Henkin et al *International law: Cases and materials* (1993) 1200-1201.

82 Hillier (n 17) 315.

83 As above.

84 Hillier (n 17) 319.

85 See summary in UNJY (1969) 238-239, cited in G Kodek 'Immunity of international

for employment-related compensation 'for lack of jurisdiction but held that there was no rule of customary international law under which foreign states and subjects of international law in general are to be considered as immune from the jurisdiction of another state'.[86] According to Kodek, such immunity can only be recognised with regard to public law activities – that is, in the case of a public international organisation, with regard to the activities by which it pursues its specific purposes (*uti imperii*) but not with regard to private law activities where the organisation acts on an equal footing with private individuals (*uti privatus*).[87]

Closely related to Kodek's views above, Hillier argues that immunities and privileges that a particular public international organisation enjoys must be provided for in a specific agreement between the organisation and the host state.[88] This explains why concepts such as *persona non grata*[89] and diplomatic démarche[90] hardly ever apply to employees and staff of public international organisations. By contrast, in many instances employees and staff of public international organisations with no diplomatic immunity, unlike diplomatic agents of sovereign states,[91] can be arrested, prosecuted and convicted in the local courts of the host state if they carry out criminal activities in that jurisdiction.[92] The following case helps to illustrate this point:[93]

organisations and alternative remedies against the United Nations' Seminar on State Immunities, Vienna, University of Vienna, Summer Semester 2006 5, http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/neumann.pdf (accessed 24 February 2013).

86 As above.

87 As above.

88 Hillier (n 17) 319. See also generally the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986, which has still not entered into force. This 1986 treaty adds rules (apart from what is contained in the Vienna Convention on the Law of Treaties 1969 and under customary international law pertaining to the Law of Treaties) for treaties with international organisations as parties. Neither the 1969 Vienna Convention nor the 1986 Vienna Convention distinguishes between the different designations of these instruments. Instead, their rules apply to all of those instruments as long as they meet certain common requirements.

89 See below for a fuller discussion on this concept.

90 See below for a fuller discussion on this concept.

91 See below on the concept of 'diplomatic immunity' of diplomatic agents of sovereign states.

92 See *US v Kuznetsov* 05-cr-916 US District Court, Southern District of New York (Manhattan).

93 T Weidlich 'Ex-diplomat, money-launderer, to return to Russia' *Bloomberg.com* 6 November 2008, http://www.bloomberg.com/apps/news?pid=20601127&sid=amHoBVgw47D4 (accessed 12 February 2013); *US v Kuznetsov* (n 92).

> A former Russian diplomat to the United Nations convicted of money-laundering in the US was granted permission to return to Russia to serve out his sentence. Vladimir Kuznetsov was found guilty March 7, 2007, in New York federal court of laundering more than $300,000 from what prosecutors said were secret payments from foreign companies seeking contracts to provide goods and services to the UN. He was sentenced Oct 12, 2007, to four years and three months and ordered to pay $73,671. Kuznetsov laundered funds obtained by Alexander Yakovlev, a UN procurement officer, prosecutors said. Kuznetsov served as chairman of the organisation's Advisory Committee on Administrative and Budgetary Questions and was its highest- ranking Russian diplomat … Yakovlev, also a Russian national who served as a procurement officer at the UN, pleaded guilty in 2005 to wire fraud and money-laundering and admitted accepting more than $1 million generated in the scheme. Yakovlev testified for the government that the money Kuznetsov took paid for a home in Russia.

Similarly, the following case involving the production and possession of pornographic material by a UN peacekeeping officer helps to shed further light:[94]

> An Irish soldier serving as a United Nations peacekeeper in Eritrea has been caught making pornographic videos of local women and is now serving a jail sentence in Ireland … The UN has launched an investigation into the scandal which has again plunged the organisation's peacekeeping duties into controversy. In the wake of the highly damaging revelation, the Eritrean government has condemned the activities of the Irish defence force and questioned its continued presence in the war-scarred state in the Horn of Africa … a government spokesman said: 'These people call themselves peacekeepers, when in fact all they want is a long holiday and a chance to fool around with our women. They did not respect our country, our culture or our people.' The soldier in question returned to Ireland … and … the Irish army said he would be dismissed.

According to the report:[95]

> An army spokesman said: 'As soon as his commanding officer became aware of his behaviour he was charged with conduct prejudicial to good order and discipline.' The private has already been sentenced to 16 days' detention by an army court, and is still serving the sentence. The statement added: 'He is likely to be dismissed from the force.' His videos were filmed last March.

94 See D Walsh & N Byrne 'Peacekeeper jailed for porn films' *The Scotsman* 23 January 2003, http://www.whale.to/b/peace1.html (accessed 4 July 2013).

95 As above.

> Their main 'star', a 22-year-old Eritrean woman … she said the soldier had told her he was making the video for 'remembrance' and would marry her and bring her to Ireland, where he said he owned a hotel. 'He was telling me what to do in the films in many different ways,' said the woman. After filming, the soldier would take the woman and her friends swimming at the Intercontinental Hotel, which she considered a 'great treat' as it is normally the preserve of foreigners. According to Eritrean authorities, the videos consisted of 'disgusting sexual acts'.

Hillier observes that, generally, privileges and immunities to be accorded to public international organisations and their staff or employees should be provided for in the constituent charter of the organisation or in subsequent supplementary agreements.[96] In the case of the UN, for example, the immunities and privileges are dealt with in the Convention on the Privileges and Immunities of the United Nations 1946.[97] The following 2008 report helps to demonstrate further the scope of the immunities and privileges enjoyed by employees and staff of the UN:[98]

> Already known as a pillar of corruption and mismanagement, the United Nations' fraud-infested contract division is in trouble again for five new shady deals involving $20 million worth of contracts. A relatively new task force created to tackle the monumental task of cleaning up the UN's procurement department, exposed the latest wrongdoing this week in its annual report to the UN General Assembly. Headed by a former US federal prosecutor, the task force had previously uncovered more than $630 million in contracts tainted by fraud, corruption or mismanagement at the world body which annually received major US tax dollars.

The 2008 report goes on to state:[99]

> The report highlights tainted contracts for air charter services in Congo, office supplies in Kenya, consulting jobs in Greece and payroll services at the

96 Hillier (n 17) 319.

97 Similar treaties spelling out immunities and privileges of other public international organisations include the Agreement on Privileges and Immunities to be Recognised and Granted by Member States in Connection with the Common Market for Eastern and Southern African States 1983; the Agreement on Privileges and Immunities of the International Criminal Court 2002; the General Agreement on the Privileges and Immunities of the Council of Europe 1949; the Convention on the Privileges and Immunities of the (UN) Specialised Agencies 1947; and the Agreement on Privileges and Immunities of the Organisation of American States 1949.

98 'More United Nations corruption' *Corruption Chronicles* – A judicial watch blog 21 October 2008, http://www.judicialwatch.org/blog/2008/oct/more-united-nations-corruption (accessed 10 February 2013).

99 As above.

> UN's New York headquarters. The payroll scheme involves two American employees who steered $2 million in contracts to private firms in which they had a financial stake. In some of the other cases, UN employees solicited kickbacks to direct deals to specific companies. This sort of fraud has long been the norm at the UN, which is precisely why the task force was launched in 2006 even though an internal watchdog (Office of Internal Oversight Services) has documented the crisis in reports noting how nearly one-third of the procurement contracts involve waste, corruption and other irregularities.

Highlighting the extent of the legal immunity enjoyed by the UN, the 2008 report adds the following:[100]

> [T]he chief of the world body's Commodity Procurement Section was sentenced to eight years in prison for accepting cash, real estate, wild parties and hookers as bribes. The corrupt diplomat, (Sanjaya Bahel of India) wielded incredible power because he was responsible for awarding billions of dollars in contracts to companies around the world. He was convicted by a federal jury of bribery, wire fraud and mail fraud.

Arguably, apart from recourse to a specific agreement(s) between a public international organisation and the host state, it is doubtful that there is an established and coherent body of customary international law relating to immunities of public international organisations.[101] However, the Third Restatement of the Foreign Relations Law of the United States seems to suggest that there actually is such a body of law, postulating that 'such privileges and immunities as are necessary for the fulfillment of the purposes of the organisation, including immunity from legal process and from financial controls, taxes and duties'.[102]

Shihata reinforces this view, contending that these immunities are based on customary international law which accords immunity to all public international organisations, at least for their non-commercial activities.[103]

100 As above.

101 Hillier (n 17) 319. See also DW Bowett *The law of international institutions* (1982) 349-350; F Seyersted 'Jurisdiction over organisations and officials of states, the Holy Sea and intergovernmental organisations' (1965) 14 *International and Comparative Law Quarterly* 526; and Restatement of the Foreign Relations Law of the United States (Revised) 467 Comment & Reporters' Note 4 73 (Tentative Date No 4) (1983).

102 As quoted in Hillier (n 17) 319.

103 IFI Shihata *The World Bank inspection panel* (1994) 107. Also, in the Zambian case of *Ventriglia and Ventriglia v Eastern and Southern Africa Trade and Development Bank and Robert Simeza* SCZ No 13 of 2010 (Appeal No 11/ 2009) J14, the Supreme Court for the Republic of Zambia made the following observation: 'The accepted principle of international customary law is that, absolute immunity is accorded to only acts of a governmental nature described in Latin as *jure imperii*. But restrictive immunity is

In particular, with regard to Specialised Agencies of the United Nations, Shihata observes that the principle of immunities is codified in the 1947 Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations, subject only to the waiver of immunity by the agency concerned.[104] To the contrary, the English courts in the *International Tin Council* cases[105] seemed to suggest that customary international law gave no such entitlement to public international organisations.[106] The position, thus, is not free from moot. Against this background, we now turn to examine the concept of diplomatic démarche as it applies to a diplomat engaged in corrupt practice.

5.2 The concept of a diplomatic démarche

A diplomatic démarche is said to be an oral or writrten diplomatic statement, especially one containing a demand, offer, protest, threat or the like.[107] As shown below, the contexts in which diplomatic démarches have

accorded to acts of commercial nature, *jure gestionis*. Lord Denning in the case of *I congreso del Partido* (7) put it this way: "Actions, whether commenced *in personam or in rem*, were to be decided according to the restrictive theory of sovereign immunity so that a state had no absolute immunity as regards commercial or trading transactions. Whether an act of a sovereign state attracted sovereign immunity depend on whether the act in question was a private act (*jure gestionis*) or a sovereign or public act (*jure imperii*) and the fact that the act was done for governmental or political reasons would not convert what would otherwise be an act of *jure gestiouis* or an act of private law into one done *jure imperii*."' See further *Rahimtoola v Nizam of Hyderabad* [1952] 3 All ER 441; *Alfred Dunhill of London, Inc v Republic of Cuba* 425 US 682 (1976); *Shearson Lehman Brothers Inc & Another v Maclaine Watson and Co Ltd & Another and International Tin Council* (*Intervener*) (No 2) (1987) [1988) 1 All ER 116 122, [1988] 1 WLR 16 24; and *Standard Chartered Bank v International Tin Council & Others* [1986] 3 All ER. 257. Elsewhere, I have also advanced similar views in KK Mwenda 'The Common Market for Eastern and Southern Africa (COMESA) and the COMESA Court: Immunity of an international organisation from legal action' (2009) 6 *University of Miskolc Journal of International Law*.

104 Shihata (n 103) 107.

105 [1990] 2 AC 418.

106 R Sadurska & C Chinkin 'The collapse of the International Tin Council: A case of state responsibility?' (1990) 30 *Virginia Journal of International Law* 845.

107 Garner (n 50) 442. In the *Rudolf Hess* case (International Legal Materials Vol 90 (1992) 396), eg, the German Constitutional Court considered that diplomatic démarches by the German government were proof that the government had fulfilled its obligations under the German Constitution, which grants a right to diplomatic protection to German citizens. See also *Kaunda & Others v President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC); International Legal Materials Vol 44 No 1 (January 2005) 173.

been issued vary from one situation to another.[108] For example, in Zambia, a recent media report provides as follows:[109]

> Zambia has issued a démarche, the highest form of diplomatic protest, against an outspoken French envoy that will see him leave the country, the foreign ministry confirmed … Foreign Minister Ronnie Shikapwasha said the government has vehemently complained to the French government over a blatant breach of diplomatic etiquette by the ambassador and is waiting for a response from Paris … Shikapwasha said Saudubray's conduct defied the norms and dictates of diplomacy, and that Zambia was left with no option but to complain to Paris. He said the move should serve as a warning to other ambassadors to abide by their roles as representatives of their nations. Shikapwasha said the government has on several occasions called and censured Saudubray for his interference in Zambia's internal affairs and undiplomatic conduct … The French envoy has been in Zambia for 13 months, and was given a final government warning last December when he told the task force on corruption to convict former president Frederick Chiluba for corruption and theft of public funds. He accused Chiluba of bribing court officials to delay his trial. At the time, the government said it would have no choice but to declare Saudubray a 'persona non grata' if he repeated his 'undiplomatic' conduct. Previously, he had picked an open quarrel with Commerce, Trade and Industry Minister Dipak Patel over the country's biggest fuel crisis involving French oil firm Total, and attacked opposition political parties and women's groups. Saudubray maintains he was misquoted on all occasions.

Another example of a diplomatic démarche can be seen in the strained relationship between the United States and North Korea where, during President George W Bush's administration, it was reported as follows:[110]

> But Christopher Hill, the assistant secretary of state for Asian affairs (and the Bush administration's chief negotiator on North Korean matters), issued the most curious statement: 'We are not going to live with a nuclear North Korea, we are not going to accept it,' adding that the Pyongyang regime 'can have a

108 See below.

109 'French envoy to Zambia "has gone too far"' *Mail & Guardian Online* 19 June 2006, http://www.mg.co.za/article/2006-06-19-french-envoy-to-zambia-has-gone-too-far (accessed 7 January 2013).

110 F Kaplan 'Kim Jong-il and his quest for the magical atom bomb: Will we go to war with North Korea?' *Slate* 6 October 2006, http://www.slate.com/id/2151039/ (accessed 9 February 2013).

> future or it can have these weapons – it cannot have both.' In the realm of the diplomatic démarche, this is about as strong as it gets.

In 2007 the *Hindu*, a national press of India, reported:[111]

> Days before the first-ever official-level security consultation between the United States, India, Japan and Australia last month, China issued démarches to each of the participants seeking to know the purpose behind their meeting. A démarche is a formal diplomatic communication made with the purpose of, inter alia, eliciting information from another state and reflects the seriousness of the issue at stake. Unlike India, Japan and Australia are close military allies of the US and their security cooperation has been going on for some time.

The three illustrations set out above help to explain what is meant by a diplomatic démarche, highlighting some of the contexts in which a diplomatic démarche can be issued. Following below is an examination of the concept of diplomatic immunity[112] as it applies to erring diplomats involved in such criminal conduct as drug trafficking, money laundering or smuggling of prohibited pornographic material.

5.3 Diplomatic immunity in the light of corrupt practices by a diplomat

As noted above, the general rule is that diplomats enjoy immunity from the jurisdiction of the local courts, but that such immunity is not an exemption from the substantive law.[113] This means that diplomats must observe the municipal law of the receiving state, and should avoid abusing the diplomatic privileges and immunity accorded to them. Such abuse of diplomatic privileges and immunity could occur, for example, where a diplomat recklessly or intentionally breaks the municipal law of the host state. But, then, what happens where a diplomat originating from state X, and accredited to state Y is found, say, in neighbouring state Z with pornographic material that is prohibited in the said state Z? Can that diplomat claim diplomatic immunity in a state where he or she is not accredited as a diplomat? In short, is diplomatic immunity universally

111 S Varadarajan 'Four-power meeting drew Chinese démarche' *The Hindu* 14 June 2007, http://www.hindu.com/2007/06/14/stories/2007061410501500.htm(accessed9February 2013).

112 The concept of 'diplomatic immunity' is discussed in the latter sections of this chapter. See also generally LS Frey and ML Frey *The history of diplomatic immunity* (1999); CJ Lewis State and diplomatic immunity (1990); GV McClanahan *Diplomatic immunity: Principles, practices and problems* (1989).

113 Brownlie (n 16) 356.

opposable in each and every state even though an individual is only accredited, say, to one particular state? Recently, in 2009,

> [a] Swedish court has handed eight-month jail sentences to a North Korean diplomat and his wife after they were caught trying to smuggle 230,000 cigarettes into the country. The diplomat tried to claim diplomatic immunity, but the court found he was not accredited in Sweden, and so the charges were brought forward. According to the Swedish daily, Dagens Nyheter, customs officials discovered the contraband when the couple tried to enter the country by ferry from Finland Nov 18. The cigarettes were hidden from view under sheets and blankets in the back seat and trunk of their Russian-registered car. The diplomat was assigned to the North Korean Trade Mission in St Petersburg, Russia … At the time of the seizure, the couple said the money from the smuggling would pay for medical treatment for the wife. They later changed the story to say the proceeds would go for humanitarian purposes in North Korea. The court did not believe either story.'[114]

The Swedish case presented above shows that some jurisdictions hold the view that while diplomats enjoy immunity generally from the jurisdiction of the local courts of the receiving state, such immunity does not extend to the jurisdiction of the courts of a third state where a diplomat, passing through the territorial zone of the third state, decides not to observe 'innocent passage' by offending the municipal law of that third state.[115] This view holds some water; otherwise some unscrupulous diplomats would be recklessly and fraudulently flashing their diplomatic passports wherever they go as a shield against possible criminal prosecution in a third state where they are not accredited as diplomats. Indeed, if such maneuvers were left unchecked, that would defeat international efforts to fight corruption and money laundering. However, it is important not to confuse the argument being advanced here as an affront to article 40(1) of the Vienna Convention on Diplomatic Relations 1961. We recognise that article 40(1) refers to situations where a diplomatic agent is passing through or is in the territory of a third state, which has granted him a passport visa, if such visa is necessary, while proceeding to take up or to return to his post, or when returning to his own country. In such a situation, article 40(1) postulates that the third state should accord the diplomatic agent inviolability and such other immunities as may be required to ensure his transit or return. The same applies in the case of any members of his family enjoying privileges or immunities who are accompanying the

114 'Sweden jails North Korean diplomat for smuggling' *Digital Journal* 16 December 2009, http://www.digitaljournal.com/article/283950 (accessed 12 February 2013).

115 See above for analogies of the concept of 'innocent' passage in the territorial waters of a coastal state as well as for that of 'transit' passage in straits.

diplomatic agent, or travelling separately to join him or to return to their country.[116] The immunities and privileges accorded to diplomatic agents and their family members underscored the ruling in the English case of *R v Guildhall Magistrates Court, ex parte Jarrett-Thorpe*.[117] In that case the applicant was the husband of the counsellor to the Sierra Leone embassy in Rome. His wife travelled to London to buy furnishings for the Rome embassy. It was intended that the applicant would join her later for the purpose of travelling back to Rome with her and to help with her luggage. It was not intended that he should enter the United Kingdom for any other purpose. When he arrived in the United Kingdom, the applicant received a message to the effect that his wife had already left for Rome. While he was waiting for a flight to Rome the applicant was arrested by the police at Heathrow in connection with criminal proceedings pending against him in London. Lawton J held that article 40 of the Vienna Convention on Diplomatic Relations 1961 applied so that the applicant was entitled to immunity.[118] The Court rejected the argument that article 40 only applied to diplomatic agents and members of their families when they were in transit between the sending state and the receiving state.[119]

Be that as it may, article 40 does not say a diplomatic agent, or any member of his family, should abuse his or her privileges and immunities by breaking the municipal law of the third state. Although the diplomatic agent and his family are passing through the third state, that passage, it is argued, must be innocent and should not offend the municipal law of that state.[120] In the *Guildhall Magistrates Court* case,[121] since the applicant did not break any law of the United Kingdom from the time of his arrival to meet his wife up to the time that he was arrested at Heathrow, notwithstanding the earlier pending criminal proceedings against him in London, his passage could be deemed innocent. Here, we should contrast this case with incidents such as the following 2007 case in India involving a Nigerian diplomat:[122]

116 Vienna Convention on Diplomatic Relations 1961 art 40(1).

117 *The Times* 5 October 1977 (QBD) in DJ Harris *Cases and Materials on International Law* (1992) 328.

118 As above.

119 As above.

120 See above for analogies of the concept of 'innocent' passage in the territorial waters of a coastal state as well as for that of 'transit' passage in straits.

121 *The Times* (n 117) 328.

122 P Thakur 'Nigerian diplomat not allowed to leave India' *The Times of India* 23 May 2007, http://timesofindia.indiatimes.com/india/Nigerian-diplomat-not-allowed-to-leave-India/articleshow/2067942.cms (accessed 12 February 2013).

> Nigerian diplomat GA Ojedokun, who was caught on Monday trying to take out $2,27 million, has been restrained from leaving the country at the instance of the Enforcement Directorate (ED), which holds that the defence advisor to the Nigerian High Commission may be holding clues to the thriving foreign exchange racket in India. The ED has got in touch with the ministry of external affairs (MEA) to prevent Ojedokun, who had flashed his diplomatic immunity to get away, from leaving. The diplomat is interned at the guest house in Vasant Vihar where he had been putting up since his arrival in the country two months ago. The ED's interest in the disgraced diplomat has been aroused by his ability to convert crores of rupees into millions of dollars, cocking a snook at the much-talked about vigil on money laundering. Ojedokun withdrew in rupees from the Bank of Tokyo's Parliament Street branch in New Delhi. In a step meant to stress the enormity of his offence, the MEA issued a statement saying that the Nigerian diplomat's money trail needed further investigation and a final report was awaited. Sources said Ojedokun told Air Intelligence Unit of Income Tax and ED sleuths that he had withdrawn the equivalent of $2,27 million (Rs 10 crore) from the Bank of Tokyo. He, however, failed to give full account of the purpose for which the money was withdrawn and from where he had exchanged the entire sum with dollars.

It is important to stress that in this chapter we are concerned mainly with issues pertaining to diplomatic immunity[123] (and, by parity of reasoning, to consular immunity[124]), as opposed to immunity and privileges of foreign states and sovereigns. Until the late 1950s the main source of law on diplomatic and consular relations was largely customary international law.[125] In 1957 the International Law Commission (ILC) undertook to produce a draft convention on diplomatic relations.[126] That draft, Hillier argues, formed the basis for the Vienna Convention on Diplomatic

123 Brownlie (n 16) 346-365.

124 Much of treaty law guiding consular relations is contained in the Vienna Convention on Consular Relations 1963. According to Hillier (n 17) 318, '[t]he primary function of consulates, vice-consulates, and consular posts is to represent and deal with nationals of the sending state. They enjoy certain immunities, but not as extensive as those enjoyed by diplomatic agents … As in the case of diplomatic relations, consular relations can only exist by agreement between the two states, and by virtue of article 23 of the Convention it is possible for the receiving state to declare a consular official *persona non grata*. The Convention provides for the inviolability of the consular premises and the consular archives and documents … Consular officials do not, however, enjoy complete immunity from the local criminal jurisdiction. Although they are not liable to arrest or detention, save in the case of grave crime, they can be subjected to criminal proceedings. Their immunity to civil and administrative jurisdiction only extends to acts performed in the exercise of consular functions.'

125 Hillier (n 17) 316.

126 As above.

Relations 1961.[127] The Convention is widely regarded as a codification of existing rules of customary international law on diplomatic relations.[128] Many states today are party to this Convention.[129] The Convention emphasises, *inter alia*, the functional necessity of diplomatic immunity.[130]

An additional point to note is that there is no right to diplomatic relations in international law.[131] Such relations exit only by consent.[132] The receiving state can, without giving any reason, declare any member of a diplomatic mission *persona non grata*.[133] Where that happens, the sending state can either withdraw the diplomatic agent or terminate his or her appointment.[134] If the diplomat is not withdrawn, or his or her appointment is not terminated, that diplomat risks losing diplomatic immunity as well as losing the privileges accorded to him or her, as a diplomat, under international law.[135] Alternatively, pursuant to article 32 of the Vienna Convention on Diplomatic Relations 1961, the sending state can waive the immunity from the recipient state's jurisdiction of some of its diplomatic agents possessing immunity under that Convention. Such a waiver, however, must be express.[136]

With regard to privileges of a diplomat to carry out free communication on the part of his or her mission, article 27(1) of the Vienna Convention on Diplomatic Relations 1961 stipulates that '[t]he receiving state shall permit and protect free communication on the part of the mission for all official purposes'. But, then, what is the meaning of the rubric 'official purposes'? Let us take a reasoned look at a recent case in Belarus.[137]

> A Latvian diplomat in Belarus has been charged with disseminating pornography, the Belarusian interior minister said Friday. Vladimir Naumov

127 As above.

128 As above.

129 As above.

130 As above.

131 As above.

132 As above. See also Vienna Convention on Diplomatic Relations 1961 art 2.

133 Vienna Convention on Diplomatic Relations 1961 art 9(1).

134 As above.

135 Vienna Convention on Diplomatic Relations art 9(2). See also *Portugal v Gonclaves* 82 ILR 115; *Empson v Smith* [1965] 2 All ER 881; *Empson v Smith* 41 ILR 407. Once a person ceases to be diplomat, his immunity from jurisdiction is lost.

136 See eg *Public Prosecutor v Orhan Olmez* 87 ILR 212.

137 RIA Novosti 'Latvian diplomat faces pornography charges in Belarus' *RIA Novosti* 28 July 2006, http://en.rian.ru/world/20060728/51973348.html (accessed 12 February 2013).

> said that the prosecutor-general had sanctioned a search of the diplomat's house, where pornographic materials were found. 'We confiscated the pornography materials and opened a criminal case against the diplomat on charges of distributing pornography,' Naumov said. The Latvian Embassy in Belarus said in turn, 'The search in the diplomat's house was a gross violation of the Vienna Convention [on Diplomatic Immunity] and international agreements.' The Belarusian Foreign Ministry said that the case would be decided under national legislation and international agreements between Belarus and Latvia.

In the example presented above, notwithstanding the controversy surrounding Belarus's choice of the legal rules to apply to the case, could it be argued that the Latvian diplomat, while disseminating pornographic material, was acting in accordance with article 27(1) of the Vienna Convention on Diplomatic Relations 1961 which requires the receiving state to permit and protect free communication by diplomats on the part of their diplomatic mission for all 'official purposes'? Indeed, what are 'official purposes'?

The Vienna Convention on Diplomatic Relations 1961 is silent on what constitutes 'official purposes', presumably leaving room for some constructive ambiguity to avoid spelling out a laundry list of exhaustive circumstances that may not entirely cover some emerging unforeseen circumstances. Be that as it may, article 41(2) of the Vienna Convention on Diplomatic Relations 1961 provides that '[a]ll official business with the receiving state entrusted to the mission by the sending state shall be conducted with or through the Ministry for Foreign Affairs of the receiving state or such other ministry as may be agreed'. Here, the term 'official business' should not, and need not, be confused with the term 'official purposes'. A 'purpose', it is argued, points to an 'object or goal' of the diplomatic mission, whereas a 'function' points to 'an act or a set of actions' by a diplomatic mission or any of its authorised agents. It is doubtful that the Latvian diplomat in Belarus, while disseminating pornographic material, was pursuing an 'object or goal' of the Latvian diplomatic mission or was carrying out a set of actions on behalf of the mission.

Article 41(1) of the Vienna Convention on Diplomatic Relations 1961 postulates that '[w]ithout prejudice to their privileges and immunities, it is the duty of all persons [that is, diplomats] enjoying such privileges and immunities to respect the laws and regulations of the receiving state'. Yet, to the contrary, there have been cases such as the following where a diplomat is alleged to have offended not only the municipal law of the

receiving state, but also the dictates of public international law enshrined in article 41(1) of the Vienna Convention on Diplomatic Relations 1961:[138]

> A US Foreign Service officer stationed in Brazil and Congo who is accused of using his office to pressure female visa applicants for sex has been ordered held without bond pending trial. Gons G Nachman of Washington is charged in US District Court with misuse of a passport, making false statements and possession of child pornography. At a detention hearing Tuesday in Alexandria, a magistrate ruled that the 42 year-old is a flight risk because he is a dual citizen of the US and Costa Rica and could easily flee to his native country. Federal public defender Geremy Kamens noted that the charges involve sex tapes Nachman allegedly made abroad with 16 and 17 year-old girls. He said it is unusual for the government to bring child pornography charges in cases involving post-pubescent teens.

Article 41(1) of the Vienna Convention on Diplomatic Relations 1961 also requires diplomats to refrain from interfering in the internal affairs of the receiving state. This is an important treaty obligation for all diplomats to comply with. It provides an additional incentive apart from, of course, the general norms of *consuetudo est servanda* (customary rules must be observed)[139] and *pacta sunt servanda* (treaties must be complied with)[140] to the receiving state for it to recognise the immunities and privileges of the diplomats. However, what is the meaning of 'not to interfere in the internal affairs of that state'? What are the 'internal affairs' of the receiving state? Could it be argued that interference in the internal affairs of a receiving state includes situations where a foreign diplomat has broken the municipal laws of the receiving state (for instance, where the diplomat has been smuggling prohibited pornographic material or trafficking in illicit drugs)?

Although the Vienna Convention on Diplomatic Relations 1961 is silent on this issue, one could reasonably impute that such actions by diplomatic agents as funding an opposition political party in a host state, harbouring or supporting terrorists attacking that host state, or exciting political discord and dissent in the host state, could well be seen as interfering in the internal affairs of the said state.[141] To illustrate, let us

138 'Diplomat accused of trading visa for sex' *ABC News – Washington* 19 February 2008, http://www.wjla.com/news/stories/0208/497296.html (accessed 10 February 2013).

139 A Cassese *International law in a divided world* (1994) 152.

140 As above.

141 See eg the *Asylum* case (*Colombia v Peru*) [1950] ICJ Rep 266; and the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (Order of 15 December 15 1979 and judgment of 24 May 1980) International Court of Justice (ICJ) Reports (1979) 19, as well as ICJ Reports (1980), 30-43.

take some insightful examples from Bangladesh,[142] Ethiopia,[143] Sudan,[144] Tanzania[145] and Uganda,[146] to mention but a few. In Bangladesh a 2006 report provides as follows:[147]

> Finance Minister M Saifur Rahman yesterday asked the donors not to interfere in the internal affairs of Bangladesh. 'I am fed up with the remarks of donors about corruption and don't want to hear anything more from you,' the minister told the newly appointed Danish Ambassador Einar H Jensen at his office. The envoy called on the minister to discuss matters of various Danish-aided projects and other issues. 'I told him to speak less regarding the internal affairs of the country – we don't like this kind of remarks now, we liked those in the past,' he told reporters about what transpired in the discussion between the two. The minister clearly told the envoy that it is good that they give aid for many projects of the country but the ownership of those projects belongs to Bangladesh. 'It is our headache how we implement the projects, not yours,' said Saifur, who returned home a few days back from the Singapore meetings of the World Bank and the International Monetary Fund (IMF). The finance and planning minister said the donor countries and agencies actually forget about the objectives of the projects when they raise their voice about corruption. The minister and the Danish envoy discussed

142 See Unb 'Saifur "fed up" with donors' allegations about graft' *The Daily Star* 26 September 2006, http://www.thedailystar.net/2006/09/26/d60926013020.htm (accessed 12 January 2013).

143 'Ethiopia expels Norwegian diplomats' Garoweonline.com 28 August 2007, http://www.garoweonline.com/artman2/publish/Africa_22/Ethiopia_Expels_Norwegian_Diplomats_printer.shtml (accessed 22 January 2013).

144 As above.

145 S Said & V Mnyanyika 'Keep off Zanzibar voters roll, donor told' *The Citizen* 15 August 2009, http://allafrica.com/stories/200908150008.html (accessed 8 January 2013).

146 In Uganda, 'Do donors have right to interfere in our affairs?' *The New Vision* 11 April 2009, http://allafrica.com/stories/200904130515.html (accessed 10 January 2013), a Ugandan government spokesperson, Ofwono Opondo, notes the following: 'While in Lusaka early this week President Yoweri Museveni told the world that donors should stop giving political and governance lectures to Africa but should instead give soft, cheap and adequate money for infrastructural development. As usual Museveni had a word for Africa leaders most of whom linking with neo-colonialism, donor philosophy and presumably educated but disoriented African elites have been major obstruction to Africa's development.'

147 Unb (n 142).

> matters of agriculture, fertiliser, water and other related fields wherein the Danish government is assisting Bangladesh.

In Ethiopia, similar complaints have been voiced against interference from some donor states.[148] As one report shows:[149]

> Ethiopia has expelled six Norwegian diplomats it accuses of interfering in its internal affairs. Just days after Sudan took similar action against Canadian and European Union envoys, the move raises fears that expulsions are becoming a favored technique for governments rejecting criticism of their human-rights records. Nick Wadhams has more from Nairobi. Norway says it is surprised by the Ethiopian order that it withdraw the diplomats, but has not indicated it will retaliate or break diplomatic relations with Prime Minister Meles Zenawi's government. No reason was given in the formal announcement of the expulsion. A top adviser to Mr Meles, Bereket Simon, tells VOA News that Norway has interfered in internal policies and on issues including Ethiopia's arch-rival, Eritrea, and Somalia, where Ethiopia sent troops to battle Islamist fighters. 'Our repeated pleas for correcting the mistakes done by the Norwegian government in terms of playing a negative role in the stability of the Horn of Africa and then our internal affairs have failed,' he said … Ethiopia's neighbor, Sudan, expelled European Union and Canadian diplomats and the country director of the US-based aid group CARE a few days ago. No reason was given, but the CARE official, Paul Barker, said he believed Sudan was upset about an internal memo he wrote concerning the security situation for his staff in the Darfur region. Officials and observers from nearby countries say they have become worried by the recent behavior of Sudanese and Ethiopian leaders, who have shown increased willingness to expel or hinder both foreign diplomats and aid organisations.

Likewise, in Tanzania strong sentiments against donor interference in the affairs of the Island of Zanzibar have been echoed by some government officials.[150]

> Zanzibar yesterday told the European Union (EU) and the United States (US) to stop interfering in Tanzania's internal affairs. But the opposition Civic United Front (CUF) called on the United Nations Development Programme (UNDP), which funds the voter registration, to suspend aid to the Zanzibar Electoral Commission (ZEC) for allegedly mismanaging it. Speaking to reporters at his office, the Zanzibar state Minister in the Chief Minister's office, Mr Hamza Hassan Juma, told

148 See below.

149 Garoweonline.com (n 143).

150 Said & Mnyanyika (n 145).

the EU and the US that Tanzania is a sovereign state. Responding to the donors' comments on the voter registration problems in Pemba, Mr Juma called on the EU, US, and their representatives to Tanzania to respect the government and rule of law. 'The Government of Zanzibar is not operating in fear of donors or any external directives. It has its Constitution and laws governing its affairs and the country's democracy,' he said … In a joint statement issued in Dar-es-Salaam, representatives of the major donor countries, which fund the national Budget by over 34 per cent, said they were 'seriously concerned about what appears to be flawed elements in the voter registration process in Zanzibar'.

In Uganda, Wafula Oguttu, the Forum for Democratic Change spokesperson, argues as follows:[151]

> It was, therefore, ridiculous for President Yoweri Museveni (of Uganda) while attending a meeting in Lusaka last week to have appealed to international donor community to commit more funds for the development of Africa's infrastructure and cheap electricity while at the same time telling them off, not to question African leaders on governance issues and not give them 'political lessons, lessons on elections voting' because some of them like him 'are freedom fighters who fought for voting'! Then why rig elections? The President talks about infrastructure development as if he just came to power yesterday. If he really cared, after more than two decades in power, what railway network, roads, ships and wagon ferries, bridges and power stations has his government developed with about $20 billion he has borrowed or received in foreign grants? Almost nothing.

All the countries noted above have complained of donor interference at some point in their internal affairs.[152] The reaction of these states has differed from one state to another.[153] Some have simply issued a diplomatic démarche whereas others have gone ahead to declare the erring diplomat *persona non grata*.[154] Explaining situations where diplomats have often been

151 *New Vision* (n 145).

152 As above.

153 As above.

154 As above. By comparison, examining the response of the United Kingdom to persistent traffic offences by some diplomatic agents of foreign states in the United Kingdom, Denza observes: 'The UK government's 1985 review of the Vienna Convention emphasised the concern of the government at the high level of illegal parking by diplomatic vehicles and their determination to reduce it substantially … Records of unpaid parking tickets would be kept and cases would be drawn to the personal attention of heads of mission with warnings about possible consequences. Further unpaid parking tickets incurred by individual cars will lead to a request for the transfer or the withdrawal of the offender. The UK government did demand the recall of a few persistent offenders. The demands brought about payment of the outstanding fines

declared persona non grata, Higgins puts it more succinctly as she argues that, except in the case of espionage – and not always then – states have often been reluctant to invoke the provisions of article 9(1) of the Vienna Convention on Diplomatic Relations 1961 regarding the power to declare a diplomat *persona non grata*.[155] Lauterpacht adds:[156]

> In its Judgment in the *Asylum* case the Court, in seeking support for the restrictive interpretation of the Havana Convention, urged that the grant of asylum was, prima facie, in the nature of intervention in the domestic affairs of the territorial state and that any extension of the right of asylum was particularly objectionable to the traditional attitude of the Latin-American states opposed to political intervention. That argument, it might be said, amounted to a departure from the accepted definition of intervention as dictatorial intervention in the internal affairs of a state. There is little, if anything, of such interference in the grant of asylum – an institution freely accepted and widely practiced especially in Latin-American countries. Yet it is arguable, in turn, that a definition which limits intervention to dictatorial interference is in itself open to question.

Also, the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (Order of 15 December 1979[157] and judgment of 24 May 1980[158]) provides some parallel reasoning that could be applied to situations where a diplomat is the offending party. In the *Tehran* case[159] the principle that the inviolability of the diplomatic mission entails that the receiving state is also under a duty to afford all reasonable protection to it was put to test. On 4 November 1979, following the revolution in Iran, a number of Iranian nationals seized the US Embassy and took the personnel inside hostage.[160] Although the International Court of Justice (ICJ) found that

and were then withdrawn. Although the use of the *persona non grata* procedure in this context was without precedent, it was reluctantly accepted by the diplomatic corps in London that it was within the powers of the receiving state under article 9' (art 9 of the Vienna Convention on Diplomatic Relations 1961). E Denza *Diplomatic law: Commentary on the Vienna Convention on Diplomatic Relations* (2008) 68. See also Review of the Vienna Convention on Diplomatic Relations, 1985 Cmnd 9497 para 80.

155 See R Higgins *Problems and process: International law and how we use it* (1996) 89. See also generally R Higgins 'The abuse of diplomatic privileges and immunities: Recent United Kingdom experience' (1985 79 *American Journal of International Law* 641; R Higgins 'UK Foreign Affairs Committee report on the abuse of diplomatic privileges and immunities: Government response and report' (1986) 80 *American Journal of International Law* 135.

156 H Lauterpacht *The development of international law by the International Court* (1996) 82.

157 International Court of Justice (ICJ) Reports (1979) 19.

158 International Court of Justice (ICJ) Reports (n 158) (1980) 30-43.

159 As above.

160 Hillier (n 17) 316-17.

> the initial hostage taking could not be attributed to the Iranian government, it had been aware of the threat posed to the embassy and had the means available to provide adequate protection. The Court therefore found that Iran's failure to prevent the seizure of the embassy amounted to a breach of its international obligations.'[161]

By parity of reasoning, a diplomat is under obligation not to interfere in the internal affairs of the receiving state as much as the receiving state should not violate the principles of inviolability of a diplomatic agent or mission.[162] Codifying customary international law[163] on the principle of inviolability of a diplomatic mission, article 22 of the Vienna Convention on Diplomatic Relations 1961 provides:

> 1 The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission.
> 2 The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
> 3 The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 29 codifies customary international law[164] on the principle of inviolability of a diplomatic agent as follows: 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.'

Following thereon, article 30(1) reinforces article 29 by providing that 'the private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission'. But what happens where a diplomat, in contravention of the municipal law of the receiving state, runs a brothel at his private residence? Can he be allowed to invoke article 30(1) of the Vienna Convention on Diplomatic Relations 1961 for the inviolability and protection of his residence? It should not

161 As above.

162 See arts 41(1), 22 and 29 of the Vienna Convention on Diplomatic Relations 1961. See also MN Shaw *International law* (1997) 533-536.

163 Hillier (n 17) 316.

164 As above. See also RMM Wallace *International law* (1997) 124-125.

be forgotten that article 41(1) of the same treaty requires the diplomat to respect the laws and regulations of the receiving state. It is, therefore, possible for the receiving state to issue a diplomatic démarche to the state being represented by the erring diplomat.

Under article 30(2) of the Vienna Convention on Diplomatic Relations 1961, the diplomatic agent's papers, correspondence and, except as provided in paragraph 3 of article 31,[165] his property, enjoy inviolability. But does this also cover illegal or prohibited pornographic material that the diplomat may have in his possession or at his private residence? Article 31 provides:

> 1 A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
> (a) a real action relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission;
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state;
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

Article 31 continues:[166]

> 2 A diplomatic agent is not obliged to give evidence as a witness.
> 3 No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
> 4 The immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state.

In certain instances, however, as we have already established above, although a diplomatic agent is generally immune from prosecution in the courts of law of the receiving state, he or she can be prosecuted in the courts

165 The said para 3 of art 31 follows below.

166 While art 38(1) introduces an important caveat as follows: 'Except insofar as additional privileges and immunities may be granted by the receiving state, a diplomatic agent who is a national of or permanently resident in that state shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.'

of the sending state.[167] We did point out that a diplomat can be recalled by his or her sending state to stand trial in the courts of law of that state. We also pointed that, in cases of universal jurisdiction, the diplomat can be arrested and extradited to the sending state or to any impartial third state to stand trial. In addition, an important caveat applying to all principles of inviolability can be found in article 41(1) of the Vienna Convention on Diplomatic Relations 1961, requiring diplomats (a) to respect the laws and regulations of the receiving state; and (b) not to interfere in the internal affairs of the receiving state. This means that, for example, even though article 27(4) of the Vienna Convention on Diplomatic Relations 1961 postulates that a diplomatic bag shall not be opened or detained, the packages constituting the diplomatic bag must bear visible external marks of their character and can contain only diplomatic documents or articles intended for official use.[168] The diplomatic bag should not be used to smuggle prohibited or illegal goods.

Further, as a general rule, the diplomatic courier who is provided with an official document indicating his status and the number of packages constituting the diplomatic bag should be protected by the receiving state in the performance of his functions,[169] and he should enjoy personal inviolability and should not be liable to any form of arrest or detention.[170] But again, the efficacy of these privileges rests on a correlative duty on the part of the diplomatic mission, agent and courier (a) to respect the laws and regulations of the receiving state; and (b) not to interfere in the internal affairs of the receiving state.[171] In short, the diplomatic bag should not contain any illegal substance such as cocaine or marijuana.

Where a diplomat acts in breach of article 41(1) of the Vienna Convention on Diplomatic Relations 1961, which requires the diplomat to respect the laws and regulations of the receiving state, such action could justifiably invite the invocation of article 9(1) of that very treaty. The said article 9(1) provides as follows:

> The receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending

167 Vienna Convention on Diplomatic Relations 1961 art 31(4).

168 Vienna Convention art 27(4).

169 Vienna Convention art 27(5).

170 As above.

171 Vienna Convention art 41(1).

> state shall, as appropriate, either recall the person concerned or terminate his functions with the mission.

However, does the fact that article 9(1) of the Vienna Convention on Diplomatic Relations 1961 confers wide-ranging powers on a receiving state to declare a foreign diplomat it considers unwelcome on its soil *persona non grata* entail that the powers in article 9(1) can be used without restraint, or wantonly, capriciously and abusively, by the receiving state? What about the principle of *good faith* in international law[172] or the principles of obligations *erga omnes* and *rights erga omnes*?[173] According to Howard:[174]

> In a comprehensive analysis of the development of the concept of obligations owed *erga omnes*, Maurizio Ragazzi provides a framework of five elements essential to the concept. Ragazzi places an important caveat on this framework – it is intended only to be descriptive, and is not a prescriptive formula that must be satisfied in order to be for the obligation to be *erga omnes*. The dicta of the ICJ in the *Barcelona Traction Case* provides four examples of obligations owed *erga omnes* – the outlawing of acts of aggression, the outlawing of genocide, protection from slavery and protection from racial discrimination – and it is from a comparison of these obligations that Ragazzi infers his five elements. They are as follows: (1) obligations narrowly defined, rather than ones which are more broadly construed; (2) negative obligations (or prohibitions), rather than positive obligations; (3) obligations or duties in the strict sense (ie 'what one ought or ought not to do') to the exclusion of other fundamental legal conceptions; (4) 'obligations deriving from rules of general international law belonging to *jus cogens* and codified by international treaties to which a high number of states have become parties'; (5) 'obligations instrumental to the

172 Cassese (n 139) 152, observes: 'The principle of good faith is intended to "invade" the penumbra of discretion left by international rules and guide the conduct of states (and other international subjects) in applying norms. While states are enjoined by the general norms, known as *consuetudo est servanda* (customary rules must be observed) and *pacta sunt servanda* (treaties must be complied with), to fulfil their duties, the principle in hand prescribes how to carry out the performance of such duties. The principle does not specify how states must behave but merely conveys the idea that international subjects must not take advantage of their rights (or discharge their obligations) in such a way as to thwart the purposes and object of legal rules. states must not betray the expectation created in other states by those rules, nor must they stultify by their behaviour the confidence with which the relevant norms have given to their fellow-states.' See also *Nuclear Tests* case ICJ (1974) 268.

173 On the principles of obligations *erga omnes* and rights *erga omnes*, see Cassese (n 139) 158 and, generally, M Ragazzi *The concept of international obligations* erga omnes (1997).

174 J Howard 'Invoking state responsibility for aiding the commission of international crimes – Australia, the United States and the question of East Timor' (2001) 2 *Melbourne Journal of International Law* 1, http://www.austlii.edu.au/au/journals/MelbJIL/2001/1.html (accessed 19 January 2013).

> main political objectives of the present time, namely the preservation of peace and the promotion of fundamental human rights, which in turn reflect basic goods (or moral values), first and foremost life and human dignity'.

Making further reference to Ragazzi's work on the principle of obligations *erga omnes*, Howard continues:[175]

> Ragazzi analyses a selection of obligations which, in light of his five elements, might be elevated to the status of obligations owed *erga omnes*. Relying heavily on the ICJ's statement in the *Barcelona Traction Case* that obligations *erga omnes* may derive from the 'principles and rules concerning the basic rights of the human person', Ragazzi focuses on human rights as the most likely source of new obligations. He also considers the law of development and international environmental law, but considers human rights law the 'privileged domain for the evolution of the concept of obligations *erga omnes'*. Thus the most widely accepted examples of obligations owed *erga omnes* remain only those expressly referred to in the *Barcelona Traction Case*, with the possible addition of the right to self-determination.

In declaring a diplomat *persona non grata*, do norms of diplomacy and/or comity play any role? Is everything done by international state actors – which actions may be considered appropriate and acceptable under international relations – done solely on the basis of complying with treaty obligations and/or international customary law?[176] Does state practice not also play a role?[177] What about issues such as principles of *good faith*,

175 As above.

176 See Cassese (n 139) 152, for the two relevant principles here, namely, *consuetudo est servanda* (customary rules must be observed) and *pacta sunt servanda* (treaties must be complied with).

177 Some states, such as the United Kingdom and the United States, have enacted legislation on matters pertaining to diplomatic immunity with a view to bringing their municipal laws in line with the Vienna Convention on Diplomatic Relations 1961. However, some pieces of legislation, such as the United States' Diplomatic Relations Act 1978 (22 USC 254), reduce the degree of immunity enjoyed by many persons at diplomatic missions. states may also pass legislation or enter into regional treaties that address matters not explicitly covered by the Vienna Convention on Diplomatic Relations 1961, but which matters are principally under customary international law (eg the Pan-American Convention 1928 and the European Convention on Consular Functions 1967). All in all, where a state enacts legislation, that piece of legislation often evidences the state practice of that particular state. In the case of the United Kingdom, eg, see generally the State Immunity Act 1978 and the Diplomatic Privileges Act 1964. In the case of the United States, see generally the Diplomatic Relations Act 1978.

obligations *erga omnes* and *rights erga omnes* in international law that we have already discussed above?[178]

5.4 Conclusion

This chapter has examined the concept of diplomatic immunity of a corrupt diplomatic agent of a foreign state who, accredited to a host or receiving state, is found in possession of such illegal substance as marijuana or cocaine, or one who is engaging in such fraudulent activities as money laundering or smuggling of prohibited goods. It was pointed out that, as a general rule, diplomats enjoy immunity from the jurisdiction of the local courts, but not an exemption from the substantive law. An argument was made that whereas a diplomat enjoys diplomatic immunity in the state to which he or she is accredited, thus shielding him or her from criminal prosecution in that jurisdiction, the diplomat will have limited jurisdictional immunity in a third state to which he or she has not been accredited. As argued above, if a diplomat is arrested in that third state for an offence under the laws of that state, he or she may not be allowed to invoke diplomatic immunity by the third state since such immunity should apply only when the diplomat is passing through the territorial zone of the said state with innocent passage analogous to that postulated under article 19(2) of the United Nations Convention on the Law of the Sea 1982. We noted that the said treaty provision codifies customary international law and that it provides that innocent passage must not be prejudicial to the peace, good order and security of the coastal state. An argument was made that, by parity of reasoning, the same analogy should be extended to the case of diplomats passing through a third state – that is, their passage must not be prejudicial to the peace, good order and security of the third state. However, if the criminal conduct of a diplomat occurs in the accrediting or receiving state, then, as argued above, the receiving state can issue a diplomatic démarche to the state represented by the erring diplomat, protesting the criminal activities of the diplomat. Also, in extreme but rare cases, the accrediting or receiving state can declare the diplomat *persona non grata*. However, the declaration of a diplomat *persona non grata*, as argued above, does not in itself entail that the diplomat can now be prosecuted by the receiving state. In cases of universal jurisdiction, for example, we noted that the receiving state can arrest the culpable diplomat and have him or her extradited to the sending state or to any impartial third state to stand trial. The sending state, on the other hand, can recall its diplomat to stand trial in that state's courts of law even though the diplomat enjoys diplomatic immunity in the receiving state. An argument was also made

178 See above.

that the sending state can waive the immunity of its diplomat to allow the receiving state to prosecute that diplomat.

6 COMESA Court of Justice Rules of Procedure 2016: Regional integration and international law

6 Introduction

In chapter 5 we examined the concept of diplomatic immunity in international law where there is evidence of corrupt practice by an erring diplomatic agent of a state. Chapter 6 turns to examine the efficacy of the treaty and procedural law pertaining to the Common Market for Eastern and Southern Africa (COMESA) Court of Justice.[1] This judicial body is provided for under article 7 of the COMESA Treaty 1994,[2] that is, the treaty that established the Common Market.[3] The COMESA Authority, the supreme policy organ of COMESA, appointed the judges of the Court during its Third Summit on 30 June 1998, in Kinshasa, the Democratic Republic of the Congo (DRC).[4] The registrar of the Court was appointed by the COMESA Council of Ministers during its meeting in June 1998 in Kinshasa, DRC.[5]

1 An earlier version of this chapter appears as KK Mwenda 'Court of Justice of the Common Market for Eastern and Southern Africa (COMESA)' *Max Planck encyclopedias of international law*.

2 The COMESA Court of Justice points out: 'The Court, in addition to other jurisdictions, took over those enjoyed by three judicial organs, which existed within the Preferential Trade Area for Eastern and Southern African States (PTA), which was upgraded into COMESA. These PTA organs were (a) the PTA Tribunal whose function under the PTA Treaty was to ensure the proper interpretation of the provisions of the Treaty and to adjudicate only in disputes between Member States arising from the interpretation and application of the PTA Treaty. The jurisdiction of the Tribunal was narrow and its ad hoc status and lack of a separate budget stifled its growth; (b) the PTA Administrative Appeals Board whose jurisdiction under the PTA Treaty was to adjudicate in disputes between the PTA and its staff arising from the interpretation and application of the Treaty, Staff Rules and Regulations and terms and conditions of contracts of employment of staff. The ad hoc status of the Board, its lack of an independent Registry and separate budget severely affected the functioning of this organ; and (c) the PTA Centre for Commercial Arbitration, which was responsible for facilitating international arbitration and conciliation of private commercial disputes. The Centre was based in Djibouti and operated under the auspices of the PTA Federation of Chambers of Commerce and Industry.' COMESA Court of Justice 'Previous judicial bodies', http://www.comesa.int/comesa-court-of-justice__trashed/ (accessed 14 February 2013).

3 COMESA Court of Justice 'About us', http://comesacourt.org/ (accessed 22 May 2018).

4 As above.

5 As above.

Kayihura observes that the COMESA Court of Justice was created to support regional integration, and that it has a fundamental role to play in the success of the Common Market by ensuring certainty and predictability in the Common Market law.[6] According to Kayihura, the Court serves countries with diverse backgrounds of common law, civil law and Islamic law across the larger part of Eastern and Southern Africa.[7] Kayihura maintains that other regional economic communities provide for the establishment of regional courts and tribunals for the settlement of disputes, namely, the East African Community (EAC) and the Southern African Development Community (SADC), and that this plurality of institutions could lead to forum shopping by litigants from COMESA member states.[8]

In this chapter we stand back to provide an overview of the COMESA Court of Justice Rules of Procedure 2016, highlighting the salient features of those rules. An exploratory study is undertaken. The chapter argues that given that the COMESA Court of Justice Rules of Procedure 2016 came into effect only a few years ago,[9] it is too early to determine their efficacy, notwithstanding that they supplement the relevant provisions of the COMESA Treaty 1994.

The COMESA Court of Justice Rules of Procedure 2016 were promulgated by the COMESA Court of Justice, with the approval of the COMESA Council, in the exercise of powers conferred on that Court by article 38 of the COMESA Treaty 1994.[10] These rules revoked and replaced the 2006 Rules of the COMESA Court of Justice.[11] As a recent COMESA report points out:[12]

> The revised edition of the COMESA Court of Justice Rules of Procedure (2016) has been launched. Zambia's Vice President, Her Honour Inonge Wina, launched the rules during the opening of the 20th Meeting of Ministers of Justice and Attorneys General from the COMESA region, Friday, 29 September 2017. The formulation of the new Rules began in early 2016 and the final draft adopted by the COMESA Ministers of Justice and Attorneys

6 D Kayihura 'Parallel jurisdiction of courts and tribunals: The COMESA Court of Justice perspective' (2010) 36 *Commonwealth Law Bulletin* 583-592.

7 As above.

8 As above.

9 See below.

10 See COMESA Court of Justice Rules of Procedure 2016 vi.

11 COMESA Court of Justice Rules of Procedure (n 10) sec I Rule 1(2).

12 COMESA 'COMESA Court Rules launched', http://www.comesa.int/comesa-court-rules-of-procedure-launched/ (accessed 25 June 2018).

> General in September of the same year. The Court has been using the 2006 Rules. The VP said it was necessary to amend and update the court rules to make them more responsive to the needs of users.

It is important to observe that the COMESA Court of Justice also has rules on arbitration, the COMESA Court of Justice Rules of Arbitration 2003. Currently, these arbitration rules are also under review.[13] Indeed,

> [t]he COMESA Court of Justice Rules Committee met in Nairobi, Kenya from 16-20 March, 2018 to review the Court's Arbitration Rules (2003). The need for review has been necessitated by the fact that the Court's Arbitration Rules (2003) needed to be updated to capture modern best practices in international Arbitration. There was also the need to simplify and improve their readability and make them more user-friendly.[14]

The COMESA Court of Justice posits further that when the COMESA Court Rules of Arbitration 2003 were formulated, the Court had a single division.[15] However, in 2005 a two-tier system was established comprising the First Instance Division and the Appellate Division of the Court.[16] Because of this development, it is now considered necessary to amend the COMESA Court Rules of Arbitration 2003.[17]

Let us now turn to examine the jurisdiction of the COMESA Court of Justice before looking at the scope of application of the COMESA Court of Justice Rules of Procedure 2016.

6.1 Jurisdiction of the COMESA Court of Justice

Setting out the jurisdiction of the COMESA Court of Justice, article 27 of the COMESA Treaty 1994 provides:[18]

> 1 The Court shall have jurisdiction to hear disputes between the Common Market and its employees that arise out of the application and

13 See below.

14 COMESA Court of Justice 'COMESA Court of Justice holds arbitration rules review meeting', http://comesacourt.org/comesa-court-of-justice-holds-arbitration-rules-review-meeting/ (accessed 27 June 2018).

15 As above.

16 As above.

17 As above.

18 See generally KK Mwenda 'The Common Market for Eastern and Southern Africa (COMESA) and the COMESA Court: Immunity of an international organisation from legal action' (2009) 6 *University of Miskolc Journal of International Law* 60-83.

interpretation of the Staff Rules and Regulations of the Secretariat or the terms and conditions of employment of the employees of the Common Market.

2 The Court shall have jurisdiction to determine claims by any person against the Common Market or its institutions for acts of their servants or employees in the performance of their duties.

Article 28 of the treaty looks at the jurisdiction of the COMESA Court of Justice under Arbitration Clauses and Special Agreements, stressing:

> The Court shall have jurisdiction to hear and determine any matter:
> (a) arising from an arbitration clause contained in a contract which confers such jurisdiction to which the Common Market or any of its institutions is a party; and
> (b) arising from a dispute between the Member States regarding this Treaty if the dispute is submitted to it under a special agreement between the Member States concerned.

In dealing with the issue of jurisdiction of national courts, article 29(1) of the COMESA Treaty 1994 states that, except where jurisdiction is conferred on the COMESA Court of Justice by or under the COMESA Treaty 1994, disputes to which COMESA is a party are not on that ground alone to be excluded from the jurisdiction of national courts. The decisions of the COMESA Court of Justice on the interpretation of the provisions of the COMESA Treaty 1994 have precedence over decisions of national courts.[19]

Following below is an examination of the scope of application of the COMESA Court of Justice Rules of Procedure 2016.

6.2 Scope of application of the COMESA Court of Justice Rules of Procedure 2016

Under article 23(1) of the COMESA Treaty 1994, the COMESA Court of Justice has jurisdiction to adjudicate upon any matter referred to it pursuant to that treaty. The First Instance Division of the Court has jurisdiction to hear and determine at first instance, subject to a right of appeal to the Appellate Division, any matter brought before the Court in accordance with the COMESA Treaty 1994.[20] Appeals go to the Appellate Division of the Court on (a) points of law; (b) grounds of lack of jurisdiction; or

19 COMESA Treaty 1994 art 29(2).

20 COMESA Treaty 1994 (n 19) art 23(2).

(c) procedural irregularity.[21] Thereafter, there is no right of appeal, as the decision of the Appellate Division is final and conclusive.[22]

A member state of COMESA which considers that another member state or the COMESA Council has failed to fulfill an obligation under the COMESA Treaty 1994, or has infringed a provision of that treaty, can refer the matter to the COMESA Court of Justice.[23] Also, a COMESA member state can refer for determination by the Court the legality of an act, regulation, directive or decision of the COMESA Council on the grounds that the act, regulation, directive or decision is *ultra vires*, unlawful or an infringement of the provisions of the COMESA Treaty 1994 or any rule of law relating to its application, or that it amounts to a misuse or abuse of power.[24] The other parties that can bring a matter before the COMESA Court of Justice, regarding the violations highlighted above, are the COMESA Secretary-General[25] and any resident in a COMESA member state.[26] However, for such residents as legal and natural persons, they must first exhaust the local remedies in the national courts or tribunals of the relevant member state before coming up to the COMESA Court of Justice.[27]

Further, the COMESA Authority, the COMESA Council or a COMESA member state can request the COMESA Court of Justice to give an advisory opinion regarding questions of law arising from the provisions of the COMESA Treaty 1994 affecting the Common Market, and the member state, in the case of such a request, has the right to be represented and to take part in the proceedings.[28]

Rule 3(1) of the COMESA Court of Justice Rules of Procedure 2016 provides that nothing in the rules can limit or otherwise affect the inherent power of the Court to administer substantive justice without undue regard to technicalities, and to preserve the dignity, or prevent abuse of the process of the Court. Indeed, these rules supplement the provisions of the

21 COMESA Treaty 1994 art 23(3). See also *Government of the Republic of Malawi v Malawi Mobile Ltd* Appeal No 1 (2016), COMESA Court of Justice, Appellate Division.

22 COMESA Treaty 1994 art 31(1).

23 COMESA Treaty 1994 art 24(1).

24 COMESA Treaty 1994 art 24(2).

25 COMESA Treaty 1994 art 25.

26 COMESA Treaty 1994 art 26. See also *COMESA v Collins Hwalimo Dube* Application Appeal No 1 (2015) COMESA Court of Justice, Appellate Division; *Dr Kabeta Muleya v COMESA* No 1 (2003), COMESA Court of Justice.

27 COMESA Treaty 1994 art 26.

28 COMESA Treaty 1994 art 32(1).

COMESA Treaty 1994. The COMESA Court of Justice has the power to issue, from time to time, such practice directions as are necessary for the proper implementation of its rules of procedure.[29] However, it is too early to determine the effectiveness of the COMESA Court of Justice Rules of Procedure 2016 since these rules were only promulgated in 2016.[30] Suffice it to say, the COMESA Court of Justice Rules of Procedure 2016 do supplement and reinforce the provisions of the COMESA Treaty 1994.

The COMESA Court of Justice Rules of Procedure 2016 came into force on 15 October 2016, and were immediately applicable to all court references pending on that day or instituted thereafter.[31] Under Rule 3(3) of these rules, any matter within the jurisdiction of the COMESA Court of Justice must be commenced, proceeded with and disposed of by the Court in accordance with the rules.

6.3 Organisation of the COMESA Court of Justice

The COMESA Court of Justice seats at a place determined by the COMESA Authority under article 44 of the COMESA Treaty 1994.[32] From 1998 to 2003, the seat of the COMESA Court of Justice was located temporarily at the COMESA Secretariat in Lusaka, Zambia.[33] In 2003 the COMESA Authority moved the seat of the Court to Khartoum, Sudan.[34]

The COMESA Court also has the power to decide, in any particular case, to sit and exercise its functions in another COMESA member state, if it considers it expedient.[35] The COMESA Court's principal judge and president are responsible for fixing the dates, the times of sittings and the length of sessions of the Court's First Instance and Appellate Divisions, respectively.[36] The Court's registry is at the place where the Court has its seat,[37] although subject to approval by the COMESA Council, there can be sub-registries of the Court at such places in the COMESA member states as the Court, from time to time, decides.[38]

29 COMESA Court of Justice Rules of Procedure 2016 sec I Rule 3(4).

30 See below.

31 COMESA Court of Justice Rules of Procedure 2016 sec I Rule 3(2).

32 Supplemented by COMESA Court of Justice Rules of Procedure 2016 sec II Rule 4(1).

33 COMESA Court of Justice 'Seat of the Court', http://www.comesa.int/comesa-court-of-justice__trashed/ (accessed 15 March 2018).

34 As above.

35 COMESA Court of Justice Rules of Procedure 2016 sec II Rule 4(1).

36 COMESA Court of Justice Rules of Procedure 2016 sec II Rule 4(2).

37 COMESA Court of Justice Rules of Procedure 2016 sec II Rule 4(3).

38 COMESA Court of Justice Rules of Procedure 2016 sec II Rule 4(4).

Before taking up his or her duties, a COMESA Court judge must take an oath or affirmation administered by the most senior judge of the COMESA Court.[39] The oath must be taken before the Chairperson of the COMESA Authority, as set out in Form A of Schedule III of the COMESA Court of Justice Rules of Procedure 2016.[40]

As a general rule, the President and the Principal Judge of the COMESA Court rank, respectively, first and second, while the judges in the Appellate Division rank senior to the judges in the First Instance Division.[41] Judges of the same division rank according to the date of their respective appointments except that, where there is equal seniority in office, precedence is determined by age.[42] Retiring judges who are re-appointed retain their former precedence.[43]

6.4 Composition and quorum of the COMESA Court of Justice

Provisions relating to the composition of the COMESA Court of Justice are contained in the COMESA Treaty 1994, and not the COMESA Court of Justice Rules of Procedure 2016. Article 20 of the COMESA Treaty 1994 provides as follows:

1 The Court shall be composed of twelve judges appointed by the Authority of whom seven shall be appointed to the First Instance Division and five shall be appointed to the Appellate Division.
2 The Judges of the Court shall be chosen from among persons of impartiality and independence who fulfill the conditions required for the holding of high judicial office in their respective countries of domicile or who are jurists of recognised competence:

Provided that no two or more Judges shall at any time be Nationals of the same Member State.

3 Notwithstanding the provisions of paragraph 1 of this Article, the Authority may, upon the request of the Court, appoint additional Judges.
4 The Authority shall designate one of the Judges of the Appellate Division as the President of the Court responsible for exercising such functions as are set out under this Treaty and the Rules of Court.

39 COMESA Court of Justice Rules of Procedure 2016 sec II Rule 5.
40 As above.
41 COMESA Court of Justice Rules of Procedure 2016 sec II Rule 6(1).
42 COMESA Court of Justice Rules of Procedure 2016 sec II Rule 6(2).
43 COMESA Court of Justice Rules of Procedure 2016 sec II Rule 6(3).

5 The Authority shall designate one of the Judges of the First Instance Division as the Principal Judge with such functions as are set out in the Rules of Court.

The implication of article 20 of the COMESA Treaty 1994 is that one must look at the municipal law of the COMESA member state where an individual is domiciled (even if he or she is not a national of that state) to make a determination whether or not he or she is eligible to serve as a judge of the COMESA Court of Justice. The COMESA Treaty 1994 simply cross-refers to national legislation or municipal law. So, for someone to be eligible to serve as a judge of the COMESA Court of Justice, he or she must be eligible to hold high judicial office in his or her country of domicile or be a jurist of recognised competence. The problem with this approach, notwithstanding the tests of holding high office or recognised competence, is that the standard of what constitutes high office or recognised competence differs across countries in the COMESA region. The COMESA Treaty should have spelt out specific eligibility criteria for an individual to be appointed as a judge of the COMESA Court of Justice, irrespective of what is contained in the national legislation or municipal laws of his or her country of domicile.

Simamba observes that non-nationals of COMESA member states were in the past appointed as judges to the COMESA Court of Justice on the basis of their domicile rather than nationality.[44] He examines the relevant legal provisions of the COMESA Treaty 1994 and argues that those provisions are capable of far-reaching interpretation, possibly beyond the intention of the parties to the treaty.[45] According to Simamba, while the COMESA Treaty 1994 allows persons who are judges or are qualified to be judges in their home countries to be appointed, it also permits the appointment of distinguished lawyers.[46]

Article 21 of the COMESA Treaty 1994 sets forth the term of office of a judge as follows:[47]

44 BH Simamba 'Appointment and term of office of judges of international courts: Innovations from Africa?' (2008) 34 *Commonwealth Law Bulletin* 515-525.

45 As above.

46 As above.

47 Art 22 of the COMESA Treaty 1994 adds further: '1 The President or a Judge shall not be removed from office except by the Authority for stated misbehavior or for inability to perform the functions of his office due to infirmity of mind or body or due to any other specified cause. 2. If a Judge is appointed by the Authority to replace the President or another Judge before the term of office of the President or a Judge expires, the Judge so appointed shall serve in that office for the remainder of the term of the replaced President or Judge. 3. If a Judge is temporarily absent or otherwise unable to

1 The President and Judges shall hold office for a period of five years and shall be eligible for re-appointment for a further period of five years.
2 The President and the Judges shall hold office throughout the term of their respective appointments unless they resign or die or are removed from office in accordance with the provisions of this Treaty.
3 Where the term of office of a Judge comes to an end by effluxion of time or on resignation before a decision or opinion of the Court with respect to a matter which has been argued before the Court of which he was a member is delivered, such Judge shall, only for the purpose of completing that particular matter, continue to sit as a Judge.
4 The President may, at any time, resign his office by giving one year's written notice to the Chairman of the Authority, but his resignation shall not take effect until his successor has been appointed by the Authority and has taken office.
5 A Judge may, at any time, resign his office by letter delivered to the President for transmission to the Chairman of the Authority, and his resignation shall take effect on the date it has been accepted by the Authority.

The Appellate Division of the COMESA Court of Justice sits in plenary session or with a quorum of three judges, as the President determines.[48] Then, the First Instance Division sits in plenary session or with a quorum of five or three judges, as the Principal Judge determines.[49]

Where, by reason of a judge being absent or prevented from taking part in the proceedings, the Court cannot sit in a plenary session, the President can, in the case of the Appellate Division, direct that the matter be heard with a quorum of three judges.[50] In the case of the First Instance

carry out his functions, the Authority shall, if such absence or inability to act appears to the Authority to be likely to be of such duration as to cause a significant delay in the work of the Court, appoint a temporary Judge to act in place of the said Judge. 4. If a Judge is directly or indirectly interested in a case before the Court, he shall immediately report the nature of his interest to the President, and, if in his opinion the President considers the Judge's interest in the case prejudicial, he shall make a report to the Authority, and the Authority shall appoint a temporary Judge to act for that case only in place of the interested Judge. 5. If the President is directly or indirectly interested in a case before the Court he shall, if he considers that the nature of his interest is such that it would be prejudicial for him to take part in that case, make a report to the Authority and the Authority shall appoint a temporary President, chosen in the same manner as the substantive President, to act as President for that case only in place of the substantive President.'

48 COMESA Court of Justice Rules of Procedure 2016 sec II Rule 9(1).

49 COMESA Court of Justice Rules of Procedure sec II Rule 9(2).

50 COMESA Court of Justice Rules of Procedure sec II Rule 9(3)(a).

Division, the principal judge can direct that the matter be heard with a quorum of five or three judges.[51]

If, however, after a Division of the COMESA Court of Justice has been convened it is found that the quorum of judges has not been met, the presiding judge must adjourn the sitting until there is a quorum.[52] Also, a judge must recuse herself or himself in proceedings in which her or his impartiality is likely to be reasonably questioned.[53] A party can request the recusal of the judge in any proceedings in which the judge's impartiality is reasonably questioned.[54] The application for the recusal should be made in writing, orally in chambers through the presiding judge, or by formal application in conformity with Rule 41.[55] That said, the nationality of a judge is not, on its own, a sufficient ground to disqualify a judge from any proceedings.[56]

As a general rule, the president and judges of the COMESA Court of Justice are all immune from legal action for any act or omission committed in the discharge of their functions under the COMESA Treaty 1994 or the COMESA Court of Justice Rules of Procedure 2016.[57] The vacation days of the COMESA Court of Justice are determined and published annually by the president, subject to any special decision of the Court.[58] In the case of an urgency, the President or the principal judge, as the case may be, can convene the Court on a vacation day.[59] The COMESA Court of Justice

51 COMESA Court of Justice Rules of Procedure sec II Rule 9(3)(b).

52 COMESA Court of Justice Rules of Procedure sec II Rule 9(4).

53 COMESA Court of Justice Rules of Procedure sec II Rule 9(5), reinforcing art 22(4) of the COMESA Treaty 1994.

54 COMESA Court of Justice Rules of Procedure sec II Rule 9(6). See also *Government of the Republic of Malawi v Malawi Mobile Limited* Appeal 1 (2016), COMESA Court of Justice, Appellate Division.

55 COMESA Court of Justice Rules of Procedure sec II Rule 9(6).

56 COMESA Court of Justice Rules of Procedure sec II Rule 9(7).

57 COMESA Treaty 1994 art 39.

58 COMESA Court of Justice Rules of Procedure sec II Rule 10(1).

59 COMESA Court of Justice Rules of Procedure sec II Rule 10(2).

observes the official public holidays of the COMESA member state where it has its seat.[60]

6.5 Powers of the president and the principal judge of the COMESA Court of Justice

The president of the COMESA Court of Justice directs the overall functions of the Court and, unless he or she designates another judge to do so, directs the judicial functions of the Appellate Division and presides over the hearings and deliberations of that division.[61] By contrast, the principal judge of the COMESA Court of Justice directs the judicial functions of the First Instance Division and, unless she or he designates another judge to do so, presides over the hearings and deliberations of that division.[62]

The president and the principal judge, as the case may be, can issue to the registrar instructions for the proper administration of the COMESA Court of Justice Rules of Procedure 2016.[63] Where the president is absent or unable to perform the functions of president, those functions will be performed by the most senior judge present in the Appellate Division.[64] Where the principal judge is absent or unable to perform the functions of the principal judge, those functions will be performed by the most senior judge present in the First Instance Division.[65]

6.6 Powers and functions of the registrar of the COMESA Court of Justice

Article 41 of the COMESA Treaty 1994 establishes the office of the registrar of the COMESA Court of Justice. Article 41 provides as follows:

1 The Council shall appoint a Registrar from among nationals of the Member States qualified to hold high judicial office in their respective States.
2 The Court shall employ such other staff as may be required to enable it to perform its functions and who shall hold office in the service of the Court.

60 COMESA Court of Justice Rules of Procedure sec II Rule 10(3).
61 COMESA Court of Justice Rules of Procedure sec II Rule 7(1).
62 COMESA Court of Justice Rules of Procedure sec II Rule 7(2).
63 COMESA Court of Justice Rules of Procedure sec II Rule 7(3).
64 COMESA Court of Justice Rules of Procedure sec II, Rule 8(1).
65 COMESA Court of Justice Rules of Procedure sec II Rule 8(2).

3 The terms and conditions of service of the Registrar and other staff shall, subject to this Treaty, be determined by the Council on the recommendation of the Court.
4 Subject to the overall supervision of the President, the Registrar shall be responsible for the day to day administration of the business of the Court. The Registrar shall also carry out the duties imposed upon him by this Treaty and the Rules of Court.

The registrar of the COMESA Court of Justice maintains custody of the seals of the Court, attends all the sittings of the Court, and implements the instructions issued by the president of the Court and the principal judge for the proper implementation of the COMESA Court of Justice Rules of Procedure 2016.[66]

The registrar also prepares the cause list of the Court with the approval of the president of the Court, in the case of the Appellate Division, and with the approval of the principal judge, in the case of the First Instance Division.[67] Additionally, the registrar is responsible for the acceptance, transmission and custody of documents, as well as for issuing notifications as provided under the COMESA Court of Justice Rules of Procedure 2016.[68] Furthermore, he or she is responsible for keeping the records of the Court, arranging for the publication of reports of cases decided by the Court, assisting the Court, the president, the principal judge and the judges in all their official functions, in addition to taxing bills of costs and attending to any other duties assigned to him or her by the COMESA Court of Justice.[69]

With the approval of the COMESA Council, the COMESA Court of Justice can appoint one or more assistant registrars to whom the registrar can delegate some of her or his powers and functions under the provisions of the COMESA Court of Justice Rules of Procedure 2016.[70] For the purposes of discharging the functions of the said Court, the registrar and

66 COMESA Court of Justice Rules of Procedure sec II Rule 11.
67 As above.
68 As above.
69 As above.
70 COMESA Court of Justice Rules of Procedure sec II Rule 12.

the assistant registrars are *ex officio* commissioners of oath and notaries public.[71]

6.7 The registers of the COMESA Court of Justice

Rule 14 of the COMESA Court of Justice Rules of Procedure decrees that the registry of the Court comprises, under the control of the registrar, separate registers for the Appellate Division and the First Instance Division, initialed by the president and the principal judge, as the case may be, in which all pleadings and supporting documents are entered in the order in which they were filed.

It is important to observe that the official languages of the COMESA Court of Justice are English, French and Portuguese,[72] and that the texts of documents prepared in the language of the case or in any other language authorised by the Court under Rule 15 of the COMESA Court of Justice Rules of Procedure 2016 are deemed to be authentic texts.[73]

Rule 15 of the COMESA Court of Justice Rules of Procedure 2016 reinforces article 43 of the COMESA Treaty 1994 on the official languages of the Court, as follows:

1 The official languages of the Court shall be the official languages of the Common Market.
2 The language of the case shall be chosen by the applicant from one of the official languages of the Court except that –
(a) at the joint request of the parties, the Court may authorise any other language from the official languages of the Common Market to be used as the language of the case for all or part of the proceedings; and
(b) at the request of one of the parties, and after the opposite party has been heard, the Court may, by way of derogation from paragraphs (a) and (b) of this sub-rule, authorise another of the languages mentioned in sub-rule (1) of this Rule to be used as the language of the case for all or part of the proceedings, but such a request may not be submitted by an institution.
3(a) The language of the case shall be used in the pleadings and oral submissions of the parties, in supporting documents, and also in the record and decisions of the Court;
(b) any supporting documents expressed in another language other than the language of the case shall be accompanied by a translation into the language of the case. In the case of lengthy documents, translations may

71 COMESA Court of Justice Rules of Procedure sec II Rule 13.
72 Art 43 COMESA Treaty 1994.
73 COMESA Court of Justice Rules of Procedure sec II Rule 17.

be confined to extracts unless otherwise ordered by the Court on its own motion or at the instance of a party;

(c) every translated document shall be accompanied by a duly signed certificate of translation; and

(d) the registrar shall cause any statement or submissions referred to in paragraph (a) to be translated into the language of the case.

Provision is also made in the COMESA Court of Justice Rules of Procedure 2016 to have translations of testimonies of witnesses and the accompanying court proceedings where a witness cannot communicate in any of the official languages of the COMESA Court of Justice.[74]

6.8 Parties appearing before the COMESA Court of Justice and their representatives

Part II of the COMESA Court of Justice Rules of Procedure 2016 deals with parties and their representation in court. Rule 18 provides that a party to any proceedings in the COMESA Court of Justice must be represented by counsel appointed by that party and who is entitled to practise before a court of a COMESA member state.[75] The counsel can be assisted by a lawyer certified to practise before a court of a COMESA member state.[76] Rule 18 of the COMESA Court of Justice Rules of Procedure 2016 reinforces article 33 of the COMESA Treaty 1994 which provides that 'every party to a reference before the Court shall be represented by counsel appointed by that party'.

For COMESA, counsel representing COMESA can appear and represent COMESA or any of its institutions in any matter where COMESA or any of its institutions is a party.[77] In the case of legal persons such as corporations, they can appear either by their director, or any other person, appointed by resolution under the seal of the corporation or the company, and the entity must be represented by counsel[78] dressed in the attire prescribed under Schedule IV of the COMESA Court of Justice Rules of Procedure 2016.[79]

74 COMESA Court of Justice Rules of Procedure sec III Rules 15(4), (5) & 16.

75 COMESA Court of Justice Rules of Procedure Part II Rule 18(1).

76 COMESA Court of Justice Rules of Procedure Part II Rule 18(2).

77 COMESA Court of Justice Rules of Procedure Part II Rule 18(3).

78 INTELSOLMAC v Rwanda Civil Aviation Authority No 1 (2009), COMESA Court of Justice First Instance Division.

79 COMESA Court of Justice Rules of Procedure Part II Rule 18(4)(5).

All counsel appearing before the COMESA Court of Justice or before any judicial authority to which the Court has issued a commission or letter of request under Rule 56(1) of the Rules of Procedure 2016 enjoy immunity in respect of words spoken by them in court or pleadings prepared by them concerning the case or the parties.[80] Counsel representing each party enjoys the following further privileges and facilities:[81]

(a) the papers and documents relating to the proceedings are exempt from both search and seizure; in the event of a dispute the customs officials or police can seal those papers and documents; they shall then be immediately forwarded to the COMESA Court of Justice for inspection in the presence of the Registrar and the person concerned;
(b) they are entitled to –
(i) such authorisation for foreign currency by COMESA member states as is necessary for the performance of their duties; and
(ii) travel in the course of duty without hindrance.

Rule 21 of the COMESA Court of Justice Rules of Procedures 2016 focuses on the right of a party to change counsel that is representing him or her, while Rule 22 empowers the COMESA Court of Justice to exclude any counsel from the proceedings if his or her conduct towards the Court, a judge or the registrar is not in accordance with the dignity of the Court or proper administration of justice.

Part III of the COMESA Court of Justice Rules of Procedures 2016 deals with proceedings in the First Instance Division of the COMESA Court of Justice, spelling out the written procedure, special forms of procedure, oral proceedings (pre-trial and trial proceedings) and delivery of judgments. The procedures contained in Part III of the COMESA Court of Justice Rules of Procedures 2016 mirror the civil procedures in many English common law jurisdictions.[82] Also, the COMESA Treaty 1994 has provisions on civil procedure upon which its rules rest.[83]

Part IV of COMESA Court of Justice Rules of Procedures 2016 deals with costs pertaining to judgments, while Part V is the equivalent of a statute of limitations, spelling out the timeframe in which certain actions should be commenced or taken. Part VI provides an opportunity for a third

80 COMESA Court of Justice Rules of Procedure Part II Rule 19(1).

81 COMESA Court of Justice Rules of Procedure Part II Rule 19(2).

82 See generally SR Grubbs, PM North & P Machin *International civil procedure* (2003); A Burrows *Civil procedure* (2013); P Loughlin *Civil procedure* (2003); JH Friedenthal, MK Kane & AR Miller *Civil procedure* (2005); SC Yeazell, *Civil procedure* (2000).

83 See, eg, arts 29-40 of the COMESA Treaty 1994.

party to oppose COMESA Court proceedings to which he or she should have been a party. Then, Part VII deals with appeals against decisions of the First Instance Division, with Rule 86 reinforcing article 23(3) of the COMESA Treaty 1994, stressing that an appeal to the Appellate Division should be based on (a) points of law; (b) grounds of lack of jurisdiction; or (c) procedural irregularity. Elaborate procedures are also spelt out on the hearing of appeals, objections, evidence and cross-appeals. Part VIII of the rules deals with preliminary rulings, while Part IX deals with advisory opinions. Again, the COMESA Treaty 1994 has principal provisions on matters such as preliminary rulings and advisory opinions.[84]

6.9 Conclusion

This chapter has examined the COMESA Court of Justice Rules of Procedure 2016, highlighting the salient features of the Rules. An exploratory study was undertaken, arguing that since the COMESA Court of Justice Rules of Procedure 2016 only came into effect a few years ago, it is too early to determine their efficacy, notwithstanding the fact that they supplement the relevant provisions of the COMESA Treaty 1994.

We also noted that the COMESA Court of Justice has rules on arbitration, namely, the COMESA Court of Justice Rules of Arbitration 2003, and that these rules currently are under review, given that when they were formulated the Court only had a single division. In 2005 a two-tier system of the COMESA Court of Justice was introduced, comprising the First Instance Division and the Appellate Division.

A notable observation was made that, under article 20 of the COMESA Treaty 1994, we have to look at the municipal law of the COMESA member state of an individual to make a determination whether or not the individual is eligible to serve as a judge of the COMESA Court of Justice. We posited that the problem with this approach, notwithstanding the tests of holding high office or recognised competence, is that the standard of what constitutes high office or recognised competence for a prospective judicial appointee differs across countries in the COMESA region. It is our considered view that the COMESA Treaty should have spelt out specific eligibility criteria for an individual to be appointed as a judge of the Court, irrespective of what is contained in the national legislation or municipal laws of his or her country of domicile.

84 COMESA Treaty 1994 arts 30 & 32.

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