PUBLIC INTERNATIONAL LAW
AND THE REGULATION OF
DIPLOMATIC IMMUNITY IN
THE FIGHT AGAINST
CORRUPTION

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Prof Kenneth Kaoma Mwenda has once again put his intellectual mettle on display. Although this book is very much a scholarly project replete with legal citations and footnotes, non-lawyers need not be discouraged about picking this one up from the shelf.

At times, the book reads like a political thriller as, for example, when Prof Mwenda writes about diplomats who disregard traffic laws and fail to pay fines. There is apparently a correlation between recalcitrant diplomats and their countries’ standing on corruption perception indices. This is certainly the case with respect to African diplomats. Those diplomats from countries perceived to be the most corrupt on the continent, are less likely to pay traffic fines than diplomats from more favourably perceived countries. The reader may not be surprised to learn that in the examples given 14 out of 20 ‘heaviest parking sinners’, as Prof Mwenda calls them, emanate from the African continent. The surprise may lie in the fact that ‘diplomats from Burkina Faso and the Central African Republic had not been involved in any wrongdoing at all’ between 1997 and 2002. It may also be of interest that the list was topped by Kuwait.

This analysis is done in the context of a diplomat’s duty not to be corrupt. The analysis is indeed timely because the bulk of diplomatic conventions and practices were established at a time when the diplomatic world was simpler and smaller and the behaviour of diplomats more predictable. It was a time when there was a clear demarcation between ‘civilised’ nations and ‘uncivilised’ ones. Although that world has passed, the international community has been slow in adapting to the new reality. In the circumstances, a modern interpretation of the law becomes all the more important in regulating diplomatic behaviour and maintaining international order.

The new world order includes diplomats from both rich and poor countries (‘civilised’ and ‘uncivilised’?), and is more diverse than ever. So, it is not just problematic diplomatic behaviour in host countries that is examined; the behaviour of corrupt host nations towards diplomats representing the donor community is also analysed.

In a world where a very large number of countries depend on other richer countries for economic aid, it is inevitable that the old rule of non-interference in internal matters will be challenged. The traditional argument is that article 41(1) of the Vienna Convention on Diplomatic Relations 1961 prohibits diplomats from interfering in the internal affairs of the state to which they are accredited.

Prof Mwenda would agree that this prohibition cannot be absolute and that, even if it was, much of what recipient states call interference may be nothing more than prudent enquiry. The question in this analysis is: Should donor countries be expected to keep quiet when the funds they give to recipient countries are misused or otherwise corruptly spent? After impressive analysis covering both domestic and international law, Prof Mwenda concludes that a donor country does have a right in law to
enquire (through its diplomats) into the use of funds provided by the donor country. It would therefore follow that a diplomat exercising this right should not be declared *persona non grata* on this basis alone.

Prof Mwenda's work is an honest attempt to provide legal answers to complex problems brought on by diplomatic immunity in today's world. While the solutions offered are essentially legal in nature, Prof Mwenda’s extensive analysis and his ability to draw parallels between domestic and international law, as well as his skilful use of contemporary examples, makes this book not only accessible but actually useful to business people, politicians and other non-lawyers.

This is an author who believes in the morality of law and is prepared to apply that morality.

Hon Mr Chisanga Puta-Chekwe  
Deputy Minister of the Canadian Ministry of Citizenship and Immigration;  
Canada’s Deputy Minister Responsible for Women’s Issues  
Toronto  
1 January 2011
PREFACE

Law, when written in the hearts of men, is like a sacrament whose sanctity and inviolability is beyond reproach. This book, now my twenty-second, is not an introductory or generalist text, but rather a specialist monograph on how we can use principles of public international law relating to diplomatic immunity to prevent and fight corruption. It is a sequel to my earlier works on the fight against corruption. Corruption, it must be noted, comes in many different forms. And these forms include grand corruption (involving decisions of significant economic value), petty corruption (involving relatively small amounts of money), political corruption (usually associated with the electoral process), corporate corruption (although not always considered a crime, this could involve practices such as money laundering, insider dealing, tax evasion or accounting irregularities), bribery, nepotism, tribalism, as well as other unethical conduct. Corruption has often been the central focus of many good governance programmes.

The analyses in the book provide the reader with a tour de force juxtaposed between intricate aspects of anti-corruption initiatives, on the one hand, and principles of public international law pertaining to diplomatic immunity, on the other. A modest attempt is made to flesh out salient aspects of the English common law that appear to have crystallised into general principles of law recognised by many ‘civilised nations’. The book is, however, awake to the chasm that divides the monists from the dualists in their doctrinal and theoretical approaches to public international law. The book advances a thesis highlighting the importance of general principles of law recognised by civilised nations in the development of public international law. It is a germane study underscored by critical interdisciplinary perspectives. This is not a book that is simply limited to a particular geographical audience. It relates to many audiences and is an informative tool to those in diplomatic service, academia and government. It is also a valuable tool to those preoccupied with the provision and/or administration of donor funds in the developing world.

In putting such a book together, there is understandably a certain quiet and loneliness that comes with indulging clairvoyantly in matters of erudition, especially if it has to do with scholarly writing, albeit some warm and cordial intermissions that may come from family, friends and colleagues. However, with some commitment, applied competence and lasting perseverance, there is usually a sense of elated but humane decorum in the actual physical product of the mind. It is almost 20 years

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1 As well as in the hearts of women.

since I studied public international law, as a Rhodes Scholar at Oxford, under Prof Ian Brownlie. And Prof Brownlie had an encyclopaedic knowledge of the law. Although I had previously taken a course in public international law at undergraduate in Zambia, my Oxford experience on the famed BCL degree was both illuminating and enlightening. That experience brought a whole new perspective to my understanding of public international law. Later, when I joined the Law Faculty of the University of Warwick in the United Kingdom as a full-time academic, it was public international law, among other courses, that I taught. And I have continued to write and publish in fields closely related to public international law, culminating in the award of the esteemed Higher Doctorate Degree of Doctor of Laws (LLD) by Rhodes University in South Africa. While higher doctorates generally are very rarely awarded, the LLD came through in a relatively short period of time; that is, within 10 to 12 years of completing my PhD in Law at the University of Warwick. More recently, the courts of law have cited as authority some of my scholarly publications in public international law, notably, the recent citation by the Supreme Court for the Republic of Zambia in the case of Ventriglia and Ventriglia v Eastern and Southern Africa Trade and Development Bank and Robert Simeza SCZ 13 of 2010 (Appeal 11/ 2009).

On 5 September 2009, at a ceremony held in Lusaka, Zambia, and hosted by the Bank of Zambia Governor, Dr Caleb M Fundanga, where the Honourable Chief Justice of the Supreme Court for the Republic of Zambia, Hon Mr Chief Justice Ernest Sakala, was in attendance as the special guest of honour, I was honoured and humbled to be presented with distinguished courtesies in recognition of my pioneering and outstanding scholarly contributions to the legal profession. It was a very humbling experience, especially that the ceremony was held specifically to honour my scholarly contributions as a leading Zambian scholar who has made significant and notable contributions to the advancement of the study and understanding of law at an international level. I must say that I owe it, in part, to the many friends, colleagues and family members that have held my hand as I continue to waddle and wade in the murky waters of erudition. And so, in early 2010, when I learned that Prof Ian Brownlie had passed away, the news came with a great sense of shock. The world had lost a great intellectual luminary. I, like many of Prof Brownlie’s former students, remain indebted to his remarkable scholarly contributions. We can only carry on from where he left.

That said, now that the writing of this book is complete, I am faced with a task which is by no means easy to fulfil. I would like to thank my dear wife, Dr Judith M Mvula-Mwenda, MD, MBA, MPH, and my admirable son, Joseph T Mwenda II, for their unfailing love and support. I would also like to acknowledge the inspiration that I continue to draw from my dear parents, Mr Joseph T Mwenda, who crossed over in 2003, and Mrs Esther M Mwenda. I would like to thank my former law students at many leading universities where I have taught in Europe, North America and Africa for their questioning minds on certain intellectual issues that form the core of this book. Some of my former law students have gone on to become prominent Supreme Court and High Court judges. Others are now distinguished political figures in their native countries, not forgetting, of course, those that are working in public international organisations as well as those that are heading the legal departments of such organisations.
There is also a faction that comprises notable legal practitioners as well as one comprising emerging legal authorities in academia, including heads of academic departments and law practice institutes. Together, we have shared a common world. Recently, I received an inspiring e-mail from one of my mentees, Mophat Chongo, and some excerpts of his e-mail are reproduced below (with his full permission, of course):

Dear Dr Mwenda
Thank you very much for all that you have done for me. At times, you converse with me as if I was equivalent to a friend of yours ... I am very humbled to know you, and I greatly appreciate the privilege of having a conversation with you. You are a giant in my eyes and I am very lucky to have the opportunity of emulating you as my role model but you can never be duplicated ... My father passed away when I was three years old, and I was mainly raised by my mother. She was strong but she was also raising a boy who very much needed a male role model ... In my short life, I have had the opportunity of meeting and interacting with some so-called important individuals on Capitol Hill but none of them inspired or will ever inspire me as much as you have ... I thought of writing you a letter to thank you and to let you know how much you mean to me ...

With great gratitude
Mophat

I am truly humbled by the tireless efforts of those who have supported my scholarly writing over the years. Their efforts have in many ways helped me to succeed at receiving many academic and professional awards, most recently, the Mwape Peer Award 2010, celebrating the distinguished career of an individual whose world class practice and commitment to law is an inspiration to the rest of the legal profession. The Mwape Peer Award 2010 is particularly important since the decision on this competitive award is arrived at by public vote and through the thoughtful deliberation of an eminent panel of assessors. In 1998, I also received a competitive graduate fellowship from Yale University Law School in the United States which I later had to turn down to take up an appointment on the World Bank’s Young Professionals Programme.

Against this background, let me now turn to express my gratitude to Hon Mr Chisanga Puta-Chekwe, the Deputy Minister in the Canadian Ministry of Citizenship and Immigration as well as Canada’s Deputy Minister Responsible for Women’s Issues, for honouring this book with an inspiring foreword. A Rhodes Scholar, Hon Mr Puta-Chekwe, has previously served as Chair of Canada’s Social Benefits Tribunal and was also the founding Chair and Chief Executive Officer of the Ontario Rental Housing Tribunal. He has also previously held senior positions in Canadian and international organisations, including the Ontario Criminal Injuries Compensation Board, Meridan International Bank, England, and the law firm of Lloyd Jones & Collins, Zambia.

My thanks also go out to colleagues at the Faculty of Law, University of Pretoria, especially the Dean, Prof Christof Heyns, and the Director of the Centre for Human Rights, Prof Frans Viljoen, for their collegiality and friendship. Further, I would like to extend my hand of gratitude to the following individuals who provided critical and insightful comments on the earlier drafts of the manuscript for this book: Prof Dr.rer.pol Wolfgang Chr Fischer, School of Law, James Cook University, Australia; Prof Michelo K Hansungule, PhD, Faculty of Law, University of Pretoria,
South Africa; Professor Owen Sichone, PhD, Department of Anthropology, University of Pretoria, South Africa; and Ms Evelynne O Change, Co-ordinator for Corporate Governance in the Secretariat of the African Peer Review Mechanism (APRM); also, a number of colleagues in the Legal Vice-Presidency of the World Bank offered some insightful views on the earlier drafts of this book.

I cannot stop here without thanking my many other good friends, family members and professional colleagues whose names, if I were to list them all, would occupy a whole chapter in this book. I thank them all for their support and friendship over the years. I am also grateful to Pretoria University Law Press (PULP) and to the peer reviewers for the excellent work leading to the publication of this book.

The law and information presented in this book are stated on the basis of materials available to me as at 1 January 2011. However, the interpretations and conclusions expressed in the book are entirely mine. They do not represent the views of the World Bank, its Executive Directors or the countries they represent.

Professor Kenneth K Mwenda, PhD, LLD
Washington DC, USA
In memory of my father, Mr Joseph T Mwenda, and his grandson, Jude Mwenda.
You are ever in our prayers until we meet again.

The LORD is my shepherd; I shall not want. He maketh me to lie down in green pastures: He leadeth me beside the still waters. He restoreth my soul: He leadeth me in the paths of righteousness for His name's sake. Yea, though I walk through the valley of the shadow of death, I will fear no evil: for Thou art with me; Thy rod and Thy staff they comfort me. Thou preparest a table before me in the presence of mine enemies: Thou anointest my head with oil; my cup runneth over. Surely goodness and mercy shall follow me all the days of my life: and I will dwell in the house of the Lord for ever.

(Psalms 23:1-6 KJV)

What do you think? If a man has a hundred sheep and one of them has gone astray, does he not leave the ninety-nine on the mountains and go in search of the one that went astray? And if he finds it, truly, I say to you, he rejoices over it more than over the ninety-nine that never went astray. So it is not the will of my Father who is in heaven that one of these little ones should perish.

(Matthew 18:12-14 ESV)
1 Objectives and scope of the study

That the fight against corruption cannot be won solely by relying on municipal law alone is a good enough reason to examine the public international law dimensions of combating corruption. This book deals with the legal and policy aspects of preventing and combating corruption from a public international law perspective. However, the book does not profess to provide an exhaustive treatment of all legal instruments relating to public international law in the fight against corruption. Neither does the book delve into historical aspects of the fight against corruption under public international law. The extensive body of the literature reviewed during the preparation of this book shows that there are far too many strands on the role of public international law in the prevention and fight against corruption. Also, many treaties have now been signed and ratified on the prevention and fight against corruption, and these include, inter alia, the United Nations

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1 See the literature listed in the bibliography and the footnotes of this book. See also the different papers presented at Georgetown Journal of International Law 2010 Symposium: Combating Global Corruption FCPA Enforcement as well as at Cornell International Law Journal 2000 Symposium: Fighting International Corruption and Bribery in the 21st Century. See P Ála‘i ‘The legacy of geographical morality and colonialism: A historical assessment of the current crusade against corruption’ (2000) 33 Vanderbilt Journal of Transnational Law 877; TR Snider & W Kidane ‘Combating corruption through international law in Africa: A comparative analysis’ (2007) 40 Cornell International Law Journal 691; A Posadas ‘Combating corruption under international law’ (2000) 10 Duke Journal of Comparative and International Law 345; and PJ Henning ‘Public corruption: A comparative analysis of international corruption conventions and United states law’ (2001) 18 Arizona Journal of International and Comparative Law 793. There have also been other interesting studies, such as the Worldwide Governance Indicators (WGI) project which reports aggregate and individual governance indicators for 212 countries and territories over the period 1996 to 2008, focusing on six dimensions of governance, namely, (a) voice and accountability; (b) political stability and absence of violence; (c) government effectiveness; (d) regulatory quality; (e) rule of law; and (f) control of corruption. Further still, Transparency International maintains a ranking of states regarding some perceived levels of corruption in those states.

However, none of the treaties cited above is the central focus of this book. By contrast, through the prism of public international law, the book identifies and sustains a thesis relating mainly to immunities and privileges of diplomatic agents of sovereign states. A thesis is maintained that, 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, or as a way of gagging outspoken and controversially-vocal diplomats who query recipient states of donor funds on the abuse or misuse of these funds, both customary international law and conventional international law do provide for some safeguards to prevent a corrupt or outspoken diplomat from abusing his or her immunities and privileges. In essence, the book posits that diplomatic immunity should not be abused by diplomatic agents who perpetuate or engage in corrupt practices, and that diplomatic immunity should only shield those diplomatic agents who inquire from the receiving state, genuinely and for bona fide reasons, how donor funds have been utilised by the receiving state, but not those that enthusiastically or spiritedly intermeddle in the internal affairs or security of the receiving state. A discussion of what constitutes the 'internal affairs' of a receiving state is provided in chapter 3.

The book also draws distinctions between the diplomatic immunity enjoyed by a diplomatic agent of a sovereign state and the type of immunity enjoyed by some public international organisations. An argument is made that, in the case of the latter, except for a few senior staff and those representing political constituencies of member states, most

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regular staff and employees of public international organisations do not enjoy diplomatic immunity. But even for the few senior staff, as well as those representing political constituencies of member states, the constituent treaty of the public international organisation or some other treaty must provide for their immunity.\(^3\) To that extent, a senior officer of a public international organisation who sits on the board of a private corporation or commercial bank should observe the internal laws of the host country so as to avoid committing any crime or omitting any obligations. That said, the individual can be removed from the board for misfeasance or other corporate governance related issues. And if that individual does not enjoy any immunity from the originating public international organisation, then he or she cannot claim any immunities or privileges.

\section{A definition of diplomatic immunity and the policy rationale for such immunity}

Defining the term ‘diplomatic immunity’, Garner observes that the term entails

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 host nation may be arrested and sent out of the country … A minister’s family shares in diplomatic immunity to a great deal, though ill-defined, degree.\(^4\)

Mindful that conventional international law, customary international law and general principles of law recognised by civilised nations form the three primary sources of international law for this book,\(^5\) we will also highlight some evidence of state practice that falls short of qualifying as conventional international law or customary international law. In doing so, we will take examples of state practice from various jurisdictions, including the United States (US).

\(^{3}\) See eg 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 (COMESA) 1983 (Legal Notice 2 of 1983, issued pursuant to the powers conferred on the Council of Ministers of the Common Market by para 2 of art 10 of the Treaty Establishing the Common Market for Eastern and Southern Africa). In the case of COMESA, in addition to the said 1983 Agreement on Privileges and Immunities, COMESA has also entered into a Special Host Agreement with the host state where the COMESA headquarters are situated (Zambia), as well as with other states where some organs or offices of COMESA are situated. (See e-mail to this author, dated 20 April 2010, from S Karangizi, former Director for Legal Services at COMESA, and now COMESA’s Deputy Secretary General for Programmes.)

\(^{4}\) BA Garner (ed) \emph{Black’s law dictionary} (2009) 818.

\(^{5}\) See art 38(1) of the 1946 Statute of the International Court of Justice.
Generally, there are three fundamental theories justifying diplomatic immunity in international law, and these are (a) personal representation; (b) extra-territoriality; and (c) functional necessity.\(^6\)

Under the first theory, personal representation, the immunity attaching to diplomatic representatives was seen as an extension of sovereign immunity.\(^7\) In 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.\(^8\) That theory, according to Hiller, always rested on a fiction and is no longer respected.\(^9\) The third theory, functional necessity, is often the preferred rationale for granting privileges and immunities to diplomats.\(^10\) It postulates that the privileges and immunities of a diplomat are necessary to enable the diplomat to perform his or her diplomatic functions.\(^11\)

Indeed, ‘modern diplomats need to be able to move freely and be unhampered as they report to their governments’,\(^12\) 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’.\(^13\)

It should be noted, however, that any dispute arising out of the interpretation or application of the Vienna Convention on Diplomatic Relations 1961, the treaty that forms the basis for this book, falls within the compulsory jurisdiction of the International Court of Justice (ICJ).\(^14\) Such disputes can accordingly be brought before the ICJ by an application made by a party to the dispute where that party is also a party to the Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes 1961.\(^15\) In highlighting the sources of international law informing this study, chapters 3 and 4 of the book will


\(^7\) As above. In the Zambian case of \textit{Ventriglia and Ventriglia v Eastern and Southern Africa Trade and Development Bank and Robert Simeza} SCZ 13 of 2010 (Appeal 11/2009) J14, the Supreme Court of 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 \textit{jure imperii}. But restrictive immunity is accorded to acts of commercial nature, \textit{jure gestionis}. Lord Denning in the case of \textit{I congreso del Partido (7)} put it this way: ‘Actions, whether commenced \textit{in personam} or \textit{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 depends on whether the act in question was a private act (\textit{jure gestionis}) or a sovereign or public act (\textit{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 \textit{jure gestionis} or an act of private law into one done \textit{jure imperii}.’

\(^8\) Hillier (n 6 above).

\(^9\) As above.

\(^10\) As above.


\(^12\) Hillier (n 6 above).

\(^13\) As above.

\(^14\) See art 1 Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes 1961.

\(^15\) As above.
Introduction

make reference to the Statute of the International Court of Justice (ICJ Statute). Following below is an examination of other types of immunities that closely relate to diplomatic immunity.

3 Other types of immunities closely related to diplomatic immunity

Under US municipal law, there are various forms of immunity that are enjoyed by different classes of public officials. For example, the US President or a state governor enjoys executive immunity which clothes him or her with absolute immunity from civil damages for actions that are within the scope of official responsibilities.

There is also qualified immunity from civil claims against lesser executive officials, who are liable only if their conduct violates clearly established constitutional or statutory rights. Other forms of immunity under US municipal law include foreign immunity, discretionary immunity, constitutional immunity, inter-government immunity and sovereign immunity. Foreign immunity, like sovereign immunity, is also available in public international law. Foreign immunity was discussed at length in a well-articulated 1990 decision, Chuidian v Philippine National Bank, where the US Court of Appeals for the Ninth Circuit held that suits against foreign officials for actions taken in their official capacity are covered by the Foreign Sovereign Immunities Act (FSIA) 1976. In that case, … a Philippine citizen sued a member of a Philippine governmental commission after the official instructed a bank not to honour a letter of credit that had been issued by issued by the former Marcos government. In holding that the defendant was entitled to sovereign immunity from the suit, the court reasoned that the terms ‘agency’, ‘instrumentality’ ‘organ’ ‘entity’ and ‘legal person’ ‘while perhaps more readily connoting an organisation or collective, do not in their typical legal usage necessarily exclude individuals’. The court also reasoned that, if individual foreign officials lacked immunity, litigants could ‘accomplish indirectly what the [FSIA] barred them from doing directly’ by simply naming the responsible official rather than the foreign state as the defendant.

16 ICJ Statute dated 26 June 1945 (59 Stat 1055, 3 Bevans 1179).
17 See Garner (n 4 above) 818.
18 As above.
19 As above.
20 As above.
21 See, generally, DL Doernberg Sovereign immunity and/or the rule of law: the new federalism (2004); I Brownlie Principles of public international law (1996).
22 912 F.2d 1095 (9th Cir 1990).
23 Title 28, paras 1330, 1332, 1391(f), 1441(d) and 1602-1611 of the United States Code.
Likewise, in regard to a complaint filed against President Robert G Mugabe of Zimbabwe by some citizens of Zimbabwe in the US District Court for the Southern District of New York, when President Mugabe was visiting the United Nations Millennium Summit, the US Court of Appeals for the Second Circuit (Second Circuit) ruled on 6 October 2004 that President Mugabe enjoyed absolute inviolability and immunity from US jurisdiction. Our focus in this book, however, is not on such type of immunities, but on immunities and privileges enjoyed by diplomatic agents of sovereign states. Admittedly, while there could be scope for future research on foreign immunity of heads of state, such a discussion falls outside the scope of this study. A different and separate treatise would be required to delve fully into deep waters of the alleged corrupt practices of some former heads of state while they were in office, and whether such individuals can be protected from liability on the grounds of foreign immunity of heads of state. In 2008, a lawsuit against three francophone African heads of state, accusing them of corrupt practices, was commenced in France, and the following report sheds light on the incident:

A lawsuit has been filed in Paris accusing three African presidents of corruption ... The suit, filed by the anti-corruption organisation, Transparency International, and a citizen of Gabon, accuses Gabonese President Omar Bongo, the President of the Republic of Congo, Denis Sassou Nguesso, and the President of Equitorial Guinea, Teodoro Obiang, of having used state funds to enrich themselves. The plaintiffs say that France is the proper jurisdiction for the complaint because much of the alleged abuse of state funds – in the purchase of expensive properties and automobiles – occurred here. ‘No one can believe that this (purchased) real estate, which is worth many millions of euros, could have been acquired with only their salaries’, the complaint reads.

It is not uncommon to find several media reports unearthing similar developments of corrupt practices by various heads of state in different parts of the world. In Taiwan, for example, it has been reported that

a Taiwan court imposed a life sentence on former President Chen Shui-bian after convicting him of corruption ..., marking a watershed in the island's turbulent political history. ... Chen, 58, was charged with embezzling $3.15 million during his presidency from a special presidential fund, receiving bribes worth at least $9 million in connection with a government land deal, laundering some of the money through Swiss bank accounts, and forging documents.

Closely related to developments in Taiwan, a recent media report in Costa Rica shows that

... judges ... sentenced a former Costa Rican president to five years in prison and imposed a half-million-dollar fine. Sixty year-old Rafael Angel Calderón, who served the country as president between 1990 and 1994, was condemned by the court on charges of embezzlement.28

In Zambia, the country’s former President, Frederick Chiluba, was stripped of his immunity by parliament after his successor, the late President Levy Mwanawasa, moved a motion in parliament to have Chiluba stripped of his immunity so that he could face charges of corruption for his past deeds in the courts of law.29 A 2008 media report captures the Zambian development aptly:

Chiluba’s immunity from prosecution was lifted in 2003 by his successor, Levy Mwanawasa, who died after a stroke last year. Several senior officials and ministers who served in the Chiluba administration have been jailed. The 2007 civil case was brought by the Zambian attorney-general in Britain because much of the stolen money was held in bank accounts in London and used to buy property in Europe and Britain. The High Court judge Peter Smith found that Chiluba’s salary amounted to £52 500 over the 10 years of his presidency but that he had spent more than £600 000 during the same period in just one jewellery and clothing boutique in Geneva. ‘He was uniquely positioned to prevent corruption but instead of preventing corruption he actively participated in it,’ Smith said in his ruling.30

The issue of corruption involving political leaders is not unique to the Third World alone, neither is it an African thing. Rather, corruption by political leaders is a universal problem found even in developed countries. In the case of Israel, for example, the former leader of the state of Israel, Ehud Olmert, was recently indicted on corruption charges,31 while in Italy the country’s top court overturned a law which gave immunity to Prime Minister Silvio Berlusconi from prosecution while in office, postulating that that law violated the Italian Constitution.32

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But there have also been allegations of corrupt practices by some former heads of state that have not been taken to court for one reason or another. In the case of Haiti, for example, it has been noted that during the 15-year reign of Haiti's former president Jean-Claude 'Baby Doc' Duvalier, extreme poverty strangled the island nation. Ninety per cent of the population subsisted on less than $150 annually. Eighty per cent of children under five suffered from malnutrition. And almost a third of Haitian children died before they reached the age of five. While international aid organisations tried to help, Duvalier pocketed much of the relief money for himself. According to documents, shortly after the International Monetary Fund granted $22 million to Haiti on 5 December 1980, $20 million of that money was withdrawn from the government's bank accounts. Former US Secretary of State Alexander Haig received a cable saying that approximately $4 million may have been diverted to Haiti's secret police, the Tonton Macoutes, while the remaining $16 million disappeared into Duvalier's personal accounts.

In Nigeria, the story is no different. The Nigerian authorities had to work closely with the authorities of Switzerland to recover some large sums of money reportedly stolen by the late General Sani Abacha when he was the head of state of Nigeria. Abacha was accused of having stolen £3 billion from government coffers. Later, after President Olusegun Obasanjo took up office as the President of Nigeria for the second time, Obasanjo had the following to say:

Africa has lost $140bn through corruption in the decades since independence, Nigeria's president, Olusegun Obasanjo, has said. The huge sum – largely spirited away by leaders and their associates – was one of the main reasons why Africa's poverty was so severe. Now, Mr Obasanjo told a meeting of civil society organisations in Ethiopia's Addis Ababa, it was time to write rules to help bring some of the money home. 'We are working to get an international convention by which money stolen by corrupt African leaders and stashed abroad is repatriated,' Mr Obasanjo said. Mr Obasanjo said that while the leaders were the main culprits, Western countries which had harboured the stolen loot should bear some responsibility. 'It is not enough to accuse

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33 See below.
34 S Schubert 'Haiti: The long road to recovery – Public money stolen by a corrupt president finally to be returned' The Business of Bribes 22 May 2009 http://www.pbs.org/frontlineworld/stories/bribe/2009/05/haiti-the-long-road-to-recovery.html (accessed 4 August 2010). S. Schubert's article continues: 'At the same time, Duvalier was making lavish purchases, like the 86-foot luxury yacht, named “Nikki”, that he bought for $1 million. Even after he fled the country in 1986 to escape an imminent coup, the spending continued. In 1988, a journalist from the St Petersburg Times in Florida described Duvalier's luxurious villa in the French Riviera (monthly rent: $40 000) as having “Ferrari sports cars parked in the driveway”. While it is hard to link specific bank accounts or purchases to specific incidents of corruption or bribes, the rate at which money flowed out of the public coffers was staggering. All told, Jean-Claude Duvalier, his ex-wife Michelle Bennett Duvalier, and three people acting as agents are believed to have taken $504 million from the Haitian public treasury between 1971 and 1986.'
developing countries of corruption,’ he said. ‘The Western world must demonstrate practical commitment to assist us by repatriating monies that have been stolen from our treasuries and stashed away in their financial institutions.’

In the then Zaire, now known as the Democratic Republic of Congo, billions are reported to have been looted through exploitation of mineral revenues during the 30-year rule of the late President Mobutu Sese Seko. In Angola, pressure groups estimate that as much as US $1 billion in oil-related revenue disappears every year.

And in the Philippines, a 2004 report shows that approximately $621 million of the money hidden in Swiss banks by the former first family of the Philippines, the Marcos family, was returned to the country. The Manila Times reported that the total money stashed away by the family of the late dictator Ferdinand Marcos was estimated at $684 million. Investigators discovered the existence of five Marcos foundations in Switzerland in 1986, which then contained funds amounting to $356 million. In 1997, the Swiss Supreme Court ordered that the funds, which by then had grown to $567 million, be transferred to the Philippine national treasury.

Closely related to the issue of corrupt leaders looting their national treasuries is the issue of whether heads of state that corruptly or dubiously secure the extension of their presidential or prime ministerial term of office beyond what is constitutionally provided for in the national constitution should be held accountable when they leave office. Such political machinations and manoeuvres to extend one’s stay in power are becoming widespread as some leaders drum up support through their political stooges and constituencies to amend the national constitution from permitting, say, only two terms for the presidency to an additional third term or even further. Then, we have the issue of corrupt political leaders who take flight to seek political asylum in a foreign state after being ousted from power. Should these individuals be granted political asylum?

37 As above.
38 As above.
40 As above.
41 As above.
42 As above.
43 See Mendez-Efrain 813 F 2d 279, 282 (9th Cir 1987); Kaveh-Haghigy 783 F 2d 1277, 1284 (9th Cir 1985); McMullen v INS 658 F 2d 1312, 1315 n 2 (9th Cir 1981); Sanchez-Trujillo 801 F 2d 1574; Carvajal-Munoz v INS 743 F 2d 562, 574 (7th Cir 1984); Ganjour v INS 796 F 2d 832, 837 (5th Cir 1986); D Anker ‘Refugee law, gender, and the human rights paradigm’ (2002) 15 Harvard Human Rights Journal 133; and ME Price ‘Persecution complex: Justifying asylum law’s preference for persecuted people’ (2006) 47 Harvard International Law Journal 413.
what happens where, say, there is a sudden change of government and a corrupt leader is overthrown, causing him or her to seek refuge in a foreign diplomatic mission within the territory of that very state for which he or she was the head of state? Can he or she be guaranteed protection under international law, or should he or she be surrendered by the foreign diplomatic mission to the new authorities in the receiving state? These are some vexing questions underpinning the international dimensions of corruption. At the national level, however, I have examined elsewhere critical aspects of municipal law in Zambia regarding the fight against corruption. Against this background, let us now turn to look at an example of how municipal law can also be used to prevent and fight corruption at the international level.

4 Municipal law and the international fight against corruption

In the US, domestic legislation has been enacted to deal with corrupt practices relating to the bribery of foreign government officials by US persons. The US Foreign Corrupt Practices Act 1977, as amended in 1988, covers primarily two main areas. The first of these relates to accounting transparency requirements under the US Securities Exchange Act 1934. The second area concerns the bribing of foreign officials so that they can assist in obtaining or retaining business. It must be noted that the provisions of the US Foreign Corrupt Practices Act 1977 prohibit the bribery of foreign government officials by US persons. These provisions

44 See Asylum case (Colombia v Peru) judgment delivered on 20 November 1950 (General List 7 (1949-1950)).
45 In the Asylum case (n 44 above), the International Court of Justice (ICJ) noted that art 38 of the Statute of the International Court of Justice covered both local custom and general custom, in the same way that it covered bilateral and multilateral treaties. In this case, the Colombian ambassador in Lima, Peru, allowed Víctor Raúl Haya de la Torre, head of the American People's Revolutionary Alliance, sanctuary at the Colombian embassy after Víctor Raúl Haya de la Torre's faction lost a one-day civil war in Peru on 3 October 1948. The Colombian government granted him asylum, but the Peruvian government refused to grant him safe passage out of Peru. Colombia maintained that, according to the conventions in force, that is, the Bolivian Agreement of 1911 on Extradition, the Havana Convention of 1928 on Asylum, and the Montevideo Convention of 1933 on Political Asylum, they were entitled to decide if asylum should be granted and their unilateral decision on this was binding on Peru. The ICJ ruled that '[a] decision to grant diplomatic asylum involves a derogation from the sovereignty of [the] state. It withdraws the offender from the jurisdiction of the territorial state and constitutes an intervention in matters which are exclusively within the competence of that state. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case.' The ICJ concluded that Colombia acted wrongfully when it granted asylum, but that there was no obligation to surrender Víctor Raúl Haya de la Torre to the Peruvian authorities.
48 As above.
49 As above.
also prescribe accounting and record-keeping practices. Apart from the US, there are not many other states that have such progressive legislation on fighting corruption involving foreign government officials. For the purposes of our study, it is interesting to note that diplomatic agents of sovereign states can also be viewed, to some degree, as foreign government officials within the territory of the host or receiving state.

5 Outline of subsequent chapters

This book runs as a sequel to my previous scholarly work on anti-corruption. Unlike the said previous scholarly work, this book examines critically the fight against corruption from a public international law perspective. Chapter 2 of the book sets the discussion in context, providing a conceptual framework for understanding the term ‘corruption’, and conceptual issues relating to legal definitions of ‘corruption’ and ‘good governance’ are examined. Chapter 2 also identifies the relationship between corruption and good governance. It argues that the term ‘good governance’ is simply a restatement of such existing concepts as constitutionalism, rule of law, accountability, transparency and the doctrine of separation of powers. A view is advanced that while corruption can be defined in legal terms, a legal definition of good governance remains elusive. A further argument is made that while it is feasible to identify closely related definitions of ‘corruption’, as evidenced, say, in international treaties and various pieces of legislation of different countries, including decisions of domestic courts, there remains a marked absence of statutory, treaty or judicial definitions of ‘good governance’. For example, although the African Charter on Democracy, Elections and Governance 2007 has the word ‘governance’ in its title, article 1 of that treaty on definitions of terms makes no provision for a definition of ‘governance’. Yet, the said treaty has a lot to do with ‘governance’. Essentially, this treaty only sets forth prescriptive aspirations for state parties to the treaty on matters of democracy, elections and governance, leaving it up to the states themselves to enact legislation to domesticate these aspirations. So, as noted above, there remains a marked absence of statutory, treaty or judicial definitions of ‘good governance’. Chapter 2 of this book posits that it is even doubtful that ‘good governance’, as a term, is justiciable.

In chapter 3, we examine the concept of diplomatic immunity in international law where there is evidence of corrupt practice by a diplomatic agent of a state. Such instances occur, for example, where a

50 See eg KK Mwenda (n 46 above); KK Mwenda Combating financial crime: Legal, regulatory and institutional frameworks (2006); KK Mwenda Anti-money laundering law and practice: Lessons from Zambia (2005); and KK Mwenda ‘Can “corruption” and “good governance” be defined in legal terms?’ (2008) 2 Rutgers University Journal of Global Change and Governance.
diplomat is found in possession of such illegal substance as marijuana or cocaine, or where he or she is engaging in criminal conduct relating, say, to drug trafficking, money laundering or smuggling of prohibited pornographic material. Chapter 3 argues that, whereas a diplomat may enjoy, generally, 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. And 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. The said treaty provision, codifying customary international law, postulates that innocent passage must not be prejudicial to the peace, good order and security of the coastal state. 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 démarché to the state that is represented by the erring diplomat, protesting the criminal conduct of the diplomat. Also, in extreme but rare cases, the accrediting or receiving state can declare the diplomat persona non grata. But 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. 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. And the sending state can also waive the immunity of its diplomat to allow the receiving state to prosecute him or her.

Chapter 4 then examines the right of foreign diplomats accredited to a recipient state of donor funds to demand that the recipient state accounts for the misuse or abuse of donor funds received from the diplomat’s state. An argument is made that where a diplomat from a donor state queries a recipient state on the latter state’s misuse or abuse of donor funds that does not amount to ‘interfering in the internal affairs’ of the recipient state, the law on diplomatic immunity is examined, and the discussion is informed by both international conventional law and international customary law, as well as by judicial decisions of international courts and the writings of most highly-qualified and eminent publicists in international law. Chapter 4 argues further that the right of a diplomat from the donor state to inquire from the recipient state on the latter state’s misuse or abuse of donor funds cannot be the basis of declaring the diplomat persona non grata. The concept of good faith when a state is asserting its rights in international law is
discussed, and an argument is made against the state's capricious and unrestrained application of its right to declare a foreign diplomat *persona non grata*. A related argument in the said chapter is that, in the absence of binding legal covenants to empower the donor state to supervise and oversee the administration of donor funds, the concept of a non-charitable purpose trust could be imported, and that through paragraph (c) of article 38(1) of the Statute of the International Court of Justice, regarding 'general principles of law recognised by civilised nations', this concept could prove a useful source of law.

Chapter 5 concludes the study, integrating the main arguments and providing some policy recommendations.
1 Introduction

Chapter 1 outlined the objective and scope of the book, fleshing out the underlying thesis and examining the rationale behind the concept of diplomatic immunity in public international law as well as highlighting other forms of immunity that are closely related to diplomatic immunity. In this chapter, we set out a contextual background to the study, examining the anatomy of corruption from a legal viewpoint. In doing so, we also look at the concept of good governance as a corollary to the study of corruption. Here, conceptual issues relating to legal definitions of the terms ‘corruption’ and ‘good governance’ are examined, highlighting also, in part, the relationship between corruption and good governance.  

As noted in chapter 1, while it is feasible to identify closely-related definitions of ‘corruption’, as evidenced, say, in international treaties and various pieces of legislation of different countries, including decisions of domestic courts, there remains a marked absence of statutory, treaty or judicial definitions of ‘good governance’. Indeed, there is yet to be seen a statute, treaty or judicial precedent in which the term ‘good governance’

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1 An earlier version of this chapter was published as a refereed scholarly article, namely, KK Mwenda ‘Can “corruption” and “good governance” be defined in legal terms?’ (2008) 2 Rutgers University Journal of Global Change and Governance.
4 See, eg, Colorado II 533 US 440-41, where the United States Supreme Court ruled that ‘corruption’ was something more than a _quid pro quo_ arrangement in which a legislator sold his vote for one or more contributions to his campaign, as well as being ‘improper
has been defined. It is even doubtful that ‘good governance’, as a term, is justiciable. Against this background, chapter 2 argues that the term ‘good governance’ is simply a restatement of such existing concepts as constitutionalism, rule of law, accountability, transparency and the doctrine of separation of powers. But let us take a more reasoned look at these concepts before we examine definitions of corruption and good governance.

According to Sartori, ‘liberal constitutionalism’ comprises the following elements: (1) a higher law, either written or unwritten, called constitution; (2) judicial review; (3) an independent judiciary consisting of independent judges dedicated to legal reasoning; (4) due process of law; and (5) binding procedures establishing the method of law making which remain an effective brake on the bare-will conception of law. However,
one commentator observes that Sartori’s definition emphasises the ‘rule of law’ side of liberal constitutionalism. According to Li:

For our purpose, constitutionalism (as a descriptive concept) means a system of political arrangements in which there is a supreme law (generally called ‘constitution’), in which all (particularly the entire system of government) is governed by the supreme law, in which only the people’s will (as defined through some pre-specified institutional procedure, usually through a super-majority voting mechanism) can supersede and change the supreme law, in which changes can only be made infrequently due to the difficulty of garnering the requisite popular support, and in which there are separation of powers, checks and balances and an independent judiciary dedicated to legal reasoning to safeguard the supremacy of the constitution.

Li goes on to argue that some writers, thinking that there is more than one kind of constitutionalism and defining constitutionalism loosely as any political system with a constitution (of any kind), would call Li’s description of constitutionalism as ‘liberal constitutionalism’. Li, however, uses the terms ‘constitutionalism’ and ‘liberal constitutionalism’ interchangeably, because, according to him, ‘[c]onstitutional systems, both past and present, are ... in fact liberal systems’. He concludes:

We can draw several implications from the above definition of constitutionalism. First, constitutionalism is an institutional realisation of liberalism. By constraining and regulating the government’s power through a supreme constitution, and by preserving the sovereignty of people, constitutionalism ensures that the government is limited. Second, constitutionalism does not recognise the sovereignty of the legislature. Instead, it only recognises the sovereignty of people. Under liberal constitutionalism, no legislature is supreme than the constitution. The legislature is a creature of the constitution and is governed by the constitution. Third, liberal constitutionalism is based on a particular view of liberalism towards human nature, which is universal self-interest. One basic premise of liberal constitutionalism, as Stephen Holmes puts it, is the fact that ‘[a]s ordinary men, rulers too need to be ruled’… That is, self-interest is universal, and rulers are no exception. Because rulers, like ordinary people, are self-interested, rulers also need to be disciplined and constrained by the rule of law.

On the other hand, addressing the term ‘rule of law’, Yu and Guernsey argue that this term does not have a precise definition and that its meaning can vary between different nations and legal traditions. Yu and Guernsey observe, however, that the term ‘rule of law’ can be understood

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11 B Li ‘What is constitutionalism?’ Perspectives Vol 1 No 6 http://www.oycf.org/Perspectives/6_063000/what_is_constitutionalism.htm (accessed 20 March 2008).
12 As above.
13 As above.
14 As above.
as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions.\textsuperscript{16} According to Yu and Guernsey, in the most basic sense, ‘rule of law’ is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power.\textsuperscript{17} As such, the two authors argue that the American legal scholar, Lon Fuller, in his book, \textit{The morality of law}, identified eight elements of law which have been recognised as necessary for a society aspiring to institute the rule of law,\textsuperscript{18} and that these elements are as follows: (i) Laws must exist and those laws should be obeyed by all, including government officials; (ii) Laws must be published; (iii) Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed (for example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed); (iv) Laws should be written with reasonable clarity to avoid unfair enforcement; (v) Law must avoid contradictions; (vi) Law must not command the impossible; (vii) Law must stay constant through time to allow the formalisation of rules (however, law also must allow for timely revision when the underlying social and political circumstances have changed); and (viii) Official action should be consistent with the declared rule.\textsuperscript{19}

Regarding the doctrine of separation of powers, while the doctrine is commonly understood, in many countries, as the constitutional ideal for the independence of the three branches of government\textsuperscript{20} – that is, the executive, the judiciary and the legislature – Gaziano, reviewing Jessica Korn’s book, \textit{The power of separation: American constitutionalism and the myth of the legislative veto}, observes that:

… the book is ultimately disappointing because the author loses sight of the fact that the legislative veto was advanced to address a much more fundamental violation of the separation of powers, namely, the vast delegation of legislative and judicial powers to the executive branch. As a result, Korn’s intriguing argument that the political branches continue to

\begin{itemize}
  \item \textsuperscript{16} As above.
  \item \textsuperscript{17} As above.
  \item \textsuperscript{18} As above.
  \item \textsuperscript{19} As above.
\end{itemize}
share power in an effective way without the legislative veto almost entirely misses the importance of the constitutional separation of powers.21

According to Gaziano, Korn argues that the separation of powers in the US has, and was intended to have, a dual purpose.22 The first purpose was to prevent encroachments on individual liberty by a tyrannical government.23 The second purpose, which Korn asserts is ignored by Wilsonian reformers, was to promote effective and efficient government through specialisation of functions and other adaptations that create a strong executive.24 Gaziano concludes that

[i]n short, Korn attempts to present an originalist framework for modern government. Her conclusion is that the invalidation of the legislative veto was not significant because Congress has more effective means to influence executive actions. Korn is correct that in matters delegated to the president, the Framers provided for a strong unitary executive, or in Madison's words, 'energy in the executive.' In matters delegated to the courts, they sought to strengthen the judges' hands by insulating them from improper political pressure through lifetime tenure and protection against diminution in pay. Those decisions have tended to promote effective administration of the respective powers exercised by each branch.25

Against this background, we now turn to examine definitions of corruption as provided in multilateral treaties.

2 International law and treaty definitions of corruption

At the outset, it must be mentioned that the legal aspects of combating corruption under international law are examined by Posadas in an academic journal article which somewhat concerns itself more with US municipal law than international law.26 Here, suffice it to say, in terms of multilateral treaties dealing with corruption, the African Union (AU) Convention on the Prevention and Combating of Corruption 2003, the Southern Africa Development Community (SADC) Protocol against Corruption 2001 and the United Nations (UN) Convention against Corruption 2005 provide some valuable sources of conventional international law. It could even be argued that these treaties are a

22 As above.
23 As above.
24 As above.
25 As above.
crystallisation of some norms of customary international law which seem to have evolved increasingly in the last decade concerning the fight against corruption in different countries and across international borders.\textsuperscript{27}

Although the UN Convention against Corruption does not spell out a specific legal definition of ‘corruption’ or ‘corrupt practices’, chapter III of that treaty places legal obligations on all state parties to the treaty to carryout, among other things, the following:

**Article 15: Bribery of national public officials**

Each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:\textsuperscript{28}

(a) the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.\textsuperscript{29}

A public official is then defined in article 2 of the UN Convention Against Corruption as follows:

(i) any person holding a legislative, executive, administrative or judicial office of a state party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority;

(ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the state party and as applied in the pertinent area of law of that state party;

(iii) any other person defined as a ‘public official’ in the domestic law of a state party. However, for the purpose of some specific measures contained in chapter II of this Convention, ‘public official’ may mean any person who performs a public function or provides a public service as defined in the domestic law of the state party and as applied in the pertinent area of law of that state party.

Closely related to the foregoing, a ‘foreign public official’ is defined in article 2 of the UN Convention Against Corruption 2005 as follows:

\textsuperscript{27} As above.

\textsuperscript{28} Art 28 of the United Nations Convention Against Corruption 2005 defines ‘knowledge, intent and purpose as elements of an offence’ as follows: ‘Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.’

\textsuperscript{29} Art 15 United Nations Convention Against Corruption 2005.
Chapter III of the UN Convention Against Corruption places further legal obligations on all state parties to pass laws that would cover the following offences relating to corruption:

Article 16: Bribery of foreign public officials and officials of public international organisations

(1) Each state party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

(2) Each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Article 17: Embezzlement, misappropriation or other diversion of property by a public official

Each state party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

Other offences relating to corruption under the UN Convention Against Corruption include those offences listed under the following treaty obligations:

Article 18: Trading in influence

Each state party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) the promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or
the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the state party an undue advantage for the original instigator of the act or for any other person;

(b) the solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the state party an undue advantage.

Article 19: Abuse of functions

Each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

Article 20: Illicit enrichment

Subject to its constitution and the fundamental principles of its legal system, each state party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

Article 21: Bribery in the private sector

Each state party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) the promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) the solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.32

Article 22 of the UN Convention Against Corruption extends the category of offences relating to corruption to the embezzlement of property in the private sector. According to article 22, each state party should consider adopting legislative and other measures to establish as a criminal offence, when committed intentionally33 in the course of economic, financial or commercial activities, the embezzlement by a person who directs or works,

32 n 29 above, arts 18-21.
33 As noted above, art 28 of the United Nations Convention Against Corruption 2005 defines ‘intent’ as follows: ‘[I]ntent … as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.’
in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position. Article 23 of the UN Convention Against Corruption establishes a link between offences of corruption and those of money laundering, establishing that corruption can predicate an offence of money laundering. According to article 23:

Laundering of proceeds of crime

(1) Each state party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a)(i) the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

(2) For purposes of implementing or applying paragraph 1 of this article:

(a) Each state party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each state party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the state party in question. However, offences committed outside the jurisdiction of a state party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the state where it is committed and would be a criminal offence under the domestic law of the state party implementing or applying this article had it been committed there;

(d) Each state party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a state party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

By contrast, the AU Convention on the Prevention and Combating of Corruption defines ‘corruption’ as ‘the acts and practices including related
Chapter 2

offences proscribed in this Convention'. Article 4 of the AU Convention provides a list of some of the proscribed acts and practices. These acts and practices include solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.

Other incidents falling under the AU Convention’s list of proscribed acts and practices include the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions. Also, under the AU Convention, corruption could include any act or omission in the discharge of a public officer’s or other officer’s duties for the purpose of illicitly obtaining benefits for himself or herself or for a third party, or the diversion to an independent agency or to an individual property belonging to the state or its agencies by a public official or any other person, which property such public office official or person has received by virtue of his position. Here, the diversion of property could be for purposes unrelated to the objectives for which the property was intended, or for the benefit

34 Art 1 AU Convention on the Prevention and Combating of Corruption.
35 n 34 above, art. 4.
36 As above.
37 As above.
38 As above.
39 Whereas, at common law, the term ‘actual intention’ imports a subjective test of intention, the term ‘constructive intention’, at common law, imports an objective test focusing more on the totality of circumstances. An illustrative examination of the term ‘intention’ is provided below. See Kevin’s English law glossary, ‘Intention’ http://www.kevinboone.com/lawglos_intention.html (accessed 9 February 2005): In Hyam v DPP [1974] 2 WLR 607, the House of Lords accepted that the accused ‘intends’ the consequences of his actions if it is ‘highly probable’ that those consequences will arise from the actions. However, there was no general agreement on how probable the consequences should be. Lord Hailsham used the terms ‘inseparable consequences’ and ‘morally certain consequence’, while Lord Diplock was prepared to accept ‘likely’. This judgment caused some confusion because it made intention difficult to distinguish from recklessness. In R v Moloney [1985] 2 WLR 648, it was held that in most cases a jury would not need to be directed as to the meaning of ‘intention’; a common sense understanding was adequate. However, Lord Bridge issued guidelines to this effect: It could be assumed that if the accused realised that the results of his action were the ‘natural consequences’ of the action, this gave additional weight to the view that the consequences were intended. The jury would still have to consider other factors along with this one of the actions. This definition is somewhat narrower than the ‘highly probable’ consequences of Hyam, but perhaps slightly broader than Lord Hailsham’s ‘inseparable consequences’. In any event, it was not long before the inexactness of the term ‘natural consequences’ gave rise to another complicated case. In R v Hancock and Shankland [1985] 2 WLR 257, Lord Scarman approved Lord Bridges guidelines in R v Moloney, but stressed that ‘natural consequences’ should be interpreted to indicate that a high likelihood of the action having the specified consequences increased the likelihood that the consequence was intended, but it was still not enough on its own. Scarman also reiterated that it is largely a matter for the jury to use common sense to decide whether
of the public official himself, or for the benefit of a culpable person himself, or for the benefit of a third party.\footnote{40}

Then, article 1 of the AU Convention provides a definition of 'proceeds of corruption', stating as follows:

'Proceeds of crime' means assets of any kind corporeal or incorporeal, movable or immovable, tangible or intangible and any document or legal instrument evidencing title to or interests in such assets acquired as a result of an act of corruption.

Under the SADC Protocol Against Corruption 2001, the term 'corruption' is defined as 'any act referred to in article 3 [of the Protocol] and includes bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others'.\footnote{41} It is clear, therefore, that under the SADC Protocol, the definition of corruption extends to the private sector as well. And article 3 of the SADC Protocol lists the following offences of corruption:

1. This Protocol is applicable to the following acts of corruption:
   a. the solicitation or acceptance, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
   b. the offering or granting, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;

\footnote{40} An act was intended. In \textit{R v Neddrick} [1985] 1 WLR 1025, the Court of Appeal accepted the House of Lords ruling in \textit{R v Moloney}, and allowed that foresight of the consequences of an action only allows a jury to 'infer intent' if the consequences are 'virtually certain' (Lane LCJ). In previous cases, the Court of Appeal had tended to follow the ruling in \textit{Hyam}. In \textit{R v Woolin} [1997] 4 All ER 103, the Court of Appeal tried to broaden the definition of intention again, but the House of Lords restated that the principle in \textit{Neddrick} should apply. However, the wording of the judgment uses the term 'find intent' rather than 'infer intent' which has let some authorities to claim that the Lords are supporting the view that a 'virtually certain' consequence is the same as an intended consequence, where \textit{Neddrick} only suggests that it increases the probability of intention. At present, the position on intention appears to be as follows: (a) If the accused carries out action A, with consequence C, then the accused intended C if he carried out A in order expressly to bring about C; (b) The accused intended C if he carried out action A, from which C was virtually certain, in which case the accused need not have a motive or desire to bring about C. Note that the meaning of 'intention' is also contentious in the law of tort; see, eg, \textit{trespass to the person}.

\footnote{41} Art 4 AU Convention on the Prevention and Combating of Corruption.

\footnote{41} Art 1 SADC Protocol Against Corruption 2001.
(c) any act or omission in the discharge of his or her duties by a public official for the purpose of illicitly obtaining benefits for himself or herself or for a third party;

(d) the diversion by a public official, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party of any movable or immovable property, monies or securities belonging to the state, to an independent agency, or to an individual, that such official received by virtue of his or her position for purposes of administration, custody or for other reasons;

(e) the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;

(f) the offering, giving, solicitation or acceptance, directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of the influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;

(g) the fraudulent use or concealment of property derived from any of the acts referred to in this article; and

(h) participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this article.

(2) This Protocol shall also be applicable by mutual agreement between or among two or more state parties with respect to any other act of corruption not described in this Protocol.42

We now turn to examine the term ‘good governance’, highlighting also the relationship between corruption and good governance.

3 The relationship between corruption and good governance

Corruption, generally speaking, is only one aspect of weak or bad governance. And although the term ‘corruption’ has benefited from elaborate definitions in the social sciences,43 a succinct legal definition of

42 n 41 above, art 3.
'good governance' remains elusive.44 There have been some descriptive views on what may be considered interpretations or objectives of 'good governance', but even such views do not constitute well set out legal definitions of good governance. For example, Tshuma, examining views postulated by the World Bank, observes that, while governance is the manner in which power is exercised in the management of a country's economic resources for development, good governance is synonymous with sound development management.45 Then, Kofele-Kale draws a distinction between what he terms 'governance as a value-neutral term' and 'governance as a normative term', concluding that good governance is to be preferred to bad governance because good governance fosters strong, but sharply delimited states capable of sustained economic and social development and institutional growth.46 According to Kofele-Kale, bad governance is a pathology to be avoided because it undermines all efforts to improve policy making and to create durable institutions.47 But both these analyses of good governance do not tell us the full story of a legal definition of good governance. If, indeed, the term 'good governance' is a legal concept, then it is not enough to state simply that 'good governance

44 PJ Kabudi 'Good governance: Definition and implications' http://tanzania.fes-international.de/doc/good-governance.pdf (accessed 16 January 2007), argues that '[g]ood governance is driven by a broad definition that encompasses an array of issues in the socio-political and economic order of a country. The United Nations Committee for Development Planning in its report issued in 1992 entitled Poverty Alleviation and Sustainable Development: Goals in Conflict? identified the following as being part of the attributes of good governance: (1) territorial and ethno-cultural representation, mechanisms for conflict resolution and for peaceful regime change and institutional renewal; (2) checks on executive power, effective and informed legislatures, clear lines of accountability from political leaders down through the bureaucracy; (3) an open political system of law which encourages an active and vigilant civil society whose interests are represented within accountable government structures and which ensures that public offices are based in law and consent; (4) an impartial system of law, criminal justice and public order which upholds fundamental civil and political rights, protects personal security and provides a context of consistent, transparent rules for transactions that are necessary to modern economic and social development; (5) a professionally competent, capable and honest public service which operates within an accountable, rule-governed framework and in which the principles of merit and the public interest are paramount; (6) the capacity to undertake sound fiscal planning, expenditure and economic management and system of financial accountability and evaluation of public sector activities; and (7) attention not only to central government institutions and processes but also to the attributes and capacities of sub-national and local government authorities and to the issues of political devolution and administrative decentralisation.'


46 N Kofele-Kale 'Good governance as political conditionality: An African Perspective' in Faundez et al (n 45 above) 152.

47 As above.
is epitomised by predictable, open and enlightened public policy, a bureaucracy imbued with a professional ethos acting in furtherance of the public good, the rule of law, transparent processes, and a strong civil society participating in public affairs’. Indeed, is the concept of good governance *sui generis*, and can the concept generate legal rights and legal obligations? Or, does the concept depend on a subset of primary legal concepts to generate legal rights and obligations? The issue here is that we should not be seen to be repackaging the same old wine in new bottles and only introducing different labels on the new bottles. The term ‘good governance’ is merely a restatement of what we already know about concepts such as the rule of law, constitutionalism, transparency, accountability and separation of powers. The argument here does not change just because ‘bad governance is characterised by arbitrary policy making, unaccountable bureaucracies, unenforced or unjust legal systems, the abuse of executive power, a civil society unengaged in public life, and widespread corruption’. Following below is an examination of some attempt to define ‘good governance’ and the attendant shortcomings of such an attempt.

4 Shortcomings of some attempt to define good governance

While some economists, political scientists and other social scientists may be excited about prospects of using such trendy, but vague and obscure terms as ‘good governance’ in their day-to-day parlance, and thus inviting an air of intellectual sophistication among themselves, individuals with enlightened legal minds need not be so excited. For a lawyer who is well-schooled in legal theory, jurisprudence and constitutional law, the term ‘good governance’ refers simply to a collection of legal concepts that have been known to many lawyers time immemorial. There is nothing new in law about the term ‘good governance’, although this term has attracted much intellectual curiosity and excitement even from some lawyers. For example, Hatchard, Ndulo and Slinn attempt, albeit in a superficial way, to resolve the conundrum facing the need to have a legal definition of ‘good governance’. They proceed by splitting the adjective ‘good’ from the term ‘good governance’, and thereafter analyse the word ‘governance’

48 As above.
49 As above.
50 See, eg, some instructive literature pertaining to concepts such as constitutionalism, rule of law, accountability and transparency: AV Dicey *Introduction to the study of the law of the constitution* (1982); F Hayek *The road to serfdom* (1994); Holmes (n 5 above); Sartori (1987) (n 5 above); BO Nwabueze *Presidentialism in Commonwealth Africa* (1974); BO Nwabueze *Constitutionalism in the emergent states* (1973); BO Nwabueze *Judicialism in Commonwealth Africa: The role of the courts in government* (1977).
in the light of that adjective. But even so, this effort does not help matters much since we do not even know whether the term 'good governance' is, strictly speaking, a legal term or an interdisciplinary one. In their discussion, Hatchard, Ndulo and Slinn rely heavily on works drawn from other social sciences, such as works by notable academic luminaries like Professor Ali Mazrui.

5 Other attempts to define good governance

The United Nations Economic Commission for Africa (UNECA) concedes that ‘ideas of what constitutes good governance vary a great deal’. This view is buttressed by the lack of a common understanding among many scholars, international organisations and national policy makers regarding what is good governance. Even university programmes that purport to be dealing with good governance offer different approaches to the study of good governance. And the course content and curricula of such academic programmes are often contrastingly different. In many cases, these programmes are packed with anything that sounds remotely connected to the role of the state in promoting and protecting human rights in national development. It is as if the term ‘good governance’ is a dumping ground for anything to do with human rights, transparency, accountability and the rule of law, irrespective of the intellectual discipline to which such issues belong. But, the question remains: what is ‘good governance’, legally speaking?

In Zambia, for example, the Governance Development Unit of the Ministry of Justice, aside from making a general reference to issues of accountability, transparency, constitutionalism, democracy, human rights and economic management, does not provide a meaningful legal definition of good governance. What the Unit does instead is to provide

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52 As above.
55 According to the World Bank Institute ‘About the Zambia governance diagnostics' http://www.worldbank.org/wbi/governance/zambia/about.html (accessed 29 April 2007): ‘In March 2000, the Zambian government created the National Capacity Building Programme for Good Governance in Zambia. In order to facilitate the co-ordination, monitoring and evaluation of the programme, the government created the Governance Development Unit (GDU) which falls under the Ministry of Legal Affairs. The goal of the GDU was to establish a database for effective monitoring and evaluation of the programme and to undertake a baseline survey on governance. It was in January 2001 that the government of Zambia officially requested World Bank support in carrying out the diagnostic survey as a first step in the ultimate goal of developing an effective governance and anti-corruption strategy.’
a list of sectoral or thematic areas covered by, say, the terms ‘accountability and transparency’. The Unit postulates that the terms ‘accountability and transparency’ cover areas such as corruption, drug trafficking, government procurement, integrity and public accounts, while the term ‘democracy’ encompasses such areas as broadcasting, electoral process, civil society, public participation, decentralisation and gender issues. By contrast, ‘economic management’, according to the Unit, covers such areas as poverty, HIV/AIDS, education, capacity and national debt, while the term ‘human rights’ focuses on press freedom, gender and law enforcement. Constitutionalism, on the other hand, is understood narrowly by the Unit as dealing mainly with institutions and linkages associated with institutions. Because of these ambiguities in various definitions of good governance, it is now argued:

Another new endeavour is the International Monetary Fund’s involvement in ‘good governance’, taking up issues such as corruption, budget transparency, tax policy reform, and corporate bankruptcy. Good governance is becoming an important criterium in determining multilateral and bilateral aid flows and in granting debt relief. As the institution that bestows the ‘seal of approval’ and whose programs must be followed in order to obtain debt relief, the IMF has a strong hand in determining whether a country is meeting its standard of good governance.

But, what is ‘good governance’, legally speaking? Critics of the International Monetary Fund (IMF)’s involvement in a country’s determination of what constitutes ‘good governance’ argue that

[although the principle of good governance is broadly endorsed, bestowing the IMF with the power to determine good governance is problematic. It further legitimises the Fund’s power grabs of the last several decades and entrenches its dubious role of giving advice where it is not an expert. Moreover, the IMF’s own decision-making structures violate basic principles of good governance, such as representation and participation. The entire African continent, for instance, is represented by two individuals on the IMF board of executive directors, while the US controls over 17% of the votes at the Fund. Such an imbalance of political influence undermines the consistent application of good governance criteria. If the IMF is to advocate good governance principles to its member governments, it must apply the same principles of transparency and accountability to its own operations.]

57 As above. 58 As above. 59 As above. 60 As above. 61 As above. 62 C Welch ‘Friends of the earth’ (edited by Tom Barry (IRC) and Martha Honey (IPS)) ‘The IMF and good governance’ (2000) 5 Foreign Policy in Focus http://www.fpif.org/briefs/vol5/v5n13imfgov.html (accessed 28 April 2007). See also C Welch ‘Friends of the earth’ (edited by Tom Barry (IRC) and Martha Honey (IPS)) ‘The IMF and good governance’ (1998) 3 Foreign Policy in Focus http://www.hartford-hwp.com/archives/25/054.html (accessed 28 April 28, 2007). 63 As above.
In contrast to the polemics surrounding the definitions of good governance, a legal definition of corruption is easily attainable and can be viewed from different but related perspectives. We highlight below some definitions of corruption.

6 Defining corruption from a ‘law in context’ perspective

According to Amundsen, political corruption can be summarised as follows:

Political corruption takes place at the highest levels of the political system, and can thus be distinguished from administrative or bureaucratic corruption. Bureaucratic corruption takes place at the implementation end of politics, for instance in government services like education and health. Political corruption takes place at the formulation end of politics, where decisions on the distribution of the nation’s wealth and the rules of the game are made. Political corruption is usually also distinguished from business and private sector corruption. This is only a matter of academic classification, however, since the bribes offered by private companies, domestic and international, are frequent and significant corruption drivers … Most definitions of corruption also emphasise the demand (state) side, for instance in stating that corruption is ‘abuse of public authority and power for private benefit’.64

The Lectric law library provides the following definition of corruption:

CORRUPTION – An act done with an intent to give some advantage inconsistent with official duty and the rights of others. It includes bribery, but is more comprehensive; because an act may be corruptly done, though the advantage to be derived from it be not offered by another. Sometimes corruption is understood as something against law; such as, a contract by which the borrower agreed to pay the lender usurious interest. It is said, in such case, that it was corruptly agreed, etc.65

In essence, a sound legal definition of corrupt practices should cover not only the offering, giving, receiving, or soliciting, directly or indirectly, of any thing of value to influence improperly the action of a public official. The definition should also extend to influencing improperly the taking or reviewing of procurement decisions, or obtaining some financial or other benefit, or avoiding an obligation.66 Even the act of tipping-off a suspect of corrupt practices should be criminalised so that a culpable party that tips-

64 Amundsen (n 43 above) 4,
65 n 43 above.
66 This conclusion reflects much of the best practice in the field of anti-corruption and complements the discussions above pertaining to the three international legal agreements: the AU Convention on the Prevention and Combating of Corruption 2003; the SADC Protocol Against Corruption 2001; and the UN Convention Against Corruption 2005.
off the suspect is made criminally liable. Equally, it should be a criminal offence for a public officer who, knowing or suspecting that a fellow public officer is engaging in corrupt practices, does not report his suspicion or knowledge to the relevant authorities. In all these cases, the *mens rea* of carrying out the offence of corrupt practices should be spelt out in law. And closely related to the foregoing would be a need to legislate against collusive, coercive and fraudulent practices that support or corroborate offences of corrupt practices.

Having established that there is hardly any evidence of a statute, treaty or judicial precedent providing a legal definition of ‘good governance’, and that the justiciability of the term ‘good governance’ is very doubtful, we now turn to examine some near attempts by multilateral development agencies to define the term ‘good governance’.

### 7 Multilateral development agencies on good governance

Generally, the term ‘good governance’, as we have seen above, has been understood differently by different stakeholders. For example, the approach taken by UNECA, that ‘ideas of what constitutes good governance vary a great deal’, can be contrasted with the narrow view advanced by Hatchard, Ndulo and Slinn in their attempt to define ‘good governance’. We have already examined Hatchard, Ndulo and Slinn’s arguments.

Suffice it to say, a good amount of the literature being churned out on matters of good governance hardly endeavours to provide a legal definition of ‘good governance’. Much of the literature retreats to the periphery, avoiding the centre, and focuses instead on attributes of good governance. The literature hardly spells out a ‘legal’ definition of good governance. One would be tempted to ask: What is good governance really, and how different is it from the collection of such concepts as

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68 As above.
69 Eg, as a codification of best practice, art 28 of the UN Convention Against Corruption 2005 defines the *mens rea* relating to ‘knowledge, intent and purpose’ as follows: ‘Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.’
70 See n 66 above.
71 See above.
72 See also below.
73 UNECA (n 54 above).
74 Hatchard *et al* (n 51 above) 2.
75 See above.
constitutionalism, the rule of law, transparency and accountability, and the doctrine of separation of powers? Is good governance a legal concept, or is it an economic or sociopolitical concept, or is it an interdisciplinary concept, falling somewhere midway between law and other social sciences? And even if the concept of good governance were to be seen as an interdisciplinary idea, we should seek to know, from a lawyer’s perspective, what precisely, under the law, constitutes good governance, as opposed to speculating on broad and sweeping definitions of good governance. The surfeit of Western ideological opulence that elevates the idea of good governance to an article of faith to be embraced wholly by all without critical circumspection often labours on the laurels of bourgeois idealism as opposed to objective realism. And this is where the problem lies. We need to know what exactly is the legal meaning of the term ‘good governance’, as opposed to indulging in speculative conjectures from the social sciences on attributes of good governance or relying heavily on some superficial descriptive analyses of what good governance ought to be.

To answer some of the questions posed above, we must move away from political ordering of the law. Although law does not operate in a vacuum, it is the law, and not politics or economics, that should give ordinary meaning to terms such as good governance and corruption since these terms are deep-seated in legal traditions. From a lawyer’s standpoint, economic variables and permutations, like political variables and dispensations, are best understood when viewed through the prism of the law. It might even be that the notions of constitutionalism, separation of powers and the rule of law, as we already know them, when viewed together with the virtues of transparency and accountability, are what good governance is all about. However, at the multilateral level, involving as many international financial institutions (IFIs) as possible, the IFIs, embracing tenets of international law, must come up with a consensus on the parameters of good governance. From there, many countries can then build their strategic frameworks for enhancing, developing and entrenching norms of good governance.

At the continental level, however, the African Development Bank and the African Development Fund have jointly issued a policy statement that ‘good governance’ has to do with the following: (a) accountability; (b) transparency; (c) combating corruption; (d) participation; and (e) legal and

77 Regarding the concepts of constitutionalism, the rule of law and separation of powers, see Dicey (n 50 above); Hayek (n 50 above); Holmes (n 5 above); Sartori (197) (n 50 above); Nwabueze (1974) (n 50 above); Nwabueze (1973) (n 50 above); and Nwabueze (1977) (n 50 above).

78 Kabudi (n 44 above) argues, eg, that ‘good governance as a concept has steadily entrenched itself in the political and development discourse. It has permeated all sectors and become part of the common shared principles and virtues of different countries in the world. It has attained universality as an indicator of adherence to democracy and rule of law. There is a danger, however, that good governance has become a catchword and that few bother to consider its implications.’
judicial framework.\(^79\) Both these institutions argue that they have given due recognition to the issue of good governance for two main reasons.\(^80\)

First, from a broader perspective, good governance, which promotes accountability, transparency, rule of law and participation, is central to creating and sustaining an enabling environment for development. Second, from the Bank’s perspective, it is inextricably related to the efficacy of the investment that it helps to finance, and is in line with the Institution’s vision for sustained African development into the twenty-first century. The absence of good governance has proved to be particularly damaging to the ‘corrective intervention’ role of government.\(^81\)

According to the African Development Bank and the African Development Fund, many programmes for poverty alleviation in Africa have been undermined by a lack of public accountability, corruption and lack of participation of the beneficiaries.\(^82\) The two institutions argue that there is now ‘a consensus that good governance should build on (i) effective states; (ii) mobilised civil societies; and (iii) efficient private sectors, three factors necessary for sustained development’.\(^83\) It is, however, not clear which other parties or institutions, apart from the African Development Bank and the African Development Fund, participated in arriving at this consensus or conclusion.

Attempting to lay down constituent elements of good governance, the Social Research Center of the United Nations Fund for Women (UNIFEM), in drawing on attributes of good governance promulgated by the United Nations Committee for Development Planning (UNDP), identifies nine core characteristics of good governance.\(^84\) These nine core characteristics are as follows:

1. **Participation**

   All men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their interests. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively.

2. **Rule of law**

   Legal frameworks should be fair and enforced impartially, particularly the laws on human rights.

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\(^80\) n 79 above, Executive Summary, para 1.

\(^81\) n 79 above, paras 1-2.

\(^82\) n 79 above, Executive Summary, para 2.

\(^83\) n 79 above, 2.

(3) Transparency

Transparency is built on the free flow of information. Processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.

(4) Responsiveness

Institutions and processes try to serve all stakeholders.

(5) Consensus orientation

Good governance mediates differing interests to reach a broad consensus on what is in the best interest of the group and, where possible, on policies and procedures.

(6) Equity

All men and women have opportunities to improve or maintain their well-being.

(7) Effectiveness and efficiency

Processes and institutions produce results that meet needs while making the best use of resources.

(8) Accountability

Decision makers in government, the private sector and civil society organisations are accountable to the public, as well as to institutional stakeholders. This accountability differs depending on the organisation and whether the decision is internal or external to an organisation.

(9) Strategic vision

Leaders and the public have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.85

Against this background, the socio-political, legal and economic contexts in which the terms ‘good governance’ and ‘corruption’ are used must be well understood, appreciating also any limitations and constraints. In the case of corruption, for example, aside from the definitions found in existing literature, treaties or pieces of legislation, should we view corruption as a vice that extends also to the private and financial sectors? Or is corruption rigidly fixated on public officers? What about PEPs86 (that is, politically-exposed persons, such as relatives or family-members of

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85 As above.

86 The term PEPs refers to individuals who are or have been entrusted with prominent public functions in a particular country. The Financial Action Task Force on Money Laundering (FATF), which is an international organisation, has issued a revised set of enhanced measures meant to target specifically the risk posed by PEPs. See FATF Report on Money Laundering and Terrorist Financing Typologies 2003-2004 (Paris, FATF: 2004) 18 http://www1.oecd.org/fatf/pdf/TY2004_en.PDF (accessed 20 February 2005). Examples of PEPs include heads of state, heads of government, cabinet ministers, senior politicians, senior government officials, judicial or military officials, senior executives of state owned enterprises, important political party officials, and family members or close associates of PEPs. The FATF Report 18 observes that
politicians) and their role as proxies of most public officers? Where do we draw the line between corruption and criminal offenses such as money-laundering?

8 How corruption can lead to money laundering

While it is recognised that corrupt practices can, in some countries, predicate the offence of money laundering, we first need to understand how corruption differs from such offences as money laundering and where the nexus between corruption and such other offences in the private and financial sectors lies. Also, corruption, like many other financial crimes, has a cultural and political dimension to it. In many countries, poor economic conditions have led to a general acceptance of corruption as a way of life. Also, the issue of political strongholds can present an obstacle to the fight against corruption. And political strongholds can take root in any country, irrespective of that country’s level of development. So, no matter how sophisticated the methodology of fighting corruption is, if the political culture in a particular country is not committed to or does not favour the fight against corruption, then the net result will be lip service to anti-corruption and good governance initiatives.

9 Conclusion

This chapter has examined some conceptual issues relating to the legal definition of the terms ‘corruption’ and ‘good governance’. The chapter argued that the term ‘good governance’ is simply a restatement of existing concepts pertaining to constitutionalism, rule of law, accountability, transparency and the doctrine of separation of powers, and that, while corruption can be defined in legal terms, a legal definition of good governance remains elusive. And commenting on the term ‘corruption’, the Asian Development Bank observes:

The term ‘corruption’ is used as a shorthand reference for a large range of illicit or illegal activities. Although there is no universal or comprehensive definition as to what constitutes corrupt behaviour, the most prominent definitions share a common emphasis upon the abuse of public power or

86 ‘[b]ecause of the special status of PEPs – politically within their country of origin or perhaps diplomatically when they are acting abroad – there is often a certain amount of discretion afforded by financial institutions to the financial activities carried out by these persons or on their behalf. If a PEP becomes involved in some sort of criminal activity, this traditional discretion given to them for their financial activities often becomes an obstacle to detecting or investigating crimes in which they may be involved.’
87 See, generally, Mwenda (n 67 above) and KK Mwenda Anti-money laundering law and practice: Lessons from Zambia (2005).
position for personal advantage. The Oxford unabridged dictionary defines corruption as ‘perversion or destruction of integrity in the discharge of public duties by bribery or favour’. The Merriam Webster’s collegiate dictionary defines it as ‘inducement to wrong by improper or unlawful means (as bribery)’. The succinct definition utilised by the World Bank is ‘the abuse of public office for private gain’. This definition is similar to that employed by Transparency International (TI), the leading NGO in the global anticorruption effort: ‘Corruption involves behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the public power entrusted to them.’

The Asian Development Bank (ADB) goes on to state that these definitions are useful but, in ADB’s judgment, they do not give adequate attention to the problem of corruption in the private sector or to the role of the private sector in fostering corruption in the public sector. As a shorthand definition, ADB defines corruption as ‘the abuse of public or private office for personal gain’. A more comprehensive definition by ADB reads as follows:

Corruption involves behaviour on the part of officials in the public and private sectors, in which they improperly and unlawfully enrich themselves and/or those close to them, or induce others to do so, by misusing the position in which they are placed.

According to ADB, some types of corruption are internal, in that they interfere with the ability of a government agency to recruit or manage its staff, make efficient use of its resources, or conduct impartial in-house investigations. Other types of corruption are external, involving efforts to manipulate or extort money from clients or suppliers, or to benefit from inside information. Still others involve unwarranted interference in market operations, such as the use of state power to artificially restrict competition and generate monopoly rents. ADB observes, however, that

[m]ore narrow definitions of corruption are often necessary to address particular types of illicit behavior. In the area of procurement fraud, for example, the World Bank defines corrupt practice as ‘the offering, giving, receiving, or soliciting of any thing of value to influence the action of a public official in the procurement process or in contract execution’. Fraudulent practice is defined as ‘a misrepresentation of facts in or to influence a procurement process or the execution of a contract to the detriment of the Borrower, and includes collusive practices among bidders ... designed to

90 As above.
91 As above.
92 As above.
93 As above.
94 As above.
95 As above.
establish bid prices at artificial, noncompetitive levels and to deprive the Borrower of the benefits of free and open competition.\textsuperscript{96}

ADB postulates that it is often useful to differentiate between grand corruption, which typically involves senior officials, major decisions or contracts, and the exchange of large sums of money; and petty corruption, which involves low-level officials, the provision of routine services and goods, and small sums of money.\textsuperscript{97} According to ADB, it is also useful to differentiate between systemic corruption, which permeates an entire government or ministry, and individual corruption, which is more isolated and sporadic.\textsuperscript{98} Finally, it is useful to distinguish between syndicated corruption in which elaborate systems are devised for receiving and disseminating bribes, and non-syndicated corruption, in which individual officials may seek or compete for bribes in an \textit{ad hoc} and unco-ordinated fashion.\textsuperscript{99}
CHAPTER 3

COMPROMISED DIPLOMATIC IMMUNITY OF CORRUPT DIPLOMATS

1 Introduction

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 noted that there was a correlation between the diplomats' abuse of diplomatic immunity and the level of corruption in their home countries.¹ The Economist publication reports that Fisman and Miguel observed 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.² Fisman and Miguel’s study also showed that results from 146 countries were strikingly similar to the Transparency International (TI) Corruption Index, which rates countries by their level of perceived sleaze.³ In the case of parking violations, for example, diplomats from countries with low levels of corruption behaved well, even when they could get away with breaking the rules.⁴ The culture of their home country, it was argued, was imported to New York, and they acted accordingly.⁵ The pattern was similar in the case of high-corruption countries. Their diplomats became increasingly comfortable with parking where they liked.⁶ And as they spent more time in New York, their number

³ As above.
⁴ As above.
⁵ As above.
⁶ As above.
of violations increased by 8 to 18 per cent. Overall, Fisman and Miguel argue that diplomats accumulated 150,000 unpaid parking tickets during the five years under review.

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. One report points out:

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.

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

‘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 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

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7 As above.
8 As above.
9 See Afril News (n 1 above).
10 As above.
11 As above.
12 As above.
13 As above.
14 As above. Additionally, Afril News (n 1 above) points out that ‘[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.'
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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’.15

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 United Nations (UN).16 In 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.17

Many sovereign states that are member states of the UN have diplomats accredited to the organisation, just like other multilateral bodies, such as the African Union (AU) and the European Union, have 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.18 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 UN.19 Upon her arrival in the United States, her passport was taken away by her employer.20 Over the ten months that she worked for him, she worked seven days a week, 12 to 15 hours a day,
and was only paid $100 a month, which was sent by her employer to Begum’s husband in Bangladesh.\textsuperscript{21} When her employers left town, they left Begum no food or money to buy food.\textsuperscript{22} She was twice assaulted by her employer’s wife and confined to the house, leaving only twice, both times with the wife.\textsuperscript{23} The second time, Begum overheard a conversation in Bengali among some sidewalk vendors.\textsuperscript{24} When her employers left town later that day, she left the apartment alone for the first time.\textsuperscript{25} Not knowing how to use the elevator, she had to ask a boy to help her get downstairs.\textsuperscript{26} She retraced her steps to the vendor and told him her tale.\textsuperscript{27} The vendor contacted a Bengali language newspaper, which contacted Andolan, a South Asian workers’ rights group.\textsuperscript{28} On August 30, 1999, Andolan brought the police to the apartment and Begum was freed.\textsuperscript{29} However, because Begum’s employers had diplomatic immunity, they were not arrested.\textsuperscript{30}

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 have been arrested and prosecuted.\textsuperscript{31} That said, the UN, as a public international organisation, enjoys immunities and privileges under article 105 of the Charter of the United Nations 1945 which postulates 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

\textsuperscript{21} As above.\textsuperscript{22} As above.\textsuperscript{23} As above.\textsuperscript{24} As above.\textsuperscript{25} As above.\textsuperscript{26} As above.\textsuperscript{27} As above.\textsuperscript{28} As above.\textsuperscript{29} As above.\textsuperscript{30} As above.\textsuperscript{31} 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 2010).
sovereign states. Under the Vienna Convention on Diplomatic Relations 1961, public international organisations cannot be parties to that treaty. The Preamble of the Vienna Convention on Diplomatic Relations 1961 gives an indication that only states can be parties to the treaty.

As a general rule, diplomatic agents enjoy immunity from the jurisdiction of the local courts, but not an exemption from the substantive law. 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. The sending state can recall that diplomat to have him or her prosecuted in its courts of law. Also, in cases of universal jurisdiction, 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 and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division), Lord Millet ruled as follows:

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

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32 See below. See also generally ‘Reparations for injuries suffered in service of the United Nations case, advisory opinion of the International Court of Justice *ICJ Reports* 1949 174-188.
33 See Preamble of the Vienna Convention on Diplomatic Relations 1961.
34 As above.
35 See *Empson v Smith* [1966] 1 QB 426, CA; *Dickinson v Del Solar* [1930] 1 KB 376; *Fatemi v US* 192 A 2d 525 (1963); *Regele v Federal Ministry* ILR 26 (1958) II 544. See also Brownlie (n 15 above) 356.
37 As above.
38 See below. However, when an offence committed by a diplomat does not fall under universal jurisdiction, the diplomat can only be extradited if there is a treaty providing for such extradition and the said offence is listed as an extraditable offence in the treaty. This is so because customary international law does not place an obligation on a state to surrender a criminal to another state. Extradition, as noted above, in the absence of universal jurisdiction, is only permissible through treaty arrangements. See, generally, C Nicholls *The law of extradition and mutual assistance* (2007).
39 Regina v Evans & Another and the Commissioner of Police for the Metropolis and 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 2010).
investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.\textsuperscript{40}

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 \textit{Eichmann}, and the definitions used in the more recent conventions establishing \textit{ad hoc} international tribunals for the former Yugoslavia and Rwanda.\textsuperscript{41}

Every state, according Lord Millet, has jurisdiction under customary international law to exercise extra-territorial jurisdiction in respect of international crimes which satisfy the relevant criteria.\textsuperscript{42} Lord Millet observed that whether or not the courts of a particular state have extra-territorial jurisdiction under its internal domestic law depended, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts.\textsuperscript{43} According to Lord Millet, the jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law.\textsuperscript{44} 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.\textsuperscript{45} Lord Millet’s views here are in line with the principle of \textit{aut dedere aut judicare} (either prosecute or extradite) with regard to international crimes that attract universal jurisdiction.\textsuperscript{46}

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.\textsuperscript{47} And most diplomatic agents of sovereign states are considered public officials in their respective sovereign

\textsuperscript{40} As above.\textsuperscript{41} As above.\textsuperscript{42} As above.\textsuperscript{43} As above.\textsuperscript{44} As above.\textsuperscript{45} As above.\textsuperscript{46} See Legal Department of International Monetary Fund \textit{Suppressing the financing of terrorism: A handbook for legislative drafting} (2003) 11.\textsuperscript{47} See BA Garner (ed) \textit{Black’s law dictionary} (1999) 348. See also generally, for a detailed discussion of what in legal terms constitutes ‘corruption’ or ‘corrupt practices’, KK Mwenda ‘Can “corruption” and “good governance” be defined in legal terms?’ (2008) 2 \textit{Rutgers University Journal of Global Change and Governance}; and KK Mwenda \textit{Legal aspects of combating corruption: The case of Zambia} (2007).
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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 committed sexual assault while another of his colleagues was accused of domestic violence.

The article continues:

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 drunk-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.’

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 in a third state to which he or she has not been accredited. And 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 UN Convention on the Law of the Sea 1982. The said treaty provision,

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52 As above.

53 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, for example, the case of United states v Sissoko 995 F Supp 1469 (1997) 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 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 section 254d). The Republic of 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 United states 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 United states’ ‘acceptance’ of such designation entitled Sissoko to diplomatic immunity. The magistrate judge 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 had issued a diplomatic note setting forth 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 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 Gambia was aware of and had used the mechanism to certify a diplomat pursuant to The Circular Diplomatic Note.

54 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, secondly, 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.
codifying customary international law,\textsuperscript{55} postulates that innocent passage must not be prejudicial to the peace, good order and security of the coastal state.\textsuperscript{56} 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. But 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.\textsuperscript{57} The sending state, on the hand, can recall a diplomat to stand trial in its courts of law even though the diplomat enjoys diplomatic immunity in the receiving state.\textsuperscript{58} And the sending state can also waive the immunity of its diplomat to allow the receiving state to prosecute him or her.\textsuperscript{59} In essence, the study demonstrates the prospects of using public international law on diplomatic immunity to strengthen the international legal framework for fighting and preventing corruption.\textsuperscript{60}
2 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 or 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 do provide for some safeguards to prevent a corrupt diplomat from abusing his or her immunities and privileges.\(^{61}\) For example, although a diplomat may enjoy diplomatic immunities and privileges under both customary international law and the Vienna Convention on Diplomatic Relations 1961,\(^{62}\) 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.\(^{63}\) 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*.

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 the 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

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\(^{62}\) See below.

\(^{63}\) See below.

\(^{63}\) See art 41(1) of the Vienna Convention on Diplomatic Relations 1961.
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Diplomatic immunity. And 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’. 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. 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. As noted above, the concept of universal jurisdiction is well-enshrined in customary international law.

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 – postulates as follows:

1. For purposes of these Principles, serious crimes under international law include (i) piracy; (ii) slavery; (iii) war crimes; (iv) crimes against peace; (v) crimes against humanity; (vi) genocide; and (vii) 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 of Universal Jurisdiction 2001, 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

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64 Garner (n 47 above) 753.
65 See, generally, The Princeton Principles (n 57 above).
66 As above.
67 See 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 2010).
69 Princeton Principles (n 57 above) Principle 2.
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,\(^\text{70}\) and any statutes of limitations or other forms of prescription will not apply.\(^\text{71}\) 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:

(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) 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.\(^\text{72}\)

The Princeton Principles of Universal Jurisdiction 2001 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.\(^\text{73}\) Generally, there are three fundamental theories justifying diplomatic immunity in international law, and these are:\(^\text{74}\)

(a) personal representation;
(b) extra-territoriality; and,
(c) functional necessity.

Under the first theory, personal representation, the immunity attaching to diplomatic representatives was seen as an extension of sovereign immunity.\(^\text{75}\) In 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.\(^\text{76}\) That theory, according to Hiller, always rested on a fiction and is no longer respected.\(^\text{77}\) The third theory, functional necessity, is often the preferred rationale for granting privileges and immunities to diplomats.\(^\text{78}\) It

\(^{70}\) Princeton Principles (n 57 above) Principle 7.
\(^{71}\) Princeton Principles (n 57 above) Principle 6.
\(^{72}\) Princeton Principles (n 57 above) Principle 10.
\(^{73}\) Princeton Principles (n 57 above) Preamble.
\(^{74}\) Hillier (n 16 above) 315.
\(^{75}\) As above.
\(^{76}\) As above.
\(^{77}\) As above.
\(^{78}\) As above.
postulates that the privileges and immunities of a diplomat are necessary to enable the diplomat to perform his or her diplomatic functions.\textsuperscript{79} Indeed, ‘modern diplomats need to be able to move freely and be unhampered as they report to their governments’,\textsuperscript{80} 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’.\textsuperscript{81}

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.\textsuperscript{82} In the case of Giovanni Porru v FAO,\textsuperscript{83} the Rome Court of First Instance dismissed a claim 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’.\textsuperscript{84} 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 (\textit{uti imperii}) but not with regard to private law activities where the organisation acts on an equal footing with private individuals (\textit{uti privatus}).\textsuperscript{85}

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.\textsuperscript{86} This explains why concepts such as \textit{persona non grata}\textsuperscript{87} and diplomatic \textit{démarche}\textsuperscript{88} hardly ever apply to employees and staff of public international organisations. By contrast, in many instances, employees


\textsuperscript{80} Hillier (n 16 above) 315.

\textsuperscript{81} As above.

\textsuperscript{82} Hillier (n 16 above) 319.


\textsuperscript{84} n 83 above 5.

\textsuperscript{85} See Kodek (n 83 above) 5.

\textsuperscript{86} Hillier (n 16 above) 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 public international organisations as parties. Both the 1969 Vienna Convention and the 1986 Vienna Convention do not distinguish between the different designations of these instruments. Instead, their rules apply to all of those instruments as long as they meet certain common requirements.

\textsuperscript{87} See below for a fuller discussion on this concept.

\textsuperscript{88} As above.
and staff of public international organisations with no diplomatic immunity, unlike diplomatic agents of sovereign states, can be arrested, prosecuted and convicted in the local courts of the host state if they carry out criminal activities in that jurisdiction. The following case helps to illustrate this point:

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 October 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:

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:

89 See below on the concept of ‘diplomatic immunity’ of diplomatic agents of sovereign states.
90 See US v Kuznetsov 05-cr-916, US District Court, Southern District of New York (Manhattan).
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. 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. 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. The following 2008 report helps to demonstrate further the scope of the immunities and privileges enjoyed by employees and staff of the United Nations:

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 say:

The report highlights tainted contracts for air charter services in Congo, office supplies in Kenya, consulting jobs in Greece and payroll services at the UN’s New York headquarters. The payroll scheme involves two American employees who steered $2 million in contracts to private firms in which they

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93 As above.
94 See Hillier (n 16 above) 319.
95 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.
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.97

And highlighting the extent of the legal immunity enjoyed by the United Nations, the 2008 report adds as follows:

[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.98

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.99 However, the Third Restatement of the Foreign Relations Law of the United States seems to suggest that there is actually such a body of law, postulating that:

[s]uch privileges and immunities as are necessary for the fulfilment of the purposes of the organisation, including immunity from legal process and from financial controls, taxes and duties.100

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.101 And, in particular, with regard to Specialised Agencies of the UN, Shihata observes that the principle of immunities is codified in the 1947

97 As above.
98 As above.
99 Hillier (n 16 above) 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 493 526; and Restatement of the Foreign Relations Law of the United states (Revised) 467 Comment and Reporters’ Note 4 at 73 (Tentative Date 4) (1983).
100 As quoted in Hillier (n 16 above) 319.
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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. To the contrary, the English courts in the *International Tin Council* cases seemed to suggest that customary international law gave no such entitlement to public international organisations. The position is, thus, 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.

3 The concept of a diplomatic *démarche*

A diplomatic *démarche* is said to be an oral or written diplomatic statement, especially one containing a demand, offer, protest, threat or the like. As shown below, the contexts in which diplomatic *démarche* have been issued vary from one situation to another. For example, in Zambia, a recent media report provides as follows:

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

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102 See Shihata (n 101 above) 107.
103 [1990] 2 AC 418.
105 Garner (n 47 above) 442. In the *Rudolf Hess* case ((1992) 90 International Legal Materials 387 396), 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); (2005) 44 International Legal Materials 173.
106 See below.
opposition political parties and women's groups. Saudubray maintains he was misquoted on all occasions.\(^{107}\)

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:

> 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 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.\(^{108}\)

And, in 2007, the *Hindu*, a national newspaper of India, reported:

> 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 co-operation has been going on for some time.\(^{109}\)

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\(^{110}\) as it applies to erring diplomats involved in such criminal conduct as drug trafficking, money laundering or smuggling of prohibited pornographic material.

### 4 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

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110 The concept of ‘diplomatic immunity’ is discussed in the latter sections of this chapter. See also generally LS Frey & ML Frey *The history of diplomatic immunity* (1999); CJ Lewis *state and diplomatic immunity* (1990); and GV McClanahan *Diplomatic immunity: Principles, practices and problems* (1989).
from the substantive law. 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 pornography 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 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 November 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.

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. This view holds some water; otherwise some unscrupulous diplomats would be flashing recklessly and fraudulently 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

111 See Brownlie (n 15 above) 356.
113 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.
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. And the same applies in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.\textsuperscript{114} The immunities and privileges accorded to diplomatic agents and their family members underscored the ruling in the English case of \textit{R v Guildhall Magistrates Court, Ex Parte Jarrett-Thorpe}.\textsuperscript{115} 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.\textsuperscript{116} 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.\textsuperscript{117}

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.\textsuperscript{118} In the \textit{Guildhall Magistrates Court} case,\textsuperscript{119} 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, despite 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:

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

\textsuperscript{114} See the Vienna Convention on Diplomatic Relations 1961, art 40(1).
\textsuperscript{115} \textit{The Times} 5 October 1977 (QBD) in DJ Harris \textit{Cases and materials on international law} (1992) 328.
\textsuperscript{116} As above.
\textsuperscript{117} As above.
\textsuperscript{118} n 113 above.
\textsuperscript{119} n 115 above.
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.120

It is important to stress that, in this chapter, we are concerned mainly with issues pertaining to diplomatic immunity121 (and, by parity of reasoning, to consular immunity)122 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.123 In 1957, the International Law Commission (ILC) undertook to produce a draft convention on diplomatic relations.124 That draft, Hillier argues, formed the basis for the Vienna Convention on Diplomatic Relations 1961.125 The Convention is widely regarded as a codification of existing rules of customary international law on diplomatic relations,126 and many states today are party to this Convention.127 The Convention emphasises, inter alia, the functional necessity of diplomatic immunity.128

121 See Brownlie (n 15 above) 346-365.
122 Much of treaty law guiding consular relations is contained in the Vienna Convention on Consular Relations 1963. According to Hillier (n 16 above) 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.’
123 See Hillier (n 16 above) 316.
124 As above.
125 As above.
126 As above.
127 As above.
128 As above.
An additional point to note is that there is no right to diplomatic relations in international law.\textsuperscript{129} Such relations exit only by consent.\textsuperscript{130} And the receiving state can, without giving any reason, declare any member of a diplomatic mission \textit{persona non grata}.\textsuperscript{131} Where that happens, the sending state can either withdraw the diplomatic agent or terminate his or her appointment.\textsuperscript{132} 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.\textsuperscript{133} 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 must, however, be express.\textsuperscript{134}

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 'the 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:

A Latvian diplomat in Belarus has been charged with disseminating pornography, the Belarusian interior minister said Friday. Vladimir Naumov 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.\textsuperscript{135}

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

\textsuperscript{129} As above.  
\textsuperscript{130} As above. See also Vienna Convention on Diplomatic Relations 1961, art 2.  
\textsuperscript{131} See Vienna Convention on Diplomatic Relations 1961, art 9(1).  
\textsuperscript{132} As above.  
\textsuperscript{133} Vienna Convention on Diplomatic Relations 1961 Art 9(2). See also \textit{Portugal v Gonclaves} 82 ILR 115; \textit{Empson v Smith} [1965] 2 All ER 881; and \textit{Empson v Smith} 41 ILR. 407.  
\textsuperscript{134} See eg \textit{Public Prosecutor v Orhan Olnec} 87 ILR 212.  
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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:

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 the 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.136

Article 41(1) of the Vienna Convention on Diplomatic Relations 1961 also requires diplomats to refrain from interfering in the internal affairs of the

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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)\(^\text{137}\) and *pacta sunt servanda* (treaties must be complied with),\(^\text{138}\) to the receiving state for it to recognise the immunities and privileges of the diplomats. But, 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 (that is, 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.\(^\text{139}\) To illustrate, let us take some insightful examples from Bangladesh,\(^\text{140}\) Ethiopia,\(^\text{141}\) Sudan,\(^\text{142}\) Tanzania\(^\text{143}\) and Uganda,\(^\text{144}\) just to mention a few. In Bangladesh, a 2006 report provides as follows:

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 said state’, the minister said.

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\(^{137}\) See A Cassese *International law in a divided world* (1994) 152.

\(^{138}\) As above.

\(^{139}\) 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 1979 and judgment of 24 May 1980), International Court of Justice (ICJ) Reports (1979) 19, as well as ICJ Reports (1980) 30-43.


\(^{142}\) As above.


\(^{144}\) In Uganda (see *The New Vision* ‘Do donors have right to interfere in our affairs?’ 11 April 2009 [http://allafrica.com/stories/200904130515.html](http://allafrica.com/stories/200904130515.html) (accessed 10 January 2010), a Uganda 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.’
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 matters of agriculture, fertiliser, water and other related fields wherein the Danish government is assisting Bangladesh.145

In Ethiopia, similar complaints have been voiced out against interference from some donor states.146 As one report shows:

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 favoured 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 neighbour, 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 behaviour of Sudanese and Ethiopian leaders, who have shown increased willingness to expel or hinder both foreign diplomats and aid organisations.147

Likewise, in Tanzania, strong sentiments against donor interference in the affairs of the Island of Zanzibar have been echoed by some government officials.148

Zanzibar yesterday told the European Union (EU) and the United states (US) to stop interfering in Tanzania’s internal affairs. But the

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145 UNB (n 140 above).
146 See below.
147 Garoweonline.com (n 141 above).
148 See below.
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 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’.149

And in Uganda, Wafula Oguttu, the Forum for Democratic Change spokesperson, argues as follows:

It was, therefore, ridiculous for President Yoweri Museveni (of Uganda) while attending a meeting in Lusaka last week, to have appealed to the 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 … 150

All the states noted above have complained of donor interference at some point in their internal affairs.151 And the reaction of these states has differed from state to state.152 Some have simply issued a diplomatic demarche, whereas others have gone ahead to declare the erring diplomat persona non grata.153

149 Said & Mnyanyika (n 143 above).
150 The New Vision (n 144 above).
151 As above.
152 As above.
153 See 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 that ‘[t]he 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.’ (E Denza Diplomatic law: Commentary on the
Compromised diplomatic immunity of corrupt diplomats

Could it also be argued that in a nation-state that considers itself a Christian nation, any activity by a foreign diplomatic mission purporting to support the legalisation of homosexuality, as part of promoting human rights, amounts to interfering in the internal affairs of the host Christian nation? Or should we deem such activity as a permissible democratic dispensation in the host state even though the socio-cultural aspirations of that state, or rather its moral fabric, are in conflict with general homosexual norms? While some cultures are understandably more homophobic than others, the provision of, say, financial support by a foreign diplomatic mission to a local group of lobbyists agitating for the legalisation of homosexuality is likely to attract some protests within the host Christian state. But such protests or conflicts are simply a reflection of competing and clashing cultures, as opposed to what would be deemed as interfering in the internal affairs of the host state. It is not even clear that these activities, in the absence of evidence of, say, espionage or covert political destabilisation, would form reasonable grounds for declaring an erring diplomat persona non grata. By parity of reasoning, what would happen where a diplomatic mission renders support to a noble religious cause whose underlying religion competes with the dominant religion or culture of the host state? Would such efforts be deemed as interfering in the internal affairs of the host state even where, say, the religious cause is solely for bringing into the host nation state some Christian medical doctors to provide free medical services to the poor? Again, in the absence of evidence pointing to espionage or some form of political destabilisation, we are faced with a mere clash of competing cultures.

Explaining situations where diplomats have often been 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.154 Lauterpacht adds:

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

Vienna Convention on Diplomatic Relations (2008) 68) The UK government did demand the recall of a few persistent offenders. The demands brought about payment of the outstanding fines 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 art 9’ (art 9 of the Vienna Convention on Diplomatic Relations 1961). See also Review of the Vienna Convention on Diplomatic Relations, 1985 Cmd 9497 para 80. 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.
paragonably 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 practised 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 and judgment of 24 May 1980) provides some parallel reasoning that could be applied to situations where a diplomat is the offending party. In the *Tehran case*, 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. Although the International Court of Justice (ICJ) found that ‘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.’ 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. Codifying customary international law 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.

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155 H Lauterpacht *The development of international law by the International Court* (1996) 82.
156 See International Court of Justice (ICJ) Reports (1979) 19.
158 As above.
159 See Hillier (n 16 above) 316-17.
160 As above.
162 See Hillier (n 16 above) 316.
Article 29 codifies customary international law 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 be forgotten that article 41(1) of that 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 démarches 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, 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 as follows:

(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.

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163 As above. See also RMM Wallace International law (1997)124-125.
164 The said para 3 of art 31 follows below.
165 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.’
(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 of the sending state. 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. 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. And he should enjoy personal inviolability and should not be liable to any form of arrest or detention. 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. In short, the diplomatic bag should not contain any illegal substance like 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 state shall, as appropriate, either recall the person concerned or terminate his functions with the mission.

But, 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, or the principles of obligations erga omnes and rights erga omnes? According to Howard:

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 main political objectives of the present time, namely, the preservation of peace and the promotion of fundamental human rights, which

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171 Cassese (n 137 above) 152, observes that ‘[t]he 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 fulfill 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.

172 On the principles of obligations erga omnes and rights erga omnes, see Cassese (n 137 above) 158; and generally M Ragazzi The concept of international obligations erga omnes (1997).
Chapter 3

in turn reflect basic goods (or moral values), first and foremost life and human
dignity. 173

Making further reference to Ragazzi’s work on the principle of obligations
_erga omnes_, Howard continues:

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. 174

In declaring a diplomat _persona non grata_, do norms of diplomacy and/or
comity play any role? And 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? 175 Does state practice not
also play a role? 176 What about issues such as principles of good faith,
obligations _erga omnes_ and _rights erga omnes_ in international law that we
have already discussed above? 177

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173 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
174 As above.
175 See Cassese (n 137 above) 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).
176 Some states, such as the United Kingdom and the United states, have enacted
legislation on matters pertaining to diplomatic immunity with a view to bring their
municipal law in line with the Vienna Convention on Diplomatic Relations 1961. But,
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 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.
177 See above.
5 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 démarché 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. But 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 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 that the sending state can waive the immunity of its diplomat to allow the receiving state to prosecute that diplomat.
1 Introduction

This chapter examines the right of foreign diplomats accredited to a recipient state of donor funds to demand that the recipient state accounts for the misuse or abuse of donor funds received from the diplomat's state. The chapter demonstrates the prospects of using public international law on diplomatic and consular relations to strengthen the international legal framework for fighting and preventing corruption. An argument is made that, where a diplomat from a donor state queries a recipient state on its misuse or abuse of donor funds, that does not amount to 'interfering in the internal affairs' of the recipient state. The chapter argues further that such an inquiry cannot be the basis of declaring the diplomat \textit{persona non grata} by the recipient state. Closely related to that, the chapter posits that, in the absence of binding legal covenants empowering the donor state to supervise and oversee the administration of donor funds, the concept of a non-charitable purpose trust can be imported. Through paragraph (c) of

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2 That is, covenants that are contained, say, in a memorandum of understanding (MOU), trust fund agreement or such other legal document pertaining to the administration of donor funds.
article 38(1) of the Statute of the International Court of Justice, regarding ‘general principles of law recognised by civilised nations’, the concept of a non-charitable purpose trust, as a part of the English common law, can provide a useful source of law.

The first part of this chapter is the introductory section. It identifies the main issues and, also, outlines the underlying arguments, including delineating the scope of the study. The second part highlights different types of donors that can be found in the international community, identifying also which of these donors are the subjects of the study. The third part of the chapter sets out the context of the discourse, highlighting ideological arguments against and in favour of donor funds. This discussion provides a context for a critical examination of intricate aspects of the law. The fourth part then examines the issue of whether a diplomat from a donor state can compromise his diplomatic immunity by querying the recipient state on the misuse or abuse of donor funds. The fifth part, preceding the conclusion, looks at the legal bases for a donor state to ask the recipient state where it has taken the donor funds. Also, the right of the donor state to recover misused or abused donor funds is discussed.

The term ‘donor funds’ here refers generally to moneys that are given to a recipient state to assist it in carrying out various socio-economic and poverty reduction programmes. These funds must be distinguished from international loans or credits accumulated by many countries. In principle, donor funds are not repayable and can come directly from a donor state to a recipient state, or they can be administered through an intermediary or trustee such as an international development agency, a multilateral

3 Donor funds can be in the form of a trust fund set up by a single donor or by multiple donors. As a trust funds, these donor funds can either be passed on to the recipient state by a trustee, such as a multilateral development bank, for the implementation of a project or programme. The recipient state then carries out the implementation or execution of the project (recipient-execution). Closely related to the foregoing, some trust fund arrangements permit the trustee to carry out or implement, in agreement with and on behalf of the recipient state, some projects or programmes for the benefit of the recipient state (trustee-execution). Other trust fund arrangements direct the trustee to split and share responsibilities for the implementation of the project or programme with the recipient state (split-execution). Here, as in the case of recipient-executed trust funds and trustee-executed trust funds, the ultimate beneficiary remains the recipient state. But where donor funds are not being administered as trust funds, they often pass directly from the donor state to the recipient state, with implementation arrangements varying from one donor fund to another, depending on the intentions of the parties.

4 Such as the Norwegian Agency for Development Co-operation (NORAD). NORAD is a directorate of the Norwegian Ministry of Foreign Affairs. Its main aims are (a) to be the centre of expertise for evaluation, quality assurance and dissemination of the results of Norwegian development co-operation, jointly with partners in Norway, developing countries and the international community; (b) to ensure that the goals of Norway’s development policy are achieved by providing advice and support to Norway’s Ministry of Foreign Affairs and Norwegian foreign service missions; and (c) to administer its grant schemes so that development assistance provided through Norwegian and international partners contributes effectively to poverty reduction. For further details, see NORAD ‘About NORAD’ http://www.norad.no/en/About+Norad/125317.cms?show=all (accessed 7 January 2010). Other international development agencies with similar goals include the United States Agency for International Development
development bank,\textsuperscript{5} an international financial institution\textsuperscript{6} or a regional integration body.\textsuperscript{7} In this chapter, however, we focus primarily on donor funds that go directly from a donor state to a recipient state as well as on those funds that are mediated through an international development agency owned or controlled by the donor state. Such international development agencies include the Norwegian Agency for Development Cooperation (NORAD); the Danish International Development Agency (DANIDA); the United States Agency for International Development (USAID); and the Swedish International Development Co-operation Agency (SIDA).\textsuperscript{8} Some of these development agencies have now decentralised some of their operations to country offices or to the embassy of the originating state in the recipient state.\textsuperscript{9}

Today, it is quite fashionable to see donor states and recipient states, respectively, referring to themselves as ‘partners’ or ‘co-operating partners’, say, in the memorandum of understanding (MOU) or other legal documentation evidencing the intention of the parties on matters of foreign aid.\textsuperscript{10} Such approaches in the use of nomenclature do not entail that there has been a significant or appreciable change in the bargaining strength of

\textsuperscript{5} Such as the World Bank; the European Bank for Reconstruction and Development (EBRD); and the African Development Bank.

\textsuperscript{6} Such as the International Finance Corporation (IFC).

\textsuperscript{7} Such as the European Union (EU).

\textsuperscript{8} For the full names of these acronyms, see above.

\textsuperscript{9} See C Battle ‘PSD donor co-ordination at the country level: A preliminary review’ 1, DCED 10 April 2008 http://www.enterprise-development.org/download.aspx?id=549 (accessed 8 January 2010). See also DANIDA Health Ghana ‘The DANIDA Health Sector Support Office (HSSO)’ http://www.danida-health-ghana.org/ (accessed 7 January 2010), where it is provided that in Ghana, ‘[a]t the country level, the DANIDA Health Sector Support Office reports to the Danish Embassy … The Health Sector Support Office is located outside the Ministry of Health (of Ghana) at Mobil House, Liberia Road, Accra, approximately five minutes’ drive from the Ministry. The DANIDA Health Office no longer shares office premises with DfID as DfID has established a Country Office for its programmes.’

\textsuperscript{10} This view was expressed by a number of sources who commented on the earlier drafts of this chapter, but chose, nonetheless, to remain anonymous. Also, the following media report in Zambia helps to shed light on the use of the terminology ‘co-operating partners’: M Nkolomba ‘Donor still funding government – Shikapwasha’ Zambia Daily Mail http://www.daily-mail.co.zm/media/news/viewnews.cgi?category=3&id=1243317468 (accessed 12 January 2010): ‘Government says it has not received official notification about any of its co-operating partners suspending aid to the Ministry of Health as a result of alleged corruption in the ministry. And government says it will co-operate with donors in the fight against corruption despite recent revelations of corruption in the Ministry of Health where some civil servants allegedly stole about K10 billion.’ The use of the term ‘co-operating partners’ is also evident in the following article: Times Reporter ‘State to pay back donor funds’ Times of Zambia (undated article) http://www.times.co.zm/news/viewnews.cgi?category=4&id=1276932460, (accessed 21 June 2010). In Times Reporter ‘“Aid freeze not new”... As Musokotwane challenges opposition, civil society’ Times of Zambia (undated article) http://www.times.co.zm/news/viewnews.cgi?category=2&id=1277098726 (accessed 21 June 2010), the following is reported: ‘Finance and National Planning Minister, Situmbeko Musokotwane, has challenged opposition leaders and civil society to stop misguiding
the weaker party. The bottom line is that there is still a donor and a recipient. Toying around with nomenclature alone simply clouds the debate with superficial arguments. It does not help to argue that in today’s world of commerce the notion of a donor and recipient has been replaced by that of co-operating partners. Whereas ‘form’ alone could be different, with some minor adjustments to power-relations, the underlying ‘substance’ is still the same – that of a donor and a recipient!

In this chapter, we offer a public international law perspective of state accountability for donor funds in developing countries. The analysis is of wider application to many developing countries, including Bangladesh, Ethiopia, Sudan, Tanzania, Uganda, and Zambia, Zambians that aid freeze to the health and road sectors was taking place for the first time in the country. Dr Musokotwane yesterday said actions by co-operating partners to freeze aid had occurred during the first, second and third Republics and were not limited to Zambia but several other countries. The minister said the government had engaged the donor community positively on the need to restore the funding and help reactivate projects that had stalled.


See below for examples.


As above.


In Uganda (see The New Vision ‘Do donors have right to interfere in our affairs?’ The New Vision 11 April 2009 http://allafrica.com/stories/200904130515.html (accessed 10 January 2010), a Uganda government spokesperson, Owono 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.’
as seen in chapter 3, just to mention a few. In chapter 3, we examined related developments in these countries regarding the host nations’ protest against alleged donor interference in their internal affairs. We will not repeat that discussion here since it has already been covered. We will, however, proceed to examine the issue of whether or not donor states have a right in international law to ensure that donor funds are not misappropriated or misused for any agenda that departs from the purposes for which the funds were donated. This is particularly important in a donor funds-recipient state such as Zambia, where recent revelations by the state-run media, the Zambia Daily Mail, show that:

When Taskforce on Corruption prosecutor Mutembo Nchito sought to meet the Auditor-General, Anna Orlia Chifungula, recently, at former Minister of Local Government Silvia Masebo’s residence, the mission was simple; subvert the course of this ongoing forensic audit on the Taskforce. Mutembo attempted to exploit the ‘blood relationship’ that Chifungula enjoys with the late President. He reflected on their shared vision of fighting abuse of public funds and on their need to strengthen the legacy of ‘our late brother’. The audit is exposing some ugly matters that Mutembo and his embattled camp would wish remained buried. He underestimated Chifungula’s long-standing commitment to the public service and the nation. Nchito, who commanded, until recently, wide influence on public officials and sometimes was instrumental in the appointment of key persons to institutions, has seen his circle of influence shrink so much and now only consigned to the editorial columns of The Post. George Kunda (the Vice-President and Minister of Justice) has been instrumental in arresting Mutembo’s pervasive influence in the judiciary and key law enforcement agencies. And his sojourn to Masebo’s house was because George Kunda had created fresh troubles for them. Kunda has helped abolish the task force and has even commissioned an audit. It is for this reason that the camp has directed all its arsenals to their most urgent troubling target – George Kunda.18

It is, however, not the aim of this chapter to examine the right of a donor state in international law to suspend or terminate the disbursement of donor funds to a recipient state on grounds such as the recipient state has been misusing or abusing the funds.19 That is a different issue altogether. The right of the donor state to suspend or terminate the provision of donor funds to the recipient state is often a prerogative of the donor state itself. And such a right may sometimes be reflected in the MOU or other legal documentation governing the administration of the donor funds. By contrast, what we will concentrate on, as we examine the right of the donor

19 The remedy of suspension and that of termination are more effective and useful where the disbursement will be done in tranches. By contrast, where the disbursement will be done through a single tranche release and that single tranche release has already occurred, then there is nothing to suspend or terminate in terms of disbursements (apart from the possibility of suspending or terminating legal relations pertaining to the project or program being supported by the donor funds).
state to inquire into how the donor funds have been utilised by the recipient state, is a possible corrective or remedial measure for the donor state where the MOU does not provide such corrective or remedial measures as restitution.\(^\text{20}\) Likewise, where the arrangement for donor funds was done through a mere exchange of diplomatic letters between the donor state and the recipient state, it is unlikely that the said letters would contain detailed and meaningful covenants on rights and obligations of the parties.

\textit{Zambia Daily Mail}, reporting on the abuse of donor funds to fight corruption in Zambia, observes that:

In October 2005, Chona (the then head of the Task Force) signed a memorandum of understanding with the governments of Denmark, Ireland, Netherlands, Sweden and the United Kingdom when in normal legal environment such a treaty should have been signed by the Attorney-General (who was Kunda)! The MOU created a pool fund for the ‘fight against corruption’. Chona even commenced the case against Chiluba in the London High Court in the name of the Attorney-General. Chona hired a law firm to sue on behalf of the Attorney-General, Howrey, Simon, Arnold and White who he paid US $1.6 million. Chona later fired this firm and hired another law firm, DLA Piper, who hired William Blair (brother to British Prime Minister, Tony Blair) as its barrister. Chona also paid the US $5 million required as deposit on the case from the Anti Corruption Fund (ACF) held in the UK. He further authorised the payment of another US $5 million … This had been a cash cow for Mark Chona (US $10 000.00 monthly allowance), Mutembo Nchito (US $20 000.00 a month) and Max Nkole. Following the acquittal of former President Frederick Chiluba, Nkole and Nchito, without bothering to seek either consent or authority from the DPP (Director of Public Prosecutions) as required by the law, secretly appealed against the case. Nchito and Mmembe also reverted to the ‘diplomatic influence’ of Mark Chona to raise donor funds for the campaign to force the state to support the appeal and raise a lobby from civil society groupings …The task force is held as a prime symbol of Mwanawasa’s legacy. Yet the rot being unravelled by the audit shows abuse, theft and wanton fraud during its existence. Donor funds were not properly utilised and this exposure will sink the bare ‘achievements’ the task force made. The country will learn that Chona, Nkole and Nchito used the task force as an oppressive political tool, a cash cow and an intelligence unit for their foreign backers.\(^\text{21}\)

We now turn to examine the different types of donors in the international community, and then provide a delineation of the type of donors that are addressed in this chapter.

\(^{20}\) See, generally, P Birks \textit{Unjust enrichment} (2005); R Goff & G Jones \textit{The law of restitution} (1978); and G McMeel \textit{Casebook on restitution} (1996).

\(^{21}\) See A special correspondent (n 18 above).
2 Different types of donors

Mindful that there are different types of donors in the international community, this chapter concentrates on state donors only. And these donors could be multilateral or bilateral state donors. The chapter does not deal with other such donors (and recipients) as non-governmental organisations (NGOs), corporate foundations, international financial institutions, multilateral development banks and regional integration bodies. We have already provided examples of such institutions. And the reason why we are focusing only on donor states is that a number of the other donors, unlike donor states, do not enjoy diplomatic status under public international law.

Also, in this chapter, a central theme pursued relates to whether a diplomat from a donor state can compromise his or her diplomatic status in the recipient state by raising politically sensitive issues on how or why the recipient state should be suspected of having misapplied or misused the donor funds. The underlying issue is whether the diplomat, accredited to the recipient state, can raise issues of corruption and good governance in the recipient state.22 A closely related issue is whether, under international law, the donor state, through its diplomatic staff accredited to the recipient state, has a right to inquire if, or to ensure that, the donor funds are utilised properly. After all, the donor state could argue, these funds were raised largely from its tax payers' money and that, therefore, the donor state has a stakeholder interest to ensure that the funds are utilised properly. Does this then clothe the donor state with locus standi to inquire further into the recipient state’s record of anti-corruption and good governance? We shall examine these issues in more detail in the sections that follow below.

3 Context of the discourse

Quite often, developing countries are the recipients of donor funds from developed nations.23 These funds, often agreed upon under the auspices of bilateral relations between two states, are usually earmarked for specific development projects pertaining to the economic, health, education and social sectors of the recipient state.24 There have also been instances when donor funds have been disbursed to alleviate distress caused by health

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22 For a detailed discussion of the terms ‘corruption’ and ‘good governance’, see, generally, KK Mwenda ‘Can “corruption” and “good governance” be defined in legal terms?’ (2008) 2 Rutgers University Journal of Global Change and Governance.
23 See, generally, D Moyo Dead aid: Why aid is not working and how there is a better way for Africa (2009).
24 By contrast, developed nations tend to seek such support from the international community for purposes far removed from direct poverty alleviation or poverty reduction, but more to do with such natural disasters as earthquakes or tsunamis.
pandemics or natural disasters such as earthquakes and tsunamis in a developing country. For example, a recent 2009 report provides as follows:

Nearly 500 million USD provided by the foreign donors for tsunami reconstruction has gone missing, a corruption watchdog in Sri Lanka said. Transparency International Sri Lanka (TISL) has accused the authorities of failing to explain to what happened to over 471 million USD out of 1 075 million USD provided by the donors. In a statement to mark the fifth anniversary of the devastating Asian tsunami, the TISL said the donors have also failed to keep their word. More than 2 126 million USD has been pledged by the donors but only 1 075 million USD has been disbursed, according to the watchdog.25

Sometimes, donor funds are earmarked for budget support or to strengthen poverty reduction programmes that are being supported by some multilateral development bank or international financial institution.26 Donor funds, therefore, are a constituent element of the broader framework of foreign aid. But then, there has been so much hullaballoo on the issue of foreign aid to Africa, whereby some skeptics have strongly challenged the relevance and usefulness of foreign aid to African countries.27 It is, however, not the purpose of this chapter to revive such debates or to indulge in the polemics related to the same. Suffice it to say, as Joireman puts it succinctly:

Zambian economist Dambisa Moyo has attracted a lot of publicity for her proposal, in Dead Aid, that foreign assistance to Africa should be cut off completely. Instead of taking foreign aid, she says, governments should seek money through the international financial markets, pursue ties with China, press for freer trade in agricultural commodities and develop microfinance institutions. Aid is harmful to Africa, Moyo claims; it not only fails to alleviate poverty, it causes poverty: ‘Millions in Africa are poorer today because of aid; misery and poverty have not ended but have increased. Aid has been, and continues to be, an unmitigated political, economic and humanitarian disaster for most parts of the developing world.’ Because

26 To illustrate, a recent media report, quoting one of Zambia’s former first ladies, Mrs Maureen Mwanawasa, points out (see C Silwamba ‘Government should redesign economic policies – Maureen’ The Post 8 January 2010 http://www.postzambia.com/post-read_article.php?articleId=4014 (accessed 8 January 2010): ‘In Africa, for example, Botswana is one country which is self-sufficient without donor funding. It’s smaller than Zambia; its population is smaller than Zambia’s. The question we should be asking ourselves is that if Botswana can do it, why can’t we do it?’ She said Zambia should not be donor-dependant to grow its economy. ‘The donors who are giving us money, it’s coming from tax payers. It means that even Zambia can create institutions which can grow money … You cannot always plan waiting that the donors are going to respond and give you budget support. There are many factors that have to be involved,’ Maureen said. She said the economy must grow and create opportunities in other key sectors.
27 See, generally, Moyo (n 23 above).
regular people are not benefiting from aid, she says, they will not suffer from its cessation.\textsuperscript{28}

Joireman continues:

The contention that foreign aid does not alleviate poverty is not terribly controversial. Scholars and policy makers have been discussing the problem for well over a decade. But Moyo takes the argument a step further by suggesting that aid causes poverty. This assertion sets a high threshold for proof - which this book, targeted at a popular audience, does not provide. Moyo’s argument pertains only to what she calls systemic aid: government aid and development banks’ direct transfers to governments. This narrowed definition of foreign aid allows her to discount assistance that goes from governments to nongovernmental organisations (NGOs).\textsuperscript{29}

Closely related to Joireman’s view, other voices have added their protest against the notion that foreign aid to Africa should be discontinued.\textsuperscript{30} Barder, for example, observes that, disappointingly, while Moyo’s book, \textit{Dead aid}, is about some important questions, it makes no useful contribution to the debate.\textsuperscript{31} According to Barder, Moyo’s arguments and her use of evidence are at best lazy, and at worst mendacious.\textsuperscript{32} Even more scathing is the critique from Bunting:

The danger is that this book will get more attention than it deserves. It has become fashionable to attack aid to Africa; an overdose of celebrity lobbying and compassion fatigue have prompted harsh critiques of what exactly aid has achieved in the past 50 years. Not all of the criticism has been unjustified – $300bn of aid has gone to Africa since 1970, yet average incomes across much
of the continent have stagnated or fallen. *Dead aid* offers a disastrous history of how aid was used as a tool of the Cold War.33

Bunting continues, arguing that this kind of analysis (much of which is now only of historical relevance) provides ammunition for those who are skeptical of international responsibilities and always keen to keep charity at home.34 According to Bunting, Moyo’s book is ‘an erratic, breathless sweep through aid history and current policy options for Africa, sprinkled with the odd statistic’.35 Bunting posits that there are so many generalisations in Moyo’s book that skid over decades of history, such frequent pre-emptory glib conclusions, that it is likely to leave you dizzy with silent protest.36 Pitted against these criticisms, the wholesome condemnation of foreign aid to Africa seems to be somewhat misconceived. Taken in its wider context, foreign aid has included programmes of capacity-building in Africa, as well as the provision of academic scholarships and fellowships for graduate training abroad, including the provision of funds to support and sustain crippled health sectors in many developing countries. For example, a recent report on Zambia shows that:

Foreign donors supporting health programmes in Zambia suspended aid after a whistle-blower accused Zambian officials of embezzling health care dollars, PlusNews reports. About 55% of Zambia’s health budget comes from foreign donors, notably the Netherlands and Sweden. Netherlands officials said they would suspend an annual $18 million in aid until Zambia’s Anti-Corruption Commission releases the Auditor-General’s findings. Money from the Netherlands supports rural healthcare through programs aimed at malaria, TB, HIV, and medical staff training. Sweden had earmarked $12 million for Zambian health projects but will put that allotment on hold until the scandal is resolved … Former health minister Nkandu Luo said almost all money backing HIV programmes comes from foreign donors. About half of all Zambians taking anti-retrovirals get the drugs through government clinics and hospitals that rely on foreign support. According to PlusNews, Zambian President Rupiah Banda has not continued the staunch anticorruption campaign of his predecessor, Levy Mwanawasa. That campaign’s success led Western donors to cut Zambia’s $7.2 billion debt to $500 million.37

It is, therefore, our contention that a missing link in the development puzzle that confronts Africa today lies not in stopping foreign aid to Africa, but rather in improving the soundness of the governance systems as well as in strengthening the robustness of anti-corruption initiatives. And for such efforts to succeed and bolster, not only should a country’s macro-economic

34 As above.
35 As above.
36 As above.
Right of diplomats to ask recipient states of donor funds to account for the donor funds

conditions be right, but there also has to be the necessary political will from the state as well as the effectiveness of government leadership. If much of Africa can get these institutional and structural fundamentals right, that could help the continent to monitor and supervise effectively the administration of foreign aid, while not abandoning altogether the underlying quest for economic growth and independence. Against this background, it is not entirely correct to assume that foreign aid will necessarily bring about wrong incentives that could wilt the political will of the state to stimulate a country’s economic growth. With sound and robust governance systems in place, the reverse is also possible. Foreign aid, especially where capital markets and financial markets are weak, underdeveloped or almost non-existent, can stimulate sustainable economic growth.

We now turn to examine the issue of whether a diplomat from a donor state can rely on diplomatic immunity while querying the recipient state on matters relating to the latter state’s abuse or misuse of foreign aid and, in particular, donor funds.

4 The issue of diplomatic immunity versus that of persona non grata

The internationalisation of capital, or globalisation, as it is commonly known, has dealt a heavy blow to the Westphalian system. The concept of Westphalian sovereignty, holding sacred the sanctity of nation-state sovereignty, based on two fundamental principles, territoriality and the

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

39 A Giddens The Consequences of Modernity (1990) 64 describes globalisation as ‘the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa’. M Castells ‘Information technology and global capitalism’ in W Hutton & A Giddens (eds) On the edge: Living with global capitalism (2001) 52 observes that globalisation is a new brand of capitalism and that it has three fundamental features: ‘Productivity and competitiveness are, by and large, a function of knowledge generation and information processing; firms and territories are organised in networks of production, management and distribution; the core economic activities are global – that is, they have the capacity to work as a unit in real time, or chosen time, on a planetary scale.’


41 According to Gleason (see G Gleason ‘Westphalian system’ http://www.unm.edu/~gleasong/a/notes/topic11.html (accessed 12 January 2010): ‘Modern Europe emerged from the convolutions of the 30 years war in 1648 with the signing of the “Peace of Westphalia”. The principles of international order that emerged in Europe after the conclusion of this peace treaty have become the foundation of the modern international system. The modern international system is based upon the principles of state sovereignty and international law ... The basic principles of international relations
exclusion of external actors from domestic authority structures, has suffered an affront in the wake of globalisation. Many puzzle, yet some wonder, whilst others protest, whenever some international donors, be they multilateral or bilateral donors, question the record of good governance and anti-corruption efforts in a developing nation that is a recipient of donor funds. Are these donors justified in making such intrusive and inquisitive inquiries in a country which is not even theirs? Where does the line start and end? Indeed, do donors have the right to ask the recipient state of donor funds, for example, on how that state has spent those donor funds? In return, can the recipient state invoke the doctrine of state sovereignty in international law for the donors to keep away from meddling in its internal affairs? These are some of the troubling issues in international relations today. Also, it would be interesting to find out if there is any merit or legal basis for a recipient state to argue that, as a way of influencing regime change in the recipient state whose government the donors do not like, some donors are in the habit of withholding donor funds whenever such a state is about to hold its presidential or general elections so as cripple that state’s economy and, thus, make the government unpopular. In Zambia, for example, a recent media shows the following:

Works and Supply Minister, Mike Mulongoti, accused donors of withholding funds whenever developing countries like Zambia were about to hold elections to push for regime change ... During the live wire programme on Radio Mazabuka, Mulongoti accused the donors of seeking regime change in developing countries by withholding aid each time a country neared election time.

Closely related to the foregoing, Zambia’s Republican President, Rupiah Banda, is said to have expressed similar sentiments regarding the donor community in Zambia. As one report shows:

President Rupiah Banda yesterday said donor countries that have taken to interfering with the internal political affairs of the country should pack their bags and leave because Zambia is a sovereign state. Mr Banda said following

in the Westphalian system, following Grotius, are generally regarded to be: sovereignty of the state; sovereign equality of states; the right of non-interference in domestic affairs of the sovereign state; territorial integrity of the state; the obligation to abide by international agreements; the principle of the peaceful settlement of disputes; and the obligation to engage in international co-operation consistent with national interests.'

42 See, eg, Leys (n 40 above) 1 214; and, generally, Stiglitz (n 40 above).


44 As above.


the announcement that the government would not appeal against the August 13, 2010, verdict by Judge Evans Hamaundu on the registration of the London judgment, several diplomats had queried him and were using shared language and views with opposition leaders. ‘They are not straight people. And also they know we are having an election next year and they are peeping their noses into our business to try and influence the election,’ Mr Banda said. He said the Zambian government had paid £8 million pounds and another US $2 million to two law firms in the United Kingdom to facilitate the prosecution of former president Frederick Chiluba while MNB Legal Partners, lawyers and other local firms were also paid huge sums of money over the case. He said the government made several attempts to write the British government asking them to extradite former Zambian Ambassador to the United States of America, Attan Shansonga, but they could not even acknowledge receipt of the letters and now wanted to cast the government in bad light. Mr Shansonga was among the key witnesses but fled to the United Kingdom at the height of investigations after promising to collect more documents that could have implicated Dr Chiluba and the seven co-accused persons. President Banda said Zambia was a sovereign state and should not have its internal affairs influenced by foreign donors. ‘They must pack and go, they should stop this behaviour. If somebody is fed up with us, they should pack their bags and go,’ he said.47

Further, President Banda has argued strongly that Zambians who were cowed into towing the foreign donor interests should be ashamed of themselves.48 He wondered why critics were fond of accusing the government each time court verdicts went in the government’s favour while the government accepted all verdicts passed in favour of the critics.49

President Banda said the government was serious about the fight against corruption and that several suspects were undergoing trial, which was a sign of commitment. Mr Banda said while foreign donors were condemning the government over alleged failure to recover the $46 million from Dr Chiluba and seven others, Britain declined to co-operate. Meanwhile, chief government spokesperson Ronnie Shikapwasha earlier said the decision by the British government to decline pleas to release Mr Shansonga was responsible for the weakened case against Dr Chiluba. Lieutenant General Shikapwasha said in an interview that Zambia had made several efforts to have Mr Shansonga extradited to stand trial in Zambia and give evidence on the allegations but the British government refused. Gen Shikapwasha said people championing demonstrations were misleading the people of Zambia into believing that the Lusaka High Court did not deliver a good judgment and yet it had been dismissed by the Court of Appeal in the UK.50

In some instances, donors have been known to hesitate to disburse donor funds when elections are nearing in the recipient state, fearing, among other things, that the government of that state might misuse the donor

47 As above.
48 As above.
49 As above.
50 As above.
funds to finance its election campaigns.\(^5^1\) Notwithstanding the foregoing, it is doubtful that a recipient state has a right of entitlement in public international law to receive donor funds as and when it desires. Unlike the situation of contractual consideration under a contract at common law between a promissee and promissor,\(^5^2\) the provision of donor funds is often not premised on contractual obligations.\(^5^3\) At common law, consideration is expected to flow from the promissee to the promissor, in a sense that it should be given by the promissee as an equivalent for the promise made by the promissor.\(^5^4\) This feature is almost always absent in a ‘donor state and recipient state’ relationship. Besides, seldom do recipient states suffer any detrimental loss resulting from a reliance on the promises made by the donors.\(^5^5\) These are some of the important law and policy issues that keep confronting international relations.

Be that as it may, one is left to wonder how valid and sustainable the principle of sovereign equality is in international law.\(^5^6\) Often violated by state practice of some military and economic powers when engaging weaker states,\(^5^7\) this principle is actually enshrined in paragraph 1 of article 2 of the Charter of the United Nations 1945. The said paragraph 1 of article 2 reads as follows: ‘The Organisation is based on the principle of the sovereign equality of all its members.’\(^5^8\)

In relation to actions of diplomats from donor states, there are those who, championing ideological interests of recipient states, are only too eager and too quick to argue that, under the doctrine of diplomatic immunity (and not necessarily that of sovereign immunity), article 27(1) of

\(^{51}\) As above.
\(^{52}\) See Combe v Combe (1951) 2 KB 215, (1951) 1 All ER 767 CA; Currie v Misa (1875) LR 10 Exch 153 162, Ex Ch; Bailey v Croft (1812) 4 Taunt 611; Wigan v English and Scottish Life Assurance Association (1909) 1 Ch 291; Milmy v Lord (1862) 4 De GF & J 264, CA in Ch; and Thomas v Thomas (1842) 2 QB 851.
\(^{53}\) As above (all cases).
\(^{54}\) Per Patteson J in Thomas v Thomas (1842) 2 QB 851.
\(^{55}\) Bailey v Croft (1812) 4 Taunt 611.
\(^{56}\) On this principle, see A Cassese International law in a divided world (1994) 158. Also, while most principles of international law impose certain obligations erga omnes on states, a number of them also grant rights erga omnes. Eg, while a state can claim to respect principles relating to the use of force by any state, when such a principle is abused, that state can insist on cessation of the violation by the other state or, if need be, claim reparation from the offending state. In short, states do not only enjoy rights, but they also have corresponding obligations.
\(^{58}\) Case Concerning Military and Paramilitary Activities (n 57 above) 14.
the Vienna Convention on Diplomatic Relations 1961 is helpful since it is restrictive in the way it permits such diplomats to enjoy diplomatic relations with a host state, pointing to ‘free communication for all official purposes’ only.59 As evidenced from some views expressed by a number of small political parties sympathetic to interests of the ruling party in Zambia, for example, the Multiparty Movement for Democracy (MMD):

The Forum for political parties intends to hold a peaceful demonstration next Monday at the British High Commission in Lusaka. The demonstration is aimed at protesting against alleged interference by High Commissioner, Tom Carter, in Zambia’s internal affairs. The parties that form the forum are the National Democratic Party, Zambia Direct Democracy, PUD and ZADECO. Forum Chairperson, Edwin Sakala, says the parties have already written to the police, seeking a permit to hold the demonstration. Mr Sakala told ZNBC News that the parties are not happy with Mr Carter’s remarks over the acquittal of former President Frederick Chiluba. He said the diplomatic community in Zambia must respect the country’s judiciary.60

In this chapter, we are concerned mainly with issues pertaining to diplomatic immunity61 (and, by parity of reasoning, to consular immunity),62 as opposed to immunity and privileges of foreign states and sovereigns. As noted in chapter 3, until the late 1950s, the main source of law on diplomatic and consular relations was largely customary international law.63 And we examined in that chapter pertinent aspects of public international law on diplomatic immunity. Here, suffice it to say, some pro-government protagonists in countries such as Zambia and others mentioned above have come out strongly, swinging heavily against those donors that are in the habit of raising ‘politically sensitive’ issues regarding anti-corruption and governance efforts in the country.64 These pro-government protagonists argue, for example, that article 41(1) of the Vienna Convention on Diplomatic Relations 1961 postulates that

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59 See eg Mail & Guardian (n 43 above).
62 Much of treaty law guiding consular relations is contained in the Vienna Convention on Consular Relations 1963. According to T Hillier Sourcebook on public international law (1998) 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.’
63 See Hillier (n 62 above) 316.
64 See eg Zambian Watchdog (n 60 above).
‘[w]ithout prejudice to their privileges and immunities, it is the duty of all persons (ie diplomats) enjoying such privileges and immunities to respect the laws and regulations of the receiving state. They also have a duty not to interfere in the internal affairs of that state.’ But, what is the meaning of the sentence ‘not to interfere in the internal affairs of that state’? Indeed, what are ‘internal affairs’ of a host state?

As noted in chapter 3, although the Vienna Convention on Diplomatic Relations 1961 is silent on this issue, one could reasonably impute that actions such 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. In Zambia, for example, the government has issued a stern warning to some foreign diplomats accredited to that country for holding private meetings with the opposition:

Parliamentary Chief Whip Vernon Mwaanga has warned that some diplomatic missions should not be surprised if diplomatic sanctions are imposed on them for meeting Patriotic Front (PF) leader Michael Sata without government’s knowledge. Mr Mwaanga said this in an interview in reaction to the recent meetings between Mr Sata and some diplomats. ‘If the diplomats decide to cross what is called ‘diplomatic correctness’, they should not be surprised should there be diplomatic sanctions against them because the normal diplomatic channel is that they should make their requests and contacts with various groups through the Ministry of Foreign Affairs,’ Mr Mwaanga said.

According to a recent media report, Mr Mwaanga said government is concerned about the approach taken by some diplomatic missions, especially the non-resident ones. Mr Mwaanga, who is a former diplomat, said government had noticed that some diplomats had been holding meetings in cafes and hotel lobbies. He pointed out:

Meetings between diplomats, institutions and citizens are supposed to be channelled through the Ministry of Foreign Affairs. I am sure that the diplomats concerned who are meeting opposition leaders will have to bear in mind how they view their relationship with this government. There can only be one government at a time and for now the MMD government is in the driving seat …

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

They are treading on very delicate and dangerous ground. I hope the Ministry of Foreign Affairs will remind them of the correct thing to do … Let them do it through the front door and not the back door because there is absolutely nothing to hide …

Zambia Daily Mail reports that, of late, Mr Michael Sata, a leader of the opposition, has been holding meetings with some foreign diplomats accredited to Zambia where he has been disparaging President Banda and his administration. Mr Sata is reported to have recently held a meeting with Canadian High Commissioner to Tanzania and Zambia, Mr Robert Orr, where he claimed he can run Zambia better than President Banda. Earlier, Mr Sata is said to have held a meeting with the Belgian ambassador to Tanzania, Zambia, Malawi and Mauritius, Paul Jansen, where he alleged that there would be free stealing in the Zambian

70 As above.
71 See Munthali (n 66 above). However, a contrasting view is championed by a leading Zambian lawyer and former Cabinet Minister, Mr Roger Chongwe, whose views are reported as follows (see G Chellah ‘Chongwe backs Sata’s meeting with donors’ The Post 14 October 2010 http://postzambia.com/post-read_article.php?articleId=14630 (accessed 14 October 2010): ‘Commenting on Parliamentary Chief Whip Vernon Mwaanga’s warning that some diplomatic missions should not be surprised if diplomatic sanctions were imposed on them for meeting Sata without government’s knowledge, Dr Chongwe stated that Sata was clearly the leader of a very large political movement in Zambia today … ’ It would appear Mr Mwaanga did not disclose the nature of the sanctions that his administration has in mind against the so-called wayward diplomats. The warning, however, comes soon after the President told the diplomats to pack their bags and leave Zambia,’ Dr Chongwe said. ‘At the time of the President’s remarks, some of the diplomats had questioned why the government did not seek return of the money taken by former President Chiluba, now a confidante of the President whom the English court found had misappropriated over US $46 000 000 belonging to the Zambian state. On the face of the statement by Mr Mwaanga, one would have no qualms in accepting it if it came from the mouth of a politician who practises what he preaches. But this is not the position with Mr Mwaanga. Why? Mr Mwaanga was the party member in charge of international affairs in the early days of the MMD in 1991. He was also a former Minister of Foreign Affairs in the Kaunda administration, but these credentials notwithstanding at the time he had no qualms in arranging meetings for us as MMD leaders to meet foreign diplomats accredited to Zambia. Neither did we wait for him to arrange these meetings. One has in mind meetings that took place with the former ambassadors from the United States, Canada, France, Germany, etc. There was no whiff from Mr Mwaanga as to the diplomatic impropriety of such meetings. I was myself leader of the Opposition Alliance from 1996 (until shortly after I was shot at in 1997) comprising 13 opposition political parties in Zambia. My colleagues and I met foreign diplomats accredited to our country without any prior permission from the Minister of Foreign Affairs. Dr Chongwe said when he returned from Australia in 2003, he met foreign diplomats in Zambia without prior permission from the Minister of Foreign Affairs. ‘I am sure that there are many more former political leaders who were and have been in a position to meet foreign diplomats without the permission of the Minister of Foreign Affairs. What I am driving at is this, that in this country a political leader does not need, taking into account past practice, to get the permission of our Foreign Ministry to meet a diplomat either at his home or in a hotel over a meal or a drink or elsewhere,’ Chongwe said. ‘Mr Mwaanga, as far as I am aware, is not himself the current Minister of Foreign Affairs and I am also aware that there are other Zambians in the Foreign Ministry whose responsibility is to deal with issues on which Mr Mwaanga has given himself the authority to expound.’
72 See Munthali (n 66 above).
government should the state succeed in removing the statutory clause on abuse of authority of office from Zambia’s anti-corruption legislation.\textsuperscript{73}

To get a fuller understanding of the issues surrounding the concept of interference in the internal affairs of a host state, let us turn to article 38(1) of the 1946 Statute of the International Court of Justice (ICJ). Article 38(1) stipulates that, in rendering decisions on matters of international law, the ICJ will 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;\textsuperscript{74} (c) the general principles of law recognised by civilised nations;\textsuperscript{75} and (d) subject to the provisions of article 59 of that same ICJ Statute, judicial decisions\textsuperscript{76} and the teachings of the most highly-qualified publicists of the various nations,\textsuperscript{77} as subsidiary means for the determination of rules of law. Here, we ought to be careful to understand that article 38(1) of the ICJ Statute does not in any way set a hierarchy of sources of international law. Neither does article 38(1) use the word ‘sources’. It only points to certain items that the ICJ can use or rely on. That said, the two most important sources of public international law are (a) international conventional law (derived mainly from treaties); and (b) international customary law (arising out of \textit{opinio juris} and widely-accepted state practice).\textsuperscript{78} These sources are augmented by general principles of law recognised by civilised nations and judicial decisions as well as teachings of the most highly-qualified publicists of various nations. Also, state practice on its own can provide evidence of a departure by a state from a particular norm of international customary law (for example states that are persistent objectors,\textsuperscript{79} although both international customary and conventional law recognises norms falling under the doctrines of \textit{jus cogens} and peremptory

\textsuperscript{73} As above.

\textsuperscript{74} See A D’Amato \textit{The concept of custom in international law} (1971) 88; H Thirlway \textit{International customary law and its codification} (1972) 58; \textit{Fisheries Jurisdiction Case (United Kingdom v Iceland) (Merits)} [1974] ICJ Reports 3 50; \textit{North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)} [1969] ICJ Reports 4 42; \textit{Case Concerning Military and Paramilitary Activities (n 57 above) 14}; \textit{Asylum Case (n 65 above) 260 277}; \textit{Advisory Opinion on the Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict} [1996] ICJ Reports 226; \textit{Case Concerning Right of Passage over Indian Territory (Portugal v India) (Merits)} [1960] ICJ Reports 6 39; \textit{Fisheries Case (United Kingdom v Norway) (Judgment)} [1951] ICJ Reports 116 131; and \textit{Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta) (Judgment)} [1985] ICJ Reports 13 29.

\textsuperscript{75} See \textit{North Atlantic Fisheries case} (1910) Hague Court Reports 141.

\textsuperscript{76} See \textit{Exchange of Greek and Turkish populations} (1925) PCIJ. See also \textit{German Interests in Polish Upper Silesia (Merits)} (1926) PCIJ, Ser A No 7 31; \textit{Corfu Channel case, ICJ Reports (1947-8) 28}; \textit{Admissions case, ICJ Reports (147-8) 63}; \textit{Corfu Channel case (Merits), ICJ Reports (1949) 24}; and \textit{US Nationals in Morocco, ICJ Reports (1952), 200 206}.

\textsuperscript{77} See \textit{Paquete Habana} case (175 US (1900) 677 700-1).

\textsuperscript{78} See Brownlie (n 61 above) 3.

\textsuperscript{79} On the concept of ‘persistent objector’ in international law, see \textit{Asylum Case (Colom. v. Peru) 1950} ICJ 266 277-78 (20 November); and \textit{Fisheries Case (UK v Norway), 1951 ICJ 116 131 (18 December). See also generally DA Colson ‘How persistent must the persistent objector be?’ (1986) 61 \textit{Washington Law Review} 957; TL Stein ‘The approach of the different drummer: The principle of the persistent objector in international law’ (1985) 26 \textit{Harvard International Law Journal} 457 459; P Weil ‘Towards relative
norms—that is, norms from which no state can derogate). Commenting on the items enumerated in article 38(1) of the ICJ Statute, Brownlie observes:

In practice the Court may be expected to observe the order in which they appear: (a) and (b) are obviously the important sources, and the priority of (a) is explicable by the fact that this refers to a source of mutual obligations of the parties. Source (a) is thus not primarily a source of rules of general application, although treaties may provide evidence of the formation of custom. Sources (b) and, perhaps, (c) are formal sources, at least for those who care for such classification. Source (d), with its reference ‘as subsidiary means for the determination of rules of law’, relates to material sources. Yet some jurists regard (d), as a reference to formal sources, and Fitzmaurice has criticised the classification of judicial decisions as ‘subsidiary means’.

Brownlie continues:

In general article 38 does not rest upon a distinction between formal and material sources, and a system of priority application depends simply on the order (a) to (d), and the reference to subsidiary means. Moreover, it is probably unwise to think in terms of hierarchy dictated by the order (a) to (d) in all cases. Source (a) relates to obligations in any case; and presumably a treaty, contrary to a custom or to a general principal part of jus cogens, would be void or voidable.

Be that as it may, and based on the provisions of article 38(1) of the ICJ Statute, notwithstanding imminent threats from some recipient states to declare persona non grata some persistently outspoken diplomats from donor states, let us now examine the legal basis, if at all any, of these diplomats to ask the recipient state where it has taken the donor funds. Closely related to that is the issue of possible remedies for the donor state against a recipient state for the latter state’s misuse or abuse of donor funds.

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79 normativity in international law?’ (1983) 77 American Journal of International Law 413 434; M Akehurst ‘Custom as a source of international law’ (1974-75) 47 British Yearbook of International Law 1 26; JI Charney ‘The persistent objector rule and the development of customary international law’ (1985) 56 British Yearbook of International Law 1 21; JB McClane ‘How late in the emergence of a norm of customary international law may a persistent objector object?’ (1989) 13 ILSA Journal of International Law and Policy 147 171.

The concept of jus cogens is reflected in art 53 of the Vienna Convention on the Law of Treaties 1969 which provides: ‘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.’ See also KQ Nguyen ‘In defence of the child: A jus cogens approach to the capital punishment of juveniles in the United States’ (1995) 28 George Washington Journal of International Law and Economics 401 402.

80 Normativity in international law?’ (1983) 77 American Journal of International Law 413 434; M Akehurst ‘Custom as a source of international law’ (1974-75) 47 British Yearbook of International Law 1 26; JI Charney ‘The persistent objector rule and the development of customary international law’ (1985) 56 British Yearbook of International Law 1 21; JB McClane ‘How late in the emergence of a norm of customary international law may a persistent objector object?’ (1989) 13 ILSA Journal of International Law and Policy 147 171.

81 Brownlie (n 61 above) 3-4.

82 Brownlie (n 61 above) 4.
5 The legal bases for a donor state to ask where the money has gone and to recover the misused or abused funds

Cognisant of the fact a number of states receiving foreign aid in the form of donor funds do not have sound legal and institutional frameworks for the public procurement of goods, services and works, or that where sound frameworks exist there is often lax enforcement and/or a weak culture of compliance, one is left to wonder what options are open for the donor states to ensure that donor funds are not abused or misappropriated. This is particularly important where the legal and institutional arrangements for donor funds do not empower the donor to supervise, monitor or evaluate progress regarding the implementation of donor-funded programmes and projects. We are thus left to look to article 38(1) of the ICJ Statute for guidance on whether diplomats from a donor state can ask a recipient state how it has spent the donor funds received from this particular donor. There is an old English adage that says 'He who pays the piper calls the tune'. But some critics, relying on paragraph (c) of article 38(1) of the ICJ Statute, which paragraph relates to 'general principles of law recognised by civilised nations', may be quick to draw analogies from the English common law, and, in particular, from the law of contract. Their argument would be that once you give someone a gift you cannot go back to claim it and that you can stop him or her from using it as he or she wishes. But can donor funds be treated as a 'gift'? We shall explore this issue in the sections below.

83 Zambia, eg, only enacted a comprehensive law to govern public procurement of goods, services and works in 2008 (the Public Procurement Act 2008). Then, the Kenyan Public Procurement and Disposal Act 2005 was passed a few years before the Zambian statute. And Ghana’s Public Procurement Act 2003 came into force just two years before Kenya’s. Closely related to that, Tanzania’s Public Procurement Act 2004 was passed a year after Ghana’s. It is evident from the foregoing that a number of these African states have only begun enacting legislation on public procurement in the last few years. However, the robustness, resilience and efficacy of these pieces of legislation are yet to be seen.

84 See eg Times of Zambia ‘Hichilema calls for repeal of Public Procurement Act’ Times of Zambia 16 May 2009 http://allafrica.com/stories/200905180969.html (accessed 12 January 2010: ‘The opposition United Party for National Development (UPND) has called on Parliament to repeal the Public Procurement Act and replace it with one that will reduce corrupt practices in the procurement process. UPND President Hakainde Hichilema said at a press conference in Lusaka yesterday that the current Public Procurement Act of 2008 was prone to corruption. “We are calling on UPND MPs and others and some progressive members from the MMD to repeal the Public Procurement Act 2008 and replace it with one which will uphold acceptable standards and principles of public procurement so as to take away the deliberately created conditions for corruption under this Government,” Mr Hichilema said. In the repealed Act, he said that there should be measures to ensure speedy recovery of stolen funds and prosecution of the culprits. Mr Hichilema said that the reason he was calling for the repeal of the Act was that during the drafting of the bill, many suggestions that came from stakeholders were ignored when the Act was being enacted.’

85 For a further analysis of this argument, see below.
Under paragraph (c) of article 38(1) of the ICJ Statute, three important criteria must be met. First, a principle of law must be ‘general’ in nature, meaning that it should have a generally wide application. Secondly, the principle must be ‘recognisable’. But this does not mean that the principle should necessarily be applicable under the laws of the contesting jurisdiction. It suffices that, although not applicable under the municipal law of the contesting state, the principle is recognised by many civilised nations. Indeed, under paragraph (c) of article 38(1) of the ICJ Statute, the general principle of law need not be applicable to a particular state for it to be recognised. For example, while the concept of trust law may not be applicable to many civil law systems, this concept is well recognised by many civil law jurisdictions as an important aspect of the English common law.

A third feature inherent in paragraph (c) of article 38(1) of the ICJ Statute is that ‘recognition’ must be by ‘civilised nations’, and not just any other nation. But, then, what are ‘civilised nations’? Article 38(1) of the ICJ Statute does not spell out the criteria of determining whether a particular nation is civilised or not. Suffice it to say, where, for example, a principle of law is not applicable to some civil law jurisdictions, for such a principle of law to be opposable under international law it should be recognised by a wide section of the civil law system as a general principle of law. And this wide section of the civil law system should consist of ‘civilised nations’. By parity of reason, the same argument holds for common law jurisdictions. And while certain general principles of law obtaining in common law jurisdictions may not be found in some civil law jurisdictions, as long as these principles are recognised by a wide section of civil law jurisdictions (which should also be ‘civilised nations’), then such principles are opposable in international law.

Our submission to turn to the English common law under article 38(1) of the ICJ Statute is, however, not free from difficulties. Whereas this view may resonate well with some monist theorists, based on the monists’ view of the unitary nature of international law and municipal law, it may not sit well with some dualist theorists who advocate for a separatist distinction between international law and municipal law. But such polemics are not the focus of this chapter. Suffice it to say, the English common law contains a set of general principles of law recognised by many ‘civilised nations’. It is a notorious fact that a number of former British protectorates and colonies follow the English common law. And most of these nations cannot be said to be ‘uncivilised’. These are fairly well-civilised nations and they are large in numbers. As a result, it would not be too far-fetched to argue that many aspects of the English law of trusts, for example, do meet the requirements of paragraph (c) of article

86 See M Dixon Textbook on international law (1996) 76-77.
87 As above.
88 Dixon (n 86 above) 77.
38(1) of the ICJ Statute. But, we need to answer the question, first, whether donor funds are gifts. Also, how does English contract law, as a part of the English common law, treat gifts or gratuitous services? Can it be argued, as highlighted above, that once you give someone a gift you cannot go back to claim it or start making suggestions as to how the recipient should use the gift since there was no 'consideration' for it in the first place? In the Canadian case of *Littler v Canada*, Jackett J, providing a legal definition of a gift, ruled as follows: 'A contract of sale, which is, by definition, a transfer of property for a consideration, cannot be a gift, which is, by definition, a disposition of property without consideration.'

But, then, are donor funds really gifts or are they some form of charitable bequest? At common law, the legal definition of the terms ‘charity’ and ‘charitable purposes’ has been influenced by the Preamble of the English Statute of Charitable Uses 1601. And many common law jurisdictions still subscribe to this formulation. One argument against a statutory definition of ‘charity’, or that of ‘charitable purposes’, is that such a definition would be too restrictive.

Viscount Simmonds in *IRC v Baddeley* stated: ‘There is no limit to the number and diversity of ways in which a man will seek to benefit his fellow men.’

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91 1978 CTC 235 (Federal Court of Appeal, Canada).

92 n 91 above, 235.

93 This statute, also known as ‘the Elizabeth Statute’, is an Act of Parliament of England (43 Eliz I, c 4). It sets the bases upon which the English common law developed a definition of the term ‘charity’. The Statute of Charitable Uses 1601 was repealed by sec 13(1) of the Mortmain and Charitable Uses Act 1888 (c 42) (but see sec 13(2) of that Act). See also the English Charities Act 1993 and the English Charities Act 1990.


96 (1955) AC 572, quoted in Malik (n 95 above).

97 As quoted in Malik (n 95 above).
The Preamble of the English Charitable Uses Act 1601 lists the following as ‘charitable purposes’:

[t]he relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning; free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks, and highways; the education and preferment of orphans; the relief, stock, or maintenance of houses of correction; marriages of poor maids; support, aid, and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption or prisoners or captives; and the aid or ease of any poor inhabitants covering payments of fifteens, setting out of soldiers, and other taxes.  

Although English legislation does not provide a sacrosanct statutory definition of ‘charitable purposes’ or ‘charity’, Sir Samuel Romilly, in the English case of Morice v Bishop of Durham, put forward a classification of charities as follows: (a) relief of the indigent; (b) advancement of learning; (c) advancement of religion; or (d) advancement of objects of general public utility. Hayton, however, puts it clearer through the following four classifications: (a) relief of poverty; (b) advancement of education; (c) advancement of religion; or (d) other miscellaneous purposes beneficial to the community which the law recognises, or that fall within the Recreational Charities Act 1958 by proving facilities for recreation or other leisure-time occupation in the interests of social welfare. But do donor funds fall within any of the four classifications?

Generally, where a disposition intended as a charitable gift confers a private benefit to a non-charitable purpose, it may be void under the rule that the trust must be wholly and exclusively charitable. Such a trust can only be valid if those non-charitable purposes were entirely subsidiary to the main charitable purposes. In IRC v City of Glasgow Police Athletic Association, Lord Cohen, upholding this rule, held that ‘[t]he main purpose of the body ... is charitable and the only elements in its constitution and operations which are non-charitable are merely incidental to that purpose’. But do donor funds satisfy the test in the case of IRC v City of Glasgow Police Athletic Association? While some donor funds may meet the requirement, many donor funds are given for various purposes that are far removed from the four classifications of charitable purposes. It is not even easy to discern if the donor state has a charitable intent or not.

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98 See Preamble of the English Charitable Uses Act 1601.
99 See, generally, the English Charities Act 2006 as well as the preceding statutes, the English Charities Act 1993 and the English Charities Act 1990. See also G Moffat Trusts law: Text and materials (1994) 643-687.
100 (1805) 10 Ves 522.
101 (1805) 10 Ves 522 531.
102 See DJ Hayton The law of trusts (1989) 87-88.
103 See Malik (n 95 above).
104 As above.
105 (1953) AC 380.
106 Quoted in Malik (n 95 above).
And even if there were to be such an intent, would that, in the absence of an MOU or any other legal document, not invite issues of private international law to determine whether we should apply the legal rules of the donor state or those of the recipient state in the event that the alleged charitable trust fails? And can we apply, for example, the doctrine of *cy-près* (in the event of initial or subsequent failure of the charitable trust) when the donor state has not even given an indication of a general or paramount charitable intention?

Explaining the doctrine of *cy-près*, Hayton observes that ‘if a charitable trust cannot take effect but the settler had a general or paramount charitable intention, then the trust property will be applied *cy-près*, to some other charitable purposes as nearly as possible resembling the original purposes, under a scheme formulated by the court or the Charity Commissioners’. But can a court of law or some Charity Commissioners in the recipient state subject donor funds received from a foreign sovereign state to a domestically developed scheme for the redistribution of such funds?

Not all donor funds, it must be noted, are meant for charity or charitable purposes. For example, some donor funds could be supporting a disguised political agenda, such as where donor funds are provided to an opposition political party masquerading as an NGO. Such donor funds cannot be said to be for a charitable purpose. And many donor funds, although carrying the title ‘donor’, are not donations in the strict legal

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107 It is very unlikely that treaty provisions of the Convention of 1 July 1985, prepared under the auspices of the Hague Conference on Private International Law, and known formally as the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition, can be invoked here. Although this treaty entered into force on 1 January 1992, for it to be invoked a state must be a party. Also, art 2 of the said treaty provides that it applies only to ‘legal relationships created – *inter vivos* or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose’. It is clear from the language of art 2 that the treaty does not apply to dispositions made by a donor state since the term ‘person’ does not cover a state but rather relates to human persons. And the words ‘*inter vivos*’ and ‘death’ point to human beings since legal persons such as companies do not die but simply get liquidated or wound-up.

108 In *Re West Sussex Constabulary’s Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch 1, it was held that persons who put money into collecting boxes should be taken to have intended to part with the money out and out absolutely in all circumstances, and that, as such, the Crown (the British government) was entitled to it as *bona vacantia* on later failure of the trusts. DB Parker & AR Mellows *The modern law of trusts* (1983) 150-151, add: ‘There are admittedly dicta in favour of this view, but they are not weighty. They are all concerned with the question whether the fact that contributions were made by unidentifiable donors to an appeal for charitable purposes indicated an intention to make the gifts outright, so that funds could be applied *cy-près*, ie to other analogous charitable purposes … to make a distinction between the intention of unidentified donors in such circumstances and that of identified donors is an artificial exercise, although no doubt the consequence of a resulting trust is highly convenient.’

109 Hayton (n 102 above) 98.

110 Eg, the promotion of racial harmony was considered not to be a charitable purpose largely on the authority of *Re Strakosch* [1949] Ch 529, in which it was held that the appeasement of racial feelings (between the Dutch and English-speaking sections of the South African community) was a political purpose and therefore not charitable. See also EH Burns *Trusts and trustees: Cases and materials* (1996) 440.

111 See *Re Strakosch* (n 110 above).
sense. A donation, legally speaking, is an unqualified gift. But donor funds cannot be said to be unqualified gifts since they are often tied to a particular purpose. A gift, by contrast, is normally given without conditions and the bequeathing party will rarely or hardly stipulate the purpose to which the gift should be directed. Neither will the parties be expected to hammer out terms of the gift in an MOU for the administration of that gift.

A gift, however, can at times be given as a qualified bequest. A good example here is where a parent, X, promises his son, Y, to get him a luxury car if he completes his university education. But a ‘qualified gift’ is not a ‘donation’ since it is ‘qualified’. And Y cannot claim to have suffered any detriment by simply completing his university education. By completing his education, Y is merely performing a pre-existing duty and, thus, suffers no detriment in the sense of doing something that he was not previously bound to do. Here, Y cannot even raise the argument of promissory estoppel since there was no variation of rights arising out of a pre-existing legal relationship. Be that as it may, the disposition in this example can be said to be a gift to the extent that Y can dispose of it as he sees or deems fit. Indeed, the luxury car is not being given to Y for a specific purpose. In *Western Fish Products Ltd v Penwith DC*, the fact that there was no detrimental reliance was one reason why the claim based on proprietary estoppel failed. Similar rulings have been held in *Coombers v Smith*,

See BA Garner (ed) *Black’s law dictionary* (1999) 504. See the definition of ‘donate’ in Garner 503, which reads as follows: ‘to give (property of money) without receiving consideration for the transfer’. See also G & C Merriam Co *Webster’s new collegiate dictionary* (1973) 339.

Although a gift can at times be given as a ‘qualified gift’. See below.

For a distinction between proprietary estoppel and promissory estoppel, see GH Trietel (n 89 above) 134-135, where he argues that ‘[p]roprietary and promissory estoppel have a number of points in common. Both can arise from promises, consideration is not, while action in reliance is, a necessary condition for their operation; and both are, within limits, revocable. But there are also many important points of difference between the two doctrines. The scope of proprietary is in two respects narrower than that of promissory estoppel. First, proprietary estoppel is restricted to situations in which one party acts under the belief that he has or will be granted an interest in or over the property (generally the land) of another. Promissory estoppel may, on the other hand, arise (if other necessary conditions are satisfied) out of any promise that strict legal rights will not be enforced: there is no need for those rights to relate to land or other property. Secondly proprietary estoppel requires the promissee to have acted to his detriment, while promissory estoppel may operate even though the promissee merely performs a pre-existing duty and so suffers no detriment in the sense of doing something that he was not previously bound to do. This difference between the two doctrines follows from the fact that promissory estoppel is (unlike proprietary estoppel) concerned only with the variation of rights arising out of a pre-existing legal relationship between promissor and promissee … promissory estoppel arises only out of a representation or promise that is “clear” or “precise and unambiguous”. Proprietary estoppel, on the other hand, can arise where there is no actual promise; for example where one party makes improvements to another’s land under a mistake and the other either knows of the mistake or seeks to take unconscionable advantage of it. Secondly (and most importantly), while promissory estoppel is essentially defensive in nature, proprietary estoppel can give rise to a cause of action.’

[1981] 2 All ER 204 217.

[1986] 1 WLR 808.
Attorney-General of Hong Kong v Humphreys Estate (Queen’s Gardens) and Mecca Leisure v The London Residuary Body.

In general, the recipient of a gift is expected to use it as he or she pleases, and he or she can even dispose of it. But, can the same be said of donor funds? Let us take a more reasoned look. What would happened if, say, a donor state committed about £5.7 million (about K43.7 billion) for a new anti-corruption programme in a country like Zambia, and then rumours later started flying around that the said monies have been misused by ‘certain quarters’ in Zambia to finance election campaigns? Would the donor state, through its diplomats accredited to Zambia, have a right to query the Zambian government or should the donor simply keep quiet since the money it gave was, after all, a gift? Relying on paragraph (c) of article 38(1) of the ICJ Statute, regarding ‘general principles of law recognised by civilised nations’, can we not draw some helpful analogies from the English law of trusts? Many common law jurisdictions, including Zambia, recognise and apply principles of the English law of trusts. And these principles are of such wide ‘generality’ to the common law world that they cannot be considered to be applicable only to a small island of states. To that end, Zambian jurisprudence, or the legal system of Zambia, cannot shy away from the concept of a non-charitable purpose trust, or a Quistclose trust, as it is commonly known. Where money is loaned out or given for a particular purpose, if that money is misapplied for a wrong purpose it will result back to the creditor or bequeathing party; meaning, the money should be returned to the person that gave it out. Here, a constructive trust will arise, and the borrower or recipient of the funds will be a constructive trustee holding these funds for the benefit of the party that made them available initially.

In Barclays Bank Ltd v Quistclose Investments Ltd, a company, Rolls Razor Ltd (RR), declared a dividend that it did not have sufficient funds to pay. Quistclose Investments Ltd (Quistclose) was willing to lend RR £1m so that RR could pay the dividend. The advance was made on the understanding that it would be deposited in a separate bank account with Barclays Bank Ltd (Barclays) and that it would only be used to pay the dividend. Notice of that arrangement was given to Barclays. RR went into voluntary liquidation before the dividend was paid. As a result, Quistclose sought to recover the funds in the dividend account from Barclays.


As above.

However, Barclays claimed that it was entitled to set off the credit balance in the dividend account against part of the debit balance on RR’s other accounts held at Barclays. The House of Lords held that, because of the exclusive purpose for which the loan was made, RR received the money in the fiduciary character of a trust to repay the dividend. Since that purpose had failed, there was a resulting trust in favour of Quistclose.

By parity of reasoning, although donor funds are not loans per se, and given that most of them do not fit the categories of ‘charitable purposes’ enumerated above, we are left to look to the concept of a non-charitable purpose trust. This concept is much more appealing than the idea of a charitable trust in the sense that it is governed primarily by doctrines of equity and the common law, with almost no legislative intervention. The idea of not involving legislative intervention is very important here because domestic legislation alone cannot be said to be of such wide ‘generality’ in the common law world. In many common law jurisdictions, the law on charitable trusts comprises domestic legislation, on the one hand, and the common law and doctrines of equity, on the other. By contrast, when it comes to Quistclose trusts, not only is there limited or no legislative intervention in many common law jurisdictions, but there are also no lists of categories for such trusts. And for non-charitable purposes trusts, such as a Quistclose trust, the doctrine of cy-près does not apply. However, a resulting trust will occur when a non-charitable purpose trust fails. So, if, for example, state Y provides donor funds to state X for a particular government project, and a government official in state X connives corruptly with some project officials to divert some of the funds, say, through misprocurement or through ‘supplying air’ to the government project, the donor state (state Y) has a right to go after the misappropriated funds or whatever proceeds the government official could have acquired using those funds. Here, the government official of state X will become a constructive trustee holding the misappropriated funds for the benefit of state Y, and the entire loot should result back to state Y. Also, state X can institute criminal and/or civil proceedings under its municipal law to deal

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123 Although both charitable and non-charitable purpose trusts, as purpose trusts, have no cestui que trust or human beneficiary, the notion of bona vacantia is less likely to arise in a non-charitable purpose trust since the donor is identifiable. See *Re West Sussex Constabulary’s Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch 1; *Re Hillier’s Trust* [1954] 1 WLR 700; *Re Walsh Hospital (Netley) Fund* [1921] 1 Ch 655; and *Re North Devon and Somerset Relief Fund Trusts* [1953] 1 WLR 260. Also, given that the donor could have spelt out a purpose which is not exclusively charitable for his disposition, it cannot be said that he intended to part with his money out and out absolutely in all circumstances or with a ‘general charitable intention’. In any case, the doctrine of cy-près does not apply to non-charitable purposes trusts. In its stead, a resulting trust would arise.

124 This is a common term in some developing nations referring to situations where a bidder wins a contract to provide goods, services or works to a project being supported by donor funds. And then some donor funds are paid to this dubious bidder, but it later turns out that he is just a conman. He hardly ever supplies anything to the project, but instead connives with some accounting or procurement staff on the project, giving them some kickbacks from the loot, so that they enter records in the accounting or procurement books that he has supplied the required goods, services or works.
with the erring government official and to recover the misappropriated funds.

We are mindful, however, that some critics will argue that non-charitable purpose trusts are restricted to private trusts only. But, as we contend, fiduciary relationships, in general, are not confined to ‘private’ trusts alone. A resulting trust can spring up whether or not the parties are private or public persons. And it is this line of thought that we are pursuing here, drawing analogies in the relationship between a donor state and a recipient state. The fact that the parties are states, as opposed to private persons, does not alter their rights and obligations differently from those of private persons in a similar situation. And given that in some instances an MOU, or such similar document, will have been drawn and signed by the parties, specifying the purpose to which the donor funds will be applied, an act by the donor state to repose its confidence in the recipient state often leads to a fiduciary relationship between the donor state and the recipient state. This fiduciary relationship entitles the donor state to ask the recipient state how it has spent the donor funds. To illustrate, if, say, you give your son, daughter or dependant some money to go and pay his or her school fees, do you not have the right later to find out if he or she has paid his or her school fees, especially if it turns out, shortly thereafter, that he or she has started enjoying an inexplicably flashy and flamboyant lifestyle? Of course, some critics will be quick to argue that the relationship between a parent and his or her child cannot be compared to that of a donor and a sovereign independent state. But then, we will be missing the point and, thus, pursuing a red herring by focusing only on one small thread of the argument. The idea, rather, is to understand the essence of a fiduciary relationship when you are given money to apply it for a particular purpose – and only for that purpose! To illustrate this point, the Zambian government recently took the right decision to reimburse the donors to the country’s health sector for the misappropriated donor funds. 125 A recent 2010 media report provides as follows:

The government has pledged to reimburse all funds to the co-operating partners that were allegedly misappropriated at the Ministry of Health. Health Minister Kapembwa Simbao said in Lusaka yesterday that the Ministry of Finance and National Planning was in the process of reimbursing the funds following the alleged fraud of donor funds at that ministry ... ‘The Ministry of Finance through the Ministry of Health is in the process of reimbursing funds to the donors. We are committed to ensuring that external support in all its forms is channelled to intended beneficiaries to full satisfaction of donor countries and their citizens,’ Mr Simbao said. The misappropriation of donor funds reported at the Ministry of Health was more than K27 billion. Following that development, Mr Simbao said, government

\[125\] See below.
sent suspected staff involved on forced leave and some were appearing before courts of law. gegen

Against this background, it would be ill-advised for the recipient state to try to gag the donor state by invoking the principle of sovereign equality of states each time the donor state wants to find out how the donor funds have been utilised. The principle of sovereign equality of states should not be abused. It should only be invoked in good faith, but not to try to thwart legitimate efforts at promoting good governance, accountability and transparency.

That said, the fact that a donor state has provided donor funds to a recipient state does not provide the donor state with a legal basis to insult

126 Times reporter ‘State to pay back donor funds’ Times of Zambia (undated article) http://www.times.co.zm/news/viewnews.cgi?category=4&id=1276932480 (accessed 21 June 2010). In a follow-up article published later in 2010 by Times of Zambia, it has since been reaffirmed: that (Times reporter ‘Government pays back K13bn health donor funds’ Times of Zambia (undated article) http://www.times.co.zm/news/viewnews.cgi?category=2&id=1278049262 (accessed 2 July 2010): ‘The Zambian government has repaid the K13 billion donor funds that were allegedly misappropriated last year by some Ministry of Health officials. Health Minister Kapembwa Simbao said the Zambian government was committed to paying back the donor funds, and assured that the balance of K16 billion from the K29 billion would also be paid back … Mr Simbao said the alleged misappropriation of funds at the Ministry last year was embarrassing for the Zambian government. Mr Simbao pledged government’s commitment to the proper utilisation of donor funds in the country’s health sector. “We are fully committed to utilising donor funds for their intended purposes, I must admit that what happened at the Ministry of Health last year was an embarrassment for all off usc… What our people did, and I insist on our people, because its not the government who stole the money, is very embarrassing,” he said. He reassured the donors that all money spent by his ministry would from now on be with the approval of only the permanent secretary. The funds would now be subjected to both internal and external audits. The Swedish government had insisted on all its funds to the government, being approved only by the permanent secretary (PS), and that no one acting in that position should approve spending of these funds … The Ministry was anxious about the outcome of the court ruling on the alleged misappropriation of donor funds … World Health Organisation (WHO) country representative Olusegun Babaniyi said the UN had appreciated that the Zambian government had shown it was not supporting the misuse of donor funds.’

127 See allAfrica.com, reproducing text of Times of Zambia ‘Don’t blackmail us, Banda tells donors’ Times of Zambia 26 June 2010) http://allafrica.com/stories/201006280559.html (accessed 2 July 2010): ‘President Rupiah Banda yesterday said co-operating partners should not blackmail the government by withholding donor support as a way of resolving challenges faced in various sectors of the economy. The President said he would not allow diplomats who present credentials to him to continue holding government to ransom using threats to withhold funding because Zambia was a sovereign state … the President said donors themselves choose areas they would like to fund and the government never forced them. The President said donors did not have the right to interfere in the internal affairs of the country and urged Zambians to stop rejoicing in their conduct. President Banda said government was grateful for the assistance it received from foreign donors but they needed to understand their limits and respect Zambians. “Do not rejoice in things like that. We should not allow donors to feel that they can interfere in the internal affairs. This is a free country. This is a sovereign country,” President Banda said. Mr Banda said donors were at liberty to select areas they would like to help Zambia in but the help must not be accompanied by attempts to interfere with the governance of the country. “They themselves chose to come and help in the road sector, in the health sector. We are very grateful for what they have helped us with but they should not interfere,” he said.’

128 For a helpful comparison, see generally n 127 above.
or unfairly criticise the recipient state. The provision of donor funds alone does not constitute a blanket licence to criticise almost everything that the recipient state is doing in the spheres of politics and economic development. If anything, a consolation that the donor state has is in limiting its criticism to the recipient state’s prudent management of the donor funds. If it is a question of donor funds having been provided to the recipient state for budget support, then let the donor state that has provided that support focus primarily on the sector and purpose for which the support has been rendered. Indeed, there must be a link between the donor’s intervention and the funds in question. Otherwise, it would be irresponsible for a donor state that has not even given much money to the recipient state to be making noise as if that donor is such a great messiah. As noted above, the there has to be a correlation between the noise being made by the donors and the funds that they have each provided. And where the funds provided by a donor have been properly utilised by the recipient state, there is no basis for that donor to be making noise. It’s only where the donor funds have been misappropriated or misused that a donor can complain. Even so, the complaint must relate directly to the misuse or abuse of donor funds.

It is important to observe that the provision of donor funds alone should not be seen as a blanket licence for the donors to criticise recipient states for almost everything that they do. If there has to be any criticism, it should be limited to the misappropriation or misuse of the donor funds. To set the argument in context, let us consider the following metaphor:

Example 1: X gives some money to his cousin, Y, to assist the latter in buying groceries for his (Y’s) family since Y is no longer in gainful employment. X later discovers that Y used part of the money to buy himself some beers and to ‘entertain’ himself with some prostitutes. Then, X begins to reprimand Y, asking him also why it is that he does not even go to church on Sundays. While matters of religion are a noble and decent cause, X has no right to question Y’s faith based purely on the grounds that X had given Y some money. If anything, X should only concern himself with the recovery of the misused part of the money.

From the foregoing, it is clear that donor states should only concern themselves with the recipient states’ accountability for the misused donor funds. However, if a donor state would like to have a greater say in the domestic politics of the recipient state, then, under the freedom of contract, the donor state should ensure that it negotiates for some kind of conditionalities to give it leverage to meddle in the domestic affairs of the recipient state. Indeed, only such conditionalities would justify a donor state’s intermeddling in the internal affairs of the recipient state.

Example 2: X is head of a foreign donor mission in country Y. And presidential and parliamentarian elections have just taken place in country Y. There is a looming view from amongst the opposition parties that the elections have been rigged by the ruling party. Not long after that, X carelessly
responds to a question from journalists on the legitimacy of the election results, issuing a statement that appears to be validating or contesting the results.

In the example above, since X has not been invited as an election observer by country Y or any authorised election monitoring team, why should he be issuing such reckless statements? His interests should focus on the donor programs his agency is administering in country Y, without meandering on a frolic of his own.

Example 3: X is head of a foreign donor mission in country A. He is genuinely interested in finding out how some perceived levels of corruption in that country are affecting the country’s business environment. But he knows also that there is not much he can do without the consent or permission of the authorities of country A to carry out a survey on corruption levels. Notwithstanding the limitations, X quietly, and without informing the authorities in country A, recruits a private consultant to prepare the survey. Somehow, news leaks to the press about the ongoing survey. The President of country A is upset with X’s conduct. X quickly rushes to state house to apologise to that country’s president.

In the example above, X should have been more thoughtful of his official mandate as well as that of his employer. He should not have commissioned such a study without the full blessings of the recipient state as well as the blessings of his superiors.

Other instances where diplomatic agents find themselves somewhat compromised include situations where a foreign diplomat privately pursues a joint business venture or partnership with some government official of the receiving state. Such deals, often brokered secretly outside the official course of business, have potential of fuelling corruption. By parity of reasoning, it would be ill-advised for a head of a foreign donor mission to rent a house owned by a senior government official of the receiving state or one owned by a spouse of such senior government official where there is alternative housing in the market of relatively suitable standards.

6 Conclusion

This chapter has examined the right of foreign diplomats accredited to a recipient state of donor funds to demand that the recipient state accounts for the misuse or abuse of donor funds received from the diplomat’s state. But such a right, we contend, can only exist where the inquiring diplomat is representing a state that has indeed donated some funds to the recipient state. And the inquiry must relate only to the purpose(s) for which the funds were donated. This view resonates well with the view of the
Secretary-General of the Commonwealth, as captured in a recent media report:129

Commonwealth Secretary-General Kamalesh Sharma has advised diplomats accredited to Zambia to respect the country’s sovereignty and not interfere in its internal affairs. Mr Sharma said foreign missions are an important information resource which should be cautious not to overstep boundaries. He said this in Lusaka yesterday when he held a meeting with Commonwealth heads of missions accredited to Zambia at the Mulungushi International Conference Centre. Mr Sharma said diplomats must learn to be good listeners and only render advice to host countries when it is necessary. ‘We are a very versatile organisation, we do not work in stereotypes and in fact one of the characteristics of the Commonwealth throughout its history is how it has escaped the curse of sterility.’130

Chapter 3 examined the issue of what constitutes interfering in the ‘internal affairs’ of a host state. We will not repeat that discussion here. Suffice it to say, in this chapter, an argument was made that where a diplomat from a donor state queries a recipient state on the latter state’s misuse or abuse of donor funds that does not necessarily amount to ‘interfering in the internal affairs’ of the recipient state. The chapter demonstrated the prospects of using public international law on diplomatic and consular relations to strengthen the international legal framework for fighting and preventing corruption.

It was argued further that the right of a diplomat from the donor state to inquire from the recipient state on the latter state’s misuse or abuse of donor funds cannot be the basis of declaring the diplomat persona non grata. A related argument was that, in the absence of binding legal covenants to empower the donor state to supervise and oversee the administration of donor funds, the concept of a non-charitable purpose trust could be imported, and that through paragraph (c) of article 38(1) of the Statute of the ICJ, regarding ‘general principles of law recognised by civilised nations’, this concept could prove a useful source of law.

129 See below.
This book has examined the fight against corruption through the lens of public international law. A specific thesis was pursued that 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, or as a way of gagging outspoken and controversially vocal diplomats who query recipient states of donor funds on the abuse or misuse of these funds, both customary international law and conventional international law do provide for safeguards to prevent a corrupt or outspoken diplomat from abusing his or her immunities and privileges. The book argued that diplomatic immunity should not be abused by diplomatic agents who perpetuate or engage in corrupt practices, and that diplomatic immunity should shield those diplomatic agents who inquire from the receiving state, genuinely and for bona fide reasons, how donor funds have been utilised by the receiving state, but not those that enthusiastically or spiritedly intermeddle in the internal affairs or security of the receiving state.

The book also drew distinctions between the diplomatic immunity enjoyed by a diplomatic agent of a sovereign state and the type of immunity enjoyed by some public international organisations. It was noted that, in the case of 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. Also, for those few senior staff enjoying immunities and privileges, it is expected that the constituent treaty of the international organisation, or some other treaty, will provide for their immunities and privileges.

Going forward, what are the policy considerations for strengthening the fight against corruption through the prism of diplomatic immunity in public international law? The recommendations set out below are in no
way a priority list for all states or public international organisations to follow. They do not constitute, or purport to be, an exhaustive list of policy recommendations. Rather, this chapter seeks to stimulate debate around critical issues that are of wider application to many developed and developing nations. Admittedly, some issues may not be as critical in one jurisdiction as they would be in another. Law, it must be emphasised, does not exist in a vacuum. Its relevance must be understood within the context of each and every nation’s or public institution’s socio-economic and political background. Against this background, the answers to the question raised above are informed by both practice and theory, and they draw from multi- and interdisciplinary sources. So, let us take a reasoned look.

(1) It is important to stress that, while the concept of diplomatic immunity can be an effective and efficient tool for preventing and fighting corruption through the advocacy of vocal and outspoken diplomats agitating for good governance, it can also be a shield by those corrupt diplomats running away from law enforcement agencies and hiding behind the veil of ‘diplomatic immunity’. Therefore, in appointing individuals to diplomatic or foreign service, the appointing authorities should not base the appointments on cronyism or such other prejudices and mediocrity, but on sound and demonstrable competences of the appointee.

(2) It is not uncommon for many states to appoint as diplomatic agents some cadres from the ruling political party, or some state security and intelligence officers (often masquerading as civil servants), including some of the crony of the head of state or the first lady. More often than not, such individuals are not well-schooled in the art of diplomacy. Some are appointed to serve as a conduit to launder money for the first family abroad. As such, a number of these ‘politically-exposed’ diplomats tend to have a very narrow view of diplomatic service.

(3) Diplomats must be afforded competent training and education in matters of diplomacy and international relations prior to taking up their first diplomatic appointment. And a culture of continuous learning through, say, the attendance of short in-service training should be encouraged so that the participants keep abreast with the latest developments in the field of international relations. It is through such training and education that diplomats will get to understand more fully some of the pertinent aspects of public international law relating to diplomatic service. That way, appointments to the diplomatic service will not be seen by some aspirants as a possible way of making easy tax-free money.

(4) Further, depending on an individual’s level of qualifications and the type of prior work experience that he or she brings along, the newcomers to the diplomatic service should ideally start in a smaller country that has
less contentious and less visible issues of diplomacy and international relations. Eventually, as they gain more experience, they can then rise through the ranks and end up in high-profile countries. The crucial point here is to try to blend individuals' experiential learning with their ability to serve professionally and diligently as diplomats at different stages of their careers.

(5) Diplomats should be encouraged to familiarise themselves with the laws and culture of the receiving state so as to avoid infringing the municipal law of that host state as well as to avoid making statements or pronouncements that appear to be an affront to the local culture or politics. For example, if a diplomat has not been invited to serve as an election observer by the recipient state, he or she should not be making misleading pronouncements on the fairness of the recipient state's elections. Indeed, that is not the role and function of a diplomat. The diplomat should just be reporting quietly and directly to the appointing authorities in his or her country of origin, without issuing any politically sensitive press statements in the recipient state or elsewhere. This underlies the importance of having diplomats that are trained in political communication, especially since the receiving state can, if it wishes, declare the diplomat *persona non grata* without furnishing any reasons for doing so. So, if diplomats are to avoid meeting the Waterloo of *persona non grata*, especially those diplomats that are accredited to developing nations, they should endeavour to get a good understanding of the local culture and the politics of the receiving state.

(6) While it is often useful and helpful for diplomats to maintain a healthy working relationship with senior government officials of the receiving state, there is also a danger of appearing partisan somewhat if the diplomats become suspiciously too close to the ruling party. Likewise, where, for example, an opposition faction or opposition leader is regularly feted by some diplomat, such developments could prompt the government of the day to cry foul that the diplomat is going beyond his or her call of duty. Eventually, if the situation regresses, the receiving state can, rightfully or wrongfully, declare the diplomat *persona non grata*.

(7) For those poor nations that often experience difficulties in meeting expenses pertaining to salaries of their diplomatic agents abroad, it would be advisable for them to consider cutting down on the number of diplomatic agents and missions so that they can focus on fewer agents and missions. That way, these nations would avoid falling into embarrassing situations of having too many diplomatic agents and missions that are regularly crippled with financial destitution, thus pushing the diplomatic agents to the edge of temptation for corrupt behaviour to make ends meet.

(8) For those rich nations that levy exorbitant visa fees through their foreign diplomatic missions, it could be asked of them: What political morality is in such gestures of levying exorbitant and non-refundable visa fees on poor people of developing nations knowing full well that many of
them will apply and only a few will be granted the visas? For example, if a prospective student from a poor nation, country Y, is asked by country X’s diplomatic mission to pay US $150 for his or her student visa to country X, it could be that this is all the money that the poor fellow has, notwithstanding that maybe the university to which this student is headed has actually given him an undertaking for a full waiver of tuition fees as well as provided him or her with a scholarship to cover living expenses. Yet, if the student fails to secure the visa, then he or she loses out completely on both the non-refundable visa fee and the education opportunity. Here, even if we were to stretch our imagination that many visa applicants do not provide sufficient evidence to convince the visa issuing authorities of reasons to grant them visas, should the cost of applying for a visa be that high? And just how much money are diplomatic missions of rich nations making out of this exercise if they can afford to reject so many visa applications from the so-called ‘Third World’? Even the basic and most fundamental economics tells us that the gains derived out of the exercise far outweigh the transaction costs of preparing and issuing visas. Perhaps, if queried, some diplomatic missions would claim the shield of diplomatic immunity. This is an area that is fertile for future research, noting that corruption comes in many forms.

(9) With regard to public international organisations, it appears that apart from dictates of a specific agreement or treaty, it is doubtful that there exists an established and coherent body of customary international law relating to immunities of international organisations. It is therefore advisable that the immunities of a public international organisation should be enshrined either in the constituent treaty of the organisation or in a closely-related treaty. That said, there is also a view that the doctrine of restrictive immunity in public international law tends to show that, to some degree, public international organisations do enjoy some immunities based on customary international law, at least for their non-commercial activities. The debate is, thus, not fully settled.

(10) As in the case of diplomatic agents of sovereign states, whether these diplomats are accredited to a sovereign state or a public international organisation, employees and regular staff of public international organisations should be provided with training on the scope and scale of their organisation’s immunities. The training aspect is particularly important for senior employees of public international organisations who represent their institutions in different member states. It would not be wise, for example, for a representative of a public international organisation to start issuing racially-motivated or culturally-demeaning statements against the people of the receiving state. That representative would find himself out of there faster than he went in.

(11) Employees and regular staff of a public international institution must be made to understand that, although their emoluments and incomes may be exempt from tax in the state where they are stationed, they do not,
however, enjoy the same kind of immunities as diplomatic agents of sovereign states. In many instances, employees and regular staff of public international organisations are amenable to the laws and jurisdiction of the receiving state.
APPENDICES
Vienna Convention on Diplomatic Relations
Done at Vienna on 18 April 1961

The States Parties to the present Convention,
Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,
Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,
Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,
Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,
Have agreed as follows:

Article 1
For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
(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;
(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;
(i) The ‘premises of the mission’ are the buildings or parts of buildings
and the land ancillary thereto, irrespective of ownership, used for the
purposes of the mission including the residence of the head of the mission.

Article 2
The establishment of diplomatic relations between States, and of
permanent diplomatic missions, takes place by mutual consent.

Article 3
1. The functions of a diplomatic mission consist, *inter alia*, in:
(a) Representing the sending State in the receiving State;
(b) Protecting in the receiving State the interests of the sending State and
of its nationals, within the limits permitted by international law;
(c) Negotiating with the Government of the receiving State;
(d) Ascertaining by all lawful means conditions and developments in the
receiving State, and reporting thereon to the Government of the sending
State;
(e) Promoting friendly relations between the sending State and the
receiving State, and developing their economic, cultural and scientific
relations.
2. Nothing in the present Convention shall be construed as preventing
the performance of consular functions by a diplomatic mission.

Article 4
1. The sending State must make certain that the *agrément* of the receiving
State has been given for the person it proposes to accredit as head of the
mission to that State.
2. The receiving State is not obliged to give reasons to the sending State
for a refusal of *agrément*. 
Article 5
1. The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.
2. If the sending State accredits a head of mission to one or more other States it may establish a diplomatic mission headed by a chargé d’affaires ad interim in each State where the head of mission has not his permanent seat.
3. A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization.

Article 6
Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.

Article 7
Subject to the provisions of articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

Article 8
1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.
2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 9
1. 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 State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the mission.
Article 10

1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:
   (a) The appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;
   (b) The arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;
   (c) The arrival and final departure of private servants in the employ of persons referred to in subparagraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;
   (d) The engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.

2. Where possible, prior notification of arrival and final departure shall also be given.

Article 11

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.

2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

Article 12

The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Article 13

1. The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner.

2. The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.
**Article 14**

1. Heads of mission are divided into three classes, namely:
   (a) That of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;
   (b) That of envoys, ministers and internuncios accredited to Heads of State;
   (c) That of chargés d'affaires accredited to Ministers for Foreign Affairs.

2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

**Article 15**

The class to which the heads of their missions are to be assigned shall be agreed between States.

**Article 16**

1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with article 13.

2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.

3. This article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

**Article 17**

The precedence of the members of the diplomatic staff of the mission shall be notified by the head of the mission to the Ministry for Foreign Affairs or such other ministry as may be agreed.

**Article 18**

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

**Article 19**

1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, a chargé d'affaires ad interim shall act provisionally as head of the mission. The name of the chargé d'affaires ad interim shall be notified, either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the sending State to the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

2. In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and
technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission.

Article 20

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.

Article 21

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

Article 22

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 23

1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.
Article 25
The receiving State shall accord full facilities for the performance of the functions of the mission.

Article 26
Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Article 27
1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.
2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
3. The diplomatic bag shall not be opened or detained.
4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy person inviolability and shall not be liable to any form of arrest or detention.
6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.
7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.
Article 28
The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 29
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.

Article 30
1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability.

Article 31
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.
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 subparagraphs (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.

Article 32
1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.
2. Waiver must always be express.
3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

**Article 33**

1. Subject to the provisions of paragraph 3 of this article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:

   - (a) That they are not nationals of or permanently resident in the receiving State; and
   - (b) That they are covered by the social security provisions which may be in force in the sending State or a third State.

3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

**Article 34**

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

- (a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;
- (b) Dues and taxes on 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;
- (c) Estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of article 39;
(d) Dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
(e) Charges levied for specific services rendered;
(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 23.

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
   (a) Articles for the official use of the mission;
   (b) Articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in article 36, paragraph 1, in respect of articles imported at the time of first installation.
3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 33.

4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

**Article 38**

1. 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.

2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

**Article 39**

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.
4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

**Article 40**

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit, the same inviolability and protection as the receiving State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to force majeure.

**Article 41**

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. All 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.

3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present
Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

**Article 42**

A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.

**Article 43**

The function of a diplomatic agent comes to an end, *inter alia*:

(a) On notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;

(b) On notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission.

**Article 44**

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

**Article 45**

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

(b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;

(c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

**Article 46**

A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

**Article 47**

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:
(a) Where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;
(b) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 48

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article 49

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 50

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 51

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 52

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in article 48:
(a) Of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with articles 48, 49 and 50;
(b) Of the date on which the present Convention will enter into force, in accordance with article 51.
Article 53

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in article 48.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Vienna Convention on Consular Relations
Done at Vienna on 24 April 1963

The States Parties to the present Convention,
Recalling that consular relations have been established between peoples since ancient times,
Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,
Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,
Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,
Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,
Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,
Have agreed as follows:

Article 1: Definitions
1. For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
(a) 'consular post' means any consulate-general, consulate, vice-consulate or consular agency;
(b) ‘consular district’ means the area assigned to a consular post for the exercise of consular functions;
(c) ‘head of consular post’ means the person charged with the duty of acting in that capacity;
(d) ‘consular officer’ means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;
(e) ‘consular employee’ means any person employed in the administrative or technical service of a consular post;
(f) ‘member of the service staff’ means any person employed in the domestic service of a consular post;
(g) ‘members of the consular post’ means consular officers, consular employees and members of the service staff;
(h) ‘members of the consular staff’ means consular officers, other than the head of a consular post, consular employees and members of the service staff;
(i) ‘member of the private staff’ means a person who is employed exclusively in the private service of a member of the consular post;
(j) ‘consular premises’ means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post;
(k) ‘consular archives’ includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safe keeping.

2. Consular officers are of two categories, namely career consular officers and honorary consular officers. The provisions of Chapter II of the present Convention apply to consular posts headed by career consular officers, the provisions of Chapter III govern consular posts headed by honorary consular officers.

3. The particular status of members of the consular posts who are nationals or permanent residents of the receiving State is governed by article 71 of the present Convention.

CHAPTER I: CONSULAR RELATIONS IN GENERAL

SECTION I: ESTABLISHMENT AND CONDUCT OF CONSULAR RELATIONS

Article 2: Establishment of consular relations

1. The establishment of consular relations between States takes place by mutual consent.

2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.
3. The severance of diplomatic relations shall not ipso facto involve the severance of consular relations.

**Article 3: Exercise of consular functions**

Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.

**Article 4: Establishment of a consular post**

1. A consular post may be established in the territory of the receiving State only with that State’s consent.
2. The seat of the consular post, its classification and the consular district shall be established by the sending State and shall be subject to the approval of the receiving State.
3. Subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending State only with the consent of the receiving State.
4. The consent of the receiving State shall also be required if a consulate-general or a consulate desires to open a vice-consulate or a consular agency in a locality other than that in which it is itself established.
5. The prior express consent of the receiving State shall also be required for the opening of an office forming part of an existing consular post elsewhere than at the seat thereof.

**Article 5: Consular functions**

Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;
(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided
that there is nothing contrary thereto in the laws and regulations of the receiving State;

(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession \textit{mortis causa} in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;

(j) transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

(k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

(l) extending assistance to vessels and aircraft mentioned in subparagraph (k) of this article, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship’s papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen insofar as this may be authorized by the laws and regulations of the sending State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

\textit{Article 6: Exercise of consular functions outside the consular district}

A consular officer may, in special circumstances, with the consent of the receiving State, exercise his functions outside his consular district.
Article 7: Exercise of consular functions in a third State

The sending State may, after notifying the States concerned, entrust a consular post established in a particular State with the exercise of consular functions in another State, unless there is express objection by one of the States concerned.

Article 8: Exercise of consular functions on behalf of a third State

Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.

Article 9: Classes of heads of consular posts

1. Heads of consular posts are divided into four classes, namely
   (a) consuls-general;
   (b) consuls;
   (c) vice-consuls;
   (d) consular agents.
2. Paragraph 1 of this article in no way restricts the right of any of the Contracting Parties to fix the designation of consular officers other than the heads of consular posts.

Article 10: Appointment and admission of heads of consular posts

1. Heads of consular posts are appointed by the sending State and are admitted to the exercise of their functions by the receiving State.
2. Subject to the provisions of the present Convention, the formalities for the appointment and for the admission of the head of a consular post are determined by the laws, regulations and usages of the sending State and of the receiving State respectively.

Article 11: The consular commission or notification of appointment

1. The head of a consular post shall be provided by the sending State with a document, in the form of a commission or similar instrument, made out for each appointment, certifying his capacity and showing, as a general rule, his full name, his category and class, the consular district and the seat of the consular post.
2. The sending State shall transmit the commission or similar instrument through the diplomatic or other appropriate channel to the Government of the State in whose territory the head of a consular post is to exercise his functions.
3. If the receiving State agrees, the sending State may, instead of a commission or similar instrument, send to the receiving State a notification containing the particulars required by paragraph 1 of this article.
Article 12: The exequatur

1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an *exequatur*, whatever the form of this authorization.
2. A State which refused to grant an *exequatur* is not obliged to give to the sending State reasons for such refusal.
3. Subject to the provisions of articles 13 and 15, the head of a consular post shall not enter upon his duties until he has received an *exequatur*.

Article 13: Provisional admission of heads of consular posts

Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions. In that case, the provisions of the present Convention shall apply.

Article 14: Notification to the authorities of the consular district

As soon as the head of a consular post is admitted even provisionally to the exercise of his functions, the receiving State shall immediately notify the competent authorities of the consular district. It shall also ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention.

Article 15: Temporary exercise of the functions of the head of a consular post

1. If the head of a consular post is unable to carry out his functions or the position of head of consular post is vacant, an acting head of post may act provisionally as head of the consular post.
2. The full name of the acting head of post shall be notified either by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, or, if he is unable to do so, by any competent authority of the sending State, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry. As a general rule, this notification shall be given in advance. The receiving State may make the admission as acting head of post of a person who is neither a diplomatic agent nor a consular officer of the sending State in the receiving State conditional on its consent.
3. The competent authorities of the receiving State shall afford assistance and protection to the acting head of post. While he is in charge of the post, the provisions of the present Convention shall apply to him on the same basis as to the head of the consular post concerned. The receiving State shall not, however, be obliged to grant to an acting head of post any facility, privilege or immunity which the head of the consular post enjoys only subject to conditions not fulfilled by the acting head of post.
4. When, in the circumstances referred to in paragraph 1 of this article, a member of the diplomatic staff of the diplomatic mission of the sending
State in the receiving State is designated by the sending State as an acting head of post, he shall, if the receiving State does not object thereto, continue to enjoy diplomatic privileges and immunities.

Article 16: Precedence as between heads of consular posts

1. Heads of consular posts shall rank in each class according to the date of the grant of the *exequatur*.
2. If, however, the head of a consular post before obtaining the *exequatur* is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the provisional admission; this precedence shall be maintained after the granting of the *exequatur*.
3. The order of precedence as between two or more heads of consular posts who obtained the *exequatur* or provisional admission on the same date shall be determined according to the dates on which their commissions or similar instruments or the notifications referred to in paragraph 3 of article 11 were presented to the receiving State.
4. Acting heads of posts shall rank after all heads of consular posts and, as between themselves, they shall rank according to the dates on which they assumed their functions as acting heads of posts as indicated in the notifications given under paragraph 2 of article 15.
5. Honorary consular officers who are heads of consular posts shall rank in each class after career heads of consular posts, in the order and according to the rules laid down in the foregoing paragraphs.
6. Heads of consular posts shall have precedence over consular officers not having that status.

Article 17: Performance of diplomatic acts by consular officers

1. In a State where the sending State has no diplomatic mission and is not represented by a diplomatic mission of a third State, a consular officer may, with the consent of the receiving State, and without affecting his consular status, be authorized to perform diplomatic acts. The performance of such acts by a consular officer shall not confer upon him any right to claim diplomatic privileges and immunities.
2. A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any intergovernmental organization. When so acting, he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.
Article 18: Appointment of the same person by two or more States as a consular officer

Two or more States may, with the consent of the receiving State, appoint the same person as a consular officer in that State.

Article 19: Appointment of members of consular staff

1. Subject to the provisions of articles 20, 22 and 23, the sending State may freely appoint the members of the consular staff.
2. The full name, category and class of all consular officers, other than the head of a consular post, shall be notified by the sending State to the receiving State in sufficient time for the receiving State, if it so wishes, to exercise its rights under paragraph 3 of article 23.
3. The sending State may, if required by its laws and regulations, request the receiving State to grant an *exequatur* to a consular officer other than the head of a consular post.
4. The receiving State may, if required by its laws and regulations, grant an *exequatur* to a consular officer other than the head of a consular post.

Article 20: Size of the consular staff

In the absence of an express agreement as to the size of the consular staff, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the consular district and to the needs of the particular consular post.

Article 21: Precedence as between consular officers of a consular post

The order of precedence as between the consular officers of a consular post and any change thereof shall be notified by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.

Article 22: Nationality of consular officers

1. Consular officers should, in principle, have the nationality of the sending State.
2. Consular officers may not be appointed from among persons having the nationality of the receiving State except with the express consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.
Article 23: Persons declared “non grata”

1. The receiving State may at any time notify the sending State that a consular officer is persona non grata or that any other member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consular post.

2. If the sending State refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this article, the receiving State may, as the case may be, either withdraw the exequatur from the person concerned or cease to consider him as a member of the consular staff.

3. A person appointed as a member of a consular post may be declared unacceptable before arriving in the territory of the receiving State or, if already in the receiving State, before entering on his duties with the consular post. In any such case, the sending State shall withdraw his appointment.

4. In the cases mentioned in paragraphs 1 and 3 of this article, the receiving State is not obliged to give to the sending State reasons for its decision.

Article 24: Notification to the receiving State of appointments, arrivals and departures

1. The Ministry for Foreign Affairs of the receiving State or the authority designated by that Ministry shall be notified of:

   (a) the appointment of members of a consular post, their arrival after appointment to the consular post, their final departure or the termination of their functions and any other changes affecting their status that may occur in the course of their service with the consular post;

   (b) the arrival and final departure of a person belonging to the family of a member of a consular post forming part of his household and, where appropriate, the fact that a person becomes or ceases to be such a member of the family;

   (c) the arrival and final departure of members of the private staff and, where appropriate, the termination of their service as such;

   (d) the engagement and discharge of persons resident in the receiving State as members of a consular post or as members of the private staff entitled to privileges and immunities.

2. When possible, prior notification of arrival and final departure shall also be given.

SECTION II: END OF CONSULAR FUNCTIONS

Article 25: Termination of the functions of a member of a consular post

The functions of a member of a consular post shall come to an end, inter alia:
(a) on notification by the sending State to the receiving State that his functions have come to an end;
(b) on withdrawal of the *exequatur*;
(c) on notification by the receiving State to the sending State that the receiving State has ceased to consider him as a member of the consular staff.

**Article 26: Departure from the territory of the receiving State**

The receiving State shall, even in case of armed conflict, grant to members of the consular post and members of the private staff, other than nationals of the receiving State, and to members of their families forming part of their households irrespective of nationality, the necessary time and facilities to enable them to prepare their departure and to leave at the earliest possible moment after the termination of the functions of the members concerned. In particular, it shall, in case of need, place at their disposal the necessary means of transport for themselves and their property other than property acquired in the receiving State the export of which is prohibited at the time of departure.

**Article 27: Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances**

1. In the event of the severance of consular relations between two States:
   (a) the receiving State shall, even in case of armed conflict, respect and protect the consular premises, together with the property of the consular post and the consular archives;
   (b) the sending State may entrust the custody of the consular premises, together with the property contained therein and the consular archives, to a third State acceptable to the receiving State;
   (c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

2. In the event of the temporary or permanent closure of a consular post, the provisions of subparagraph (a) of paragraph 1 of this article shall apply. In addition,
   (a) if the sending State, although not represented in the receiving State by a diplomatic mission, has another consular post in the territory of that State, that consular post may be entrusted with the custody of the premises of the consular post which has been closed, together with the property contained therein and the consular archives, and, with the consent of the receiving State, with the exercise of consular functions in the district of that consular post; or
   (b) if the sending State has no diplomatic mission and no other consular post in the receiving State, the provisions of subparagraphs (b) and (c) of paragraph 1 of this article shall apply.
CHAPTER II: FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CONSULAR POSTS, CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

SECTION I: FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO A CONSULAR POST

Article 28: Facilities for the work of the consular post
The receiving State shall accord full facilities for the performance of the functions of the consular post.

Article 29: Use of national flag and coat-of-arms
1. The sending State shall have the right to the use of its national flag and coat-of-arms in the receiving State in accordance with the provisions of this article.
2. The national flag of the sending State may be flown and its coat-of-arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business.
3. In the exercise of the right accorded by this article regard shall be had to the laws, regulations and usages of the receiving State.

Article 30: Accommodation
1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws and regulations, by the sending State of premises necessary for its consular post or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist the consular post in obtaining suitable accommodation for its members.

Article 31: Inviolability of the consular premises
1. Consular premises shall be inviolable to the extent provided in this article.
2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.
3. Subject to the provisions of paragraph 2 of this article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.
4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

**Article 32: Exemption from taxation of consular premises**

1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to paragraph 1 of this article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the person acting on its behalf.

**Article 33: Inviolability of the consular archives and documents**

The consular archives and documents shall be inviolable at all times and wherever they may be.

**Article 34: Freedom of movement**

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure freedom of movement and travel in its territory to all members of the consular post.

**Article 35: Freedom of communication**

1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.
2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.
3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence,
documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

**Article 36: Communication and contact with nationals of the sending State**

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
   (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
   (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
   (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond
with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

**Article 37: Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents**

If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

(a) in the case of the death of a national of the sending State, to inform without delay the consular post in whose district the death occurred;

(b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments;

(c) if a vessel, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consular post nearest to the scene of the occurrence.

**Article 38: Communication with the authorities of the receiving State**

In the exercise of their functions, consular officers may address:

(a) the competent local authorities of their consular district;

(b) the competent central authorities of the receiving State if and to the extent that this is allowed by the laws, regulations and usages of the receiving State or by the relevant international agreements.

**Article 39: Consular fees and charges**

1. The consular post may levy in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.

2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this article, and the receipts for such fees and charges, shall be exempt from all dues and taxes in the receiving State.
SECTION II: FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

Article 40: Protection of consular officers
The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Article 41: Personal inviolability of consular officers
1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.
2. Except in the case specified in paragraph 1 of this article, consular officers shall not be committed to prison or be liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.
3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 42: Notification of arrest, detention or prosecution
In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel.

Article 43: Immunity from jurisdiction
1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.
2. The provisions of paragraph 1 of this article shall not, however, apply in respect of a civil action either:
   (a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or
   (b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.
**Article 44: Liability to give evidence**

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.

2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.

3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

**Article 45: Waiver of privileges and immunities**

1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in articles 41, 43 and 44.

2. The waiver shall in all cases be express, except as provided in paragraph 3 of this article, and shall be communicated to the receiving State in writing.

3. The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

**Article 46: Exemption from registration of aliens and residence permits**

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all obligations under the laws and regulations of the receiving State in regard to the registration of aliens and residence permits.

2. The provisions of paragraph 1 of this article shall not, however, apply to any consular employee who is not a permanent employee of the sending State or who carries on any private gainful occupation in the receiving State or to any member of the family of any such employee.
Article 47: Exemption from work permits

1. Members of the consular post shall, with respect to services rendered for the sending State, be exempt from any obligations in regard to work permits imposed by the laws and regulations of the receiving State concerning the employment of foreign labour.

2. Members of the private staff of consular officers and of consular employees shall, if they do not carry on any other gainful occupation in the receiving State, be exempt from the obligations referred to in paragraph 1 of this article.

Article 48: Social security exemption

1. Subject to the provisions of paragraph 3 of this article, members of the consular post with respect to services rendered by them for the sending State, and members of their families forming part of their households, shall be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this article shall apply also to members of the private staff who are in the sole employ of members of the consular post, on condition:
   (a) that they are not nationals of or permanently resident in the receiving State; and
   (b) that they are covered by the social security provisions which are in force in the sending State or a third State.

3. Members of the consular post who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State.

Article 49: Exemption from taxation

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:
   (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
   (b) dues or taxes on private immovable property situated in the territory of the receiving State, subject to the provisions of article 32;
   (c) estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject to the provisions of paragraph (b) of article 51;
(d) dues and taxes on private income, including capital gains, having its source in the receiving State and capital taxes relating to investments made in commercial or financial undertakings in the receiving State;
(e) charges levied for specific services rendered;
(f) registration, court or record fees, mortgage dues and stamp duties, subject to the provisions of article 32.

2. Members of the service staff shall be exempt from dues and taxes on the wages which they receive for their services.

3. Members of the consular post who employ persons whose wages or salaries are not exempt from income tax in the receiving State shall observe the obligations which the laws and regulations of that State impose upon employers concerning the levying of income tax.

**Article 50: Exemption from customs duties and inspection**

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:
   (a) articles for the official use of the consular post;
   (b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilization by the persons concerned.

2. Consular employees shall enjoy the privileges and exemptions specified in paragraph 1 of this article in respect of articles imported at the time of first installation.

3. Personal baggage accompanying consular officers and members of their families forming part of their households shall be exempt from inspection. It may be inspected only if there is serious reason to believe that it contains articles other than those referred to in subparagraph (b) of paragraph 1 of this article, or articles the import or export of which is prohibited by the laws and regulations of the receiving State or which are subject to its quarantine laws and regulations. Such inspection shall be carried out in the presence of the consular officer or member of his family concerned.

**Article 51: Estate of a member of the consular post or of a member of his family**

In the event of the death of a member of the consular post or of a member of his family forming part of his household, the receiving State:
(a) shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the receiving State the export of which was prohibited at the time of his death;
(b) shall not levy national, regional or municipal estate, succession or inheritance duties, and duties on transfers, on movable property the
presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consular post or as a member of the family of a member of the consular post.

**Article 52: Exemption from personal services and contributions**

The receiving State shall exempt members of the consular post and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

**Article 53: Beginning and end of consular privileges and immunities**

1. Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.

2. Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.

3. When the functions of a member of the consular post have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so, whichever is the sooner, but shall subsist until that time, even in case of armed conflict. In the case of the persons referred to in paragraph 2 of this article, their privileges and immunities shall come to an end when they cease to belong to the household or to be in the service of a member of the consular post provided, however, that if such persons intend leaving the receiving State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.

5. In the event of the death of a member of the consular post, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving State or until the expiry of a reasonable period enabling them to do so, whichever is the sooner.
Article 54: Obligations of third States

1. If a consular officer passes through or is in the territory of a third State, which has granted him a visa if a visa was necessary, while proceeding to take up or return to his post or when returning to the sending State, the third State shall accord to him all immunities provided for by the other articles of the present Convention as may be required to ensure his transit or return. The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or travelling separately to join him or to return to the sending State.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the transit through their territory of other members of the consular post or of members of their families forming part of their households.

3. Third States shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to force majeure.

Article 55: Respect for the laws and regulations of the receiving State

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the State.

2. The consular premises shall not be used in any manner incompatible with the exercise of consular functions.

3. The provisions of paragraph 2 of this article shall not exclude the possibility of offices of other institutions or agencies being installed in part of the building in which the consular premises are situated, provided that the premises assigned to them are separate from those used by the consular post. In that event, the said offices shall not, for the purposes of the present Convention, be considered to form part of the consular premises.

Article 56: Insurance against third party risks

Members of the consular post shall comply with any requirements imposed by the laws and regulations of the receiving State, in respect of insurance against third party risks arising from the use of any vehicle, vessel or aircraft.
Article 57: Special provisions concerning private gainful occupation

1. Career consular officers shall not carry on for personal profit any professional or commercial activity in the receiving State.
2. Privileges and immunities provided in this chapter shall not be accorded:
   (a) to consular employees or to members of the service staff who carry on any private gainful occupation in the receiving State;
   (b) to members of the family of a person referred to in subparagraph (a) of this paragraph or to members of his private staff;
   (c) to members of the family of a member of a consular post who themselves carry on any private gainful occupation in the receiving State.

CHAPTER III: REGIME RELATING TO HONORARY CONSULAR OFFICERS AND CONSULAR POSTS HEADED BY SUCH OFFICERS

Article 58: General provisions relating to facilities, privileges and immunities

1. Articles 28, 29, 30, 34, 35, 36, 37, 38 and 39, paragraph 3 of article 54 and paragraphs 2 and 3 of article 55 shall apply to consular posts headed by an honorary consular officer. In addition, the facilities, privileges and immunities of such consular posts shall be governed by articles 59, 60, 61 and 62.
2. Articles 42 and 43, paragraph 3 of article 44, articles 45 and 53 and paragraph 1 of article 55 shall apply to honorary consular officers. In addition, the facilities, privileges and immunities of such consular officers shall be governed by articles 63, 64, 65, 66 and 67.
3. Privileges and immunities provided in the present Convention shall not be accorded to members of the family of an honorary consular officer or of a consular employee employed at a consular post headed by an honorary consular officer.
4. The exchange of consular bags between two consular posts headed by honorary consular officers in different States shall not be allowed without the consent of the two receiving States concerned.

Article 59: Protection of the consular premises

The receiving State shall take such steps as may be necessary to protect the consular premises of a consular post headed by an honorary consular officer against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

Article 60: Exemption from taxation of consular premises

1. Consular premises of a consular post headed by an honorary consular officer of which the sending State is the owner or lessee shall be exempt
from all national, regional or municipal dues and taxes whatsoever, other
than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in paragraph 1 of this article
shall not apply to such dues and taxes if, under the laws and regulations of
the receiving State, they are payable by the person who contracted with the
sending State.

Article 61: Inviolability of consular archives and documents
The consular archives and documents of a consular post headed by an
honorary consular officer shall be inviolable at all times and wherever they
may be, provided that they are kept separate from other papers and
documents and, in particular, from the private correspondence of the head
of a consular post and of any person working with him, and from the
materials, books or documents relating to their profession or trade.

Article 62: Exemption from customs duties
The receiving State shall, in accordance with such laws and regulations as
it may adopt, permit entry of, and grant exemption from all customs
duties, taxes, and related charges other than charges for storage, cartage
and similar services on the following articles, provided that they are for the
official use of a consular post headed by an honorary consular officer:
coats-of-arms, flags, signboards, seals and stamps, books, official printed
matter, office furniture, office equipment and similar articles supplied by
or at the instance of the sending State to the consular post.

Article 63: Criminal proceedings
If criminal proceedings are instituted against an honorary consular officer,
he must appear before the competent authorities. Nevertheless, the
proceedings shall be conducted with the respect due to him by reason of his
official position and, except when he is under arrest or detention, in a
manner which will hamper the exercise of consular functions as little as
possible. When it has become necessary to detain an honorary consular
officer, the proceedings against him shall be instituted with the minimum
of delay.

Article 64: Protection of honorary consular officers
The receiving State is under a duty to accord to an honorary consular
officer such protection as may be required by reason of his official position.

Article 65: Exemption from registration of aliens and residence permits
Honorary consular officers, with the exception of those who carry on for
personal profit any professional or commercial activity in the receiving
State, shall be exempt from all obligations under the laws and regulations
of the receiving State in regard to the registration of aliens and residence permits.

**Article 66: Exemption from taxation**

An honorary consular officer shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending State in respect of the exercise of consular functions.

**Article 67: Exemption from personal services and contributions**

The receiving State shall exempt honorary consular officers from all personal services and from all public services of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

**Article 68: Optional character of the institution of honorary consular officers**

Each State is free to decide whether it will appoint or receive honorary consular officers.

**CHAPTER IV: GENERAL PROVISIONS**

**Article 69: Consular agents who are not heads of consular posts**

1. Each State is free to decide whether it will establish or admit consular agencies conducted by consular agents not designated as heads of consular post by the sending State.
2. The conditions under which the consular agencies referred to in paragraph 1 of this article may carry on their activities and the privileges and immunities which may be enjoyed by the consular agents in charge of them shall be determined by agreement between the sending State and the receiving State.

**Article 70: Exercise of consular functions by diplomatic missions**

1. The provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission.
2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.
3. In the exercise of consular functions a diplomatic mission may address:
   (a) the local authorities of the consular district;
(b) the central authorities of the receiving State if this is allowed by the laws, regulations and usages of the receiving State or by relevant international agreements.

4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 of this article shall continue to be governed by the rules of international law concerning diplomatic relations.

Article 71: Nationals or permanent residents of the receiving State

1. Except insofar as additional facilities, privileges and immunities may be granted by the receiving State, consular officers who are nationals of or permanently resident in the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privileges provided in paragraph 3 of article 44. So far as these consular officers are concerned, the receiving State shall likewise be bound by the obligation laid down in article 42. If criminal proceedings are instituted against such a consular officer, the proceedings shall, except when he is under arrest or detention, be conducted in a manner which will hamper the exercise of consular functions as little as possible.

2. Other members of the consular post who are nationals of or permanently resident in the receiving State and members of their families, as well as members of the families of consular officers referred to in paragraph 1 of this article, shall enjoy facilities, privileges and immunities only insofar as these are granted to them by the receiving State. Those members of the families of members of the consular post and those members of the private staff who are themselves nationals of or permanently resident in the receiving State shall likewise enjoy facilities, privileges and immunities only insofar as these are granted to them by the receiving State. The receiving State shall, however, exercise its jurisdiction over those persons in such a way as not to hinder unduly the performance of the functions of the consular post.

Article 72: Non-discrimination

1. In the application of the provisions of the present Convention the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its consular posts in the sending State;

(b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.
Article 73: Relationship between the present Convention and other international agreements

1. The provisions of the present Convention shall not affect other international agreements in force as between States Parties to them.
2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

CHAPTER V: FINAL PROVISIONS

Article 74: Signature
The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

Article 75: Ratification
The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 76: Accession
The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in article 74. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 77: Entry into force
1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 78: Notifications by the Secretary-General
The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in article 74:
(a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with articles 74, 75 and 76;
(b) of the date on which the present Convention will enter into force, in accordance with article 77.

**Article 79: Authentic texts**

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in article 74.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

Done at Vienna on 24 April 1963. Entered into force on 19 March 1967.
APPENDIX

JUDGMENT OF THE
SUPREME COURT FOR
THE REPUBLIC OF
ZAMBIA IN A CASE
INVOLVING CLAIMS OF
DIPLOMATIC IMMUNITY

SCZ NO. 13 OF 2010
Appeal No. 11/ 2009
In the Supreme Court for Zambia

Holden at Lusaka

(Civil Jurisdiction)

Between:

Antonio Ventriglia  1ST Appellant
Manuela Ventriglia  2ND Appellant

AND

Eastern and Southern African  1ST Respondent
Trade and Development Bank
Robert Mbonani Simeza  2ND Respondent
(In his capacity as Receiver of Zambezi Portland Cement Limited (in Receivership))

Coram: Chibesakunda, JS, Mwanamwambwa & Chibomba JJS.

9 April 2009 and 21 April 2010

For the Appellants: Mr V. Malambo, State Counsel of Messrs Malambo and Company with Mr S. Mambwe of Messrs Mambwe and Siwila and Company and Mr A. Silwila of Messrs Mambwe Siwila and Company.

For the 1st and 2nd Respondent: Mr M. Mundashi, State Counsel of Messrs Mulenga Mundashi and Company with Mr J Sangwa of Messrs Simeza and Associates.
JUDGMENT

Chibesakunda, JS., delivered the Judgement of Court

Cases referred to:

Rahimtoola v Nizam of Hyderabad [1952] 3 ALL ER 441

Legislation referred to:
27. Article 2 and 174(5) of Comesa Charter.
30. Article No 42 and 48 of the Pta Charter.

Other works referred to:
34. Judicial decision on the question relating to the UN and related Inter-Governmental Organisations, Part 3 of 2005.
35. Beating the state at its own game. An inquiry into the intricacies of sovereignty and the separation of powers (by De Gaay Fortman).

The Court, for convenience sake, heard two appeals, Appeal No. 11 of 2009 and Appeal No. 32 of 2009 together. By consent of the parties, these two appeals had been consolidated: Appeal No. 32 was against a High Ruling dated 28th October 2008. The High Court in an application under Order 14(a) of the RSC 1999 Edition (16), had ruled for reasons stated in that Ruling, that the 1st Respondent was covered by Diplomatic Immunity as provided under Section 4 of the Diplomatic Immunity and Privileges Act(21). Therefore, the first Respondent was not amenable to any Court proceedings in Zambia and as such the proceedings against it were a nullity and misconceived. Consequently the injunction granted against the 2nd Respondents in favour of the two Appellants was discharged. The second Ruling, dated 7th November 2008, in Appeal No. 11 of 2009, the High Court, in an application by the two Appellants for a stay of the High Court Ruling of the 28th October, 2008 rejected and therefore refused to restore the injunction which was discharged as a result of its Ruling of 28th October, 2008, that the 1st Respondent was not amenable to Court proceedings in Zambia. The High Court ruled that, this was so because the action against the 1st Respondent was a nullity as the 1st Respondent enjoyed diplomatic immunity, so there was, therefore, no cause of action against the 1st Respondent and the 2nd Respondent for the Court to stay.
The Appellants, aggrieved by these two rulings, have come to this Court to challenge them.

The brief history of this matter is that, before the High Court, in a writ taken out of the Commercial Registry, the two Appellants had claimed for:

(a) A declaration that the Defendant having failed to perform its obligations under the loan agreement to declare a dispute and refer the dispute for arbitration, should not be seen to benefit out of its own default, and as such the purported appointment of the Receiver under the provisions of the said Agreement be declared a nullity;

(b) An order that the Dispute be declared and that the matter be referred to Arbitration as per Clause 16.12 of the Loan Agreement made between the 1st and 2nd Defendants;

(c) An Order for an Interim and Interlocutory injunction restraining the Receiver, his agents, servants or whomsoever from performing duties of a Receiver until the determination of this matter or any further Court Order;

(d) Damages for undue loss of the Plaintiff’s credibility and creditworthiness;

(e) Damages for loss of business

(f) Aggravated Damages;

(g) Costs and

(h) Any other Relief the Court may deem fit.

This endorsement on the writ was elaborated in the Statement of claim. We will not restate the Statement of claim.

The 1st Respondent in its defence pleaded, inter alia, that: “As an international organisation, is immune from the jurisdiction of the Courts in the Republic of Zambia by virtue of Section 4 of the Diplomatic Immunities and Privileges Act, Chapter 20 of the Laws of Zambia and Statutory Instrument No. 123 of 1992.” This was the point raised as a preliminary point under Order 14(a) of the RSC 1999 Edition,(15), which resulted in the Ruling of 28th October, 2008.

Before dealing with the issues before the High Court, we will restate briefly the history of this case. According to the Statement of claim and the affidavit evidence before the Court, the history of this case is briefly that, the two Appellants were shareholders in a Company registered as Zambezi Portland Cement Limited. The 1st Respondent is a Body Corporate, a Financial Institution providing Banking and Financial Services and established by Charter pursuant to Chapter 9 of the Treaty for establishment of Preferential Trade Area for Eastern and Southern Africa States with its Registered Office as NSSF Complex, 23rd Floor Bishops Road, Nairobi, Kenya.
The 2nd Respondent is a Receiver Manager for Zambezi Portland Cement Limited, appointed by the 1st Respondent. Some time in 2005, this Company, Zambezi Portland Cement Limited applied for a loan from the 1st Respondent for the construction of a cement making plant in Ndola, on the Copperbelt Province of the Republic of Zambia. The 1st Respondent accepted the proposals and agreed to finance the project with an initial loan of US$12,000,000. A loan agreement to that effect was executed. After the execution of this loan facility agreement, the 1st Respondent executed a mortgage deed and debenture covering five properties including the property on which the cement making plant is situated. On and about September, 2005 the parties again executed a plant and assessment deed where Zambezi Portland Cement Limited agreed to pledge its rights and interests in prospecting licence No. 193 and 168/1 to the 1st Respondent once all the formalities of changing title from the third party were concluded. After that it was then realised that the repayment schedule, as agreed in the loan agreement, would not be achieved due to the delay in the construction of the plant. The parties, therefore, agreed on variation of the loan agreement. The parties, executed the deed of variation of 2006 and 2007. As the construction of the plant was going on in 2006, it became apparent that construction costs had gone beyond the estimated costs and that additional funding was needed to complete the project. So, the Appellants sourced an additional US$13,000,000 from Barclays Bank. Again even this additional US$13,000,000 was not sufficient to complete the construction of this project. By December, 2007 only 95% of the project was completed. Therefore having exhausted the whole US$13,000,000 a further loan, was required. The Appellants in order to secure another loan approached the Trust Merchant Bank of Congo DRC to source for US$7,000,000 to complete the plant. In order to secure this loan a property known as Plot No. 1468 was pledged as security.

The Appellants’ position at the High Court was that they never defaulted on loan repayment to the 1st Respondent as the loan repayment was rescheduled to begin on 30th June, 2008 and that the first instalment was in fact made on 3rd July, 2008 and that this payment, was acknowledged by the 1st Respondent. The Appellants were, therefore, surprised that the 1st Respondent wrote to them giving notice of default on 4th July, 2008. Before a response could be given to them, the 1st Respondent again gave a notice of default on 8th July 2008, demanding immediate payment of the whole loan aforesaid. Before a response would be given to the 1st Respondent to its notice of demand and demand for immediate payment, on the 14th of July, 2008, one, Robert Mbonani Simeza (now the 2nd Respondent) issued a letter to the Appellants stating that he was appointed as receiver by the 1st Respondent and that he enclosed a notice to that effect. Their argument before the High Court was that even if there was that breach alleged to have been committed by Zambezi Portland Limited on certificate of title No. 10571, the valuation of the cement plant, on which the 1st Respondent had security, was three times the amount lent
and it was therefore unreasonable for the 1st Respondent to appoint a receiver. Their argument also is that if the 1st Respondent had wanted title deeds of the property pledged to the Trust Merchant Bank, they should have resorted to the method of settling the dispute stipulated in the loan agreement which was to declare a dispute.

According to the Appellants, the appointment of the 2nd Respondent as Receiver therefore was, done in bad faith. They argued further that at law, a receiver cannot be appointed for a Company which is a going concern. In fact, the receiver was appointed just two weeks before the said project was to be commissioned. Therefore, there was no reason for appointing a receiver.

The 1st and 2nd Respondents’ position was that the two Appellants defaulted in their repayment of the loan which they obtained from the 1st Respondent. Because of this failure, the 1st Respondent appointed the 2nd Respondent as Receiver to execute all the debts under the debenture and mortgage executed between the 1st Respondent and Zambezi Portland Cement Limited. The 1st and 2nd Respondent’s position also is that the two Appellants ceased to be share holders in Zambezi Portland Cement Limited. Zambezi Portland Cement Limited had failed to meet its payments obligation in the loan agreement upon due notice.

The Appellants, after issuing a writ against the 1st and 2nd Respondents, applied for an injunction ex-parte. This was granted ex-parte.

Before hearing the substantive claim, the 1st Respondent raised a preliminary issue under Order 14(a) of the RSC, 1999 Edition(15). In this application, the 1st Respondent sought a declaration from the Court that as per Statutory Instrument No. 123 of 1992, as read together with Cap 20 of the Laws of Zambia and its own Charter, it enjoyed absolute immunity and as such was not amenable to any Court proceedings in Zambia.

Mr Sangwa for Respondents argued that under Section 4 of Cap 20, the President of the Republic of Zambia has declared certain legal entities to be immuned from any Court processes in Zambia. He argued that the President issued the statutory instrument No. 123 of 1992 to confer Diplomatic Immunity on the 1st Respondent. Therefore, the issuance of the writ against the 1st and 2nd Respondents was irregular. He cited two cases; (i) Shearson Lehman Bros Inc v Maclaine Watson & (Company Ltd, & Re International Tin Council Intervening (4) and (ii) Standard Chartered Bank v International Tin Council and Another (16) in support of his argument. According to him, the claim by the Appellants that the 1st Respondent waived its immunity under Clause 16 of the Mortgage Deed, was not legally tenable as according to the authorities, only the express waiver would be regarded as a waiver at law.
In response, Mr Musaluke and Mr Muya, for the two Appellants, argued: (1) that, although the 1st Respondent enjoyed treaty immunity, it nonetheless had waived this immunity under Clause 16 of the Mortgage Deed; (2) that there is a development in International Customary Law of the concept of restrictive immunity which is that Sovereign immunity can not be invoked in matters relating to commercial activities between States. Restrictive immunity doctrine had developed in cases where States through International Organisations or by themselves have engaged in commercial transactions. In support of this argument, they cited the celebrated case of *I congreso del Partido* (1981) 2ALL E.R. 1064 (7) as authority.

We will not restate the full arguments by both parties in this application on this preliminary issue raised under Order 14(a) of the RSC 1999 Edition (16), before the High Court save to state that on this preliminary issue raised by the Respondent, the Learned trial Judge held that: “Under the circumstances, I hold that the 1st Defendant did not waive its diplomatic immunity under S.I No. 123 of 1992 aforementioned. This suit against the 1st Defendant is therefore a nullity.” consequently, the lower Court discharged the ex parte injunction hence this appeal before this Court.

Before this Court, Mr Malambo SC, leading the arguments on behalf of the Appellants, addressed this Court extensively and admirably on the jurisprudential growth of the body of International Law since World War II, after the establishment of Treaty Bodies, such as the World Bank, IMF, UN, PTA etc., on this branch of law on the international organisations’ immunity. In his argument, he brought out the intensity of this debate on the applicability or opposability of these principles of absolute or restrictive immunity. He argued that there is a general acceptance of the principle of the International Customary Law on granting absolute immunity to acts described as *jure imperii* and not to acts described as *jure gestionis*. He conceded to the argument that, International Customary law’s general principle is that, except by consent of Sovereign States, the Courts of any country will not implead a foreign Sovereign State in a claim for damages. The thesis behind this is that if the Courts entertained a claim against a Sovereign State, and if there was a judgment against such a State, the Courts would be called upon to execute that Judgment. As such, that execution would destroy the relations between States and lead to such repercussions impossible to foresee. The Learned State Counsel further pointed out that, this was one side of the coin. On the other side of the coin, he went on, is the proposition that, legal entities should abide by the rules of the market and that there should be accountability for their actions. He submitted that usually, in such cases there is also the inclusion of arbitration clauses. He argued that it is trite law that immunity, granted to State actors, is absolute, whereas the immunities given to treaty bodies, engaged in commercial activities, are restrictive. He cited the cases of *Rahimtooala v Nizam of Hyderabad* (1), *Trendtex Trading Corporation Limited v*
Central Bank of Nigeria, Alfred (2) Dunhill of London Inc v Republic of Cuba (3) I Congreso del Partido (7), Holland v Lampen – Wolfe (8), Plannmount Limited v Republic of Zaire (10), Owners of the Ship Philippine Admiral v Wallen Shipping (Hong Kong) Limited and Others (9) and an Italian case of FAO v D-Previde NZE Asiyende (12) drawing a distinction between the concept of absolute immunity enjoyed between Sovereign States and restrictive Immunity granted to Treaty Bodies engaged in commercial activities. He referred to Lord Denning as the pioneer of this approach in the celebrated case of Rahimoola v Nizam of Hyderabad (1) where he expounded this principle this way: “If the dispute brings into question for instance the legislative or international transaction of a foreign government, or the policy of its executive, the Court should grant immunity if asked to do so, because it does offend the dignity of a foreign Sovereign to have the merits of such a dispute canvassed in the domestic Courts of another country: but if the dispute concerns for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities) and it arises properly within the territorial jurisdiction of our Courts, there is no ground for granting immunity.” Lord Denning continued to propound this thesis of restrictive immunity in another celebrated case of Trendex Trading Company Limited Vs Central Bank of Nigeria (2). This approach was equally followed in the case of Thai Europe Service Limited v Government of Pakistan (6). Under-pinning all these authorities is the school of thought according to Mr Malambo, SC., that a treaty body once it engages in commercial activities, brings itself on equal footing with an individual it is dealing with. 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 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 gestioins or an act of private law into one done jure imperii.” In considering whether State immunity should be granted, the Court had to consider the whole context in which the claim against the State was made, with a view to deciding whether the relevant act on which the claim was based should, in the context, be considered as fairly within an area of activity, trading or commercial or otherwise, of a private law character in which the State has chosen to engage or whether the relevant act should be considered as having been done outside that area and within the sphere of Sovereignty.”
Mr Malambo also quoted Lord Wilberforce in the same case as having explained this theory this way: “It is necessary to start from first principle. The basis on which one State is considered to be immune from the territorial jurisdiction of the Courts of another State is that of ‘par in parem...’ which effectively means that the Sovereign or governmental acts of one State are not matters on which the Courts of other States will adjudicate.” The relevant exception, or limitation, which has been engrafted on the principle of immunity of States, under the so called restrictive theory, arises from the willingness of State to enter into commercial or other private law transaction with individuals. Its appears to have two main foundations. (a) It is necessary in the interest of justice of individuals having such transactions with States to allow them to bring such transactions before the Courts… (b) To require a State to answer a claim based on such transactions does not involve a challenge to or inquiry into any act of Sovereignty or governmental act to the State. It is, in accepted phrases, neither a threat to the dignity of that State nor any interference with its Sovereign functions. (Emphasis ours) Lord Wilberforce concluded: “the restrictive theory does not and could not deny capability of a State to resort to Sovereign or governmental actions. It merely assets that acts done within the trading or commercial activity are not immune. The inquiry has to be made whether they were within or outside that activity.” (emphasis ours). The House of Lords restated and applied the above principles in the case of Holland v Lampen – Wolfe (8). In his Judgment, Lord Millet said: “Until 1975 England, almost alone of the major trading nations, continued to adhere to a pure, absolute doctrine of State immunity. In the 1970s mainly under the influence of Lording Denning M. R., we abandoned that position and adopted the so called restrictive theory of State Immunity under which acts of a commercial nature do not attract State immunity even if done for governmental or political reasons. This development of the common law was confirmed by your Lordships’ House in the I Congreso (7) case in relation to acts committed before the passing of the 1978 Act.”

According to State Counsel, from 1975, the Courts in Britain and in Europe have invoked this principle of restrictive immunity in cases such as Planmount Limited v Republic of Zaire(10) and the Privy Council in the case of Owners of the Ship Phillippine Admiral v Wallen Shipping (Hong Kong) Limited and others (11).

Mr Malambo SC, argued further that this was in line with the general provisions of International Law and Equity, which requires that such immunity from jurisdiction is meant to be granted to such International Organisations whilst balancing that with the principle of protecting and guaranteeing the fundamental rights and legitimate interests of ordinary citizens. These members of the public must equally be afforded judicial protection. Their individual’s right to access to justice under Article 10 of the UDH ought to be guaranteed. This concept is known as restrictive
immunity. He argued that, that right of international customary law of immunity granted to international organisations should not negate the right of those individuals’ access to justice in cases where international organisations have joined the market place in commercial activities because these entities have placed themselves on equal footing with the members of the public that they have entered into commercial intercourse with. He argued that they should be held accountable for their actions.

Referring to the facts before this Court, Mr Malambo SC, submitted that the holding by the Learned trial Judge that the suit against the 1st Respondent was a nullity as the 1st Respondent enjoyed absolute immunity from suit in the Zambian Courts even before he examined the nature of the action against the 1st Respondent, was a gross misdirection by the Learned trial Judge. According to State Counsel, this approach no longer represents the international law.

In his further arguments, State Counsel argued that, the Learned trial Judge treated this legal issue rather casually, a legal issue that has serious implications on the fundamental rights of access to justice for impartial and fair determination of the members of public’ proprietary rights. To accept as the Learned trial Judge did that the 1st Respondent was entitled to absolute immunity from suit even before examining whether the facts on which it claimed immunity were jure imperii or jure gestionis, was a gross misdirection. According to State Counsel, the proper approach should have been as Lord Denning put it in his Judgement in the case *Trendex Trading Corporation Limited v Central Bank of Nigeria* (2), that is to examine the claim of immunity by the 1st Respondent. He cited further the case of *Companie Naviera Vascongada v SS Christina* 1939 (16) and the case of the *Trendex Trading Corporation Limited* (2), in which case Lord Denning held that even in the absence of arbitration clause, if a foreign Sovereign entity enters into an agreement, it is obliged and bound like any other trader.

According to Mr Malambo, S C, the Public International Customary Law which has received wide acceptance internationally is that even the immunity and privilege accorded depend on the nature of the activities involved in the agreement. This development of International law has been accepted as a correct interpretation of the Vienna Convention. He argued that it is a fallacy to allege that the Vienna Convention is not applicable to treaty bodies. In his view all the important statutory instruments under Cap 20 of our laws were crafted on the provisions of the Vienna Convention. He argued that all the immunities described under Article 29 and 36 of the Vienna Convention (20) were incorporated in the statutory instruments made under Cap 20. On the argument that, Cap 20 is divided into two segments, the first dealing with Sovereignty immunity and the second segment dealing with International Organisations Immunity, he argued that Cap 20 was enacted before the creation of such bodies as PTA.
Bank. This explains why Cap 20 is constructed in that way because its main body is the Vienna Convention. However, he went on to argue that if one examined these statutory instruments, one would find that immunities and privilege conferred on the treaty bodies are derived from the Vienna Convention. His argument therefore was that these statutory instruments which derive authority from the Convention cannot be interpreted differently from the Vienna Convention. According to him, paras, 1595-1597 of the *Halsbury Laws of England 4th Edition* (17) supports this proposition. Citing the case of *Zoora v Waldnk Zake 1964* (13), he argued further that immunities and privileges enjoyed by diplomatic missions are the same as those enjoyed by treaty bodies. There is no difference and these immunities given to treaty bodies’ do not depend on treaties but on International Law as interpreted by the Courts. He argued that the Vienna Convention is part of the International Customary Law. He argued that the various statutory instruments that have been drawn under Section 4 of Cap 20 (22) relating to immunities of treaty bodies cannot have different interpretations from the Vienna Convention. Under the body of International law there is a doctrine of restrictive immunity when it comes to Treaty Bodies engaged in commercial activities. His main argument is therefore that, the Learned trial Judge misdirected himself in refusing to accept this development of the law.

As regards the injunction, State Counsel argued that the findings by the Learned trial Judge that the two Appellants were no longer shareholders in Zambezi Portland Cement Limited, was not supported by any evidence before him. State Counsel Malambo further pointed out that even the Learned trial Judge's holding at p.12 of Vol. (1) of the record of appeal, that: “The Plaintiffs have not disputed or challenged the Defendant’s assertions. If it is true that the Plaintiffs are not shareholders in Zambezi Portland Cement Limited, then they are not entitled to protection by way of an interlocutory injunction”, was not supported by any evidence on record. He pointed out that contrary to that holding, the two Appellants did dispute and challenge the 1st Respondent’s assertions on the ownership of the shares. The affidavit evidence before the Court by the Appellants established that the issue of ownership was being hotly contested by the two Appellants. He referred to page 593 in Vol. 2 of the record of appeal which indicates that this issue was being hotly contested. According to State Counsel Malambo, the learned trial Judge used reasons which were not supported by the evidence on record, as basis for rejecting the injunction. He argued that this was a miscarriage of justice.

Mr Malambo SC, further pointed out that according to the Learned trial Judge, he discharged the injunction on grounds; (1) that, the Appellants had commenced an action on the basis of being shareholders of Zambezi Portland Cement Limited; (2) that, the Appellants did not disclose the material facts namely that, they ceased to be shareholders in Zambezi Portland Cement Limited on or about 4th June, 2007. These two grounds,
according to State Counsel, as already submitted, were not supported by any evidence on record. The Learned State Counsel pointed to the Statement produced before the Court from the Registrar of Companies and argued that the document before the Court, established that the two Appellants were the only share holders in Zambezi Portland Limited even at the time the High Court discharged the injunction. He therefore urged the Court to uphold the appeal.

Mr Siwila in support of State Counsel Malambo submitted that his only point was to echo his submissions before the lower Court. According to Mr Siwila, although the 1st Respondent enjoyed diplomatic immunity as per the PTA treaty, nevertheless, it had waived this immunity by signing the mortgage deed with Clause 16. According to Mr Siwila, by signing this mortgage deed willingly and voluntarily, they submitted themselves to the jurisdiction of the Zambian Courts. So the 1st Respondent was amenable to the jurisdiction of the Zambian Courts. We will not restate his argument on the discharging of the injunction.

Mr Mambwe did not make any submissions.

Mr Mundashi State Counsel, leading the response for the Respondent made only two points leaving the main argument to Mr Sangwa. His first point in response is that all the arguments canvassed by State Counsel Malambo were never raised in the Court below. Therefore these new issues cannot be raised before this Court. He submitted that State Counsel Malambo was not in the lower Court and as such may not have realised that the two Counsel, who represented the two Appellants, conceded to the fact that the 1st Respondent enjoyed immunity and as such was not amenable to the Zambian Courts' jurisdiction.

His second point was that Cap 20 is set in two distinct segments. In the first segment, Section 3 deals with the domestication of the Vienna Convention, Section 2 defines the Vienna Convention. In the second segment, Section 4 spells out the immunities of treaty bodies such as the 1st Respondent. So as far as State Counsel Mundashi was concerned, there is no blanket application of a Vienna Convention in Zambia. The first segment of Cap 20 is confined to dealing with the immunity of the States and this is the segment which deals with the domestication of the Vienna Convention. The second portion of Cap 20 deals with immunities conferred on treaty bodies. So the Vienna Convention has no application to Treaty Bodies and therefore has equally no application to this case before this Court.

On ground 2 Mr Mundashi State Counsel accepted that the issue of ownership of the shares was not as settled as put by learned trial Judge in his Judgment. He also accepted that the learned trial Judge knew or ought
to have known by the time he discharged the injunction that the issue of ownership of shares was still contentious and that this issue was still pending before the High Court. However, as far as he was concerned, at the time the Appellants applied for this ex-parte injunction, which was granted, they had an obligation to disclose the fact that the ownership of shares was still contentious. So, according to the law, they were being punished for failure to disclose this material fact.

Mr Sangwa, augmenting the arguments by Mr Mundashi SC., argued spiritedly and extensively, firstly that, the arguments by Mr Malambo SC. were new as these were never canvassed in the Court below. He argued that, in fact, the argument by Mr Malambo SC., were at variance with the arguments which were before the High Court on behalf of the Appellants. Then Mr Sangwa argued that the Ruling of 28th October, 2008, which is now subject of this appeal, resulted from an application pursuant to Order 14A of the Rules of the Supreme Court, 1999 edition (21) calling upon the Court to make a specific finding on whether or not the 1st Respondent was immuned from suit and legal process by virtue of the provisions of the Diplomatic Immunities and Privileges Act (22) and the Diplomatic Immunity Privileges of the Common Market for Eastern and Southern African Development Bank, Statutory Instrument No. 123 of 1992. The 1st Respondent had also prayed that should the High Court answer the said question in the affirmative, it should declare the whole claim null and void and set it aside.

The Court below agreed that the 1st Respondent had immunity from suit and legal process by virtue of Statutory Instrument No. 123 and Section 4 of Cap 20 as read with the COMESA Treaty. According to Mr Sangwa, the two Learned Counsel representing the Appellants accepted that, the 1st Respondent was immuned from any legal process in Zambia by virtue of the COMESA Treaty and Cap 20 of the Laws of Zambia. Their only contention in the Court below was that, by virtue of Clause 16 in the Mortgage Deed, the 1st Respondent had waived its immunity. Mr Sangwa argued that there was no mention of this concept of restrictive immunity or even any argument on the development of International Customary Law on the concept of restrictive immunity. The thrust of his argument is that these doctrines of absolute immunity and restrictive immunity had nothing to do with the 1st Respondent’s immunity. According to him, this Treaty Body and its privileges are defined in the Treaties creating it. He then argued that the 1st Respondent is a creation of various statutes and treaties. As such its claims of immunity are from COMESA and PTA Treaties to which Zambia was a party and Cap 20 of the Laws of Zambia. He argued that Zambia voluntarily enacted the Diplomatic Immunities’ Act Cap 20 in which Section 4 gave effect to Zambia’s treaty obligations. He quoted Section 4 and went into details on the definition and characteristics of an International Organisation relating to the 1st Respondent. He cited the case of McAlpine Watson & Co. Ltd v Department of
Trade & Industry (14), in defining the attributes of an International Organisation. He went on to say that, the Court held in this case that: “The expression ‘International Organisation’ is a term of art in public international law. It is a body or entity created by agreement between States or other entities in international law.” He went on to argue that, Treaty Organisations can only enjoy such immunities as are conferred on them by the Treaties that created them and that such Treaties are given legal effect by statutes in Member States. According to him, this is what happened to the 1st Respondent. He submitted that the 1st Respondent has now claimed immunity conferred upon it pursuant to provisions of the Charters which Zambia was party to and that these immunities have been given legal effect by the Diplomatic Immunities Act, Cap 20 of the Laws of Zambia (21). He argued that by Article 174 of the Preferential Trade Area for Eastern and Southern African States Charter, which was signed by Zambia, Zambia had committed itself to recognise some of these institutions created under the Preferential Trade Area of Eastern and Southern Africa and that these were to continue to operate under their respective Charters.

Mr Sangwa continued to argue that, although he accepted totally the jurisprudential arguments of State Counsel Malambo as reflecting the International Customary Law, according to him, these are irrelevant to the case before the Court because (a) the law as propounded by Lord Denning in the case Trendex Trading Corporation Limited v Central Bank of Nigeria (2), can only be invoked where parties claiming immunity are Foreign Sovereign States; (b) According to him, the decision in Trendex Trading (2) case was never founded on the interpretation of the Vienna Convention. So given that scenario, he argued, the entire concept of absolute or restrictive immunity had nothing to do with the Vienna Convention. He argued that there should be no connection between the rationale in the Trendex Trading (2) case on the development of this restrictive immunity theory to the Vienna Convention and the case before the court.

He submitted that the two concepts or approaches i.e. absolute and or restrictive immunity are certainly part of the International Customary Law. But the Vienna Convention and other Treaties have dictated their own terms. He went on to submit that the 1st Respondent as a Treaty Body is therefore not claiming that it is immune from suit and legal process in Zambia as was in Trendex Trading (2) case. It is seeking immunity on the basis; (1) of the COMESA Treaty an Agreement between each Member State; (2) the provisions of the Diplomatic Immunities Act, Cap 20 of the Laws of Zambia and (3) on the Statutory Instrument of No. 123 of 1992. The 1st Respondent is not a State, it cannot therefore, claim State immunity. He cited the case of Standard Chartered Bank v International Tin Council & Others (16) emphasising that the Treaties and legislation invariably confer on the International Organisation and Treaty Bodies in question the legal capacities of a body corporate. They confer such privileges and immunities which are decreed in the Treaties. Accordingly,
he argued, the concepts of absolute immunity and restrictive immunity have nothing to do with the International Organisations which are Treaty bodies. International Organisations only enjoyed such privileges, no more no less, as stated in the Treaties creating them. This is why in the Court below the Respondent relied entirely on the provisions of Statutory Instrument No. 123 of 1992 (30), Section 4 of Cap 20 of the Laws of Zambia (26), Article 174 of the COMESA Charter (27) and Article 42 of the PTA Charter (28), which clearly defined the 1st Respondent’s privileges and immunities. He urged this Court to adopt the definition of an International Organisation as pronounced in the case of *Maclaine Waton & Co. Ltd v Department of Trade & Industry & Related Appeals* (14) and urged this Court to apply that definition to the 1st Respondent. He referred further to the case of *Standard Chartered Bank v International tin Council and Others* (13) and again urged this Court to adopt the *ratio decidendi* in that case. He therefore argued that the 1st Respondent was entitled to the immunity stipulated in Article 174 5(4) of the COMESA Treaty and Article 42 of the PTA Charter (29), which have been given legal effect by Section 4 of Cap 20 and Statutory Instrument No. 123 of 1992 (30) unless

On this argument, that the 1st Respondent waived its immunity under Clause 16 of the Mortgage Deed, which appears at page 19 of the record, he argued that Clause 4 of Statutory Instrument No. 123 of 1992 (Diplomatic Immunity and Privileges of COMESA PTA Bank) requires a waiver to be express. His argument is that Clause 16 even if given liberal interpretation, cannot be held to be a waiver as stipulated in Clause 4 referred to supra. He argued that Clause 16 if stripped off what is irrelevant to this case, simply means that when it comes to the realization of the security given by Zambezi Portland Cement Limited, in the exercise of any rights reserved under the Mortgage Deed, the 1st Respondent would have to follow the Zambian law. So Clause 16 of the Mortgage Deed was not a waiver by the 1st Respondent even by any stretch of imagination. He argued that in finding out whether Clause 16 was a waiver, this Court should adopt the approach which the English Court adopted in *Standard Re International Tin Council & Others* (13). The Court held that: “As in most questions of pure construction, much turns on the initial impression which the words create. The Language of art 6(1) (a) did not first reading, and does not now after detailed exegesis, strike me as containing any limitation on the time at which the waiver, to be effective, must be made. The waiver must be express.” In augmenting this argument he referred to Article 3 of the Agreement between member States which reads: “The Common Market, its property and assets wherever located and by whomsoever held shall enjoy immunity from every form of legal process, except in so far as in any particular case it has expressly waived its immunity. It is however, understood that no waiver of immunity shall extend to any measure of execution.” (*Emphasis ours*). So in line with this provision, he urged this Court to dismiss this argument on waiver.
Mr Sangwa canvassed the view that as per the cited case of Re International tin Council (15), the concept of restrictive immunity does not apply to the 1st Respondent. According to Mr Sangwa, an International Organisation like the 1st Respondent, once incorporated, is merely a means by which member States engaged in collective enterprise, agree to carry on the project in the atmosphere of common interests. So if a group of member States carry out this enterprise collectively through a medium of an International Organisation, no one Member State either by executive, legislative or judicial action can assume the management of that enterprise or subject it to its own domestic law.

On ground 2 in relation to the appeal against the discharge of an ex-parte injunction by the learned trial Judge, Mr Sangwa argued that the Appellants had a duty to disclose to the learned trial Judge at the ex-parte injunction stage that there was a dispute on ownership of shares in Zambezi Portland Limited. He argued that the Appellant in an affidavit in support of ex-parte injunction on 6th September 2008, did not disclose that material fact. They obtained the ex-parte injunction without disclosing this material fact. The fact was only fully disclosed when the Respondents applied to set aside this ex-parte injunction on the 13th September, 2008. He argued that it is trite law that since they ought to have disclosed at that stage of getting the ex-parte order that ownership of shares in this company was contentious. The Court was punishing them for that.

The second argument is that even if this court was to reject this argument, in the alternative, there is still no legal basis for the learned trial Judge to have granted an injunction to the Appellants. Mr Sangwa argued that, this is so because in line with the trite injunction law, there was no prospect of their claim succeeding because; (a) there is this issue of immunity from legal process by the 1st Respondent; (b) on the basis of the maxim that “He who comes to equity must come with clean hands,” the Appellant had not come to equity with clean hands because; (i) the Appellants defaulted in their obligation under Clause 3(d) of the Loan Agreement. (ii) The certificate of title which was supposed to remain in the name of the 1st Respondent as part and parcel of security provided for in the first loan was instead used by the Appellants to secure another loan from the Trust Merchant Bank of Congo for US$7million.

Mr Sangwa argued that on the foregoing, the Appellant did not come to Court with clean hands. Further Mr Sangwa pointed out that it is trite law that a Court will not grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the claimant from irreparable injury, According to Mr Sangwa, there was no evidence establishing irreparable damage to be suffered by the Appellants and the right to relief was not clear. So again he asked this Court to dismiss this appeal.
In response to these arguments by Mr Mundashi, SC and Mr Sangwa, Mr Malambo SC, responded firstly that, there was no contradiction between his arguments and those of the two Counsel before the High Court. His argument before this Court is an elaboration of what the two Counsel presented before the lower Court. He pointed out that in their arguments before the lower Court, the two learned Counsel cited the case of *I congreso del Partido* (7), a celebrated case because Lord Denning pioneering in this field of the law, propounded the doctrine of restrictive immunity. He argued that in this celebrated case of *I congreso del Partido* (7), Lord Denning in pioneering this concept of restrictive immunity enunciated the principle of law of restrictive immunity.

According to State Counsel Malambo, the Learned trial Judge ignored this argument and concluded in the way he did without dealing with these issues presented before him. Further State Counsel Malambo argued that in concluding the way he did, the Learned trial Judge failed to analyse the nature of activities of the 1\textsuperscript{st} Respondent which were subject to the agreement and thus determining whether or not such activities fell under the activities covered by absolute immunity: *jure imperii*, or whether or not such activities were of a commercial nature to be covered by the doctrine of restrictive immunity: *jure gestionis*. He argued that in the alternative, should the Court hold that the 1\textsuperscript{st} Respondent was protected by *Article 4 of Cap 20 (25)*, his other argument is that, the 1\textsuperscript{st} Respondent under Clause 16 of the Mortgage Deed waived that immunity.

In response with regard to the issue of the discharge of the ex-parte injunction, Mr Malambo SC, argued that, the learned trial Judge made certain findings of fact that were not supported by any evidence. He based his decision to discharge the injunction on these findings of fact and as such misdirected himself. He, therefore, urged this Court to uphold the appeal.

We have given much thoughtful consideration to the issues raised in this appeal. Hence our taking time. These issues in this appeal, in our view, are seminal, providing future development of the law in Zambia on this principle of jurisdictional Immunity of the States and the International Organisations. This branch of the law has been an unknown sea to the Zambian Courts. We must pay tribute to Counsel on both sides for presenting arguments to this court spiritedly and convincingly, these arguments have been of great assistance to the Court.

Before dealing with substantive arguments, we will deal with the preliminary issues raised by Mr Mundashi, State Counsel and Mr Sangwa on behalf of the Respondents. Their arguments before us are that, the issues raised on the doctrine of absolute and or restrictive immunity were never pleaded nor raised before the High Court. Both Counsel argued that
the Appellants before the Court accepted that the 1st Respondent enjoyed immunity from legal process and as such was not amenable to any Court process in Zambian Courts, because of Article 174(5) of the COMESA Charter (27) as read together with Article 42 of the PTA Charter (30), which has been given legal effect in Zambia by Section 4 of Cap 20 (26) and Article 4 of Statutory Instrument No. 123 of 1992 (32).

According to both Counsel, the argument being advanced before this Court are at variance with the arguments which were advanced by both Counsel for the Appellants before the High Court. According to Counsel for the Respondents, as per plethora of authorities, the Appellants therefore cannot be allowed to raise fresh issues before this Court.

We agree that, that principle of law has been clearly laid down in a plethora of authorities by this Court that in order not to ambush the other party, only issues that were pleaded and or raised in the Court below can be raised in this Court as this is a Court of record. Only in very exceptional cases is this Court obliged to receive fresh evidence. But that Statement on issues not raised before the lower Court is not cast in iron. We have held that issues which were not pleaded but which were nevertheless raised in the Court below, without any objection from the other side, cannot be ignored and the Court has an obligation to consider such issues. See the Case of Nkongolo Farms and ZANACO, Kent (in Receivership) and Charles Haruperi, SCZ No. 19 of 2007 (20). At first blush it would appear Mr Mundahsi, SC, and Mr Sangwa’s arguments are correct, but on further scrutiny of the matter, we are satisfied that, looking at the record at page 604, the issues relating to the doctrines of absolute and restrictive immunity were raised by Counsel for the Appellants’ citation of the case of I congreso del Partido (7). We agree with Mr Malambo State Counsel that, the arguments before us are a further development of the issues which were raised in the High Court: See the Case of Kingswell Chipeta and 4 Others v Zambia Printing Company Ltd. (18). We also agree with Mr Malambo SC, that the learned trial Judge made no mention of these issues in his Ruling of 28th October, 2008. That was misdirection and miscarriage of justice. As Mr Malambo State Counsel pointed out that the learned trial Judge ignored or causally dealt with these major issues raised by the Appellants. We will, therefore, address our minds to these issues raised by the Appellants.

Looking at all of these issues canvassed in this appeal, we hold the view that, the issues raised in this appeal represent a development of the International law on the applicability and or opposability of the two doctrines of absolute immunity and restrictive immunity. Before we delve into these schools of thought, the view we hold is that the argument before this Court is not whether or not, the 1st Respondent did not enjoy immunity from suit or any legal process, because we agree with Mr
Mundashi SC and Mr Sangwa that the Appellants did not deny that the 1st Respondent, by virtue of Article 174(5) of the COMESA Charter(27), read together with Article 42 of the PTA Charter (29) and Section 4 of Cap 20 and Statutory Instrument No. 123 of 1992 (30) was accorded immunity from legal suit and process in Zambia. It is trite law that the Respondent’s claim for immunity is based primarily on International Customary law which has accorded immunity to public international organisations at least for their non commercial activities. See the Miskolc Journal of International Law by Professor K K Mwenda page 61 (32.) Rather, the questions before this Court are: (1) what is the nature of the immunity accorded to the 1st Respondent? (2) What is the extent of that immunity from any suit and legal process? (3) Can Treaty or international law supersede our Acts of Parliament?

In response to the first question, we agree with Mr Malambo SC., that the immunities and privileges enjoyed by treaty bodies are the same as diplomatic immunities accorded to State actors. The immunities granted to State actors in Zambia are the same as the diplomatic immunities granted to treaty bodies. Hence the title of Cap 20 of the Laws of Zambia says: “Diplomatic Immunities Act” (26). Even Statutory Instrument No. 123 of 1992 (30) is titled “Diplomatic Immunities and Privileges of COMESA” So, these treaty bodies' immunities do not depend on treaties only; they have to be interpreted against the background of International Law (See Article 2 of the COMESA Charter). We also agree with Mr Malambo SC., that immunities conferred on treaty bodies in accordance with Section 4 of Cap 20 (26), relating to immunities and privileges cannot have different interpretation from the Vienna Convention or International Customary law.

On the next question, as to what is the nature of that immunity accorded to the 1st Respondent, Mr Mundashi, State Counsel and Mr Sangwa admirably tried to convince us that the 1st Respondent’s immunity and privileges are as stipulated in the treaties which created it, nothing more and nothing less. According to them, this principle derives its authority from a well known principle of International Customary law that an International Organisation enjoys statutory or treaty immunity accorded to it by the treaty or treaties creating it. This theory is based on a well established principle that, an International Organisation cannot confer on itself privileges and immunities. It can only enjoy the privileges and immunities granted to it by its member States.
Mr Mundashi, SC, and Mr Sangwa further argued that, in the case before us, it is wrong to look elsewhere in dealing with this matter other than to look at these Charters (COMESA and PTA) which created the 1st Respondent and also to look at Section 4 Cap 20 and Statutory Instrument No. 123 of 1992, whose provisions gave legal effect to the 1st Respondent’s claim of jurisdictional immunity. Attractive as this argument may be, we find this argument not in consonance with the COMESA Charter which says in its Article 2 (27) that, the establishment of the Common Market for Eastern and Southern Africa (COMESA) has to be with due regard “to the principles of international law governing relations between Sovereign States, and the principles of liberty, fundamental freedoms and the rule of law (our own emphasis)…”.

The 1st Respondent is one of the principal organs of COMESA. In our view, therefore, the privileges and immunities that have been accorded to the 1st Respondent have to be in tandem with the acceptable principles of the International Law governing relations between Sovereign States and principles of liberties, fundamental freedoms and the rule of law. Since it is trite International Customary law that except by consent of the parties, the Courts universally will not implead another Sovereign State’s claim for damages and since it is equally trite International Customary law that Foreign Sovereign States and or legal bodies who carry out duties of the State are conferred absolute immunity jure imperii for non commercial activities and that, legal bodies whether State or legal entities involved in commercial activities for the States can only invoke restrictive immunity (see Professor Mwenda’s article ‘Miskolc Journal of International Law’), the immunities and privileges conferred on the 1st Respondent COMESA, PTA Treaties and given legal effect by Section 4 of Cap 20 and Statutory Instrument No.123 of 1992 have to be interpreted against that background.

In a Kenyan Court of Appeal case of Tononolea Steels Limited v the PTA Bank (21), which dealt with the issue of 1st Respondent’s claim of absolute immunity, the brief facts, as narrated by Professor K K Mwenda in his article ‘Miskolc Journal of International Law’ are that Tononolea Steels Limited (21) had a financing importation contract in the order of the amount of US$ 80,000,000.00. There was an alleged breach of the agreement between the 1st Respondent and Tononolea Steel Limited (21) This Company then took the 1st Respondent to Court. The 1st Respondent claimed absolute immunity as provided in the COMESA, PTA Treaties, read together with the Kenyan domestic law, which give legal effect to these treaty obligations. The Kenyan Court of Appeal in three different Judgements, delivered by three different Judges, dismissed the claim of absolute immunity by the 1st Respondent. One of the three Judges opined that: “It is inconceivable that the Government of Kenya could knowingly disregard such an important rule of International Law and grant PTA Bank absolute immunity from every form of legal process extending to even its
commercial activities.” This judgement has been subjected to severe criticism by those who advocate for absolute immunity for International Organisations. (See Professor Mwenda’s article ‘Miskolc Journal of International Law).

In another case in which the 1st Respondent claimed absolute immunity before the COMESA Court is the case of Eastern and Southern African Trade Development PTA Bank and Dr M Gondwe v Martin Ogang (17), the COMESA Court dealt with a dispute in which one Martin Ogang alleged that he had been wrongfully dismissed by the Board of the 1st Respondent. The 1st Respondent in making its own claim placed great emphasis of its jurisdictional immunity in Article 48 of the PTA Bank Charter which says: “(1)... Actions may be brought against the Bank in the territories of the Member States or elsewhere in a Court of competent jurisdiction. 2. No action shall be brought against the Bank by member of the bank or persons acting for or deriving claims from them.....” In the Court’s first hearing Martin Ogang was granted a suspension order to stop the 1st Respondent from enforcing its decision to terminate his employment contract. On the second instance, the issues before the Court included the following: (a) to determine whether or not the 1st Respondent, an international financial institution, was immuned from jurisdiction of the COMESA Court and (b) to resolve the claim made by the 1st Respondent and Dr Michael Gondwe, the Applicants, that since Mr Martin Ogang, did not State the law upon which the 1st Respondent could be made to stand before the COMESA Court, Mr Martin Ogang had no locus standi. The Court invoked Article 42 of its Charter which states: (2) No action shall be brought against the Bank by members of the Bank or persons acting for or deriving claims from them. However, members of the Bank shall have recourse to such special procedures for the settlement of disputes between the bank and its members as may be prescribed in this Charter or in the regulations of the Bank made in accordance with the terms of contracts entered into with the Bank.” The COMESA Court ruled that the 1st Respondent’s immunity was applicable only in actions brought to COMESA Court by its members and that these were member States and or financial institutions and therefore did not include individual members of the public. The Court therefore ruled that the immunity provided under Article 42 of the PTA Charter (before Clauses 1 – 2 were amended), did not apply to actions brought by individuals to COMESA Court. The COMESA Court also ruled that its decisions take precedence over decisions of national Courts in the interpretation of its Charter.

Article 2 (27) and the two cases we have cited, fortify our view that, the interpretation of the 1st Respondent’s immunities and privileges as spelt out in the treaties, have to have due regard to all these provisions of International law, fundamental freedoms and principles of liberties and the rule of law. Mr Malambo, SC., has argued, rightly in our view, that this development of the law on the applicability of restrictive immunity, which
is receiving universal recognition underscores a duty of States to guarantee the fundamental rights of access to justice for members of the public who engage in commercial activities with the treaty bodies. We adopt Lord Wilberforce’s words in the case of *I congreso del Partido* (7) when he says: “It is necessary in the interest of justice of individuals having such transactions with States to allow them to bring such transactions before the Courts…”

Article 10-16 of UDHR (28) spells out this fundamental human right of access to justice. We are alive to the fact that, the UDHR (29) is not a treaty and therefore not binding qua international convention. Nonetheless, our view is that even with that stated, the UDHR (29) is binding on the basis that, it is part of the International Customary law codified. It is equally binding because the provisions of the UDHR (29) have acquired the force of custom through general practice accepted as law.

Also, and even more persuasive, our Constitution in Article 18 (32) as a grand norm of our laws has incorporated all the elements of this fundamental human right (*that is access to justice*). Defining this fundamental Human Rights, Professor de Gaay Fortman in his Article, “*Beating the State at its own Game, an inquiry into the intricacies of sovereignty and the separation of powers*” says: “the link with public justice points to duty rather than mere discretionary power. A real step forward in this connection is the current emphasis on the other side of the sovereign coin: the responsibility to protect. In other words, sovereignty in the sense of the execution of national authority implies responsibility rather than just discretion.” Therefore, although human rights are not hieratical, the Courts have, in balancing and weighing between these fundamental human rights given an edge to fundamental human rights such as the right to access to justice. Therefore, using this approach, our country is under a duty by virtue of Article 18 or our Constitution (32) read together with Article 10 and 16 of the UDHR (29) to guarantee this fundamental human right of access to justice and to equality before the law to the Appellants. According to *Professor de Gaay Fortman*, in the same article referred to above, analysing this fundamental right after September 11th 2001 attacks on USA and the consequential arrests and detentions of a number of people without trial has this to say on this duty of ensuring this fundamental right of access to justice: “...the legality principle the rule of law implies that everyone, including the state itself and its functionaries, is subject to the law in the sense of clear and unambiguous rules and standards that generally have no retroactive effect…”

The next question is, can treaty law or international customary law supersede our domestic law. As we have already ruled that the diplomatic immunities and privileges enjoyed by treaty bodies are the same as the diplomatic immunities and privileges accorded to State actors, these have been given legal effect by Section 4 of Cap 20 (28). So, the diplomatic
immunities and privileges accorded to the 1st Respondent have been given legal effect by Section 4 of Cap 20 (28). The diplomatic immunities and privileges of the 1st Respondent are part of treaty law as well as our statutory law. The question is, is there any conflict between our subsidiary legislation in Cap 20 (28) and the treaty law in COMESA, PTA and our Constitution on the right to access to justice? Our Constitution which is a grand norm of our laws as already stated in our Judgement, has incorporated the provisions of this right of access to justice (see Article 18 of our Constitution). So if there is a conflict between our Constitution and the subsidiary legislation in Cap 20, our Constitution (32) prevails. In this case therefore, the right of access to justice has an edge over the consideration of the treaty obligations under COMESA and PTA treaties as domesticated in Section 4 and Statutory Instrument No. 123 of 1992 (31).

So, although we see some merit in the arguments by Mr Mundashi, SC and Mr Sangwa that the 1st Respondent being an international financial institution created to pursue public purposes of facilitating reconstruction and development to a much larger community within member States by promoting regional trade and investment and as such it therefore requires immunity from suit so that they can be allowed to perform their functions unhampered by adhering to rules and regulations in different member States, and as such should enjoy some immunity, nonetheless, we adopt the approach by Lord Denning in Trendex (2), and I congreso del Partido (7) and other European Courts, the Italian Courts, American Courts and Kenyan Courts. We are therefore persuaded to hold that the learned trial Judge misdirected himself in holding that the 1st Respondent was covered by absolute immunity. We hold that the facts disclosed establish with no doubt that the 1st Respondent entered into a commercial transaction with the appellants and as such is not covered by the principle of absolute immunity. The principle of restrictive immunity has to be invoked.

Mr Malambo and Mr Siwila both argued that in the alternative, should the Court hold that the 1st Respondent was covered by the doctrine of absolute immunity, then the Court should consider that the 1st Respondent waived its immunity by including Clause 16 in the Mortgage Deed. Since we have already held that there is merit in the argument that the learned trial Judge misdirected himself when he ruled that the 1st Respondent enjoyed absolute immunity, we will not go too much in the arguments on this point. However, looking at Clause 16, we agree with Mr Mundashi, SC., and Mr Sangwa that there was no express waiver of immunity. Article 4, of Statutory Instrument No. 123 (31) provides that there has to be express waiver of immunity before it can be enforced.

Coming to ground 2 the thrust of this ground is that, the learned trial Judge erred when he held that the Appellants failed to disclose that they ceased to be shareholders in Zambezi Portland Cement Limited and as such they
were not entitled to any equitable remedy of an injunction. Mr Mundashi, SC, and Mr Sangwa have argued that although such a finding was not supported by evidence that the Appellants were no long shareholders, nonetheless, the Appellants are being punished for failing to disclose, this material fact that ownership of shares was contentious at the stage the Appellants applied for an ex-parte injunction.

We understand the argument but have difficulties in accepting that argument. The findings of the learned trial Judge at page 12 of the record were: “the fact that the Plaintiffs (now Appellants) ceased to be shareholders in the company aforementioned was a very material fact. The suppression of that fact, with a further claim that they are shareholders when they are not, means that the injunction cannot be sustained.” Therefore the argument of Mr Mundanshi, SC, and Mr Sangwa cannot be accepted. The Learned trial Judge based his conclusion on his holding that the Appellants were no longer shareholders in the Company, which was a wrong holding as it was not supported by any evidence before the learned trial Judge.

In the alternative, it has been argued that even if the learned trial Judge misdirected himself on that finding as a basis for refusing to grant interlocutory injunction, applying the well established principles in granting or rejecting application for an interlocutory injunction, the Appellants would not have been granted that relief as their claim of right was not clear and the chances of succeeding on the main claim were not established. Also according to the Respondents, the Appellants did not come to equity with clean hands in that they failed to honour their obligation in the loan agreement by not surrendering the title deed to the 1st Respondent and by failure to pay as stipulated in the loan agreement.

In addition, Mr Sangwa argued that as the Appellants came to court seeking this relief after Receiver had been appointed they were no longer an interested party and as such cannot seek for any remedy.

We have considered these arguments. Firstly, we agree that there was evidence on record that the Appellants were still Directors of Zambezi Portland Cement Limited using the authority of Avalon Mortors Limited (in Receivership) (19), As already Stated we are satisfied that the Learned trial Judge based his rejection to grant the Appellant an injunction on his conclusions which were not supported by any evidence on record. He concluded wrongly that the Appellants were to be punished because they had failed to disclose the facts that they ceased to be shareholders. So he misdirected himself.

Coming to the other argument by Mr Sangwa that even if there was no misdirection, the lower Court would not have granted the Appellants the injunction since the Appellants did not have a clear claim of right. We hold
that there are two main contentious issues which were to be dealt with at trial stage, these are: (1) whether or not the 1st Respondent was right to appoint the 2nd Respondent as a receiver at that stage; (2) whether or not there was a breach of the loan agreement between Zambezi Portland Cement Limited and the 1st Respondent. Looking at these two issues, we are satisfied that there was need for an interlocutory injunction to be granted to the Appellants to protect property *pendente lite*. We therefore find merit on ground 2 as well.

In sum total, the appeal succeeds. We award costs to the Appellants, to be agreed upon or to be taxed in default.

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L. P. Chibesakunda
SUPREME COURT JUDGE

………………………………………..

M. S. Mwanamwambwa
SUPREME COURT JUDGE

………………………………………..

H. Chibomba
SUPREME COURT JUDGE
Convention on the Privileges and Immunities of the United Nations 1946

Adopted by the UN General Assembly on 13 February 1946

Whereas Article 104 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes and

Whereas Article 105 of the Charter of the United Nations provides that the Organization shall enjoy in the territory of each of its Member such privileges and immunities as are necessary for the fulfillment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Consequently the General Assembly by a Resolution adopted on the 13 February 1946, approved the following Convention and proposed it for accession by each Member of the United Nations.

**Article I: Juridical Personality**

1. The United Nations shall possess juridical personality. It shall have the capacity:
   (a) to contract;
   (b) to acquire and dispose of in movable and movable property;
   (c) to institute legal proceedings.

**Article II: Property, Funds and Assets**

2. The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process
except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

3. The premises of the United Nations shall be inviolable. The property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

4. The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.

5. Without being restricted by financial controls, regulations or moratoria of any kind,
   (a) The United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;
   (b) The United Nations shall be free to transfer its funds, gold or currency from one country to another or within any country and to convert any currency held by it into any other currency.

6. In exercising its rights under Section 5 above, the United Nations shall pay due regard to any representations made by the Government of any Member insofar as it is considered that effect can be given to such representations without detriment to the interests of the United Nations.

7. The United Nations, its assets, income and other property shall be:
   (a) Exempt from all direct taxes; it is understood however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;
   (b) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use. It is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed with the Government of that country;
   (c) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications.

8. While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

*Article III: Facilities in Respect of Communications*

9. The United Nations shall enjoy in the territory of each Member for its official communications treatment not less favourable than that accorded
by the Government of that Member to any other Government including its diplomatic mission in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephones and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

10. The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Article IV: The Representatives of Members

11. Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during the journey to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind;

(b) Inviolability for all papers and documents;

(c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens registration or national service obligations in the State they are visiting or through which they are passing in the exercise of their functions;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also;

(g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

12. In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

13. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and
subsidiary organs of the United Nations and to conferences convened by
the United Nations are present in a state for the discharge of their duties
shall not be considered as periods of residence.

14. Privileges and immunities are accorded to the representatives of
Members not for the personal benefit of the individuals themselves, but in
order to safeguard the independent exercise of their functions in
connection with the United Nations. Consequently a Member non only
has the right but is under a duty to waive the immunity of its representative
in any case where in the opinion of the Member the immunity would
impede the course of justice, and it can be waived without prejudice to the
purpose for which the immunity is accorded.

15. The provisions of Sections 11, 12 and 13 are not applicable as between
a representative and the authorities of the state of which he is a national or
of which he is or has been the representative.

16. In this article the expression ‘representatives’ shall be deemed to
include all delegates, deputy delegates, advisers, technical experts and
secretaries of delegations.

Article V: Officials

17. The Secretary-General will specify the categories of officials to which
the provisions of this Article and Article VII shall apply. He shall submit
these categories to the General Assembly. Thereafter these categories shall
be communicated to the Governments of all Members. The names of the
officials included in these categories shall from time to time be made
known to the Governments of Members.

18. Officials of the United Nations shall:
(a) Be immune from legal process in respect of words spoken or written
and all acts performed by them in their official capacity;
(b) Be exempt from taxation on the salaries and emoluments paid to them
by the United Nations;
(c) Be immune from national service obligations;
(d) Be immune, together with their spouses and relatives dependent on
them, from immigration restrictions and alien registration;
(e) Be accorded the same privileges in respect of exchange facilities as are
accorded to the officials of comparable ranks forming part of diplomatic
missions to the Government concerned;
(f) Be given, together with their spouses and relatives dependent on them,
the same repatriation facilities in time of international crisis as diplomatic
envoys;
(g) Have the right to import free of duty their furniture and effects at the
time of first taking up their post in the country in question.

19. In addition to the immunities and privileges specified in Section 18, the
Secretary-General and all Assistant Secretaries-General shall be accorded
in respect of themselves, their spouses and minor children, the privileges
and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

20. Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

21. The United Nations shall cooperate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article.

**Article VI: Experts on Missions for the United Nations**

22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage;

(b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) Inviolability for all papers and documents;

(d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) The Same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.
Article VII: United Nations Laissez-Passer

24. The United Nations may issue United Nations laissez-passer to its officials. These laissez-passer shall be recognized and accepted as valid travel documents by the authorities of Members, taking into account the provisions of Section 25.

25. Applications for visas (where required) from the holders of United Nations laissez-passer, when accompanied by a certificate that they are traveling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

26. Similar facilities to those specified in Section 25 shall be accorded to experts and other persons who, though not the holders of United Nations laissez-passer, have a certificate that they are traveling on the business of the United Nations.

27. The Secretary-General, Assistant Secretaries-General and Directors traveling on United Nations laissez-passer on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

28. The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

Article VIII: Settlement of Disputes

29. The United Nations shall make provisions for appropriate modes of settlement of:
   (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
   (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

30. All differences arising out of the interpretation or application of the present convention shall be referred to the international Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

Final Article

31. This convention is submitted to every Member of the United Nations for accession.

32. Accession shall be affected by deposit of an instrument with the Secretary-General of the United Nations and the Convention shall come
into force as regards each Member on the date of deposit of each instrument of accession.

33. The Secretary-General shall inform all Members of the United Nations of the deposit of each accession.

34. It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this Convention.

35. This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised Convention.

36. The Secretary-General may conclude with any Member or Members supplementary agreements adjusting the provisions of this Convention so far as that Member or those Members are concerned. These supplementary agreements shall in each case be subject to the approval of the General Assembly.
Convention on the Privileges and Immunities on the Specialized Agencies 1947

Approved by the General Assembly of the United Nations on 21 November 1947

[Whereas] the General Assembly of the United Nations adopted on 13 February 1946 a resolution contemplating the unification as far as possible of the privileges and immunities enjoyed by the United Nations and by the various specialized agencies; and

[Whereas] consultations concerning the implementation of the aforesaid resolution have taken place between the United Nations and the specialized agencies;

[Consequently,] by resolution 179(II) adopted on 21 November 1947, the General Assembly has approved the following Convention, which is submitted to the specialized agencies for acceptance and to every Member of the United Nations and to every other State member of one or more of the specialized agencies for accession.

Article I: Definitions and scope

1. In this Convention:
   (i) The words ‘standard clauses’ refer to the provisions of articles II to IX.
   (ii) The words ‘specialized agencies’ mean:
        (a) The International Labour Organization;
        (b) The Food and Agriculture Organization of the United Nations;
        (c) The United Nations Educational, Scientific and Cultural Organization;
        (d) The International Civil Aviation Organization;
        (e) The International Monetary Fund;
(f) The International Bank for Reconstruction and Development;
(g) The World Health Organization;
(h) The Universal Postal Union;
(i) The International Telecommunications Union; and
(j) Any other Agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter.

(iii) The word ‘Convention’ means, in relation to any particular specialized agency, the standard clauses as modified by the final (or revised) text of the annex transmitted by that agency in accordance with sections 36 and 38.

(iv) For the purposes of article III, the words ‘property and assets’ shall also include property and funds administered by a specialized agency in furtherance of its constitutional functions.

(v) For the purposes of articles V and VII, the expression ‘representatives of members’ shall be deemed to include all representatives; alternatives, advisers, technical experts and secretaries of delegations.

(vi) In sections 13, 14, 15 and 25, the expression ‘meetings convened by a specialized agency’ means meetings: (1) of its assembly and of its executive body (however designated), and (2) commission provided for in its constitution; (3) of any international conference convened by it; and (4) of any committee of any of these bodies.

(vii) The term ‘executive head’ means the [principal executive official] of the specialized agency in question, whether designated ‘Director-General’ or otherwise.

2. Each State party to this Convention in respect of any specialized agency to which this Convention has become applicable in accordance with section 37 shall accord to, or in connexion with, that agency the privileges and immunities set forth in the standard clauses on the conditions specified therein, subject to any modification of those clauses contained in the provisions of the final (or revised) annex relating to that agency and transmitted in accordance with sections 36 or 38.

Article II: Juridical personality

3. The specialized agencies shall possess juridical personality. They shall have the capacity (a) to contract, (b) to acquire and dispose of immovable and movable property, (c) to institute legal proceedings.

Article III: Property, funds and assets

4. The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is however, understood that no waiver of immunity shall extend to any measure of execution.
5. The premises of the specialized agencies shall be inviolable. The property and assets of the specialized agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

6. The archives of the specialized agencies, and in general all documents belonging to them or held by them, shall be inviolable, wherever located.

7. Without being restricted by financial controls, regulations or moratoria of any kind:
   (a) The specialized agencies may hold funds, gold or currency of any kind and operate accounts in any currency;
   (b) The specialized agencies may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other country.

8. Each specialized agency shall, in exercising its rights under section 7 above, pay due regard to any representations made by the Government of any State party to this Convention in so far as it is considered that effect can be given to such representations without detriment to the interests of the agency.

9. The specialized agencies, their assets, income and other property shall be:
   (a) Exempt from all direct taxes; it is understood, however, that the specialized agencies will not claim exemption from taxes which are, in fact, no more than charges for public utility services;
   (b) Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the specialized agencies for their official use; it is understood, however, that articles imported under such exemption will not be sold in the country into which they were imported except under conditions agreed to with the Government of that country;
   (c) Exempt from duties and prohibitions and restrictions on imports and exports in respect of their publications.

10. While the specialized agencies will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the specialized agencies are making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, States parties to this Convention will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

Article IV: Facilities in respect of communications

11. Each specialized agency shall enjoy, in the territory of each State party to this Convention in respect of that agency, for its official
communications, treatment not less favourable than that accorded by the Government of such State to any other Government, including the latter's diplomatic mission in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications, and press rates for information to the press and radio.

12. No censorship shall be applied to the official correspondence and other official communications of the specialized agencies. The specialized agencies shall have the right to use codes and to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags. Nothing in this section shall be construed to preclude the adoption of appropriate security precautions to be determined by agreement between a State party to this Convention and a specialized agency.

Article V: Representatives of members

13. Representatives of members at meetings convened by a specialized agency shall, while exercising their functions and during their journeys to and from the place of meeting, enjoy the following privileges and immunities:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage, and in respect of words spoken or written and all acts done by them in their official capacity, immunity from legal process of every kind;
(b) Inviolability for all papers and documents;
(c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;
(d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens' registration or national service obligations in the State which they are visiting or through which they are passing in the exercise of their functions;
(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign Governments on temporary official missions;
(f) The same immunities and facilities in respect of their personal baggage as are accorded to members of comparable rank of diplomatic mission.

14. In order to secure for the representatives of members of the specialized agencies at meetings convened by them complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties.

15. Where the incidence of any form of taxation depends upon residence, periods during which the representatives of members of the specialized
agencies at meetings convened by them are present in a member State for the discharge of their duties shall not be considered as periods of residence.

16. Privileges and immunities are accorded to the representatives of members, not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the specialized agencies. Consequently, a member not only has the right but is under a duty to waive the immunity of its representatives in any case where, in the opinion of the member, the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded.

17. The provisions of sections 13, 14 and 15 are not applicable in relation to the authorities of a State in which the person is a national or of which he is or has been a representative.

**Article VI: Officials**

18. Each specialized agency will specify the categories of officials to which the provisions of this article and of article VIII shall apply. It shall communicate them to the Governments of all States parties to this Convention in respect of that agency and to the Secretary-General of the United Nations. The names of the officials included in these categories shall from time to time be made known to the above-mentioned Governments.

19. Officials of the specialized agencies shall:

   (a) Be immune from legal process in respect of words spoken or written and in all acts performed by them in their official capacity;
   (b) Enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations.
   (c) Be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registrations;
   (d) Be accorded the same privileges in respect of exchange facilities as are accorded to officials of comparable rank of diplomatic missions;
   (e) Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crises as officials of comparable rank of diplomatic missions;
   (f) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

20. The officials of the specialized agencies shall be exempt from national service obligations, provided that, in relation to the State of which they are nationals, such exemption shall be confined to officials of the specialized agencies whose names have, by reason of their duties, been placed upon a list compiled by the executive head of the specialized agency and approved by the State concerned.

Should other officials of specialized agencies be called up for national service, the State concerned shall, at the request of the specialized agency
concerned, grant such temporary deferments in the call-up of such officials as may be necessary to avoid interruption in the continuation of essential work.

21. In addition to the immunities and privileges specified in sections 19 and 20, the executive head of each specialized agency, including any official acting on his behalf during his absence from duty, shall be accorded in respect of himself, his spouse and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

22. Privileges and immunities are granted to officials in the interests of the specialized agencies only and not for the personal benefit of the individuals themselves. Each specialized agency shall have the right and duty to waive the immunity of any official in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the specialized agency.

23. Each specialized agency shall co-operate at all times with the appropriate authorities of member States to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuses in connexion with the privileges, immunities and facilities mentioned in this article.

Article VII: Abuses of privilege

24. If any State party to this Convention considers that there has been an abuse of a privilege or immunity conferred by this Convention, consultations shall be held between that State and the specialized agency concerned to determine whether any such abuse has occurred and, if so, to attempt to ensure that no repetition occurs. If such consultations fail to achieve a result satisfactory to the State and the specialized agency concerned, the question of whether an abuse of a privilege or immunity has occurred shall be submitted to the International Court of Justice in accordance with section 32. If the International Court of Justice finds that such an abuse has occurred, the State party to this convention affected by such abuse shall have the right, after notification to the specialized agency in question, to withhold from the specialized agency concerned the benefits of the privilege or immunity so abused.

25.1 Representatives of members at meetings convened by specialized agencies, while exercising their functions and during their journeys to and from the place of meeting, and officials within the meaning of section 18, shall not be required by the territorial authorities to leave the country in which they are performing their functions on account of any activities by them in their official capacity. In the case, however, of abuse of privileges of residence committed by any such person in activities in that country outside his official functions, he may be required to leave by the Government of that country provided that:

2(I) Representatives of members, or persons who are entitled to diplomatic immunity under section 21, shall not be required to leave the
country otherwise than in accordance with the diplomatic procedure applicable to diplomatic envoys accredited to that country.

(II) In the case of an official to whom section 21 is not applicable, no order to leave the country shall be issued other than with the approval of the Foreign Minister of the country in question, and such approval shall be given only after consultation with the executive head of the specialized agency concerned; and, if expulsion proceedings are taken against an official, the executive head of the specialized agency shall have the right to appear in such proceedings on behalf of the person against whom they are instituted.

Article VIII: Laissez-passer

26. Officials of the specialized agencies shall be entitled to use the United Nations [laissez-passer] in conformity with administrative arrangements to be concluded between the Secretary-General of the United Nations and the competent authorities of the specialized agencies, to which agencies special powers to issue [laissez-passer] may be delegated. The Secretary-General of the United Nations shall notify each State party to this Convention of each administrative arrangements so concluded.

27. States parties to this Convention shall recognize and accept the United Nations laissez-passer issued to officials of the specialized agencies as valid travel documents.

28. Applications for visas, where required, from officials of specialized agencies holding United Nations [laissez-passer], when accompanied by a certificate that they are travelling on the business of a specialized agency, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

29. Similar facilities to those specified in section 28 shall be accorded to experts and other persons who, though not the holders of United Nations laissez-passer have a certificate that they are travelling on the business of a specialized agency.

30. The executive heads, assistant executive heads, heads of departments and other officials of a rank not lower than head of department of the specialized agencies, travelling on United Nations [laissez-passer] on the business of the specialized agencies, shall be granted the same facilities for travel as are accorded to officials of comparable rank in diplomatic missions.

Article IX: Settlement of disputes

31. Each specialized agency shall make provision for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of private character to which the specialized agency is a party;
(b) Disputes involving any official of a specialized agency who by reason of his official position enjoys immunity, if immunity has not been waived in accordance with the provisions of section 22.

32. All differences arising out of the interpretation or application of the present Convention shall be referred to the International Court of Justice unless in any case it is agreed by the parties to have recourse another mode of settlement. If a difference arises between one of the specialized agencies on the one had, and a member on the other had, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court and the relevant provisions of the agreements concluded between the United Nations and the specialized agency concerned. The opinion given by the Court shall be accepted as decisive by the parties.

Article X: Annexes and application to individual specialized agencies

33. In their application to each specialized agency, the standard clauses shall operate subject to any modification set forth in the final (or revised) text of the annex relating to that agency, as provided in sections 36 and 38.

34. The provisions of the Convention in relation to any specialized agency must be interpreted in the light of the functions with which that agency is entrusted by its constitutional instrument.

35. Draft annexes 1 to 9 are recommended to the specialized agencies named therein. In the case of any specialized agency not mentioned by name in section 1, the Secretary-General of the United Nations shall transmit to the agency a draft annex recommended by the Economic and Social Council.

36. The final text of each annex shall be that approved by the specialized agency in question in accordance with its constitutional procedure. A copy of the annex as approved by each specialized agency shall be transmitted by the agency in question to the Secretary-General of the United Nations and shall thereupon replace the draft referred to in section 35.

37. The present Convention becomes applicable to each specialized agency when it has transmitted to the Secretary-General of the United Nations the final text of the relevant annex and has informed him that it accepts the standard clauses, as modified by this annex and undertakes to give effect to sections 8, 18, 22, 23, 24, 31, 32, 42 and 45 (subject to any modification of section 32 which may be found necessary in order to make the final text of the annex consonant with the constitutional instrument of the agency) and any provisions of the annex placing obligations on the agency. The Secretary-General shall communicate to all Members of the United Nations and to other States members of the specialized agencies certified copies of all annexes transmitted to him under this section and of revised annexes transmitted under section 38.

38. If, after the transmission of a final annex under section 36, any specialized agency approves any amendments thereto in accordance with
its constitutional procedure, a revised annex shall be transmitted by it to the Secretary-General of the United Nations.

39. The provisions of this Convention shall in no way limit or prejudice the privileges and immunities which have been, or may hereafter be, accorded by any State to any specialized agency by reason of the location in the territory of that State of its headquarters or regional offices. This Convention shall not be deemed to prevent the conclusion between any State party thereto and any specialized agency of supplemental agreements adjusting the provisions of this Convention or extending or curtailing the privileges and immunities thereby granted.

40. It is understood that the standard clauses, as modified by the final text of an annex sent by a specialized agency to the Secretary-General of the United Nations under section 36 (or any revised annex sent under section 38), will be consistent with the provisions of the constitutional instrument then in force of the agency in question, and that if any amendment to that instrument is necessary for the purpose of making the constitutional instrument so consistent, such amendment will have been brought into force in accordance with the constitutional procedure of that agency before the final (or revised) annex is transmitted.

The Convention shall not itself operate so as to abrogate, or derogate from, any provisions of the constitutional instrument of any specialized agency or any rights or obligations which the agency may otherwise have, acquire, or assume.

**Article XI: Final provisions**

41. Accession to this Convention by a Member of the United Nations and (subject to section 42) by any State member of a specialized agency shall be effected by deposit with the Secretary-General of the United Nations of an instrument of accession which shall take effect on the date of its deposit.

42. Each specialized agency concerned shall communicate the text of this Convention together with the relevant annexes to those of its members which are not Members of the United Nations and shall invite them to accede thereto in respect of that agency by depositing an instrument of accession to this Convention in respect thereof either with the Secretary-General of the United Nations or with the executive head of the specialized agency.

43. Each State party to this Convention shall indicate in its instrument of accession the specialized agency or agencies in respect of which it undertakes to apply the provisions of this Convention. Each State party to this Convention may by a subsequent written notification to the Secretary-General of the United Nations undertake to apply the provisions of this Convention to one or more further specialized agencies. This notification shall take effect on the date of its receipt by the Secretary-General.

44. This Convention shall enter into force for each State party to this Convention in respect of a specialized agency when it has become
applicable to that agency in accordance with section 37 and the State party has undertaken to apply the provisions of the Convention to that agency in accordance with section 43.

45. The Secretary-General of the United Nations shall inform all Members of the United Nations, as well as all members of the specialized agencies, and executive heads of the specialized agencies, of the deposit of each instrument of accession received under section 41 and of subsequent notifications received under section 43. The executive head of a specialized agency shall inform the Secretary-General of the United Nations and the members of the agency concerned of the deposit of any instrument of accession deposited with him under section 42.

46. It is understood that, when an instrument of accession or a subsequent notification is deposited on behalf of any State, this State will be in a position under its own law to give effect to the terms of this Convention, as modified by the final texts of any annexes relating to the agencies covered by such accessions or notifications.

47.1 Subject to the provisions of paragraphs 2 and 3 of this section, each State party to this Convention undertakes to apply this Convention in respect of each specialized agency covered by its accession or subsequent notification, until such time as a revised convention or annex shall have become applicable to that agency and the said State shall have accepted the revised convention or annex. In the case of a revised annex, the acceptance of States shall be by a notification addressed to the Secretary-General of the United Nations, which shall take effect on the date of its receipt by the Secretary-General.

47.2 Each State party to this Convention, however, which is not, or has ceased to be, a member of a specialized agency, may address a written notification to the Secretary-General of the United Nations and the executive head of the agency concerned to the effect that it intends to withhold from that agency the benefits of this Convention as from a specified date, which shall not be earlier than three months from the date of receipt of the notification.

47.3 Each State party to this Convention may withhold the benefit of this Convention from any specialized agency which ceases to be in relationship with the United Nations.

47.4 The Secretary-General of the United Nations shall inform all members States parties to this Convention of any notification transmitted to him under the provisions of this section.

48. At the request of one-third of the States parties to this Convention, the Secretary-General of the United Nations will convene a conference with a view to its revision.

49. The Secretary-General of the United Nations shall transmit copies of this Convention to each specialized agency and to the Government of each Member of the United Nations.
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