DIPLOMATIC IMMUNITY OF CORRUPT DIPLOMATS: WHEN THE SHIELD CAN NO LONGER HOLD

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I. INTRODUCTION

This article examines the concept of diplomatic immunity in public international law where there is evidence of corrupt practices by an erring diplomatic agent of a state. The article argues that although a diplomat enjoys diplomatic immunity from criminal prosecution for engaging in criminal activities of corruption in a state to which the diplomat is accredited, he or she has limited immunity when the offense is committed in a third state to which he or she is not accredited. Where the diplomat is arrested in the third state, he or she may not be allowed to invoke diplomatic immunity by that state since such immunity applies only when the diplomat is passing through the territorial

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zone of the state with some kind of innocent passage analogous to that postulated under Article 19(2) of the 1982 United Nations Convention on the Law of the Sea. This Law of the Sea 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, where 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 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. For example, in cases of universal jurisdiction 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.

In a recent study regarding traffic offenses committed by foreign diplomats accredited to the United Nations ("UN") Headquarters in New York, Raymond Fisman of Columbia University and Edward Miguel of the University of California, Berkeley, found that there is a correlation between the diplomats' abuse of diplomatic immunity and the level of corruption in their home countries.[1] The Economist publication, for instance, reported that Fisman and Miguel observed that between the period of 1997 and 2002, "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 shows that results from 146 countries were "strikingly similar to the Transparency International Corruption Index ("TI"), which rates

1. *See* Raymond Fisman & Edward Miguel, *Cultures of Corruption: Evidence From Diplomatic Parking Tickets* (Nat'l Bureau of Econ. Research, Working Paper No. 12312, 2006); *see also "Corrupt Culture" Revealed Among African Diplomats*, AFROL NEWS, (last visited Oct. 13, 2013), http://www.afrol.com/articles/21829.

2. *A Ticket for Corruption—Sleazy Countries are Best at Breaking New York City's Parking Rules,* THE ECONOMIST (New York), Aug. 10, 2006*,* at 28.

countries by their level of perceived sleaze."[3] In the case of parking violations, for example, diplomats from countries with low levels of corruption are said to have behaved well, even when they could have gotten away with breaking the rules.[4] The culture of their home country, it is argued, "was imported to New York, and they acted accordingly."[5] The pattern is 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 of violations increased by 8-18%."[7] Overall, Fisman and Miguel's study indicated that diplomats accumulated 150,000 unpaid parking tickets during the five year period under review.[8]

It is interesting to note that Chad also appeared at the bottom position of TI's 2005 Corruption Index, "earning the dishonorable title of being the world's most corrupt country."[9] One report points out that "Chadian UN diplomats obviously have brought their attitude to New York, being number three on the list of parking violators. Each Chadian diplomat in New York has committed 124 unpaid parking violations between 1997 and 2002, the report showed."[10] 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."[11] And Egypt beat Chad narrowly, with 140 violations per diplomat.[12] At the time Fisman and Miguel wrote their report, Egypt had twenty-four diplomats at the UN headquarters compared to Chad's only two.[13] 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

3. *Id*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *"Corrupt Culture" Revealed Among African Diplomats*, AFROL NEWS (last visited Oct. 13, 2013), http://www.afrol.com/articles/21829.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

> 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.[14]

The first part of this article provides an introductory background. It outlines the underlying arguments and delineates the scope of the study. The second part examines the concept of diplomatic immunity while the third part deals with the concept of diplomatic démarche as it applies to different contexts of erring diplomatic agents of states. Expounding on the provisions of Article 1 of the 1961 Vienna Convention on Diplomatic Relations, 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 organizations as the United Nations.[16] In regard to the latter, except for a few senior staff and those representing political constituencies of member states, most reg-

14. *Id.* The articles continues "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."

15. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 344 (6th ed. 2003); *see also* Vienna Convention on Diplomatic Relations, Preamble, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (spelling out the following categories of staff of a diplomatic mission: (a) the 'head of the mission' is the person charged by the sending state with the duty of acting in that capacity; (b) the 'members of the mission' are the head of the mission and the members of the staff of the mission; (c) the 'members of the staff of the mission' are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission; (d) the 'members of the diplomatic staff' are the members of the staff of the mission having diplomatic rank; (e) a 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission; (f) the 'members of the administrative and technical staff' are the members of the staff of the mission employed in the administrative and technical service of the mission; (g) the 'members of the service staff' are the members of the staff of the mission in the domestic service of the mission; and (h) a 'private servant' is a person who is in the domestic service of a member of the mission and who is not an employee of the sending state).

16. *See* TIM HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 319 (1998).

ular staff and employees of public international organizations do not enjoy diplomatic immunity.[17]

Many sovereign states that are members of the United Nations have diplomats accredited to the organization, just like other multilateral bodies, such as the African Union and the European Union, have diplomats of their member states accredited to them. However, generally, diplomatic agents of sovereign states often enjoy immunities and privileges that are somewhat different from those afforded to public international organizations.[18] To illustrate:

> Shamela Begum [a Bangladeshi woman] was a live-in domestic maid in New York for an official at the Bahrain Mission to the [United Nations.] Upon her arrival in the US, her passport was taken away by her employer. Over the ten months that she worked for him, she worked seven days a week, twelve to fifteen hours a day, and was only paid $100 a month, which was sent by her employer to Begum's husband in Bangladesh. When her employers left town, they left Begum no food or money to buy food. She was twice assaulted by her employer's wife and confined to the house, leaving only twice, both times with the wife. The second time, Begum overheard a conversation in Bengali among some sidewalk vendors. When her employers left town later that day, she left the apartment alone for the first time. Not knowing how to use the elevator, she had to ask a boy to help her get downstairs. She retraced her steps to the vendor and told him her tale. The vendor contacted a Bengali language newspaper, which contacted Andolan, a South Asian workers' rights group. On August 30, 1999, Andolan brought the police to the apartment and Begum was freed. However, because Begum's employers had diplomatic immunity, they were not arrested.[19]

By contrast, if Begum's employers were not serving as diplomatic agents of a sovereign state accredited to the United Nations, but were simply working as regular staff of the United Nations, without any diplomatic immunity, they would have been arrested and prosecuted.[20] Understandably, the concept of diplomatic immunity is broader than its variant of functional immunity enjoyed by employees

17. *See, e.g.*, Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15 [hereinafter Privileges and Immunities Convention].

18. *See id.*

19. LORA JO FOO, ASIAN AMERICAN WOMEN: ISSUES, CONCERNS, AND RESPONSIVE HUMAN AND CIVIL RIGHTS ADVOCACY 58 (2002); *see generally* Simoni Sengupta, *An Immigrant's Legal Enterprise in Suing Employer, Maid Fights Diplomatic Immunity,* N.Y. TIMES, Jan. 12, 2000, at B1.

20. *See* Freeman Klopott, *World Bank Economist Paying $41k Back to Servant*, WASHINGTON EXAMINER, June 18, 2010, *available at* http://washingtonexaminer.com/article/12950.

of many public international organizations when carrying out official functions of the organization.[21] It explains why the former Managing Director of the International Monetary Fund, Dominique Strauss-Kahn, was not able to invoke diplomatic immunity when he was arrested in New York in 2011 on criminal charges of trying to rape a hotel maid.[22] His lawyers, however, later tried to invoke diplomatic immunity in civil proceedings brought about by the hotel maid against Dominique Strauss-Kahn.[23] As a recent report shows:

> On the afternoon of May 14, moments after authorities pulled Dominique Strauss-Kahn off an Air France flight on suspicion that he had tried to rape a hotel maid, the former International Monetary Fund chief pulled rank. "I have diplomatic immunity," he told police, and asked to speak with the French consulate, according to court papers. Hours later, as police questioned him about his diplomatic status, and whether he was claiming immunity, Strauss-Kahn did an about-face. "No, no, no. I am not trying to use that," he said. "I just want to know if I need a lawyer." More than four months on, with the criminal case now behind him, Strauss-Kahn is taking another crack at invoking diplomatic immunity—this time to fend off a civil suit filed by Nafissatou Diallo, the maid who accused him of sexually assaulting her in his suite at the Sofitel Hotel in Manhattan.[24]

The report continues:

> "Mr. Strauss-Kahn did not invoke diplomatic immunity in the criminal case because he was not a diplomat under any applicable treaty or law," wrote [Dialo's lawyer]. "He was on 'personal' business at the time and was acting in his personal capacity when he attacked Ms. Diallo. The IMF, the United States State Department and the New York Police Department all agree that Mr. Strauss-Kahn lacks immunity . . . ." Even if Strauss-Kahn is able to persuade a judge that international law entitles him to immunity, legal experts say he still could lose the argument, since it is the IMF's decision whether to support an immunity claim for one of its employees False The immunity attaches as the result of the work [he's] doing for the organization or the country, and the organization or the country retains the right to waive that immunity . . . .[25]

21. *See* Krista Friedrich, *Statutes of Liberty? Seeking Justice Under United States Law when Diplomats Traffic in Persons*, 72 BROOK. L. REV. 1139, 1158 (2007).

22. *See* Noeleen Walder, *Analysis: Experts Skeptical of Strauss-Kahn Immunity Claim*, REUTERS, Sep. 28, 2011, *available at* http://www.reuters.com/article/2011/09/28/us-strausskahn-immunity-idUSTRE78R0LS20110928.

23. *Id.*

24. *Id.*

25. *Id.*

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

> 1. The Organization 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 Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
> 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.[26]

As we shall see below, however, it is not clear whether customary international law clothes public international organizations with the same kind of immunities and privileges as those afforded to diplomatic agents of sovereign states.[27] Under the Vienna Convention on Diplomatic Relations 1961, public international organizations cannot be parties to that treaty.[28] The preamble of the Vienna Convention on Diplomatic Relations 1961 gives an indication that only states can be parties to the treaty.[29]

As a general rule, diplomatic agents enjoy immunity from the jurisdiction of the local courts, but not an exemption from the substantive law.[30] This means that a diplomat's immunity from the jurisdiction of the receiving state does not exempt him or her from the jurisdiction of the sending state.[31] The sending state can recall that diplomat to have him or her prosecuted in its courts of law.[32] 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.[33] In a House of Lords ruling in the English case of *Regina v.*

26. Charter of the United Nations and Statute of the Int'l Court of Justice, June 26, 1945, 59 Stat 1031.

27. *See generally* Reparations for Injuries Suffered in Service of the United Nations, Advisory Opinion, 1948 I.C.J. 174, 175-80 (Apr. 11).

28. *See* Vienna Convention on Diplomatic Relations, *supra* note 15, at Preamble.

29. *See id.*

30. *See* Empson v. Smith [1966] 1 A.C. 426, 431 (Q.B.) (U.K); Dickinson v. Del Solar [1930] 1 (A.C.) 376, 380 (K.B.) (U.K.); Fatemi v. United States, 192 A2d 525, 528 (D.C. Cir) (1963); BROWNLIE, *supra* note 15, at 356.

31. *See* Vienna Convention on Diplomatic Relations, *supra* note 15, art. 31(4).

32. *See id.*

33. Regina v. Evans and Another and the Commissioner of Police or the Metropolis and Others Ex Parte Pinochet (No. 3) [1999] 1 A.C. 61 (H.L. 1999) (appeal taken from Q.B.).

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),[34] 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 investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.[35]

Further, Lord Millet stated that "[t]he second requirement is implicit in the original restriction to war crimes and crimes against peace, the reasoning of the court in *Eichmann*, and the definitions used in the more recent Conventions establishing ad hoc international tribunals for the former Yugoslavia and Rwanda."[36]

Every state, according to Lord Millet, has jurisdiction under customary international law to exercise extra-territorial jurisdiction with respect to international crimes that satisfy the relevant criteria.[37] 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."[38] According to Lord Millet, the jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law.[39] Customary international law, Lord Millet observed, is part of the common law, and accordingly the English courts

34. *See generally id.*

35. *See generally id.*

36. *See generally id.*

37. *See generally id.*

38. *See id.*

39. *See* Regina v. Evans and Another and the Commissioner of Police or the Metropolis and Others Ex Parte Pinochet (No. 3) [1999] 1 A.C. 61 (H.L. 1999) (appeal taken from Q.B.).

have, and always have, had extra-territorial criminal jurisdiction with respect to crimes of universal jurisdiction under customary international law.[40]

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 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.[41] Additionally, diplomatic agents of sovereign states are considered public officials in their respective sovereign states.[42] Here, to set the discussion in context, let us take a reasoned look at the following June 2010 article in the United Kingdom's Daily Mail:

> 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.[43]

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

40. *See generally id.*

41. BLACK'S LAW DICTIONARY 348 (7th ed. 1999); *see generally* K.K. Mwenda, *Can "Corruption" and "Good Governance" be Defined in Legal Terms?*, 1 RUTGERS J. GLOBAL CHANGE AND GOVERNANCE 1 (2008); K.K. MWENDA, LEGAL ASPECTS OF COMBATING CORRUPTION: THE CASE OF ZAMBIA (2007) (discussing the legal concepts of "corruption" or "corrupt practices).

42. *See* Carrie Menkel-Meadow, *The Variable Morality of Constitutional (and Other) Compromises: A Comment on Sanford Levinson's Compromise and Constitutionalism*; 38 PEPP. L. REV. 903, 910 (2010) (listing persons who are considered public officials); BLACK'S LAW DICTIONARY 1245 (7th ed. 1999).

43. Kirsty Walker, *Crimes of Untouchable Diplomats Accused of Sex Assaults, Human Trafficking and £36 Million in Unpaid Fines*, DAILY MAIL, June 29, 2004, http://www.dailymail.co.uk/news/article-1290341/Diplomats-accused-sex-assaults-human-trafficking-36m-unpaid-fines.html.

> their host country—effectively putting them above the law. Unless their home country agrees to waive their immunity from prosecution, there is nothing the British government can do except risk a diplomatic incident by ordering their expulsion. Some 25,000 people are entitled to diplomatic immunity in the UK. Serious crimes are defined as offences which would carry a 12-month jail sentence. According to the list published by the Foreign Office, the most common offence was drink-driving with 48 diplomats accused. In 2009, a total of 18 alleged offences were committed. There were also ten carried out in 2008, 20 in 2007, 15 in 2006 and 15 in 2005. A list of the worst offenders over the five years is headed by diplomats from Saudi Arabia who were accused of eight offences, followed by South Africa, five, then Kazakhstan, Ghana and Cameroon, four; Nigeria, Malawi and Russia, three.[44]

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."[45]

> Diplomatic missions also owe £36million in unpaid London congestion charge fines, £526,300 in parking and traffic violations, and more than £480,000 in unpaid rates. The U.S., which is in a long-running dispute over payment of the congestion charge, has an unpaid bill of £3.8million. One of eight nations which owe more than £1million, the U.S. is followed by Russia (£3.2million), Japan (£2.8million) and Germany (£2.6million).[46]

In our study, we look critically at the issue of diplomatic immunity where some diplomats engage in corrupt practices. An argument made is 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.[47] Furthermore, if the diplomat is arrested in that

44. *Id.*

45. *Id.*

46. *Id.*

47. Vienna Convention on Diplomatic Relations, *supra* note 15, arts. 4, 13 (regarding what constitutes "accreditation" of a diplomatic agent); *see generally* United States v. Sissoko 995 F.Supp. 1469, 1470 (S.D. Fla. 1997) (holding that Sissoko, "special advisor" on a special mission, was not entitled to diplomatic immunity because: (1) he had not been submitted to the U.S. State Department for certification, (2) the Republic of Gambia never notified the U.S. State Department of Sissoko's diplomatic status, and (3) the Republic of Gambia was aware of and had used the mechanism to certify a diplomatic pursuant to the Circular Diplomatic Note to certify a diplomat).

third state for an offense 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.[48] The said treaty provision, codifying customary international law,[49] postulates that innocent passage must not be prejudicial to the peace, good order and security of the coastal state.[50] 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.[51] 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.[52] 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.[53] And the sending state can also waive the immunity of its diplo-

48. United Nations Convention on the Law of The Sea arts. 18, 19, 38-39, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 109 [hereinafter Convention on the Law of The Sea] (providing information about "innocent passages" and transit passages, in that, transit passages are through a strait between one area of high seas or economic zone and another; additionally there is not criterion of "innocence" required of the transiting ship or aircraft but are still required to refrain from using threat or use of force against the state bordering the trait); *see generally* R.R. CHURCHHILL & A.V. LOWE, THE LAW OF THE SEA (1983) (regarding the Convention on the Law of the Sea); ROB MCLAUGHLIN, UNITED NATIONS NAVAL PEACE OPERATIONS IN THE TERRITORIAL SEA 107-108 (2009) (discussing the Court's holding in the *Corfu Channel Case* which declares the Convention on the Law of the Sea, and not that of innocent passage, as governing law).

49. *See* Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 244, 245 (Dec. 15).

50. Convention on the Law of the Sea, *supra* note 48, art. 19.

51. *See* Derrick Howard, *Twenty-First Century Slavery Reconciling Diplomatic Immunity and the Rule of the Law in the Obama Era*, 3 ALA. C.R. C.L. L. REV. 121, 143 (2012) (stating that designating a person as *persona non grata* is a remedy to have the person leave the country or face arrest).

52. *See generally* PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Princeton Project on Universal Jurisdiction 2001).

53. Vienna Convention on Diplomatic Relations, *supra* note 15, art. 31(4).

mat to allow the receiving state to prosecute him or her.[54] 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.[55]

II. The Concept Of Diplomatic Immunity

As noted above, this article focuses on the concept of diplomatic immunity of a corrupt diplomatic agent who, accredited to a host/receiving state, is found in possession of illegal substance such 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 way of preventing corrupt diplomats from abusing their immunities and privileges, we recognize 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.[56] For example, although a diplomat may enjoy diplomatic immunities and privileges under both customary international law and the Vienna Convention on Diplomatic Relations 1961,[57] 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.[58] 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

54. *Id.* at art. 32(2).

55. *See generally* G.A. Res. 58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003); G.A. Res. 51/191, U.N. Doc. A/RES/51/191; G.A. Res. 51/59, Annex, U.N. Doc. A/RES/51/59; United Nation Convention Against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13,127, 2225 U.N.T.S. 209; *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OCED (Org. for Econ. Cooperation and Dev.), Nov. 21, 1997; Information and Notices, Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 1997 O.J. (C 195) 1; Information and Notices, Convention on the Protection of the European Communities' Financial Interests, 1995 O.J. (C 316) 48; Information and Notices, Protocol on the Protection of the European Communities' Financial Interests, 1996 O.J. (C 313) 1; Information and Notices, Second Protocol of the Convention on the Protection of the European Communities' Financial Interests 1997 O.J. (C221) 11; Eur. Parl. Ass., *Twenty Guiding Principle for the Fight Against Corruption Adopted by the Committee of Ministers*, Res. (97) 24(1997); Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173, 38 I.L.M. 505; Civil Law Convention on Corruption, 1999, E.T.S. No. 174; Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, *available at* http://www.oas.org/juridico/english/Treaties/b-58.html; African Union: Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5.

56. *See* Malcolm Shaw, International Law 621 (5th ed. 2003).

57. *See* Vienna Convention on Diplomatic Relations, *supra* note 15, Preamble.

58. *Id.* at art. 41.

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.[59] 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, this article focuses primarily on three major types of conduct that involve abuse of inviolability principles pertaining to diplomatic missions, diplomatic agents, diplomatic bags, private residences of diplomatic agents as well as property and documents of diplomatic agents. The said three types of conduct relate to situations where: (1) a diplomat is found to have used a diplomatic bag to conceal and/or transport illegal drugs or prohibited pornographic material; (2) a diplomat is found to have used his or her private residence to carryout illegal activities such as prostitution or the production of prohibited pornographic videos; and (3) a diplomat is carrying out money laundering activities at his private residence or through the use of diplomatic bags. In all these instances, the diplomatic bag, the private residence of a diplomat, as well as his or her own person, are mediums through which a corrupt diplomat can act to abuse his or her diplomatic immunity. 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."[60] 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.[61] 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.[62] As noted above, the concept of universal jurisdiction is well-enshrined in customary international law.[63]

Principle 2 of the Princeton Principles of Universal Jurisdiction were concluded at Princeton University in 2001 by leading jurists and legal experts to guide the prosecution of war crimes and other serious

59. *Id.* at art. 2.

60. BLACK'S LAW DICTIONARY 753 (7th ed. 1999).

61. *See generally* PRINCETON PRINCIPLES, *supra* note 52 at 11-12.

62. *See generally id.* at 16-17, 50.

63. *See generally* Regina v. Evans, *supra* note 33.

crimes under international law when there are no traditional jurisdictional links to the victims or perpetrators.[64] It postulates as follows:

> 1. For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.
>
> 2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.[65]

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.[66] 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, the offence could be treated as an offence in the arresting state as well since it is also a crime in that jurisdiction.

Augmenting dictates of Principle 3, Principle 5 spells out that with respect to serious crimes under international law as specified in Principle 2(1), the official position of any accused person, whether as head of state or government or as a responsible government official, should not relieve such person of criminal responsibility nor mitigate punishment.[67] Even amnesties to excuse or exonerate the accused are discouraged[68] and any statutes of limitations or other forms of prescription will not apply.[69] 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

64. News, Princeton Univ., Jurists Demand End to Impunity: Announce "Princeton Principles" on Universal Jurisdiction for Heinous Crimes (July 23, 2001), http://www.princeton.edu/pr/news/01/q3/0723-principles.htm.

65. PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Princeton Project on Universal Jurisdiction 2001).

66. *Id.* at Principle 3.

67. *Id.* at Principle 5.

68. *Id.* at Principle 7.

69. *Id.* at Principle 6.

> 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.[70]

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.[71] 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.[72]

Under the first theory of personal representation, the "immunity attaching to diplomatic representatives was seen as an extension of sovereign immunity."[73] The second theory of extra-territoriality 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.[74] That theory, according to Hillier, always "rested on a fiction and is no longer respected."[75] The third theory, functional necessity, is often the preferred rationale for granting privileges and immunities to diplomats.[76] It postulates that "the privileges and immunities of a diplomat are necessary to enable the diplomat to perform his or her diplomatic functions."[77] Indeed, "modern diplomats need to be able to move freely and be unhampered as they report to their governments,"[78] 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."[79]

While it is recognized that public international organizations may also require the same immunities and privileges as diplomatic missions of sovereign states if they are to carry out their functions effectively in

70. *Id.* at Principle 10.
71. *Id.* at Preamble.
72. HILLIER, *supra* note 16, at 315.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*; *see also* MARTIN DIXON & ROBERT MCCORQUODALE, CASES & MATERIALS ON INTERNATIONAL LAW 352 (3d ed. 2000); LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 1200-01 (3d ed. 1993).
78. HILLIER, *supra* note 16, at 315.
79. *Id.*

the international community, there is no general law applicable to the relations between public international organizations and host states.[80] In the case of *Giovanni Porru v. FAO*,[81] 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."[82] According to Kodek, such immunity can only be recognized with regard to public law activities—that is, in the case of a public international organization, with regard to the activities by which it pursues its specific purposes (*uti imperii*) but not with regard to private law activities where the organization acts on an equal footing with private individuals (*uti privatus*).[83]

Closely related to Kodek's views above, Hillier argues that immunities and privileges that a particular public international organization enjoys must be provided for in a specific agreement between the organization and the host state.[84] This explains why concepts such as persona non grata and diplomatic démarche hardly ever apply to employees and staff of public international organizations. By contrast, in many instances, employees and staff of public international organizations 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.[85] The following case illustrates this point:

> A former Russian diplomat to the United Nations convicted of money-laundering in the U.S. was granted permission to return to Russia to serve out his sentence. Vladimir Kuznetsov was found

80. *Id*. at 319.

81. Porru v. FAO, 71 I.L.R. 240 (Trib. 1st Instance (Labor Section)) (1969) (It.).

82. 1969 U.N. Jurid. Y.B. 238, U.N. Doc. ST/LEG/SER.C/7.

83. Georg Kodek, Immunity of International Organizations and Alternative Remedies Against the United Nations 5 (2006), *available at* http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/neumann.pdf.

84. HILLIER, *supra* note 16, at 319; *see also generally* Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *opened for signature* Mar. 21, 1986, 25 I.L.M. 543 (not yet in force). This 1986 treaty adds rules (apart from what is contained in the Vienna Convention on the Law of Treaties 1969 and under customary international law pertaining to the Law of Treaties) for treaties with international organizations 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.

85. *See, e.g.*, United States v. Kuznetsov, 442 F.Supp.2d 102, 108 (S.D.N.Y. 2006) (denying Defendant U.N. employee's motion to dismiss on the grounds of diplomatic immunity because Defendant had not established that he was entitled to immunity under the Vienna Convention as a diplomatic agent).

> guilty March 7, 2007, in New York federal court of laundering more than $300,000 from what prosecutors said were secret payments from foreign companies seeking contracts to provide goods and services to the UN. He was sentenced Oct. 12, 2007 to four years and three months and ordered to pay $73,671. Kuznetsov laundered funds obtained by Alexander Yakovlev, a UN procurement officer, prosecutors said. Kuznetsov served as chairman of the organization'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.[86]

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 organization's peacekeeping duties into controversy. In the wake of the highly damaging revelation, the Eritrean government has condemned the activities of the Irish defense 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.[87]

According to the report:

> 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 . . . said the soldier had told her he was making the video for "remembrance" and would marry

86. Thom Weidlich, *Ex-Diplomat, Money-Launderer, to Return to Russia (Update1)*, BLOOMBERG Nov. 6, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=amHoBVgw47D4.

87. *Peacekeeper Jailed for Porn Films*, THE SCOTSMAN, Jan. 23, 2003, http://www.scotsman.com/news/world/peacekeeper-jailed-for-porn-films-1-1380396.

> 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."[88]

Hillier observes that, generally, privileges and immunities to be accorded to public international organizations and their staff or employees should be provided for in the constituent charter of the organization or in subsequent supplementary agreements.[89] In the case of the United Nations, for example, the immunities and privileges are addressed in the Convention on the Privileges and Immunities of the United Nations 1946.[90] 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 U.N.'s procurement department, exposed the latest wrongdoing this week in its annual report to the U.N. General Assembly. Headed by a former U.S. 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 U.S. tax dollars.[91]

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 U.N's New York headquarters. The payroll scheme involves two American employees who steered $2 million in contracts to private firms in which they had a financial stake. In some of the other cases, U.N. employees solicited kickbacks to direct deals to specific companies. This sort of fraud has long been the norm at the U.N., 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

88. *Id.*

89. HILLIER, *supra* note 16, at 319.

90. *See generally* Privileges and Immunities Convention, *supra* note 17.

91. *More United Nations Corruption*, JUDICIAL WATCH (Oct. 21, 2009), http://www.judicialwatch.org/blog/2008/10/more-united-nations-corruption/.

> how nearly one-third of the procurement contracts involve waste, corruption and other irregularities.[92]

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.[93]

Arguably, apart from recourse to a specific agreement(s) between a public international organization 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 organizations.[94] 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 "such privileges and immunities as are necessary for the fulfillment of the purposes of the organization, including immunity from legal process and from financial controls, taxes and duties."[95]

Shihata reinforces this view, contending that these immunities are based on customary international law which accord immunity to all public international organizations, at least for their non-commercial activities.[96] And, in particular, with regard to Specialized Agencies of

92. *Id.*

93. *Id.*

94. *See* HILLIER, *supra* note 16, at 319; *see also* D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 349-50, 362-65 (4th ed. 1982); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 467 reporter's note 4 (1986); *see generally* Finn Seyersted, Note, *Jurisdiction Over Organs and Officials of States, the Holy See and Intergovernmental Organizations (2)*, 14 INT'L & COMP. L.Q. 493, 526 (1965).

95. HILLIER, *supra* note 16, at 319.

96. IBRAHIM F. I. SHIHATA, THE WORLD BANK INSPECTION PANEL 107 (1994); *see also* Ventriglia v. Eastern & Southern African Trade & Development Bank, (2010) ZLR 486, 495 [SC] (Zam), (holding that "[t]he 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 gestiouis* or an act of private law into one done *jure imperii;*'" *see also generally* Rahimtoola v. Nizam of Hyderabad, [1958] A.C. 379 (H.L.) (appeal taken from Eng.); Alfred

the United Nations, Shihata observes that "the principle of immunities is codified in the 1947 Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, subject only to the waiver of immunity by the Agency concerned."[97] 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 organizations.[98] 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.

III. The Concept Of a Diplomatic Démarche

A diplomatic démarche is said to be an oral or writrten diplomatic statement, especially one containing a demand, offer, protest, threat or the like.[99] 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

Dunhill of London, Inc. v. Republic of Cuba, 245 U.S. 682 (1976); Shearson Lehman Bros. v. Maclaine, Watson & Co., [1987] 1 W.L.R. 480 (C.A.) (Eng.); Standard Chartered Bank v. Int'l Tin Council, [1987] 1 W.L.R. 641 (Q.B.) (Eng.); Kenneth K. Mwenda, Note, *The Common Market for Eastern and Southern Africa (COMESA) and the COMESA Court: Immunity of an International Organisation From Legal Action*, 6 Miskolc J. Int'l L. 60 (2009).

97. Shihata, *supra* note 96, at 110.

98. *See generally* J.H. Rayner Ltd. v. Dept. of Trade & Indus., [1990] 2 A.C. 418 (H.L.) (appeal taken from Eng.); Romana Sadurska & C.M. Chinkin, *The Collapse of the International Tin Council: A Case of State Responisbility?*" 30 VA. J. Int'l L. 845, 845-50 (1990).

99. Black's Law Dictionary 495 (9th ed. 2004); *see* Rudolf Hess Case 90 I.L.R. 387, 396 (BVerfG 1980) (Ger.) (holding that 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 generally* Kaunda v. President of the Republic of S. Afr., 44 I.L.M. 173 (S. Afr. 2005).

> been in Zambia for 13 months, and was given a final government warning last December when he told the task force on corruption to convict former president Frederick Chiluba for corruption and theft of public funds. He accused Chiluba of bribing court officials to delay his trial. At the time, the government said it would have no choice but to declare Saudubray a "persona non grata" if he repeated his "undiplomatic" conduct. Previously, he had picked an open quarrel with Commerce, Trade and Industry Minister Dipak Patel over the country's biggest fuel crisis involving French oil firm Total, and attacked opposition political parties and women's groups. Saudubray maintains he was misquoted on all occasions.[100]

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 that:

> 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.[101]

And, in 2007, the Hindu, a national press of India, reported that:

> 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 U.S. and their security cooperation has been going on for some time.[102]

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 ex-

100. *French Envoy to Zambia 'Has Gone too Far,'* MAIL & GUARDIAN (June 19, 2006, 4:34 PM), http://www.mg.co.za/article/2006-06-19-french-envoy-to-zambia-has-gone-too-far.

101. Fred Kaplan, *Kim Jong-il and His Quest for the Magical Atom Bomb: Will we go to War with North Korea?*, SLATE (Oct. 6, 2006, 5:27 PM), http://www.slate.com/articles/news_and_politics/war_stories/2006/10/kim_jongil_and_his_quest_for_the_magical_atom_bomb.html.

102. Siddharth Varadarajan, *Four-Power Meeting Drew Chinese Démarche*, THE HINDU (June 14, 2007), http://www.hindu.com/2007/06/14/stories/2007061410501500.htm.

amination of the concept of diplomatic immunity[103] as it applies to erring diplomats involved in such criminal conduct as drug trafficking, money laundering or smuggling of prohibited pornographic material.

IV. Diplomatic Immunity in the Light of Corrupt Practices by a Diplomat

As noted above, the general rule is that diplomats enjoy immunity from the jurisdiction of the local courts, but that such immunity is not an exemption from the substantive law.[104] 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 neighboring 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 Nov. 18. The cigarettes were hidden from view under sheets and blankets in the back seat and trunk of their Russian-registered car. The diplomat was assigned to the North Korean Trade Mission in St. Petersburg, Russia . . . At the time of the seizure, the couple said the money from the smuggling would pay for medical treatment for the wife. They later changed the story to say the proceeds would go for humanitarian purposes in North Korea. The court did not believe either story.[105]

103. For a discussion on "diplomatic immunity" *see generally* Linda S. Frey & Marsha L. Frey, The History of Diplomatic Immunity (1999); Charles J. Lewis, State and Diplomatic Immunity (2nd ed. 1985); Grant V. McClanahan, Diplomatic Immunity: Principles, Practices, Problems (1989).

104. Ian Brownlie, *supra* note 15, at 356.

105. Martin Laine, *Sweden Jails North Korean Diplomat for Smuggling*, Digital Journal (Dec. 16, 2009), http://www.digitaljournal.com/article/283950.

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 recklessly and fraudulently flash 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 recognize that Article 40(1) refers to situations where a diplomatic agent is passing through or is in the territory of a third state, which has granted him a passport visa, if such visa is necessary, while proceeding to take up or to return to his post, or when returning to his own country.[106] 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.[107] Similarly, the same applies in the case of any members of his family enjoying privileges or immunities, who are accompanying the diplomatic agent, or traveling separately to join him or to return to their country.[108] The immunities and privileges accorded to diplomatic agents and their family members underscored the ruling in the English case of *R v. Guildhall Magistrates Court, ex parte Jarrett-Thorpe*.[109] In that case, the applicant was the husband of the counselor to the Sierra Leone Embassy in Rome. His wife traveled to London to buy furnishings for the Rome Embassy. It was intended that the applicant would join her later for the purpose of traveling 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

106. *See* Vienna Convention on Diplomatic Relations, *supra* note 15, art. 40(1).

107. *See id.*

108. *Id.*

109. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 349 (5th ed. 1998).

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.[110] 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.[111]

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. In the R v. Guildhall Magistrates Court, ex parte Jarrett-Thorpe case, 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, albeit the earlier pending criminal proceedings against him in London, his passage could be deemed innocent.[112] Here, we should contrast this case with a 2007 Indian case involving a Nigerian diplomat:

> Nigerian diplomat G.A. Ojedokun, who was caught on Monday trying to take out $2.27 million, has been restrained from leaving the country at the instance of the Enforcement Directorate (ED), which holds that the defense 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 ac-

110. *Id.*

111. *Id.*

112. *See* THE TIMES, Oct. 5, 1977 (Q.B.D.).

> count of the purpose for which the money was withdrawn and from where he had exchanged the entire sum with dollars.[113]

It is important to stress that, in this article, we are concerned mainly with issues pertaining to diplomatic immunity (and, by parity of reasoning, to consular immunity),[114] 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.[115] In 1957, the International Law Commission ("ILC") undertook to produce a draft convention on diplomatic relations.[116] That draft, Hillier argues, formed the basis for the Vienna Convention on Diplomatic Relations 1961.[117] The Convention is widely regarded as a codification of existing rules of customary international law on diplomatic relations.[118] And many states today are party to this Convention.[119] The Convention emphasizes, inter alia, the functional necessity of diplomatic immunity.[120]

An additional point to note is that there is no right to diplomatic relations in international law.[121] Such relations exist only by consent.[122] And the receiving state can, without giving any reason, declare any member of a diplomatic mission persona non grata.[123] When that happens, the sending state can either withdraw the diplomatic agent

113. Pradeep Thakur, *Nigerian Diplomat not Allowed to Leave India*, THE TIMES OF INDIA, May 23, 2007, http://timesofindia.indiatimes.com/india/Nigerian-diplomat-not-allowed-to-leave-India/articleshow/2067942.cms.

114. Much of treaty law guiding consular relations is contained in the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; *see also* HILLIER, *supra* note 16, at 318-19 ("The 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 . . . [a]s 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 . . . [c]onsular 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 from civil and administrative jurisdiction only extends to acts performed in the exercise of consular functions.").

115. HILLIER, *supra* note 16, at 316.

116. *Id.*

117. *Id.*

118. *See id.*

119. *See id.*

120. *Id.*

121. *Id.*

122. *Id.*; *see also* Vienna Convention on Diplomatic Relations, *supra* note 15, art. 2.

123. Vienna Convention on Diplomatic Relations, *supra* note 15, art. 9(1).

or terminate his or her appointment.[124] 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.[125] 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.[126] Such a waiver must, however, be express.[127]

With regard to privileges of a diplomat to carry out free communication on the part of his or her mission, Article 27(1) of the Vienna Convention on Diplomatic Relations 1961 stipulates that "[t]he receiving state shall permit and protect free communication on the part of the mission for all official purposes."[128] But, then, what is the meaning of 'official purposes'? For example, 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.[129]

In the example presented above, notwithstanding the controversy surrounding Belarus' choice of the legal rules to apply to the case, could it be argued that the Latvian diplomat, while disseminating pornographic material, was acting in accordance with Article 27(1) of the Vienna Convention on Diplomatic Relations 1961 which requires the receiving state to permit and protect free communication by diplomats

124. *Id.*

125. *Id.* at art. 9(2); *see also* Portugal v. Gonclaves, 82 I.L.R. 115 (Civil Court of Brussels Second Chamber 1982) (Belg); Empson v. Smith, 41 I.L.R. 407 (C.A. 1965); Empson v. Smith, [1965] 2 All E.R. 881 at 881. Once a person ceases to be diplomat, his immunity from jurisdiction is lost.

126. Vienna Convention on Diplomatic Relations, *supra* note 15, art. 32(1).

127. *Id.* at art. 32(2); *see also* Public Prosecutor v. Orhan Olmez, 87 I.L.R., 212 (Malay. Sup. Ct. 1987).

128. Vienna Convention on Diplomatic Relations, *supra* note 15, art. 27(1).

129. *Latvian Diplomat Faces Pornography Charges in Belarus*, RIA NOVOSTI, July 28, 2006, http://en.rian.ru/world/20060728/51973348.html (last visited Feb. 12, 2013).

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."[130] 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 authorized 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 1961 Vienna Convention on Diplomatic Relations postulates that, "[w]ithout prejudice to their privileges and immunities, it is the duty of all persons (i.e. diplomats) enjoying such privileges and immunities to respect the laws and regulations of the receiving state."[131] 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 1961 Vienna Convention on Diplomatic Relations. According to a U.S. report, "[a] U.S. Foreign Service officer stationed in Brazil and Congo used his status to pressure female visa applicants for sex. Gons G. Nachman [was] charged in a U.S. District Court with missuse of his diplomatic passport, making false statements, and possessing child pornography."[132]

Article 41(1) of the Vienna Convention on Diplomatic Relations 1961 also requires diplomats to refrain from interfering in the internal affairs of the receiving state.[133] This is an important treaty obligation

130. Vienna Convention on Diplomatic Relations, *supra* note 15, art. 41(2).

131. *Id.* at art. 41(1).

132. *U.S. Diplomat Accused of Pressuring Visa Applicants for Sex*, FOX NEWS, Feb. 15, 2008, http://www.foxnews.com/story/2008/02/15/us-diplomat-accused-pressuring-visa-applicants-for-sex/.

133. Vienna Convention on Diplomatic Relations, *supra* note 15, art. 41(1).

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)[134] and *pacta sunt servanda* (treaties must be complied with),[135] to the receiving state for it to recognize 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 (e.g. 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, harboring 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.[136] To illustrate, let us take some insightful examples from Bangladesh, Ethiopia, Sudan, Tanzania and Uganda, 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 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

134. *See* ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 152 (1987).

135. *Id.*

136. *See* Asylum Case (Columbia/Peru), 1950 I.C.J. 266 (Nov. 20); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Dec. 15), 1980 I.C.J. 6 (May 24).

> discussed matters of agriculture, fertilizer, water and other related fields wherein the Danish government is assisting Bangladesh.[137]

In Ethiopia, similar complaints have been voiced out against interference from some donor states. 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 favored technique for governments rejecting criticism of their human-rights records. Nick Wadhams has more from Nairobi. Norway says it is surprised by the Ethiopian order that it withdraw the diplomats, but has not indicated it will retaliate or break diplomatic relations with Prime Minister Meles Zenawi's government. No reason was given in the formal announcement of the expulsion. A top adviser to Mr. Meles, Bereket Simon, tells VOA News that Norway has interfered in internal policies and on issues including Ethiopia's arch-rival, Eritrea, and Somalia, where Ethiopia sent troops to battle Islamist fighters. "Our repeated pleas for correcting the mistakes done by the Norwegian government in terms of playing a negative role in the stability of the Horn of Africa and then our internal affairs have failed," he said . . . . Ethiopia's neighbor, Sudan, expelled European Union and Canadian diplomats and the country director of the US-based aid group CARE a few days ago. No reason was given, but the CARE official, Paul Barker, said he believed Sudan was upset about an internal memo he wrote concerning the security situation for his staff in the Darfur region. Officials and observers from nearby countries say they have become worried by the recent behavior of Sudanese and Ethiopian leaders, who have shown increased willingness to expel or hinder both foreign diplomats and aid organizations.[138]

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

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

137. Dhaka Unb, *Saifur 'fed up' With Donors*, THE DAILY STAR, Sept. 26, 2006, http://archive.thedailystar.net/2006/09/26/d60926013020.htm.

138. *Ethiopia Expels Norwegian Diplomats*, GAROWEONLINE, Aug. 28, 2007, http://www.garoweonline.com/artman2/publish/Africa_22/Ethiopia_Expels_Norwegian_Diplomats_printer.shtml.

> 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 percent, said they were "seriously concerned about what appears to be flawed elements in the voter registration process in Zanzibar . . . ."[139]

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

> It was, therefore, ridiculous for President Yoweri Museveni (of Uganda) while attending a meeting in Lusaka last week to have appealed to international donor community to commit more funds for the development of Africa's infrastructure and cheap electricity while at the same time telling them off, not to question African leaders on governance issues and not give them "political lessons, lessons on elections voting' because some of them like him 'are freedom fighters who fought for voting!" Then why rig elections? The President talks about infrastructure development as if he just came to power yesterday. If he really cared, after more than two decades in power, what railway network, roads, ships and wagon ferries, bridges and power stations has his government developed with about $20 billion he has borrowed or received in foreign grants? Almost nothing.[140]

All the countries noted above have complained of donor interference at some point in their internal affairs.[141] And the reaction of these states has differed from one state to another. Some have simply issued a diplomatic démarche whereas others have gone ahead to de-

139. Salma Said and Vicent Mnyanyika, *Keep Off Zanzibar Voters Roll, Donors Told*, ALLAFRICA, Aug. 15, 2009, http://web.archive.org/web/20090818182756/http://allafrica.com/stories/200908150008.html (accessed by searching for allAfrica.com in the Internet Archive index).

140. *Do Donors Have Right to Interfere in our Affairs?,* THE NEW VISION, Apr. 11, 2009, *available at* http://web.archive.org/web/20090415230228/http://allafrica.com/stories/200904130515.html (accessed by searching for allAfrica.com in the Internet Archive index).

141. *See id.*, ". . .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.'"

clare the erring diplomat persona non grata.[142] 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."[143] And 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 particularly objectionable to the traditional attitude of the Latin-American states opposed to political intervention. That argument, it might be said, amounted to a departure from the accepted definition of intervention as dictatorial intervention in the internal affairs of a state. There is little, if anything, of such interference in the grant of asylum—an institution freely accepted and widely practiced especially in Latin-American countries. Yet it is arguable, in turn, that a definition which limits intervention to dictatorial interference is in itself open to question.[144]

Also, the Case Concerning United States Diplomatic and Consular Staff in Tehran (Order of December 15, 1979[145] and judgment of

142. *See, e.g.*, GAROWEONLINE, supra note 138; *see also* EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 86 (3rd ed. 2008) "The UK Government's 1985 Review of the Vienna Convention emphasized the concern of the Government at the high level of illegal parking by diplomatic vehicles and their determination to reduce it substantially. . . Records of unpaid parking tickets would be kept and cases would be drawn to the personal attention of heads of mission with warnings about possible consequences. 'Further unpaid parking tickets incurred by individual cars will lead to a request for the transfer or the withdrawal of the offender.' The UK Government did demand the recall of a few persistent offenders. The demands brought about payment of the outstanding fines and were then withdrawn. Although the use of the *persona non grata* procedure in this context was without precedent, it was reluctantly accepted by the diplomatic corps in London that it was within the powers of the receiving state under Article 9 [of the Vienna Convention on Diplomatic Relations of 1961"]; Foreign Affairs Committee, Government Report on Review of the Vienna Convention on Diplomatic Relations and Reply to "The Abuse of Diplomatic Immunities and Privileges," 1985, Cmnd. 9497, ¶ 80 (U.K.).

143. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 89 (1994-2001 ed. 2001); *see generally* Rosalyn Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641, 641-651 (1985); *see also* Rosalyn Higgins, *UK Foreign Affairs Committee Report on the Abuse of Diplomatic Immunities and Privileges: Government Response and Report*, 80 AM. J. INT'L L. 135, 135-40 (1986).

144. HERSCH LAUTERPACTH, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 82 (1996).

145. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, ¶ 19 (Dec.15).

May 24, 1980)[146] 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 November 4, 1979, following the revolution in Iran, a number of Iranian nationals seized the US Embassy and took the personnel inside hostage."[147] 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.[148] The court therefore found that Iran's failure to prevent the seizure of the embassy amounted to a breach of its international obligations."[149]

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.[150] Codifying customary international law on the principle of inviolability of a diplomatic mission, Article 22 of the Vienna Convention on Diplomatic Relations 1961 provides that:

> 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.[151]

Then, Article 29 codifies customary international law on the principle of inviolability of a diplomatic agent. It states that "[t]he 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

146. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 ¶ 30-43 (May 24).

147. HILLIER, *supra* note 16, at 316-17.

148. *Id.* at 317.

149. *Id*. at 316-17.

150. Vienna Convention on Diplomatic Relations, *supra* note 15, at 22, 29, 41(1); *see also* MALCOLM N. SHAW, INTERNATIONAL LAW 533-36 (4th ed. 1997).

151. Vienna Convention on Diplomatic Relations, *supra* note 15, art. 22.

due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."[152]

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.'[153] 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.[154] It is, therefore, possible for the receiving state to issue a diplomatic démarche to the state being represented by the erring diplomat.

Under Article 30(2) of the Vienna Convention on Diplomatic Relations 1961, the diplomatic agent's papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, enjoy inviolability.[155] 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 that:

> 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; and
>
> (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 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.

152. *Id*. at art. 29.

153. *Id.* at art. 30(1).

154. *Id.* at art. 41(1).

155. *Id.* at art. 30.

> 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.[156]

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.[157] 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.[158] 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.[159] 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.[160] And he should enjoy personal inviolability and should not be liable to any form of arrest or detention.[161] 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.[162] In short, the diplomatic bag should not contain any illegal substance such as cocaine or marijuana.

Where a diplomat acts in breach of Article 41(1) of the Vienna Convention on Diplomatic Relations 1961, which requires the diplo-

156. *Id*. at art. 31.
157. *Id.*
158. *Id.* at art. 41(1).
159. *Id*. at art. 27(3)-(4).
160. *Id.* at art. (5).
161. *Id.*
162. *Id.* at art. 9(1).

mat 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.[163]

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[164] or the principles of obligations *erga omnes* and *rights erga omnes*?[165] 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

163. *Id.*

164. CASSESE, *supra* note 134, at 152-53 ("The principle of good faith is intended to 'invade' the penumbra of discretion left by international rules and guide the conduct of states (and other international subjects) in applying norms. While states are enjoined by the general norms, known as *consuetudo est servanda* (customary rules must be observed) and *pacta sunt servanda* (treaties must be complied with), to 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 purpose and object of legal rules. States must not betray the expectation created in other states by those rules, nor must they stultify by their behavior the confidence which the relevant norms have given to their fellow-states."); *see also* Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, ¶ 49 (Dec. 20).

165. *Id*. at 157-59; *see generally* MAURIZO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *Erga Omnes* (1997).

> than positive obligations; (3) obligations or duties in the strict sense (i.e. "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;" and (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 in turn reflect basic goods (or moral values), first and foremost life and human dignity."[166]

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.[167]

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?[168] Doesn't state practice also play a role?[169] What about issues

166. Jessica Howard, *Invoking State Responsibility for Aiding the Commission of International Crimes—Australia, the United States and the Question of East Timor*, 2 MELBOURNE J. INT'L. L. 1, 15 (2001) (Aust.).

167. *See id.* at 15-16.

168. CASSESE, *supra* note 134, at 152 (discussing the principles of *consuetudo est servanda* (customary rules must be observed) and *pacta sunt servanda* (treaties must be complied with).

169. 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. But some pieces of legislation, such as the United States' Diplomatic Relations Act, reduce the degree of immunity enjoyed by many persons at diplomatic missions. Diplomatic Relations Act, 1978 §§ 4, 6, 22 U.S.C. §§ 254c, 254e. States may also pass legislation or enter into regional treaties that address matters not explicitly covered by the Vienna Convention on Diplomatic Relations, but which matters are principally under customary international law, such as the Pan-American Convention on Diplomatic Of-

such as principles of good faith, obligations *erga omnes* and *rights erga omnes* in international law that we have already discussed above?

V. Conclusion

This article 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. Furthermore, 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, the receiving state can issue a diplomatic démarche to the state represented by the erring diplomat, protesting the criminal activities of the diplomat.

Finally, 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

ficers, Feb. 20, 1928, 22 Am. J. Int'l L. SUPP. 142, and the European Convention on Consular Functions, Dec. 11, 1967, E.T.S. No. 61. All in all, where a state enacts legislation, that piece of legislation often evidences the state practice of that particular state. In the case of the United Kingdom, for example, *see generally* the State Immunity Act, 1978, c. 33, (U.K.), and the Diplomatic Privileges Act, 1964, c. 81, (U.K.). In the case of the United States, *see generally* the Diplomatic Relations Act, 1978 §§ 4, 6, 22 U.S.C. §§ 254c, 254e (2012).

entail that the diplomat can now be prosecuted by the receiving state. In cases of universal jurisdiction, for example, we noted that the receiving state can arrest the culpable diplomat and have him or her extradited to the sending state or to any impartial third state to stand trial. The sending state, on the other hand, can recall its diplomat to stand trial in that state's courts of law even though the diplomat enjoys diplomatic immunity in the receiving state. An argument was also made that the sending state can waive the immunity of its diplomat to allow the receiving state to prosecute that diplomat.