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CHAPTER Two

2. RECOGNITION AND STATE RESPONSIBILITY UNDER INTERNATIONAL LAW

2.1. Definition of Recognition

Recognition is a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation.

Recognition is a process whereby certain facts are accepted and endowed with a certain legal status, such as statehood and sovereignty over newly acquired territory.

Recognition is a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation.

The decision whether or not to recognize will depend, mostly, more upon political considerations than exclusively legal factors.

There are a variety of options open as to what an entity may be recognized as; full sovereign state, or as the effective authority within a specific area or as a subordinate authority to another state.

2.2. Recognition of states

There are basically **two** theories as to the nature of recognition. The **constitutive theory** maintains that it is the act of recognition by other states that creates a new state and endows it with legal personality and not the process by which it actually obtained independence. Thus, new states are established in the international community as fully fledged subjects of international law **by virtue of the will and consent of already existing states.** The disadvantage of this approach is that an unrecognized 'state' **may not be subject to the obligations imposed by international law** and may accordingly be free from such restraints as, for instance, the prohibition on aggression.

The second theory, the **declaratory theory**, adopts the opposite approach and is a little more in accord with practical realities. It maintains that recognition is merely an acceptance by states of an already existing situation. A new state **will acquire capacity in international law** not by virtue of the **consent of others** but by virtue of **a particular factual situation**. It will be legally

constituted by its own efforts and circumstances and **will not have to await the procedure of recognition by other states.** This doctrine owes a lot to traditional positivist thought on the supremacy of the state and the concomitant weakness or non-existence of any central guidance in the international community.

For the constitutive theorist, the heart of the matter is that fundamentally an **unrecognized 'state' can have no rights or obligations in international law.** The opposite stance is adopted by the declaratory approach that emphasizes the factual situation and minimizes the power of states to confer legal personality.

The **recognition of governments** is distinguished from the recognition of a state. As far as the recognition of state is concerned, this may be when new states are created because of former

- Colonial territory has gained independence,
- Secession,
- Disintegration or
- A disputed territory has achieved independence through self-determination.
- Occupying *terra nullius* (a territory without an owner/which belongs to no state).

Similarly, recognition of a government may be necessary when a new administration comes to power unconstitutionally or through election, when a civil war gives rise to competing administrations.

A change in government does not affect the identity of the state itself. The state does not cease to be an international legal person because its government is overthrown.

Recognition of a state will affect its legal personality, whether by creating or acknowledging it, while recognition of a government affects the status of the administrative authority, not the state.

Basic factors (doctrines) to be considered in the recognition of governments include;

- The effective control doctrine
- Tobar doctrine (doctrine of legitimacy); governments which came into power by extra-constitutional means should not be recognised, at least until the change had been accepted by the people.

Estrada doctrine calls for automatic recognition of governments in all circumstances.

2.3. Modes of Recognition

In addition to the fact that there are different entities to be recognised, recognition itself may take different forms.

1. ***De facto and De jure* Recognition**

Recognition *de facto* implies that there is some doubt as to the long-term viability of the government in question.

Recognition *de jure* usually follows where the recognising state accepts that the effective control displayed by the government is permanent and firmly rooted and that there are no legal reasons detracting from this.

De facto recognition involves a hesitant assessment of the situation, an attitude of wait and see, to be succeeded by *de jure* recognition when the doubts are sufficiently overcome to extend formal acceptance.

2. **Premature Recognition**

It is immediate acceptable recognition of a new state, particularly one that has emerged or is emerging as a result of secession, and intervention in the domestic affairs of another state by way of premature or precipitate recognition.

It is therefore a process founded upon a perception of fact. The recognition of Croatia and Bosnia-Herzegovina is included in this category.

3. **Implied Recognition**

It assumes that recognition itself need not be expressed, that is in the form of an open, unambiguous and formal communication, but may be implied in certain circumstances.

The kind of conditions which may give rise to the possibility of recognition where no express or formal statement has been made includes;

- A message of congratulations to a new state upon attaining sovereignty
- Establishment of diplomatic relations
- The issuing of a consular exequatur to a representative of an unrecognised state
- Conclusion of bilateral treaty between the recognising and unrecognised state

4. **Conditional Recognition**

This refers to the practice of making the recognition subject to fulfilment of certain conditions.

The political nature of recognition has been especially marked with reference to what has been termed conditional recognition.

5. Collective Recognition

It refers to recognition by means of an international decision, whether by an international organisation or the international community in general.

However, member states reserved the right to extend recognition to their own executive authorities and did not wish to delegate it to any international institution.

2.4. Jurisdiction

Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs. Jurisdiction is a vital and indeed central feature of state sovereignty, for it is an exercise of authority which may alter or create or terminate legal relationships and obligations. It may be achieved by means of legislative, executive or judicial action. In each case, the recognised authorities of the state as determined by the legal system of that state perform certain functions permitted them which affect the life around them in various ways. Jurisdiction, although primarily territorial, may be based on other grounds, for example nationality, while enforcement is restricted by territorial factors.

2.4.1. The Principle of Domestic Jurisdiction

It follows from the nature of the sovereignty of states that while a state is supreme internally, that is within its own territorial frontiers; it must not intervene in the domestic affairs of another nation. This duty of non-intervention within the domestic jurisdiction of states provides for the shielding of certain state activities from the regulation of international law. State functions which are regarded as beyond the reach of international legal control and within the exclusive sphere of state management include the setting of conditions for the grant of nationality and the elaboration of the circumstances in which aliens may enter the country.

Article 2(7) of the UN Charter declares that:

> *"Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter".*

2.4.2. Legislative, Executive and Judicial Jurisdiction

Legislative jurisdiction refers to the supremacy of the constitutionally recognized organs of the state to make binding laws within its territory. Such acts of legislation may extend abroad in certain circumstances. The state has legislative exclusivity in many areas. For example, a state lays down the procedural techniques to be adopted by its various organs, such as courts, but can in no way seek to alter the way in which foreign courts operate.

Executive jurisdiction relates to the capacity of the state to act within the borders of another state. Since states are independent of each other and possess territorial sovereignty, it follows that generally state officials may not carry out their functions on foreign soil (in the absence of express consent by the host state) and may not enforce the laws of their state upon foreign territory. It is also contrary to international law for state agents to apprehend persons or property abroad. The seizure of the Nazi criminal Eichmann by Israeli agents in Argentina in 1960 was a clear breach of Argentina's territorial sovereignty and an illegal exercise of Israeli jurisdiction. Similarly, the unauthorized entry into a state of military forces of another state is clearly an offence under international law.

Judicial jurisdiction concerns the power of the courts of a particular country to try cases in which a foreign factor is present. There are a number of grounds upon which the courts of a state may claim to exercise such jurisdiction. In criminal matters these range from the territorial principle to the universality principle and in civil matters from the mere presence of the defendant in the country to the nationality and domicile principles. It is judicial jurisdiction which forms the most discussed aspect of jurisdiction and criminal questions are the most important manifestation of this.

2.4.3. Civil Jurisdiction

The exercise of civil jurisdiction has been claimed by states upon far wider grounds than has been the case in criminal matters, and the resultant reaction by other states much more muted. In common law countries, such as the United States and Britain, the usual basis for jurisdiction in civil cases remains service of a writ upon the defendant within the country, even if the presence of the defendant is purely temporary and coincidental. In continental European countries on the other hand, the usual ground for jurisdiction is the habitual residence of the defendant in the particular state.

Many countries, for instance the Netherlands, Denmark and Sweden, will allow their courts to exercise jurisdiction where the defendant in any action possesses assets in the state, while in

matrimonial cases the commonly accepted ground for the exercise of jurisdiction is the domicile or residence of the party bringing the action.

2.4.4. Criminal Jurisdiction

International law permits states to exercise criminal jurisdiction (whether by way of legislation, judicial activity or enforcement) upon a number of grounds. The importance of these jurisdictional principles is that they are accepted by all states and the international community as being consistent with international law.

A. The Territorial Principle

The territorial basis for the exercise of jurisdiction reflects one aspect of the sovereignty exercisable by a state in its territorial home, and is the indispensable foundation for the application of the series of legal rights that a state possesses. That a country should be able to legislate with regard to activities within its territory and to prosecute for offences committed upon its soil is a logical manifestation of a world order of independent states and is entirely understandable since the authorities of a state are responsible for the conduct of law and the maintenance of good order within that state. It is also highly convenient since in practice the witnesses to the crime will be situated in the country and more often than not the alleged offender will be there too.

Thus, *all crimes committed (or alleged to have been committed) within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is so even where the offenders are foreign citizens.*

B. Nationality Principle

This principle provides states to claim jurisdiction over crimes committed by their nationals abroad. Many countries, particularly those with a legal system based upon the continental European model, claim jurisdiction over all crimes committed by their nationals, notwithstanding that the offence may have occurred in the territory of another state. Common law countries tend, however, to restrict the crimes over which they will exercise jurisdiction over their nationals abroad to very serious ones.

C. The Passive Personality Principle

Under this principle, a state may claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of the state.

D. The Protective Principle

This principle provides that states may exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular state concerned.

The principle is justifiable on the basis of protection of a state's vital interests, since the alien might not be committing an offence under the law of the country where he is residing and extradition might be refused if it encompassed political offences.

E. The Universality Principle

Under this principle, *each and every state has jurisdiction to try particular offences. The basis for this is that the crimes involved are regarded as particularly offensive to the international community as a whole*. There are two categories that clearly belong to the sphere of universal jurisdiction, which has been defined as the competence of the state to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality or other grounds of jurisdiction recognised by international law. These are piracy and war crimes. However, there are a growing number of other offences which by international treaty may be subject to the jurisdiction of contracting parties and which form a distinct category closely allied to the concept of universal jurisdiction. These include crimes against peace and crimes against humanity

2.5. Immunities from Jurisdiction

Immunity is an exception to the general rule of territorial jurisdiction of a state in which state power cannot be exercised. Immunities from national jurisdiction can be split in two categories. **First, state/sovereign immunity**, which concerns the rights and privileges accorded to a state, its government and representatives and property within a national legal system.

Second, **diplomatic and consular immunity**, which deals with the immunities enjoyed by official envoys of the foreign sovereign state and the duties owed to them by the host state.

Absolute and Restrictive Approach to Immunity

The concept of absolute immunity declares that the sovereign have to be completely immune from foreign jurisdiction in all cases regardless of circumstances. On the other hand, according to the doctrine of restrictive immunity, a state has immunity from the jurisdiction of local courts only in respect of certain classes of acts. Immunity was available as regards governmental

activity, but not where the state was engaging in commercial activity. Governmental acts with regard to which immunity would be granted are termed ***acts jure imperii***, while those relating to private or trade activity are termed ***acts jure gestionis.*** A number of states in fact started adopting the restrictive approach to immunity, permitting the exercise of jurisdiction over non-sovereign acts, at a relatively early stage. With the adoption of the restrictive theory of immunity, the appropriate test becomes whether the activity in question is of itself sovereign (jure imperii) or non-sovereign (jure gestionis). In determining this, the predominant approach has been to focus upon the nature of the transaction rather than its purpose.

Conclusion

The concept of jurisdiction revolves around the principles of state sovereignty, equality and non-interference. Domestic jurisdiction as a notion attempts to define an area in which the actions of the organs of government and administration are supreme, free from international legal principles and interference. Indeed, most of the grounds for jurisdiction can be related to the requirement under international law to respect the territorial integrity and political independence of other states.

Sovereign immunity is closely related to two other legal doctrines, non-justifiability and act of state.

Thus, immunity **from jurisdiction does not mean exemption from the legal system of the territorial state in question.**

The absolute immunity approach

The relatively uncomplicated role of the sovereign and of government in the eighteenth and nineteenth centuries logically gave rise to the concept of absolute immunity, whereby the sovereign was completely immune from foreign jurisdiction in all cases regardless of circumstances Governmental acts with regard to which immunity would be granted are termed acts ***jure imperii***, while those relating to private or trade activity are termed acts ***jure gestionis***.

2.5.1. Diplomatic Immunity

Diplomatic immunity is a form of legal immunity that ensures diplomats are given safe passage and are considered not susceptible to law suitor prosecution under the host country's laws, although they may still be expelled. Modern diplomatic immunity was codified as international law in the Vienna Convention on Diplomatic Relations (1961) which has been ratified by all but a handful of nations. The concept and custom of diplomatic immunity dates back thousands of years. Many principles of diplomatic immunity are now considered to be customary law.

Diplomatic immunity was developed to allow for the maintenance of government relations, including during periods of difficulties and armed conflict. When receiving diplomats, who formally represent the sovereign, the receiving head of state grants certain privileges and immunities to ensure they may effectively carry out their duties, on the understanding that these are provided on a reciprocal basis.

Originally, these privileges and immunities were granted on a bilateral, ad hoc basis, which led to misunderstandings and conflict, pressure on weaker states, and an inability for other states to judge which party was at fault. An international agreement known as the Vienna Convention codified the rules and agreements, providing standards and privileges to all states.

It is possible for the official's home country to waive immunity; this tends to happen only when the individual has committed a serious crime, unconnected with their diplomatic role (as opposed to, for example, allegations of spying), or has witnessed such a crime. However, many countries refuse to waive immunity as a matter of course; individuals have no authority to waive their own immunity (except perhaps in cases of defection).Alternatively, the home country may prosecute the individual. If immunity is waived by a government so that a diplomat (or their family members) can be prosecuted, it must because here is a case to answer and it is in the public interest to prosecute them. For instance, in 2002, a Colombian diplomat in London was prosecuted for manslaughter, once diplomatic immunity was waived by the Colombian government.

The diplomatic law has mostly been customary law. The most important convention which codified norms of diplomatic law is Viena Convention on Diplomatic Relations (hereafter Vienna Convention), which was done at Vienna on 18 April 1961 and entered into force on 24 April 1964. Nowadays, the diplomatic law contains norms of international law, domestic law, and norms which arise from the obligation of the State to implement the norms of international law or bilateral agreements[1]. The key part of the diplomatic law are norms whose regulate privileges and immunities of the diplomats performed their function in friendly or unfriendly environments, even in situations of war, civil war or natural disasters. The diplomatic privileges and immunities should allow diplomats to perform their functions in the receiving State without fully understanding of all customs, laws, and regulations of this State. On the other side, the diplomatic privileges and immunities could not be a license to commit crimes and the violence of any domestic or international law. In practice, the **diplomatic privileges and immunities are sometimes misused as a shield protecting diplomats in the activities prohibited by law.**

Such activities are serious crimes, murders, espionage, terrorism, drunk driving, participating in illegal trafficking of artwork, drugs, cars and quite trivial offenses such as illegal parking, violation of traffic regulations or fishing without a license.

2.5.2. Theories of Diplomatic Immunity

A. Theory of Personal Representation

The theory of personal representation identified the envoy with the sovereign to exempt him from the jurisdiction of the receiving State by the status of his master. An ambassador is authorized to represent the head of a sending State, whose sovereignty has to be respected. The principle of the inviolability of ambassador's personality has been starting initially from the fact that the ambassador is a personal representative of the sovereign and has to be treated as the sovereign himself. Freedom of communication between sovereign of State and ambassador as his representative has to be guaranteed.

This theory was accepted in the Renaissance when the international relations are based on relations between the royal families. Diplomats served as a liaison between the dynasties and conduct personal relationships with the sovereign of State and their relatives. The monarch or sovereign or supreme authority of a sending State was sending abroad his relatives as diplomats. Diplomatic privileges and immunities were based on the fact that attack against diplomats has been understood as an attack against the ruler of the sending State himself because they have the same blood. In the 1600's, Cardinal Richelieu made significant changes in diplomatic theory and practice. After Cardinal Richelieu, the theory of personal presentation has lost attractiveness because diplomats formal have represented the head of State, but in their daily work, they followed the instructions of their governments.

B. Theory of Extraterritoriality

The theory of exterritoriality, initially developed by Hugo Grotius, is based on the legal fiction that all acts performed in the embassy premises are regarded as being performed on the territory of the sending State. Second legal fiction is that diplomat abroad remains a civil servant of his own country, and he should be treated as he is not in the territory of the receiving State, but in the territory of the sending State. This theory explains the i**nviolability of diplomat's personality, inviolability of mission premises, as well as inviolability of residences and property of diplomatic agents.** Diplomatic asylum is based on the theory of exterritoriality.

However, this theory conflicts with the requirement codified in Article 41 of the Vienna Convention, which prescribed that diplomats must respect the local laws and regulations of the receiving State. The local law of the receiving State is not entirely excluded. For example, rent of the building or premises and contracts in connection with; employment of local nationals as staff in the embassy; payment of services and baying products; issuing of a driving license; requirement from diplomats to be part in contracts made according to the local law of the receiving State, etc. International Law Commission dismissed this theory following a similar rejection by the League of Nations Expert Committee. Theory of exterritoriality could also hard explain inviolability of mission premises of international organizations.

The violence of exterritoriality principle in practice proved exterritoriality as a legal fiction: cultural revolutionaries breach in the UK Embassy in Beijing, the occupation of Belgian and Portuguese embassies in Kinshasa, breach of the Chinese embassy in Prague by the Soviet Army, etc.

C. Theory of Functional Necessity

The theory of functional necessity is based on the thesis that diplomats could successfully perform their functions abroad, only if they are protected with privileges and immunities in the receiving State. The theory has become more importance after Second World War because the number of States increased and accordingly also the diplomatic staff entitled to the privileges and immunities.

The Preamble of the Vienna Convention states that "...the propose of privileges and immunities is not to benefit individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing State..."[12] It made clear that the principle of functional necessity is the fundamental principle for diplomatic privileges and immunities in the Vienna Convention.

2.5.3. Diplomatic Immunity under the Vienna Convention on Diplomatic Relations

The General Assembly of the United Nations established the International Law Commission (ILC) with the resolution no. 174 on the 21 November 1947. The General Assembly expressed "…its desire for the common observance by all governments of existing principles and rules and recognized practice concerning diplomatic intercourse and immunities, particularly in regard to the treatment of diplomatic representatives of foreign States…"[21] and considered "…that early codification of international law on diplomatic intercourse and immunities is necessary and

desirable as a contribution to the improvement of relations between States…"[22] In the same resolution, the General Assembly requested the ILC "…as soon as it considers it possible, to undertake the codification of the topic *Diplomatic intercourse and immunities*, and to treat it as a priority topic…"[23] The ILC had started to work on the issue, and the draft of the Convention was adopted at its ninth session in 1957. 81 States adopted the Vienna Convention on the Diplomatic Relations at the United Nations Conference on Diplomatic Intercourse and Immunities held in Vienna from 2 March to 14 April 1961 and entered into force on 24 April 1964.

The Vienna Convention is based on the codification of the so far existing rules of the customary law, accepting of codified rules in the Congress of Vienna from 1815, Aachener Protocol from 1818, the Pan-American Havana Conference from 1928, as well as the introduction of the new rules that were acceptable to the most states.

The diplomatic privileges and immunities are not directly defined under the Vienna Convention, but they are specified under a series of articles of the Convention. In the Vienna Convention privileges and immunities are mentioned as: **the person of** a diplomatic agent is inviolable, and the receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity (Article 29); a diplomatic agent enjoys immunity from the criminal, civil and administrative jurisdiction with some exceptions regarding civil and administrative jurisdiction (Article 31); a diplomatic agent is not obliged to give evidence as a witness (Article 31); with exceptions defined under Article 34 a diplomat is exempted from all dues and taxes, personal or real, national, regional or municipal (Article 34); articles for the official use of the mission and articles for the personal use of a diplomatic agent are exempted from all customs duties, taxes, and related charges duties and customs control (Article 36).

2.5.4. Persons entitled to Privileges and Immunities

2.5.4.1. Diplomatic Staff of the Mission

Article 1 of the Vienna Convention provides definitions necessary for interpretation and application of the Convention. The general practice is that the *members of the diplomatic staff of the mission* have the same privileges and immunities enjoyed by the head of the mission, who is himself the *member of the diplomatic staff of the mission*. The *diplomatic agent* is the *head of the mission* or *a member of the diplomatic staff of the mission*.

The *members of the family of a diplomatic agent* forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36[24]. Usually, members of the *diplomatic staff of the mission*, who will remain in a foreign country a few years or more, doing their duties, are accompanied by their wives, children, relatives, and servants. The members of diplomatic staff of the mission enjoy absolute privileges and immunities. Based on current practice their *family members and the members of their household* should also enjoy the same privileges and immunities if they are not nationals of the receiving State. There are no established criteria for determining who is a family member or what a certain age is limited for children. Spouses and minor children are universally recognized as members of the family, but some relatives may also be qualified as family members if they are part of the household. Taking into account the cultural differences and different views what the family could imply, it would be hard to find an acceptable definition what family is. The usual practice considers a spouse and minor child as a family member but left open the question whether the family member could be a spouse living separately, in another country, or a child who is studying or working away from the parent's apartment, with their income, or unmarried partners, etc. Usually, in practice, every case of this kind should be solved individually, through negotiations between the ministry of foreign affairs and diplomatic mission.

Article 42 of the Convention prohibited to a diplomatic agent any practice for the personal profit of any professional or commercial activity. Members of the diplomatic agent's family enjoy privileges and immunities, and they cannot in principle work in the receiving State because work for companies in the receiving State involves a series of the contractual obligations incompatible with the privileges and immunities. However, some countries allow the employment of spouses of diplomats. The common practice is that the receiving and sanding State conclude a bilateral agreement, which regulates the status of family's members of the diplomatic agent if they compete for work in the free market. Such a bilateral agreement contains exclusions of immunity and the tax privileges because they can be not exempt from taxes, duties, social security, etc.

2.5.4.2. The Non-Diplomatic Staff of the Mission

The *members of the administrative and technical staff*, the *service staff*, and the *private servants* have limitations regarding the privileges and immunities compared with the *members of* the *diplomatic staff of the mission*.

There had been no consistent practice of States before the Vienna Convention regarding various categories of persons who do not have diplomatic rang and as the mission staff should enjoy

some privileges and immunities. Some countries respected privileges and immunities for the administrative and technical staff of the mission, and some included the service staff and servants in the category of the privileged persons. The Vienna Convention set up a general and uniform rule based on reasonable and necessary.

The expression the *administrative and technical staff of mission* includes the translators, technical secretary, financial, technical and officers in charge of security, etc. The administrative and technical staff of the mission benefits privileges and immunities specified in Articles 29 to 35 with limitations. Immunity from the civil and administrative jurisdiction of the receiving State specified in Article 31 of the Convention was not extended to the activities of the *members of administrative and technical staff* performed them outside of their duties. It is difficult to determine in practice whether something is done "... outside the course of their duties..." The Convention did not exactly define who determines whether an act is performed outside the course of their duties or not. The limited scope of the immunity and privileges for the *administrative and technical staff* of the mission is a compromise between two positions. One position is that the function of the diplomatic mission shall be considered as a whole, where any member of mission's staff has the specific role. Administrative and technical staff such as ambassador's secretary or archivist can be involved more in the confidential information, then a member of the diplomatic staff. This confidential information must be protected from possible actions by the authorities of the receiving State .On the other hand, the status of an ambassador and ambassador's technical secretaries could not be equated. The compromise was to give limited privileges and immunities to the *administrative and technical staff* of the mission.

Members of the service staff of the mission include embassy drivers, cooks, gardeners, doorkeepers, and cleaners. Unlike private servants, member of the service staff of the mission is employed by the sending State, and not by a member of the mission. Members of the service staff of the mission enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive because of their employment and the exemption contained in Article 33 of the Convention. The receiving State can give freely, in its discretion, additional privileges and immunities to this category of staff.

Private servants of members of the mission enjoy privileges and immunities only to the extent admitted by the receiving State. They are exempt from dues and taxes on the emoluments they receive because of their employment. Inviolability of premises of the mission and residence of

diplomat request the receiving State to exercise its jurisdiction over those persons in such a manner "…as not to interfere unduly with the performance of the functions of the mission…"[29]

2.5.4.3. The Diplomatic Bag

Article 27 provides that the receiving state shall permit and protect free communication on behalf of the mission for all official purposes. Such official communication is inviolable and may include the use of diplomatic couriers and messages in code and in cipher, although the consent of the receiving state is required for a wireless transmitter. Article 27(3) and (4) deals with the diplomatic bag, and provides that it shall not be opened or detained and that the packages constituting the diplomatic bag 'must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use'. The need for a balance in this area is manifest. On the one hand, missions require a confidential means of communication, while on the other the need to guard against abuse is clear. Article 27, however, lays the emphasis upon the former.This is provided that article 27(4) complied with. In the Dikko incident on 5 July 1984, a former Nigerian minister was kidnapped in London and placed in a crate to be flown to Nigeria. The crate was opened at Stansted Airport, although accompanied by a person claiming diplomatic status. The crate did not contain an official seal and was thus clearly not a diplomatic bag. The issue of the diplomatic bag has been considered by the International Law Commission, in the context of article 27 and analogous provisions in the 1963 Consular Relations Convention, the 1969 Convention on Special Missions and the 1975 Convention on the Representation of States in their Relations with International Organizations. Article 28 of the Draft Articles on the Diplomatic Courier and the Diplomatic Bag, as finally adopted by the International Law Commission in 1989, provides that the **diplomatic bag shall be inviolable** wherever it may be. **It is not to be opened or detained and 'shall be exempt from examination directly or through electronic or other technical device'.** However, in the case of the consular bag, it is noted that if the competent authorities of the receiving or transit state have serious reason to believe that the bag contains something other than official correspondence and documents or articles intended exclusively for official use, they may request that the bag be opened in their presence by an authorized representative of the sending state. If this request is refused by the authorities of the sending state, the bag is to be returned to its place of origin.It was thought that this preserved existing law. Certainly, in so far as the consular bag is concerned, the provisions of article 35(3) of the Vienna Convention on Consular Relations are reproduced, but the stipulation of exemption from electronic or other technical examination does not appear in the Vienna Convention on Diplomatic Relations and the view of the Commission

that this is mere clarification is controversial. As far as the diplomatic courier is concerned, that is, a person accompanying a diplomatic bag, the Draft Articles provide for a regime of privileges, immunities and inviolability that is akin to that governing diplomat. He is to enjoy personal inviolability and is not liable to any form of arrest or detention (draft article 10), his temporary accommodation is inviolable (draft article 17), and he **will benefit from immunity from the criminal and civil jurisdiction of the receiving or transit state in respect of all ac**ts performed in the exercise of his functions (draft article 18). In general, his privileges and immunities last from the moment he enters the territory of the receiving or transit state until he leaves such state (draft article 21).

2.6. Enforcement Mechanisms of International Law

2.6.1. Peaceful settlement

International law provides a variety of methods for settling disputes peacefully, none of which takes precedence over any other. Nonbinding mechanisms include direct negotiations between the parties and the involvement of third parties through good offices, mediation, inquiry, and conciliation. The involvement of regional and global international organizations has increased dramatically since the end of World War II, as many of their charters contain specific peaceful-settlement mechanisms applicable to disputes between member states. The UN may be utilized at several levels. The secretary-general, for example, may use his good offices to suggest the terms or modalities of a settlement, and the General Assembly may recommend particular solutions or methods to resolve disputes. Similarly, the Security Council may recommend solutions (e.g., its resolution in 1967 regarding the Arab-Israeli conflict) or, if there is a threat to or a breach of international peace and security or an act of aggression, issue binding decisions to impose economic sanctions or to authorize the use of military force (e.g., in Korea in 1950 and in Kuwait in 1990). Regional organizations, such as the Organization of American States and the African Union, also have played active roles in resolving interstate disputes.

Additional methods of binding dispute resolution include arbitration and judicial settlement. Arbitration occurs when the disputing states place their conflict before a binding tribunal. In some cases, the tribunal is required to make a number of decisions involving different claimants (e.g., in the dispute between the United States and Iran arising out of the 1979 Iranian revolution), while in others the tribunal will exercise jurisdiction over a single issue only. In a judicial settlement, a dispute is placed before an existing independent court. The most important and comprehensive of these courts is the ICJ, the successor of the Permanent Court of International Justice, created in 1920. Established by the UN Charter (Article 92) as the UN's principal judicial organ, the ICJ consists of 15 judges who represent the main forms of

civilization and principal legal systems of the world. They are elected by the General Assembly and Security Council for nine-year terms.

The ICJ, whose decisions are binding upon the parties and extremely influential generally, possesses both contentious and advisory jurisdiction. Contentious jurisdiction enables the court to hear cases between states, provided that the states concerned have given their consent. This consent may be signaled through a special agreement, or *compromis* (French: "compromise"); through a convention that gives the court jurisdiction over matters that include the dispute in question (e.g., the genocide convention); or through the so-called optional clause, in which a state makes a declaration in advance accepting the ICJ's jurisdiction over matters relating to the dispute. The ICJ has issued rulings in numerous important cases, ranging from the *Corfu Channel* case (1949), in which Albania was ordered to pay compensation to Britain for the damage caused by Albania's mining of the channel, to the territorial dispute between Botswana and Namibia (1999), in which the ICJ favoured Botswana's claim over Sedudu (Kasikili) Island. The ICJ's advisory jurisdiction enables it to give opinions on legal questions put to it by any body authorized by or acting in accordance with the UN Charter.

Other important international judicial bodies are the **European Court of Human Rights**, established by the European Convention on Human Rights; the Inter-American Court of Human Rights, created by the Inter-American Convention on Human Rights; and the International Tribunal for the Law of the Sea, set up under the Law of the Sea treaty. The World Trade Organization (WTO), established in 1995 to supervise and liberalize world trade, also has created dispute-settlement mechanisms.

2.6.2. Use of force

The UN Charter prohibits the threat or the use of force against the territorial integrity or political independence of states or in any other manner inconsistent with the purposes of the Charter; these proscriptions also are part of customary international law. Force may be used by states only for self-defense or pursuant to a UN Security Council decision giving appropriate authorization (e.g., the decision to authorize the use of force against Iraq by the United States and its allies in the Persian Gulf War in 1990–91). The right of self-defense exists in customary international law and permits states to resort to force if there is an instant and overwhelming need to act, but the use of such force must be proportionate to the threat. The right to self-defense is slightly more restricted under Article 51 of the UN Charter, which refers to the "inherent right of individual or collective self-defence if an armed attack occurs" until the Security Council has taken action. In a series of binding resolutions adopted after the terrorist September 11 attacks in 2001 against the World Trade Center and the Pentagon in the United States, the Security Council emphasized that the right to self-defense also applies with regard to international terrorism. Preemptive strikes by countries that reasonably believe that an attack upon them is imminent are controversial but permissible under international law, provided that the criteria of necessity and proportionality are present.

It has been argued that force may be used without prior UN authorization in cases of extreme domestic human rights abuses (e.g., the actions taken by NATO with regard to Kosovo in 1999 or India's intervention in East Pakistan [now Bangladesh] in 1971). Nonetheless, humanitarian interventions are deeply controversial, because they contradict the principle of nonintervention in the domestic affairs of other states.

The use of force is regulated by the rules and principles of international humanitarian law. The Geneva Conventions (1949) and their additional protocols (1977) deal with, among other topics, prisoners of war, the sick and wounded, war at sea, occupied territories, and the treatment of civilians. In addition, a number of conventions and declarations detail the types of weapons that may not be used in warfare. So-called "dum-dum bullets," which cause extensive tissue damage, poisonous gases, and chemical weapons are prohibited, and the use of mines has been restricted. Whether the use of nuclear weapons is per se illegal under international law is an issue of some controversy; in any event, the criteria of necessity and proportionality would have to be met.

2.6.3. International cooperation

States have opted to cooperate in a number of areas beyond merely the allocation and regulation of sovereign rights.

High seas and seabed

Traditionally, the high seas beyond the territorial waters of states have been regarded as open to all and incapable of appropriation. The definition of the high seas has changed somewhat since the creation of the various maritime zones, so that they now are considered to be those waters not included in the exclusive economic zone, territorial sea, or internal waters of states or in the archipelagic waters of archipelagic states.

The **high seas** are open to all states, with each state possessing the freedoms of navigation and over flight and the freedom to lay submarine cables and pipelines, to conduct scientific research, and to fish. On ships on the high seas, jurisdiction is exercised by the flag state (i.e., the state whose flag is flown by the particular ship). Nevertheless, warships have the right to board a ship that is suspected of engaging in piracy, the slave trade, or unauthorized broadcasting. There also is a right of "hot pursuit," provided that the pursuit itself is continuous, onto the high seas from the territorial sea or economic zone of the pursuing state in order to detain a vessel suspected of violating the laws of the coastal state in question.

The international seabed (i.e., the seabed beyond the limits of national jurisdiction), parts of which are believed to be rich in minerals, is not subject to national appropriation and has been designated a "common heritage of mankind" by the Declaration of Principles Governing the Seabed (1970) and the Law of the Sea treaty. Activities in the international seabed, also known as "the Area," are expected to be carried out in the collective interests of all states, and benefits are expected to be shared equitably.

Outer space

Outer space lies beyond the currently undefined upper limit of a state's sovereign airspace. It was declared free for exploration and use by all states and incapable of national appropriation by a 1963 UN General Assembly resolution. The Outer Space Treaty (1967) reiterated these principles and provided that the exploration and use of outer space should be carried out for the benefit of all countries. The Moon Treaty (1979) provided for the demilitarization of the Moon and other celestial bodies and declared the Moon and its resources to be a "common heritage of mankind." A number of agreements concerning space objects (1972 and 1974) and the rescue of astronauts (1968) also have been signed.

Antarctica

The Antarctic Treaty (1959) prevents militarization of the Antarctic continent and suspends territorial claims by states for the life of the treaty. Because it provides no mechanism for its termination, however, a continuing and open-ended regime has been created. There also are various agreements that protect Antarctica's environment.

Protection of the environment

Because the rules of state responsibility require attributions of wrongful acts to particular states—something that is difficult to prove conclusively in cases of harm to the environment—it was recognized that protecting the environment would have to be accomplished by means other than individual state responsibility. Instead, an international cooperative approach has been adopted. For several kinds of pollutants, for example, states have agreed to impose progressively reduced limits on their permissible emissions.

The Stockholm Declaration (1972) and the Rio Declaration (1992), which was issued by the United Nations Conference on Environment and Development, enjoined states to ensure that activities within their jurisdiction do not cause environmental damage to other states or areas. Other agreements have addressed the need for early consultation on potential environmental problems, notification of existing problems, and wider use of environmental-impact assessments. Supervisory and monitoring mechanisms also have been established by several of these agreements, including the Convention on Long-Range Trans boundary Air Pollution (1979), the Law of the Sea treaty, the Vienna Convention for the Protection of the Ozone Layer (1985), the amended Convention on Marine Pollution from Land-Based Sources (1986), the Convention on Environmental Impact Assessment in a Transboundary Context (1991), the Convention on Biological Diversity (1992), the United Nations Framework Convention on Climate Change (1992), and the Kyoto Protocol (1997).