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IMMUNITIES FROM NATIONAL JURISDICTION

- In the previous chapter, the circumstances in which a state may seek to exercise its jurisdiction in relation to **civil and criminal matters** were considered. States are recognized as having authority over people, things and events within their own territory and therefore may exercise jurisdiction over them. However, international law does recognize that certain people, things and events are entitled to immunity from the enforcement of local law.
- Under international law, immunity from jurisdiction is granted to certain persons, such as Diplomatic and consular representative/ambassadors high commissioners, foreign troops, international organization and sovereign immunity.

1. State immunity

- Sovereign immunity is creation of customary international law and derives from the principle of **independence and equality of sovereign states**, since States are **independent and legally equal**, no State may exercise jurisdiction over another State without its consent.
- This is often expressed by the maxim “*par in parem non habet imperium*” which means **an equal has no power over an equal**.
- The classic case illustrating the relationship between territorial jurisdiction and sovereign immunity is The *Schooner Exchange v. McFadden (1812)*. The court found that the vessel was a national armed vessel commissioned by, and in the service of the **emperor of France**. The court found that the United States was at peace with France and permitted the vessel to enter the ports as a friendly power. **The court held that when the vessel entered American territory, it did so under the implied promise that the vessel was exempt from United States jurisdiction and enjoyed sovereign immunity.**

Absolute and restrictive immunity

- International attitudes towards state immunity vary. In general, there are two approaches: the absolute doctrine and the restrictive doctrine.

Absolute state immunity

- Initially the first and only approach, the absolute doctrine still applies in some jurisdictions. Under this doctrine, any proceedings against foreign states are inadmissible unless the state expressly agrees to waive immunity. Under a fully “absolute” approach, a foreign *state enjoys total immunity* from being sued or having its assets seized or enforced against by a foreign court, even in commercial matters.
- With the rise of industrialization during the **19th century**, States became more involved in commercial activities, particularly in the area of railways, shipping and postal services. This situation led to calls for the **modification of the absolute immunity of states** and it was suggested that a distinction could be drawn between *acts jure imperii and acts jure gestionis*.
- Acts jure imperii are acts of a government which are sovereign in nature. Acts jure gestionis are commercial acts in respect of which the state is not immune.

- **Restrictive Theory of Foreign State Immunity**
- The increase in States' trading in the latter part of the 20th Century, led a number of States including the UK, to develop the restrictive theory of foreign State immunity, resting upon a distinction between **acts of purely governmental in character and acts of the government that had commercial transactions traits**, which are scarcely any different from the activities of private individuals and companies. **Under the restrictive theory, foreign States are immune in respect of acts of government but not in respect of commercial acts.**
- The immunity of the sovereign is recognized only with regard to public acts or acts *jure imperii* of a state, but not with regard to private acts or acts *jure gestionis*.

- The doctrine of State immunity **is not static**, and has undergone enormous changes in the last hundred years. No longer is State immunity seen as an **absolute doctrine**, particularly in the area of what can broadly be described as commercial activity.
- A State should be held to account for its actions when it **enters into any form of commercial transaction with private individuals or companies**. This will set the stage for States entering into commercial transactions not to willfully disregard their contractual obligations, but rather take conscious steps towards honoring their obligations, **bearing in mind the consequences of a breach of contract**. This would in turn promote the efficient functioning of commerce and industry. However, **individuals and companies, may have to be extra careful when entering into commercial transactions**.

2. Diplomatic and Consular Immunity

- Diplomats who represent their country abroad enjoy diplomatic immunity. This protects them against **prosecution** in the receiving state for the entire period in which they hold their diplomatic post. The international agreements on diplomatic immunity can be found in **the Vienna Convention on Diplomatic Relations 1962**. For instance, the receiving state is not permitted to prosecute diplomats, and must protect them, along with their families and property. The main aim of the Convention is to allow diplomats to carry out their **work without hindrance in the receiving state**.
- Under **Article 14 of the Vienna Convention on Diplomatic Relations** divided the **Head of Mission** into three classes, namely:
 - (1) That of **ambassadors** or nuncios accredited to Heads of State, and other heads of mission of equivalent rank; (2) That of **envoys**, ministers and internuncios accredited to Heads of State; (3) That of *chargés d'affaires* accredited to Ministers for Foreign Affairs (ambassador-deputy).
- Diplomatic privileges and immunities guarantee that diplomatic agents or members of their immediate family: May not be **arrested or detained**, May not have their **residences entered and searched**, May not be ordered as witnesses, May not be prosecuted.

- **Consular immunity:** the consular officer, like a diplomatic agent, represents his State in the receiving State. However, unlike a diplomatic agent, he is not concerned with **political relations** between the two States, but with a variety of **administrative functions**, such as issuing visas and passports, looking after the commercial interests of his State, and assisting the nationals of his State in distress.
- Thus, he is not granted the same degree of immunity from jurisdiction as a diplomatic agent.
- Under **article 1 of Vienna Convention on Diplomatic Relations** provides that 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

3. Immunities of International Organizations

- The immunity of international organizations is determined by the provisions of the **organization's statutes**, of any possible protocol on privileges and immunities entered into between the organization's members as well as of the headquarters agreement concluded between the organization and its host state.
- Actually, immunities are granted to international organization by **treaties**, or by **headquarters** agreements concluded with the host state where the organization is seated. **Immunity is regarded as functionally necessary for the fulfillment of their objective.**
- Probably the most important example of treaties providing immunities to international organizations is the **1946 General Conventions on the privileges and immunities of the United Nation**, which sets out the immunities of the United Nations and its personnel.

4. Foreign armed forces

- Members of the armed forces usually enjoy **limited immunities** from local jurisdiction while in the territory of a foreign state. Obviously such immunities only apply where the forces are present with the consent of the host state.
- The receiving state impliedly agrees not to exercise jurisdiction in such a way as to impair the integrity and the efficiency of the force.
- The general rule is that the commander of **visiting forces** has exclusive jurisdiction over offences committed within the area where the force is stationed or while members of the force are on duty. **Usually the status and immunities of foreign troops will be the subject of specific agreement.**

- For example **Status of Mission Agreement** between The Transitional Federal Government of the Somali Republic and the African union on the African Union Mission in Somalia (AMISOM) **Addis Ababa 6th March 2007.**
- Under **article 3** of the above mentioned agreement provides that AMISOM, its property, funds and assets and its members, including the Head of Mission and Special Representative of the Chairperson of the African Union Commission, Members of all components of the mission including African Countries, the European Union, the United States, **shall enjoy the privileges and immunities** specified in the present Agreement as well as those provided in the provisions of the AU convention on Diplomatic Privileges and Immunities.

Expelling Diplomats who Abuses their Privileges

- In diplomacy, the term *Persona non grata* is a Latin word persona as “person” and non grata as “unwelcome” which means “person not appreciated or unwelcome person”. This term is used for **foreign diplomats and ambassadors**.
- The term is regulated in the **Article 9 of the Vienna Convention on Diplomatic Relations dated 1961**. under Article 9 provides that the receiving State may at any time and **without having to explain its decision**, notify the **sending State** that the head of the mission or any member of the diplomatic staff of the mission is **persona non grata** or that any other member of the staff of the mission is not acceptable.
- In any such case, the **sending State** shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable **before arriving in the territory of the receiving State**. If the sending State **refuses or fails within a reasonable period** to carry out its obligations **under paragraph 1 of this Article**, the receiving State may refuse to recognize the person concerned as a member of the mission.”

- The receiving state does not have to disclose any grounds for the *Persona Non Grata declaration*.
- **The Main Reasons Persona Non Grata is Based On:-**
 1. The acts and manners of the diplomatic official that are **contrary to the interests of the receiving state**
 2. Certain **crimes committed by the diplomatic official** within the borders of the receiving state
 3. **Retaliation** (If the diplomatic official of a state is declared Persona Non Grata in another country, in return to this declaration, the diplomatic official belonging to that state is also declared Persona Non Grata).

- The doctrine of **persona non grata** does not apply to, or in respect of, **United Nations personnel**. As described in the 1961 Vienna Convention on Diplomatic Relations, the doctrine applies to **diplomatic agents who are accredited by one State to another** in the context of their bilateral relations.
- The United Nations is **not a State** and its personnel are not accredited to the States where they are deployed, but work under the sole responsibility of the Secretary-General. **Under Article 100 and 101 of the United Nations Charter**, United Nations staff members are appointed by the Secretary-General, **responsible only to the Organization**, and United Nations Member States undertake to respect their exclusively international character”.
- On 4th January 2019, Somalia banned **Nicholas Haysom**, the head of the UN mission in the country, with a persona non grata declaration. He was also accused of interfering in internal affairs.

- **Under Article 105 of the Charter of the United Nations** provides that 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 and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
- **The same scenario happened both Ethiopia and Burkina Faso whereby these two Governments expelled senior UN official on 30 September 2021 and 26 December 2022 respectively.**



THANK YOU