

Chapter 6 jurisdiction and immunities in international law;

Jurisdiction refers to the power of the court to entertain the case at hand; there are 3 types of jurisdiction. These are: 1. Local jurisdiction 2. Material jurisdiction and 3. Judicial jurisdiction. Unlike judicial jurisdiction, local jurisdiction and material jurisdiction are entirely the matter of national issue. When we talk about local and material jurisdiction we are talking about whether a given court has the power or jurisdiction regarding the submitted dispute.

The concept of judicial jurisdiction comes in to picture when there are competing interests over a given case. Under judicial jurisdiction the basic question is which country should assume a jurisdiction of entertaining the case at hand. When we talk about judicial jurisdiction under international law mainly we are talking about two types judicial jurisdiction. These are 1. Prescriptive jurisdiction (legislative jurisdiction) and 2. Enforcement (executive jurisdiction). The earlier three types of jurisdiction were the jurisdiction of the court to entertain the given case. Whereas, the above mentioned two types of jurisdiction are mainly concerned with the power of legislating and enforce laws of a given country.

Prescriptive jurisdiction refers to the power of state to bring any matter with in the cognizance of its national law. Put differently, prescriptive jurisdiction refers to the power of state to assert the applicability of its law to any person, property, territory or other events wherever they are situated.

On the other hand when we talk about enforcement jurisdiction we are talking about the power of state to enforce the laws that it has enacted. So, here we are talking about the power of state to take executive measures. To this end, appreciating the difference between these two different concept becomes relevant when we study the major rules that we have under international law regarding jurisdiction.

There are two basic rules that are recognized under customary international law regarding jurisdiction. The first major rule is that, the state is free to exercise its jurisdiction without any limitation unless there is clear prohibition limiting its powers recognized by international law. Hence, the basic rule is because states are sovereign, the power of states are unfettered or without limit. They can do any thing they think fit except where there is clear international law rule that limits the powers of the states.

On the other hand, the second principle stipulates that, the state cannot exercise jurisdiction in the territories of another states. As opposed to this rule the first rule depicts the jurisdiction of states as unlimited jurisdiction unless there are clear international law rule that prohibit states to act in a certain way. Reverse to the first principle the second principle dictates that, states cannot exercise jurisdiction in the territories of another states. The logical question that comes next to this understanding is aren't these two principle contradictory? The answer for the avbove provided question is it depends upon the interpretation followed by the person answering the question.

If we closely look at the first principle of jurisdiction it says, states are entitled with unlimited jurisdiction or power but this unlimited power stops whenever there is a clear prohibition provided by international law rule. In this regard, the first rule of interpretation asserts that, there is no any contradiction between the two principles. This interpretation rule hinge upon the second definitive attributes of the first principle. Accordingly, since the unlimited powers of state stops whenever it is prohibited by clear international law rules, the second principle of customary international law rule could be regarded as the clear prohibition of the powers of states as regards territories of another states.

Therefore, according to the first interpretation rule, the second principle of jurisdiction is to be considered as the first exception of unlimited powers of state whenever it is clearly provided by international law rules. There is also another way of interpretation that could lead us to the absence of contradiction between the two principles. According to this second way of interpretation, it is true that states enjoy unlimited power as regards prescriptive jurisdiction. In other words, under international law states can legislate virtually on any matter in relation to their prescriptive jurisdiction, but when it comes to enforcement jurisdiction the principle together with its exception applies. This means, with respect to executive of enforcement jurisdiction, international law does not recognize an unlimited jurisdiction. QUESTION; do you think a police force of one country can cross a border of another country so as to apprehend its national whom it considered terrorists?

At any rate, the police of one country cannot cross the border of another state in order to enforce or execute laws of its government. However, with the presence of clear treaty states can cross the border of one another so as to enforce its executive jurisdiction provided that they have agreed to do so with each other. In the absence of clear agreement, as a matter of principle the law enforcing agent of one country cannot cross the border of another state under the impression of enforcing the laws of its government.

However, in continents like Africa it is very difficult to confidently allege that, the state cannot enforce its executive jurisdiction in the territory of another states. Because, African countries are the country where the rule of law didn't ingrain. So, a given African country might chase its nationals in order to apprehend them even by crossing the territory of another states. Mostly such African countries ask for excuse to what they did. You will find these two major rules of jurisdiction in the lotus case which was entertained by PCIJ in 1927.

Generally speaking, territorial jurisdictions are considered to be absolute in its nature under international law; for instance, if we are talking about Ethiopia, Ethiopia has an absolute jurisdiction. Meaning, both prescriptive and enforcement jurisdiction with in its own territory. Therefore, territorial jurisdiction are regarded to be absolute in their nature. However, there is one major exception to this principle, if you look at article 2 sub art (7) of the united nation charter, it says members of the UN and the UN itself cannot interfere in to internal affairs of states.

Accordingly, some legal scholars have preferred to consider this specific article of the UN as if it is another indication of the absolute nature of territorial jurisdiction. However, the development of human right law and the expansion of international humanitarian law is forcing legal scholars to understand the situation as the concept of absolute territorial jurisdiction is losing its prior definition or acceptance. Therefore, nowadays it seems that international law no more recognize the absolute nature of territorial jurisdiction.

Therefore, currently at least in relation to the commission of international crimes I-E genocide, crimes against humanity and war crimes, international communities and the UN itself now understand article 2 sub art (7) of the UN charter as implying or imposing obligation not to interfere in routine internal affairs. But, in the case of major human right issues exception to absolute nature of territorial jurisdiction would apply.

Basis of jurisdiction recognized under international law;

How does state exercise its jurisdiction in relation to specific occurrences; in other words, when does state exercise its jurisdiction in relation to the commission of specified crime. What are the grounds recognized by international law that entitle a states to lawfully exercise jurisdiction over a person juridical or physical.

The territoriality principle;

The first ground of jurisdiction is the principle called the territoriality principle. According to this principle territory is used as the test of conferring jurisdiction on a sovereign country. According to the territoriality principle, every state claims jurisdiction over crimes committed in its own territory even by foreigners. Hence, under the territoriality principle the nationality of the offender doesn't matter so as to exercise jurisdiction over him. What matters under territoriality principle is the fact that a given crime is committed in the territory of the claiming country or not

The territoriality principle of jurisdiction is the very known grounds of jurisdiction under international law and under customary international law. Unlike other ground which we are going to study this ground of jurisdiction is widely acceptable and recognized by international communities. But, the question that comes in association with using territoriality principle as a ground of jurisdiction is when do we say a certain crime was committed in the territory of a given country. Put differently, the question here is when do we say an act took place in the territory of a given state.

In response to the above provided question, there are two kinds of territoriality principle the first of which is the subjective theory of territoriality and the second is the objective theory of territoriality principle.

According to the subjective territoriality principle it is the place of commencement that matters. So, if you follow the subjective territoriality principle, what you should focus on is the place where the commission of a given crime was undertaken. In other words, the basic concern under subjective territoriality principle is the place where the crime was commenced or it started.

On the other hand, under objective territoriality principle the focus is on the country where that given act which was started in another country produces the final result. This doctrine is also known as the effect doctrine or principle. There is a lot of controversy as regards which of the two principle should prevail. Generally, in the principle of territoriality, the focus is the country where the crime is occurred will have jurisdiction over a physical or juridical person who has committed the crime.

The principle of nationality;

Once again the nationality principle is the least controversial grounds of jurisdiction. In this regard, we can say that, the territoriality principle and the nationality principle are the most widely accepted principles. But, when we talk about nationality principle we

have to be careful. Because, we have to identify whether we are talking about active nationality principle or passive nationality principle.

Generally, the nationality principle provides that, the state may prosecute its nationals for crime committed anywhere else in the world. Here the test is the nationality of persons. Here the place where the crime was committed is totally irrelevant. Even if, the person commits the crime on the moon if that person is an Ethiopian, Ethiopia will always exercise jurisdiction based on the principle of nationality. To this end, reference has to be made to national or municipal law so as to determine the nationality of a given person in order to exercise jurisdiction over him as per the nationality principle. Because, international law does not determine the nationality of individuals or other juridical persons.

There are two types of nationality principles; these are 1. Active nationality principle and 2. Passive nationality principle.

Active nationality principle uses nationality as a test and wherever the offense is committed the national state would exercise its jurisdiction over the offender. While the passive nationality principle is used to try an alien for crimes committed abroad against nationals of the state claiming for exercising jurisdiction over the case.

So, according to the passive nationality principle the test of exercising jurisdiction is whether the offender by committing certain crime has affected or caused damage, injury or otherwise to the nationals of the state claiming jurisdiction. If for instance, the crime committed in USA targets Ethiopian national, according to passive nationality principle Ethiopia will exercise jurisdiction over the offender. Therefore, the difference between the passive nationality principle and active nationality principle is the fact that, active nationality principle is all about the national of a given state committing a crime while the passive nationality principle is all about the national of a given country being the target of the crime committed. Both in the case of active nationality principle and passive nationality principle, the place of commission of a crime is abroad and the person upon which the crime is committed is an alien in the case of active nationality principle while the target of a crime is a national by virtue of passive nationality principle but the offender is an alien even in the case of passive nationality principle.

As opposed to active nationality principle, the passive nationality principle is a recent development as well as very contentious when compared with active nationality principle. During 19th century UK and USA had been opposing the principle of passive nationality.

But, after 9/11 incident and after the deliberate target of American nationals by so many groups, America recognized the principle of passive nationality principle as a valid ground of exercising jurisdiction. But, even today there are some countries who criticize the principle of passive nationality principle on the basis of different issue. Therefore, it would be valid if one says the principle of passive nationality principle has not been recognized as customary international law rule. So, time will tell whether this rule will crystallize into customary international law rule or not.

The principle of protective;

According to the protective principle states are allowed to punish acts that are prejudicial to its security and its existence even when the crime is committed by foreigners abroad. If we closely look at this principle, the principle does not qualify both active and passive nationality principle or it does not qualify for the principle of territoriality. But, according to the protective principle the state will be allowed to exercise criminal jurisdiction when acts prejudicial to its security are committed by foreigners abroad. For instance, plan to overthrow through its government, espionage and forging its currency could serve as the example of protective principle. If for instance, a non Ethiopian group of persons organized themselves into a paramilitary group and is trying to overthrow through the government of Ethiopia by basing their center in Kenya, according to the protective principle Ethiopia has valid jurisdiction over such individuals to handle the case. Here it has to be noted, the principle of protective jurisdiction is a very much controversial principle of jurisdiction. To begin with, the question like what constitutes the crime of threat to the security of state or give rise to prejudicial interest of the state is not a settled issue. Hence, defining this is a very subjective matter. But, generally there are some countries that have made use of the principle of protective jurisdiction.

The principle of universality;

Under international law there are certain crimes that are regarded as violations of international law; accordingly, some crimes fall within the category of serious crime that will be regarded as destructing the order of international law itself. Here the crime under consideration is the type of crime that are the category of genocide, crimes against humanity and war crime. Again, historically some crimes have succeeded to be recognized as a crime committed against human kind as a whole. The typical example of crimes that have attained seriousness or wider scope in terms of its handling jurisdiction is the crime of piracy.

To this effect, when crimes like piracy, genocide, war crime and crimes against humanity is committed every country will have valid jurisdiction to entertain the case at hand without it being required to prove the existence of link in the form of nationality or territoriality. So, according to the universality principle, whenever these major crimes have been committed every country has jurisdiction to try the offenders. Again, even if, it is in a few circumstances, the question which says what kind of crime constitutes such kinds of crime will raise controversy.

The source of universality principle could either be customary international law rules or treaty concluded among states. For instance, crimes like genocide and piracy are held universal crime by virtue of customary international law rule. While in the case of treaty, for instance, treaties concerned hijacking, countries some times gives jurisdiction to all member states.

In relation to those grounds of jurisdiction, international jurists were asking if the physical presence of an offender is not a precondition for exercising universality jurisdiction. To this end, there was one typical case in which the Belgium issued arrest warrant against a foreign minister of Congo. Then when it was asked for its jurisdiction Belgium claimed for universality jurisdiction. But the guy was not their. With regard to this issue there is no clear cut answer, but some years back around 10 countries were tried to recognize jurisdiction in abstentia. But, some two or 3 years back Spain and France were the only country who have recognized exercise of jurisdiction in abstentia. The other countries who were party to the recognition left the membership.

In this regard, since countries are showing the tendency of not exercising universality jurisdiction in abstentia, the effect of not exercising universality jurisdiction in abstentia will in turn results in the effect of the country under whose the criminal is found will exercise the universality jurisdiction over the criminal.

Concurrent jurisdiction;

Taking in to account the above listed grounds of jurisdiction, competing interest of jurisdiction might arise due to various reasons; in this case, if 2 or more countries claim for exercising jurisdiction over the same individual based on different tests, the priority should be given to the country where the offender is or the country in whose territory the person is living that will have priority in terms of exercising jurisdiction over the criminal under custody.

Some times countries might conclude the treaty of extradition which in turn solve the problem of competing claims in relation to jurisdiction. But, the issue of extradition treaty is totally left the agreement of states; meaning, international law does not in any way force the country to conclude extradition treaty. For instance, Ethiopia has concluded extradition treaty with Djibouti.

The basic question that can be raised here is the question relates to the fact that, what if a given country refuses nether to prosecute nor to extradite the offender provided that the offender committed crime contrary to humanity and other similar crime which are serious in nature? In this regard, there is the principle called the duty to either prosecute or extradite. In fact, this principle doesn't attain the status of being customary international law rules. However, it is more common that this principle will be incorporated in the multilateral treaties. As it is well known, under international criminal law there is the concept called the primacy principle and complementarity. The former principle is all about the right of state to exercise jurisdiction over their national should he commit internationally prohibited crime. While the second principle is all about the circumstance under which international courts exercise jurisdiction over specified person provided that the country having primacy to exercise jurisdiction fails or unwilling to exercise its jurisdiction over a given person. Therefore, the question posed above is not that much relevant in those days because of the presence of the above mentioned principles.

The concept of double jeopardy;

The fact that it is possible for more than one state to assume jurisdiction over the same subject matter might raise the question of whether international law has the provision that prohibit the possibility of double jeopardy.

When seen nationally, the criminal code of many countries have excluded the possibility of double jeopardy under their legal jurisdiction. However, the question here is, do we have the same principle under international law. In international law, it could be concluded that there is a gap in relation to the concept of double jeopardy. Meaning, there is no clear customary international law or treaty that prohibit the possibility of double jeopardy. If you for instance look at the ICCPR treaty, it has incorporated the provisions that deals with the prohibition of double jeopardy. But, the prohibition of double jeopardy entrenched under ICCPR is the prohibition of double jeopardy with in a national legal system not at the level of international level.

But, there are some scholars who argue that, the prohibition of double jeopardy should always be presumed. In some case entertained by ICJ the court gave opportunity for countries to agree on the matter rather deciding the issue in a certain way. Scholars interpreted this inaction of the ICJ as implying uncertainty regarding the possibility of double jeopardy in the field of international law.

Hence, it is quite possible that one person convicted in one country could also be subject to the exercise of jurisdiction by another countries. To this end, some scholars argue that, the non inclusion of the provision that deals with the prohibition of double jeopardy with in international customary law rule as intentional act of bigger countries. Because, the bigger countries particularly the western world do not trust the court of certain states as exercising genuine jurisdiction over the offender. For instance, in the case of Lukabe case, the western world didn't allow Libya to exercise its jurisdiction on the basis of nationality principle as regards the crime committed against American aircraft over Scotland's air mass. In this case, Gadaffi was argued by saying the case of the offenders should be submitted to libian court based on the principle of nationality principle, but the western world do not trust the court structure and jurisdiction of the libian court.

Areas that are outside the exclusive jurisdiction of any country;

There are some area that are not given for any country exclusively to exercise jurisdiction in relation them. Among such areas the first area upon which states do not have exclusive jurisdiction is the area which relates to the issue of outer space. Under international law state enjoys exclusive jurisdiction on air space immediately above its territory and immediately above its territorial sea. So international law recognizes the jurisdiction of states as regards on its land mass as well as on its upward natural setting.

But, the upward extension of sovereignty in exercising jurisdiction which is accepted under international law is not without limit. However, in earlier times, the sovereignty of states as regards upward extension was thought not have any limit but starting from 16th and 17th century as well as currently, the outer space which technically is the part comes above air space as not falling under the jurisdiction of any countries.

But, the question which says where is the exact line where the outer space starts remains unsolved. But the general understanding is 150 to 200 miles is considered to form the part of atmosphere and beyond that it forms outer space. Consequently, issues like airplane and radio waves are cases that require consent of states for the very fact that they are conceptualized in the air space where a given state can exercise its jurisdiction.

For instance, Ethiopian air plane does not use air space immediately found above the territory of Eritrea. Because, Ethiopia and Eritrea does not have agreement of using air space found above their territory.

Hence, the reason why most air plane flies over different territories is attributed to the existence of agreement either in the form of bilateral treaty or multilateral treaties. But, mostly in relation to the usage of air plane the available treaty is that of multilateral treaty. Regarding flight of air plane, there might be a treaty like treaty of freedom of flight. for instance in commercial flight there is a concept called two freedoms. The first principle is the principle that allows the flight of air plane over a given treaty directly or without being required to land in the territory which it is crossing. While the second type of principle is the principle that dictates air planes of any country while crossing the air space of another country should land in the territory of the country that it is crossing and refuel. Not only refueling the air plane the states might agree to take passengers from the country where the air plane is refueling. For instance if you take the case of Ethiopia and UAE. Both Ethiopia and UAE can land in the territory of one another and take passengers from the territory of one another.

Usually international air transporters are not allowed to either start their flight from within the same country or come from another sovereign and stop over here and serve another destination within the same country. For instance, if you want to fly to Bahir Dar you are not allowed or it is not possible to use or fly with Turkish and fly Emirates. The reason for its impossibility is attributable to the fact that it is dependent of the consent of states while states do not want or unwilling to allow such transportation. Therefore, in most cases countries are not willing to allow foreign air transporters to fly one destination to another destination within the same country. But this does not mean that, serving as transporters by foreign transporters within the same country is totally impossible. In the presence of clear agreement, countries may allow foreign air transporters to serve different destination even within the same country. For instance, Ethiopian air transporters authority serves more than 3 destination within Nigeria. Destination like Kano, Abuja and Lagos.

Generally, by virtue of different conventions outer space is now considered to be res communes. Meaning, it is considered as the area that forms part of the common heritage for mankind. For this reason, in outer space countries can not exercise or conduct nuclear test as well as they cannot do environmentally hazardous things. Therefore in case of

outer space, sovereignty belongs to all mankind. So, no country can claim for having unilateral claim over outer space.

The other area found outside exclusive jurisdiction of states is the area of Antarctica;

Antarctic is the mixture of permanent and temporary ice and frozen land mass. This part of the earth is subject of claim by seven countries. Countries like turkey, argentina, chili, australia, neuzland, france and Norway claims for having exclusive right over the this part of the earth.

Though, many countries have claim over Antarctica, by virtue of Antarctic treaty of 1959 this part of the earth has become part of the land the do not form exclusive jurisdiction for any sovereign states. But, the tricky aspect of the 1959 Antarctic treaty is the fact the treaty was designed only for limited period of time not perpetual. But, currently the status of Antarctica seems to be parts of the earth that do not form parts of exclusive jurisdiction for any sovereign countries.

The other area that does not form part of exclusive jurisdiction for any state is the part of the earth called arctic zone of the earth. This part of the globe consists of many of the frozen seas. Again, in the case of arctic there are also some claims as to making the arctic their own territory. Notable countries like Denmark, Norway, Russia and Canada have in the past made claim of sovereignty over the arctic. But, international lawyers are arguing that, for the fact that arctic consists of many of frozen seas, the logic applicable to that of high seas should also apply to arctic.

The other areas of the earth that does not belong to any body else other than forming part of common heritage is the area considered as high seas. Over this part of the earth every country has sovereign jurisdiction or power to properly use it. In relation to this concern like who would exercise jurisdiction over a crime committed against ships passing on the high seas seems to be relevant here. But, the issue has been solved in lotus case. Accordingly, since ships have a place of registration which thereby confers them nationality as juridical person; still here we can apply the test of nationality or territoriality principle in order to exercise jurisdiction over the crime committed against ships passing on the high seas. But, the principle of territoriality that is applicable on the ship attacked on the high seas is dependent on the extention of territoriality principle or territorial extention of the territoriality principle.

Immunities from jurisdiction under international law;

By virtue of international law second categories of persons and bodies are immune from exercise of jurisdiction by municipal courts of countries. The two principal categories that fall in to the exception are the following;

The first categories is foreign states. It is also called as the principle of sovereign immunity. In this regard, there is no doubt that sovereign states are immune from the jurisdiction of a given state.

The second group concerns with diplomatic agents of foreign states.

But in addition to the above mentioned categories of persons enjoying immunity, international law has come to recognize the immunity of international organizations. Therefore, the issue of international organization could be regarded as the third category of persons enjoying the principle of immunity under international law.

Generally when we talk about immunity international law recognizes two types of immunity; the first of which is immunity from jurisdiction this to mean immunity from exercise of jurisdiction of a court. So, when we talk about immunity from jurisdiction we are talking about immunity of a foreign state from the jurisdiction of municipal courts on other states to adjudicate a claim against it. Arising from tort or contract.

The second type of immunity we are talking is the immunity from enforcement. As the name itself indicates immunity from enforcement refers to the immunity that a sovereign state or diplomatic mission enjoy from enforcement of court orders. This immunity from enforcement is not about immunity from judicial process rather it is the immunity from the enforcement aspect of the judicial decisions. Therefore, this is type of immunity could be considered as immunity from enforcement measures against state property or any other interesting aspect by virtue of local courts decision as opposed to the issue of another states interest.

Sovereign or state immunity;

Under international law state immunity refers to the legal rules and principles determining conditions under which a sovereign state may claim freedom from the jurisdiction of legislative, administrative and judiciary powers of another state. So when we talk about state immunity we are talking about the immunity states enjoys from the exercise of jurisdiction by the host states.

Rules of states immunity forms part of customary international law but not all of them. Sometimes also the principle of state immunity may be incorporated in the multilateral

treaties. For example, the 1972 European Convention on State Immunity plus the UN Convention on Jurisdictional Immunity of States and Their Property of 2004 could be regarded as the multilateral treaty that deals with the immunity of states from host state jurisdiction. However, the 2004 UN Convention has not yet entered into force but it still has significant influence on state behavior in relation to sovereign immunity. The UN Convention on Sovereign Immunity was drafted by ILC. Question; what is the basis for state immunity? Why is that countries make exceptions to the application of the rule of exclusive territorial jurisdiction? Why do they give freedom to other sovereign state so that the countries would not be subject to the exercise of jurisdiction by that state?

To this end, the following reasons could serve as the best justification for the existence of state sovereignty. The first is the existence of the concept of reciprocity and the second is the concept of equality of the states. Because, at least theoretically states are assumed to be equal in the eyes of international law. Therefore, from the view point of logic, entertaining the case of another state by another state will not be logical and equally acceptable.

Therefore, if we say all states are equal in the eyes of international law it does not make sense to subject one sovereign state under the sovereign power of another state. Regarding the concept of reciprocity, countries do not want to be tried by another country. Therefore, in order to facilitate international commerce and cooperation it would be cumbersome to subject one sovereign state under the absolute jurisdiction of another equal state.

The third theoretical explanation for the existence of state immunity could be the idea which says sovereign immunity is the waiver of jurisdiction by the territorial state. According to some scholars immunity is not the concept designed on the basis of states consent for these scholars immunity is something prescribed or imposed by international law.

The scope of sovereign immunity;

Historically the rule was that states enjoy absolute immunity. This means, states are immune both from the exercise of jurisdiction as well as from enforcement jurisdiction of another state in relation to all of their acts. Without making distinction between commercial act, sovereign act and etc. but, as the activities of state grew countries started to deny the concept of absolute immunity concept.

For instance, during the period of socialist government states were doing every thing even that could have done in the capacity of private individuals. For example, in the context of Ethiopia, the socialist government of Ethiopia were providing bread for sale; in this case, some states started to contend the application of immunity principle in case of governments act like saling and buying that do not have intrinsic relationship with sovereign act.

Accordingly, at this time we have the concept of restricted immunity. According to the principle of restricted immunity, states do not enjoy immunity in commercial act. Put differently, states enjoy immunity for their acts that are strictly sovereign in nature not commercial. This doctrine came up with this classification of acts of government in to acts jure imperie (sovereign act) and act jure jestchine (commercial act).

Currently the prevailing doctrine in relation to states immunity is the doctrine of restricted immunity rather than the absolute immunity of states. The next logical question is how do we know whether a given act is a commercial act or sovereign act? In relation to this question, two theories have developed by international law jurists, these two theories are

The nature doctrine; according to this doctrine in order to identify whether a given act is commercial act or sovereign act, we should be able to see the nature of the act undertaken.

the second theory provides for looking the purpose of the act other than looking the nature of the act. What if for instance a government of Ethiopia buys shoes for its military members; do we consider this act as sovereign act or commercial act? On the basis of which test? The nature of the act or the purpose of the act? Why?here it has to be noted that, sovereign immunity applies strictly only to acts performed by states organs. For instance, in context of Ethiopia sovereign immunity does not apply to state interprise because they are not considered as state organs.

Some material defines the concept of sovereign act as constituting only internal administrative act, legislative act, acts of the national armed forces and diplomatic activities of the state. But, this kind of definition is very much restricted in terms of giving true picture of the meaning of sovereign act. Because, as you might know, states activity is very much broad and includes so many acts. In this regard, article 2 sub art (2) of the UN convention on state immunity and their property provided that, in relation to the tests that are to be applied it does not clearly say, it adopted qualified sovereign

immunity in principle. But the reading of its relevant provisions gives us the understanding that qualified sovereign immunity principle has been accepted by the UN convention on state immunity and their property.

In relation to the qualified sovereign immunity principle, article 2 sub art (2) of the convention says, priority should be given to the nature of the activity test but it also provides that, if decision cannot be reached by using the nature of the activity test the purpose of the act should be consulted.

This specific article says, reference should be made primarily to the nature of the contract or transaction but its purpose should also be taken in to account if the parties to the contract or transaction have so agreed or if the parties of the state of the forum and the purpose is relevant to determining the commercial act of the transaction. Accordingly, the UN convention prefers the nature test doctrine rather than the purpose test approach in order to determine the act of the government as commercial act or sovereign act. The approach followed by UN convention could be regarded as the modified concept of identifying whether the act is commercial act or sovereign act. Because, it doesn't strictly rely on the nature test only rather should the state fails to reach on practical decision as to whether a given act is commercial or sovereign act it tends to use the doctrine of the purpose test.

Who are entitled to sovereign immunity/

Obviously states are entitled to sovereign immunity; by representing the states head of states are also entitled to sovereign immunity. So, if head of states goes to another country and committed certain wrong they could not be tried under the jurisdiction of courts of that state.

What about cases of international tribunal which have a constituent document in which the instrument contains a clause empowering international tribunal to exercising jurisdiction over member states case. For instance, in the case of international criminal court there is the clear provision which entitles the international criminal court (ICC) to exercise jurisdiction over heads of state. Again, there were similar provision under ICTY, under the special court for serralion and the lurenburg tribunal. Now, the question is on one hand we are saying that customary international law provides that, heads of state enjoys sovereign immunity to the fullest sense. So, according to scholars that argue against the provision that have been provided in the rom statute and other similar statute says that,

since the immunity of heads of state is entrenched under customary international law rule it has to be respected in every angle and there should be no exception to it.

For instance, in the case of international criminal court as regards the arrest warrant against al basher; the African union was argued that, since heads of state enjoys sovereign immunity under customary international law rule al basher should not be subjected to the jurisdiction of international criminal court. Even, the African union argued that, enjoyment of sovereign immunity by heads of state is a preemptory norm that could be deviated in no way. According to the argument of African union, if there is a treaty that contravene with the principle of customary international law rule it should be held null and void by virtue of viana convention on laws of treaties.

But on the other hand human right scholars argue that, the principle of sovereign immunity does not apply in relation to acts which constitute gross violation of human rights committed by heads of state. Meaning, when a head of state involved in gross human right violation like genocide and crime against humanity the application of sovereign immunity stops. In this regard, the two contradicting argument proposed above tries to justify their argument on the basis of the jus cogens principle. But, the way interpreted the jus cogens principle is different from one another.

The first group who argued on behalf of human rights asserted that, when the head of state is involved in the violation of human right, the principle of sovereign immunity should be set aside. While the other group maintained that the principle itself had attained the status of jus cogens norm and therefore there cannot be any exception. Even where states agree and provide exception to the principle of jus cogens.

The other question is when we say states have or are entitled to sovereign immunity which part of states are entitled to enjoy the principle of sovereign immunity? When you read article 2 sub art (1) (b) of the UN convention; it reads "the state and its various organs of government, constituent units of the federal states who have political subjugation for the state which are entitled to perform acts and exercise of state sovereign authority and are acting that capacity, the agencies or instrumentalities of the state or entities, the representative of the states acting in that capacity these all are understood as forming part of the state for the purpose of the UN convention on state immunity and their properties. Therefore, according to the UN convention all these personalities enjoy sovereign immunity as state or representative of the state."

Waiver of immunity;

It is possible under international law for state to waive their immunity; practically speaking, the waving of immunity on the part of state is not a new concept because in so many times states have waived their immunity right so as to deal with different business dealers. For the purpose of waiving the principle of immunity, the government of a given state may insert in the underlying contract the clause which says "in any case I am not going to claim sovereign immunity" if a given government of state inserted such kinds of clause with in a contract that it had concluded with certain person, the government cannot invoke the concept of sovereign immunity so as to avoid the jurisdiction of courts of the agreed place.

For example, the Ethiopian government has involved in dispute with certain Singapore company. The company was first brought to Ethiopia in order to pull out natural gas found in the territory of Ethiopia; but, after some years, the Ethiopian government revoked its license by alleging that the company did not perform the terms contract as prescribed in the contract. But, in this case the Ethiopian government and this company have agreed not to take their case to the formal court structure rather they preferred to submit their case to arbitration council should the dispute occurs. Therefore, in this case the Ethiopian government cannot invoke the concept of sovereign immunity because of its waver. So, like any ordinary party, the Ethiopian government will defend itself by standing equal with the company with whom it has concluded the contract.

But, the contention here is if waiver is possible under international law how countries can argue concluding treaties that contravene with customary international law rule like that of the sovereign immunity of head of state is null and void under international law. Because, after all the state is the one who waives its sovereign immunity under contract or other incidents. In the same line, under the statute of rom or other special statutes can't we consider the states consent as regards the statute as waving of their sovereign immunity?

In other words, for instance in the case of international criminal court (ICC) states party to the statute were conscious about the existence of the clause that entitles international criminal court to assume jurisdiction over heads of state provided that they committed gross human right violation. Hence, can't we consider this as waiving their immunity when states drafted and signed or acceded to the treaty of ICC?

To this effect, the best solution seems checking whether the country against whom the ICC is requiring to exercise its jurisdiction was member party to its statute or not. Because, if the country were party to it, it would be difficult to contend that the ICC

does not have the right to exercise jurisdiction over him. Because, the country on behalf whom he is serving has already consented to it.

Contrary to the above understanding, some international law jurists suggests that, since the issue of sovereignty is a sensitive part of international law, waiving of the right to immunity should be made expressly or explicitly. In fact, this line of argument is very stupid for our instructor. For our instructor, the mere fact that a given country signed or acceded to the convention which provides for the submission of head of state to certain jurisdiction should they commit legally prescribed crimes. Signature and accession of the state suffice to conclude that the country signed the treaty or acceded to it has waived its immunity right.

Diplomatic immunity;

As was indicated when we were discussing the history of international law rules regulating various aspects of diplomatic relations are very broad. If you remember, we have said diplomatic relations were the corner stone for the commencement of international law. To this end, the issue of diplomatic relation requires strict regulation so as to make it moderate and normal in its operation.

In the case of diplomatic relation, the rules regulating diplomatic relations under international law is one of the most accepted and least controversial part of international law. There are reasons for this certainty, the first reason is the broadness of the concept itself. Secondly, diplomatic relation is the concept which is very important for states at any rate. Therefore, its importance gives diplomatic relation certainty or wide range of acceptance without lots of controversy.

In the past, diplomatic relations have traditionally been conducted through the medium of ambassadors and with growth of international trade and commerce, commercial intercourses started to be conducted with the intermediation of consuls. currently, we have both embassies and consular offices with in different countries.

Basis for diplomatic immunity;

What is the rationale behind extending immunities to diplomats; here the logic that we have used for state immunity may apply to diplomatic immunity even if it is not directly. The logic is diplomats are the agents of the state who stands equal with all other states. Therefore, since he/she is representing the state he/she should be immune from any jurisdiction.

But in the case of diplomatic immunity, there is one major reason why diplomats enjoy immunity. This basic reason is the concept of functional necessity. The principle of functional necessity envisages that, it is not because diplomats are sovereign but its because diplomats require some level of autonomy or non intervention from the part of the judiciary and other organs of the receiving states For them to effectively exercise or discharge their obligation. Put differently, the principle simply says that, for diplomats to be able to properly discharge their diplomatic duties courts and other organs of the receiving states should not intervene in their activities.

For instance, the traffic police cannot jam the movement of diplomat by alleging the diplomat didn't pay required payment for parking. But, this does not in any imply that, the diplomat are free from all wrong things that they did in their social interaction. The general idea here is to reasonably enable him/her to discharge her duties or responsibilities, the international communities have agreed that, there should be some level of protection from intervention by judiciary and other organs of the government of the receiving state. Therefore, functional necessity justifies the reason why states extends immunity to diplomatic mission.

Here it has to be clear that, under international law there is no obligation on states to maintain diplomatic relations with another countries. If the country does not want to maintain diplomatic mission with certain country international law does not oblige the state so refused to maintain diplomatic mission to do so.

Again, under customary international law as well as under article 9 of the Vienna convention on diplomatic relations; the state can expel a diplomatic that it doesn't like without being required to provide any justification for its actions. According to international law principle, state can declare certain diplomatic as persona non grata. The term persona non grata refers to the expulsion of a given diplomatic with in the fixed time period by receiving country.

In relation to diplomatic relation, there are various customary international law rules as well as different treaties that aims to regulate the issue of diplomatic relations. But, presently the commonly known instrument available in relation to diplomatic relation is the Vienna convention on diplomatic relation which was enacted in 1961 and inters in to force in 1964. This Vienna convention has more than 195 state members. To this end, the provisions of this Vienna convention are widely acceptable and complied provisions of international law when compared with other international law instruments designed as

regards diplomatic relations. This proclamation deals with a number of aspects of diplomatic relations.

It has designated the functions of diplomatic missions, this convention also revealed that there are different types of diplomatic missions. Further more, this convention also has underlined the nature of immunity derived from the function of the diplomatic based on their ranks or position.

The first talks about the immunity of diplomatic mission; here individual members have not been imagined but the mission it self. Accordingly, the first principle is the inviolability of the premises of diplomatic mission. This principle dictates that, no one can inter in to diplomatic premise either as peace keeping force or ordinary person without getting permission from the mission itself. Therefore, as per article 22 of the Vienna convention on the diplomatic relation, diplomatic premises are inviolable.

In this regard, the receiving state has the obligation to ensure the protection of diplomatic premises from both ordinary persons as well as the peace keeping of its army not to inter in to the premise without securing permission from the mission itself. In relation to this, there was certain case that was happened in 1979. The iran university students destroyed the American diplomats premise and caused severe dmage to it. This case was submitted to ICJ, then the court decided that this is the clear violation of article 22 of he Vienna convention diplomatic relation by iran government because of failing to provide or give adequate protection for diplomatic premises.

Again, there was also the case happened in Kosovo. In Kosovo America and Nato bombarded Chinese diplomatic premise. By any rate this all activities could be regarded as violation of article 22 of the Vienna convention.

As opposed to states immunity we do not have a classification of sovereign act or commercial in order to extend immunity. In this regard, diplomats enjoy absolute immunity both immunity from criminal as well as civil jurisdiction. If we were to talk about diplomats as people as agent of state we cannot imagine the agents enjoying more privileges than the principal. So, this one area where you can clearly see that the justifications for sovereignty immunity no more provide strong logic for diplomatic or consular immunity.

Article 22 of the Vienna convention on diplomatic relation reads as follows;

Art 22- the premises of the diplomatic mission shall be inviolable, the agents of the receiving states may not enter the premises except with the consent of the head of the mission.

The receiving states are under special duty to take all appropriate steps to protect the premises of the mission against any intrusion, damage and to prevent any disturbances of the peace of the mission that impairs its duty.

The premises of the mission, their infrastructures and their property therein and means of transport of the mission shall be immune from search, requisition, attachment or execution.

The protection provided above is absolutely meant for premises of diplomatic mission not for individual members of the diplomatic mission. Regarding the individual members of the diplomatic mission, there is another provision which dictates the inviolability of the residence of the diplomatic heads or ambassadors are inviolable.

This principle dictates that, the residential places of diplomatic heads or ambassadors is inviolable. But, contrary to this basic principle, similar incident was happened in USA where foreign national of Ethiopian origin caused several damage to the premises of ambassador girma birru of Ethiopian diplomat serving on behalf of Ethiopia in USA.

The other privileges that the mission has is what is provided under article 27 of the Vienna convention, this protection is related to the protection accorded to the diplomatic bag. The obligation here is the receiving state is under obligation not to seize, search diplomatic bags. But, diplomatic bags can only be used to transport items in relation to discharging diplomatic functions. Therefore, if you try to transport something illegal by using diplomatic bags that will definitely creates problem.

To this end, there are some diplomats who tries to transport illegal things by using their diplomatic bags, for instance, in England once upon a time, in one of the diplomat bag 3 living persons were found being transported by this diplomatic bags. Some other diplomats also use their diplomat bag to transport illegal substances like coconut and other prohibited objects of transaction like ivory. But in any case, under article 27 sub art (3) and)4) diplomatic bag should not be subjected to search, opened or detained by the agents of the receiving states.

The other privileges accorded to diplomatic mission is the freedom of communication by diplomats;

Diplomats have full freedom to communicate with their own countries by using any means of communication available in the country where they are discharging their obligation. But, if they used this freedom of communication for undesired purpose they might held persona non grata in accordance with the decision of the receiving states.

Privileges and immunities of members of diplomatic missions;

With regard to the members of the diplomatic mission the first thing that you should know is the fact that the convention does not grant full or similar kind of immunity to all members of the diplomatic mission; the convention relies on the different classification to extend different entitlement of immunity. For instance, a foreign cooker who works in America embassy does not have equal kind of diplomatic immunity with that of ambassadors. This convention puts different classification as regards the immunity of members of diplomatic mission. Accordingly, the heads of mission or diplomatic agents enjoys better immunity or protection when compared with other diplomats in terms of rank. Next to heads of mission the second category of diplomats enjoying better protection is the one called chefs de affaires who are accredited by foreign ministers. Next to chefs de affaires, there are diplomats who are professionals who perform different kinds of diplomatic work. Then we have administrative and technical staff. Finally, there is the service staff like driver, receptionist and cooks.

Like we have said above, the most expansive immunity is granted to heads of diplomatic missions. Then people fall under other categories enjoy immunity lesser in accordance with position and ranks. Here, we have one basic exception to what we have said above. This basic principle is called the nationality exception;

This exception dictates that, if you are the national of the receiving state but are working for foreign diplomatic mission then the level of protection that you would be entitled to differs from that foreign diplomats had he placed in your position. So, Ethiopian nationals or permanent resident of Ethiopia who work for foreign diplomatic mission do not get the kind of immunity and privileges that foreign nationals get. In a way this basic principle entrenched under Vienna convention will also apply to the case of international organization personnel. This deprivation of full privileges of national diplomat working in the foreign diplomat seems logical, because, the person assigned as diplomat belongs to Ethiopia.

Major immunities that members of diplomat mission obtains under Vienna convention;

The first privilege is the immunity from the jurisdiction of the court. Therefore, for diplomats and heads of mission, there is a total full immunity from both criminal, civil

and administrative jurisdiction. But, there are few exception to this principle. These few principle are provided under article 31 sub art (1) of the Vienna convention on diplomatic relation. So, if you are diplomat of a given country the national court of the receiving country cannot exercise jurisdiction on you regardless of the nature and degree of the crime you have committed. The same principle applies to administrative and civil jurisdiction of national court of the receiving country.

Like it has been tried to bementioned above, there are certain practical exception as regards civil jurisdiction of the court; to this end, article 31 of the Vienna convention on diplomatic relation reads as follows;

Except in cases of

Real action related to private immovable situated in the territory of the receiving state unless he holds on behalf of the country sending state for the purpose of the mission.

An action relating to succession in which diplomatic agents involved as an executor, administrator, heir or legatees as a private persons and not on behalf of he sending state.

An action relating to any professional or commercial activity exercised by the diplomat outside his mission function.

For instance if diplomats owns house in Ethiopia in his private capacity and disputes arise in relation to his house Ethiopian court may exercise their jurisdiction over this diplomat since he is not acting by representating his country. However, save for these exceptions, on all other cases national court of the receiving country cannot exercise its jurisdiction as regards diplomats. Regarding the above mentioned subordinate staff (service staff and technical staff) they have complete immunity from criminal jurisdiction so long as they are non national of the receiving state. But, there immunity from civil and criminal and administrative jurisdiction is limited to their official act. Here it has to be clear that, the kind of immunity extended to heads of diplomatic mission, diplomatic agent or to subordinate staff also will be extended to his families. Like we have said in our previous classes, immunities are extended to diplomatic agents or heads not to make them careless in their social interaction rather it is meant for enabling them to exercise their official activities without any intervention.

If the diplomatic heads or agents exceed his mission and cause unnecessary damage to the receiving state, the sending country always retain the power of exercising jurisdiction over its diplomats. But the question here is what if the crime committed by the diplomat in

the receiving state does not constitute a type of crime in his own country? In this case, the receiving state can ask the sending state to waive its sovereignty in order to exercise jurisdiction over the offender in context of the receiving states. But, if the sending state is not willing to give its consent so as to enable the receiving state to exercise jurisdiction over the offender by waiving its sovereignty, there is nothing to be done to the offender.

The other right that the diplomat have as of their status is the right not to be detained or arrested. Therefore, the personality of the diplomatic agent or heads is inviolable. The receiving country even has the duty of protecting the diplomat from extraneous attack or physical interference with the duty of diplomat. Therefore, diplomats and their families cannot be arrested or detained.

In the case between iran and USA in which the embassy of USA was destroyed by iran university students, the ICJ unequivocally decided that, the duty of the receiving state to give protection for the premises of the mission and its members of diplomatic mission, do not depend on the other countries or the sending states fulfilling some obligations. Even, in the case of breach on the part of the sending states the obligation of receiving state give protection for diplomats remains intact or unaffected.

The other basic concern requires significant attention is the issue of the interests of the receiving in discharging its duty of giving protection to diplomats and their premises. Because, there are some diplomats who abuse their status to the extent that it could affect the interests of the receiving countries. Not only the interests of the state as person, sometimes the acts of the diplomats may prejudice the interests of private individuals both in the form of crime or civil breach. To this end, what will be the available option for receiving in case diplomats act constitute prejudicial effect on the interests of the state as well as the interests of private individuals.

The receiving state might have at least the following recourses against the diplomat acting in contrast to his official act or obligation. The first option is asking the sending state to waive its immunity so as to enable the receiving state to exercise its jurisdiction over the diplomat acted in wrong way. More over, the receiving state can also institute suit against the diplomat in his country as second recourse. Meaning, for instance if diplomat G. is kenyan diplomat working in Ethiopia on behalf of Kenya and acted to the detriment of Ethiopian interest or acted to the detriment of Ethiopian private individuals, Ethiopia as a receiving state can institute a suit against diplomat G. in Kenya. Thirdly, the receiving state can also declare the diplomat acted in the wrong way as persona non grata. Fourthly, if the issue is with the sending state, the receiving state can altogether give an end to

the diplomatic relation with the sending state. exception to the above mentioned four recourses, the receiving state cannot detain or bring institute in its own court structure a suit against the diplomat.

The other privileges of the diplomats is the immunity related to their property; the property of the diplomat is inviolable in whatsoever means. For instance, the residential house of the diplomat cannot be searched or intered in to without the consent of the concerned diplomat. Therefore both premises of the diplomatic mission and the premises of the private members of the diplomatic mission are inviolable. In addition to the above stated facts, diplomatic bank must also be established in the receiving state in order to help the diplomats to use banking service efficiently and effectively.

The other question needs due attention here is, what if a crime is committed in the premises of diplomatic mission? Who is going to exercise jurisdiction over the matter? Is that the jurisdiction of the receiving state or the sending state?

In this regard, some people tries to extend the principle of territorial extention to the extent of considering the land found in the receiving state but allowed to be the premise of the diplomatic mission as the territory of the sending state. But, this assumption is totally wrong according to the legal understanding of our instructor, therefore, regarding crime committed in the premise of diplomatic mission, our instructor clearly pointed out that, the person representing the embassy of sending state as of legal attorney should submit all possible personal information of the offenders to the police of the receiving state so that the receiving state exercise its jurisdiction over the crime committed in the premise of the diplomatic mission found in the receiving state.

To put the above mentioned statement in precise order, assume certain crime has been committed in the embassy found in UK and further imagine that certain damage has been caused to the property of the embassy and private workers of the embassy. In this case, the legal attorney of the Ethiopian embassy found in UK must be able to gather personal information of the offenders and submit it to the police of UK. Because, the right to exercise jurisdiction over the case is exclusively the right of UK. Therefore, the police of the receiving state has the jurisdiction in relation to offenses that took place with in the diplomatic mission premises.

When does diplomats start enjoying diplomatic immunities? Diplomats start enjoying diplomatic immunities starting from the time when they submitted their letter of appointment to the legitimate authority. This authority could be the office of president

or that of foreign minister as the case may be. The other question automatically flows from the above statement is when does the entitlement of immunities stop? Regarding, this question there is no clear cut practice capable of showing the time when diplomatic immunity stops. But, the Vienna convention on diplomatic relations and their immunities has dictated that, the diplomatic immunity will extend up to reasonable time until the person extremely leaves the territory of the receiving states. Therefore according to Vienna convention, immunity does not stop on the day of submitting his/her letter of resignation. This kind of reasoning begs other technical question like what if the person concerned decided to stay in the receiving rather than leaving the territory of the receiving state? In this regard, the Vienna convention does not provide adequate answer for the above raised question; rather the test used by the convention (the test of reasonable time) only serves for facilitating smooth exit of the diplomats from the territory of the receiving states.

Generally, when diplomat is any more working as a diplomat in the receiving state provided that he has left the receiving state the judicial organs of the receiving state will start to have jurisdiction as regards both criminal and civil responsibility of the diplomat concerned. But, the jurisdiction of the court to try the case does not extend to the issues that the diplomat effected or caused when serving as diplomat. However, if he has concluded or promised to perform or engaged in certain undesirable act in such a way that, his/her act doesn't have any intrinsic relationship with his/her official duty or capacity.

For instance, if the diplomat was engaged in some private transaction that do not relate to his official act, obviously, as we have said, he enjoys absolute immunity with the exception of 3 or 4 elements that we have discussed in our previous session. But now the judicial and executive organ of the receiving state will start to exercise jurisdiction in relation to activities that were undertaken by diplomat provided that they do not relate to his official act.

Abuse of immunities;

Under article 41 of the Vienna convention on diplomatic relation and their properties practical duty has been imposed on the diplomat to comply with certain legal obligation of the receiving state provided that those legal obligation do not tamper with the official duty of the diplomat. To this end, arbitral committee could also serve as a means of dispute resolving body should the dispute arise between the diplomat and private individual or the government of the receiving state itself. But the arbitral committee envisioned

here is not the ordinary arbitral committee, rather it is a committee established at the level of foreign minister exclusively for discharging such purposes.

Consular immunities;

Like diplomats consuls represent their sending state but unlike diplomats they are not concerned with political relations of states. Usually, consular office is concerned with trade and other commercial relation of the nationals of the receiving and sending states. Regarding, consular immunity we have separate convention entitled as the Vienna convention on consular relations and immunities/1963. This convention provides almost the same kind of privileges and immunities for consuls as the the Vienna convention on diplomatic relations and their properties provides.

Consular persons are totally immune from criminal jurisdiction of the receiving state but as regards civil jurisdiction, they are only immune from the civil jurisdiction of the receiving state to the extent of their official acts. In this regard, consuls could be considered as next to ambassadors when seen from the view point of privileges accorded to diplomats depending on their function and position. the other unique features of consular office is the fact that, the consular office or its members can talk to the detained nationals.

The immunities of international organizations;

Regarding immunities of international organizations, there are definite international organization enjoying immunities from any legal process in the state it is operating or other states. For instance, the UN has legal immunities from any legal process in the court structure of the member states. Therefore, united nations or its agencies could not be tried in Ethiopian court. Here it has to be noted that, UN as international organization is entitled to total immunity from any kind of legal process. However, secretary generals are entitled to the same immunities and privileges as diplomats. Regarding other staff of the UN, they have immunities for function that they discharge in their to their official capacity only. Again, here in the case of immunities of UN staffs the nationality exception applies.

With respect to united nations, there is a 1946 general convention on the privileges and immunities of the UN. However, regarding other international organizations, their immunities and privileges is dependent on the head quarter agreement. For instance, African union has its head quarter in Ethiopia, regarding its immunities and privileges certain provisions have been provided in the head quarter agreement of the union with the government of Ethiopia.

Does the principle of waiver apply in case of the immunity of international organizations? If it applies who will be the competent organ to give its consent so as to waive the immunities of international organization concerned? Regarding the above raised question, the convention on the immunity of UN has made secretary general of the UN the legitimate person to consent as regards the waiver of the immunities of united nations as international organization.

Chapter 7 state responsibilities under international law;

Under this chapter we will talk about the very basic principles of international law which mainly focus on the breach of international law by states entails international responsibility. Accordingly, the basic rule is that, the breach of international law by state entails as a matter of principle entails international responsibility. As we have discussed in our session relating to the laws of treaty, failure to comply with the terms of treaty will result in certain legal consequences either as prescribed by the treaty or if the breach relates to jus cogens as prescribed by the customary international law rules. Therefore, violation of customary international law or fails to observe the terms of treaty in turn ends up in committing the breach of international law and thereby considered as an internationally wrongful act. This major principle has been affirmed in both the decisions of the ICJ and PCIJ. For instance in morocco case the PCIJ has affirmed that, where states commit an internationally wrongful act against another states, international responsibility is established immediately as between the two states. Again, in another case, judge humor emphasized that responsibility is is the necessary corollary of the right. This case was an arbitration caused by Spanish code of morocco claims arbitration decision. As it is well known, states have international legal personality that enable them to exercise rights and obligations under international law; therefore, if states enjoy rights and obligation, it is the necessary corollary that the state should shoulder responsibilities. All rights of international character born responsibility; responsibility results in the duty to make reparation if the obligation in question is not met. This is the direct flow of the character of the municipal legal system by international law. Because, in municipal legal system, if somebody doesn't exercise his/her right properly and infringed the rights of others by exceeding the limit of his/her right, the domestic law imposes certain legal consequences to the act undertaken by the person so exceeded his/her appropriate right.

Therefore, under international law, breach entails international responsibility. So far, the desions of the ICJ and PCIJ have been used as authoritative sources of international

responsibility of states. Concomitantly, international law commission is intensively working on the codification of the rule that governs international responsibilities of state should they breach certain international legal principles. The draft articles on international responsibility for wrongful acts could be regarded as one contribution made by international law commission. In fact, this draft article is not a convention; the draft was formulated by UN general assembly in the form of resolution in 2001. Apart from this draft article, there were so many drafts prepared by the commission. But, the only article that attract the attention of many states is the draft article on states responsibility for wrongful acts. As of other conventions, this draft article did not passed in the normal path required for formulating convention or other forms of treaty. For the very fact that, this draft article contains very contentious matters, the UN generally assembly preferred to formulate the article in the form of draft and recommended all states to comply with this draft article.

Generally speaking, the issue of state responsibility is the very contentious area of international law field. As opposed to the issues of diplomatic immunities and jurisdiction of the court, this part of international law course is full of unsettled matters. Though, this article remains to be draft so far its importance could not be argued. Essentially, this draft article is the only article that regulates the various issues related to state responsibility in codified manner. More over, the ICJ was referring to this draft article while disposing several cases. Therefore, this draft article is the very instrumental article for various international law cases as regards state responsibility. The reason for learning this draft article emanates from the importance of this draft article in the current international law arena.

Article 1 of this draft article deals with the principle that we have dealt with in the preceeding pages. Article 1 of this draft article reads as follows;

General principles Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

The principle proposed under this specific article could be regarded as the starting point for discussing the issues of state responsibility under international law. By virtue of this article, every internationally wrongful of state entails international responsibility. As has been tried to be mentioned above, this draft article has contained so many new provisions

in relation to state responsibility which can be considered as an exercise of progressive development powers by international law commission.

The laws of state responsibility under international law is concerned with and the determination of whether there is a wrongful act for which the wrong doing state is to be held accountable as well as what the legal consequence it entails upon states who breaches its obligation. More over, this part of law deals with how such international responsibility could be applicable on the wrong doing states.

International responsibility covers many things, it includes unlawful acts or omission directly committed by the state and directly affecting other states. It also includes act and omission indirectly committed by states. For instance the breach of the treaty, violation of the territory of another, unlawful use of force, causing damage on the property of another states may fall under this category. In all these cases, the question would arise regarding responsibility. What happens to the state that did these prohibited acts. To this end, the above raised issues are the focusing areas of the laws of state responsibility.

The nature of state responsibility;

There are essential characteristics of state responsibility, responsibility in genral hinges upon certain basic factors. There are three basic factors for state responsibility; the first basic factor is the existence of an international legal obligation enforced as between 2 or more states. So the first essential characteristic feature of state responsibility is the existence of a current binding legal obligation between 2 or more states.

The second essential features of state responsibility is the existence of act or omission that violates the rule invisioned under the first essential characteristics of state responsibility which could be attributable or imputable to the state concerned. Under the second essential features we will talk about the act and omission which violates an obligation of a current binding between 2 or more states and which is imputable to the states responsibility. Accordingly, the existence of act or omission doesn't suffice there should be the concept of imputability. Meaning, the act or omission undertaken must be imputable to a given state so as to make the country concerned responsible under international law.

Finally, the third essential features of state responsibility is the fact that, state responsibility presupposes that, the loss or damage must result from unlawful act or omission of the state in question. The above mentioned 3 essential characteristics of

state responsibility should be fulfilled cumulatively in order to consider certain state as if it has committed a crime that entails state responsibility under international law.

Elements of an internationally wrongful acts;

What are the elements of an internationally wrongful acts or omission as a case may be? To have some concept on the issue of elements of an internationally wrongful acts it would be of much helpful to read article 2 of the draft article. Article 2 of the draft article reads as follows;

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

Is attributable to the State under international law; and

Constitutes a breach of an international obligation of the State.

Article 2 of the draft article is the article which tries to put some shade lights on the concept of elements of an internationally wrongful acts. According to this specific article, there are two elements that constitute an interenationally wrongful acts. These are elements are;

First, there is an internationally wrongful act of state when conduct consisting of an act or omission is attributable to the state under international law. Secondly,

Second, when the conduct constitute a breach of an international obligation of that state. Therefore, the above two elements of an internationally wrongful acts could be understood as implying the fact that, the existence of an act or omission by itself does not give rise to state responsibility. Because, in order to make certain state responsible for its internationally wrongful act, in addition to the existence of act and omission the act or omission undertaken must be attributable or imputable to the state in question.

We will discuss about the concept of attributability and imputability in the coming section of this short note. But before that it would be very important to discuss the question of liability under international law.

Here the issue is what standard of assessing fault that international law uses. When does international law consider states liable for its actions as regards internationally wrongful acts. As you know, in domestic law there are 3 different ways of considering single individual liable for his act or omission. These 3 ways are; 1. Fault based liability 2. Strict liability 3. Vicarious liability.

However, in case of international law, there are two conflicting theories the first of which is the principle of objective responsibility. This is another name for strict liability theory. The objective theory principle dictates that, once an unlawful acts or omissions have taken place which have caused the sustained injury, the wrong doing state will be held responsible under international law when the damage was suffered irrespective of good or bad faith on the side of wrong doing country. Therefore, the state of mind on the part of the wrong doing country is immaterial in rendering the wrong doing state liable under international law rules. Hence, if we follow the objective theory test, our focus will be on the existence of breach on one hand and the causal of consequential damage on the part of the victim country. So, since we are talking about strict liability here, it is not important to assess the mental element of the wrong doing state when disposing cases related to state responsibility.

On the other hand, there is the theory called subjective responsibility. This theory maintains that, international responsibility attaches or incurred only when the state is at fault or at least when it is negligent. Accordingly, the subjective theory of liability envisages that, for you to consider the act or omission of certain state as giving rise to state responsibility, there should be either intention or negligence on the part of the state so acted or omitted. If there is not fault all in all I.E. no intention and if the negligence cannot be proved this kind of situation makes free a country from international responsibility from the view point of subjective theory of responsibility.

Which one of the two theories do you think is dominant at international level? Providing adequate answer for the above raised question is not an easy task; because, scholars have not agreed on the issue of standards of liability regarding state responsibility. Therefore, it is safe to say, it depends on the circumstances under discussion. To this effect, this uncertainty has also been reflected in the draft article on state responsibility for wrongful acts.

The draft article simply says, the standard of liability that has to be used depends on the nature of the breach involved. For instance, in case of genocide, war crime and other act contrary to the principle of jus cogens, we apply the objective test theory rather than the subjective theory of state responsibility. Because, requiring mental element on the part of the wrong doing state is not tenable in case of the act committed contrary to the principle of jus cogens.

Imputability or attribution;

As you know, state is an abstract legal entity which in turn results in the necessity of representation as state cannot perform certain act by itself. The state may act through authorized officials and other representatives appointed to discharge the function of the state. To this end, not all acts committed by nationals of a given state are attributable to the state. In this regard, specific link should be established so as to consider the act of a person as if it is attributable to the concerned state. But, the question what kind of linkage should exist in order to establish the concept of imputability or attribution remains tenable under international law.

Accordingly, since international law does not consider every acts of national persons as if it is attributable to the state of his/her nationality there has to be specified test to establish imputability or attributability of certain act to that of the state. The notion of imputability tries to address this question in some manner. Imputability is the legal fiction which assimilates the actions and omissions of the state officials and other representatives to the state itself. The draft article starting from article 4 up to article 11 deals with the concept of imputability.

In this regard, article 4 of the draft article lays down the major principle of attribution. Article 4 of the draft article reads as follows;

Article 4 Conduct of organs of a State

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

An organ includes any person or entity which has that status in accordance with the internal law of the State.

As it has been said above, article 4 of the draft article lays down the major principle of for imputability under international law; according to this specific article, the conduct of any state organ including any person as indicated under sub art (2) of article 4 of the draft article having that status in accordance with internal law of that state shall be deemed or considered as an act of the concerned state. In fact, this approach reflects customary international law rule. For instance, if ministry of finance and economic development borrowed money from certain government and fails to perform its obligation of repaying the debt it received from the government creditor, this act of the ministry could be regarded as act of state by virtue of the concept of imputability. The same principle applies to any act committed by foreign minister whether crime or other positive obligation he assumed on behalf of the state.

Article 5 of the draft article is also another article which deals with the concept of imputability of certain act or omission committed by individual person or juridical person to state concerned. Article 5 of the draft article reads as follows;

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

This specific article is talking about entities that are not state organs strictly speaking but they are entities that enjoy some authority of exercising state powers. In short, this article is referring to certain privatized corporation like for instance Ethiopian air line corporation. As you know, Ethiopian air line is a typical commercial entity but when it comes to enforcing emigration laws of Ethiopia they are not less vigilant about persons trying to enter or exit Ethiopia without possessing lawful passport. Therefore, doing so by Ethiopian air line could be regarded as if the corporation is exercising state power in this regard.

Technically speaking, what article 5 of the draft article on state responsibility for wrongful act envisioned is the private entities which are not public entities or not government

organs, but by virtue of the contract or some decisions they have been given certain governmental authority. So, article 5 of the draft article is saying, the acts or omission of such non governmental organs is attributable to the state.

More over, article 6 of the draft article also stipulates some additional points of imputability; this article reads as follows;

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

The spirit of this specific article is not that much practical in terms of current legal setting; but, this article is trying to further extend the concept of imputability in the field of international law. The workable example for issues envisioned under article 6 of the draft article could be; the trend followed by the common wealth countries. These countries have conferred the final judicial authority to the preve-council of UK. In this case, the council is authorized to to pass final decision as regards cases submitted to it by common wealth countries. If we see the entity, the entity belongs to UK it is the government entity of UK. Now the question is to whom the act of the council be imputable should the council breach fundamental norms of international law? For instance, morishious has submitted its case to this council in order to get final say on the case it submitted to the council. Do we attribute the breach of the council to morishious or UK because of its foundation and belongingness? This is the whole area covered by article 6 of the draft article on state responsibility for wrongful acts.

Article 7 of the draft article reads as follows;

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Briefly speaking, article 7 of the draft article is talking about, exceeding once authority by an organ of state or persons authorized by state does not exonerate the state rather even if, the organ of the state exceeds its powers, the actions or omissions of this organs of the state would still be considered as the act or omission of the authorizing state.

In certain case for example, the police of Mexico assigned to give protection for Americans were involved in hitting American by exceeding their power of giving protection to Americans. Accordingly, Mexico was held responsible to its act of police officer by virtue of article 7 of the draft article on state responsibility for wrongful acts.

Again article 8 of the draft article reads as follows;

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

By virtue of article 8, if a given state exercises control or gave specific instruction to person or group of persons the actions or omissions of those persons will be attributable to the state authorizing or controlling those groups. Under this article there are two elements of attribution. These are 1. The phrase which says "acting on the instruction of" in fact, this first element is very clear condition when compared with the second element of attribution under article 8. Because, if a country instructed a person or group of persons to do something, the state instructed the commission of certain act will be considered as the one who is undertaking the act itself. Whereas, the second element is the phrase which says "under the direction or control of the state" the meaning of this phrase has remained to be controversial; because, it is not quite clear what constitutes the rule of giving direction or exercising control. For instance, in

Nicaragua case, the ICJ attributed the acts of rebellion groups operating in Nicaragua to USA itself. The reason of attribution was the fact that, the group was equipped, financed, armed and supported by USA. Read one paragraph of the ICJ'S decision from the line below;

"it would in principle have to be proved that, that state had effective control of the military or paramilitary operation in the course of which the alleged violations were committed."

Accordingly, the ICJ used the test of effective control in the case of Nicaragua; there are also other cases entertained by international criminal tribunals. From among such cases, the tadic case is the commonly quoted decision of international tribunal for former Yugoslavia (ICTY), while entertaining the case of tadic the tribunal changed the test of effective control used by ICJ to over all control. But the ICJ has again reversed the stance taken by ICTY to that of effective control when disposing the domicile case (bosnia versus Serbia). The court said, the tadic case was individual criminal responsibility not state responsibility. Therefore, the court reasoned that, we shouldn't extend the reasoning used by ICTY to that of state responsibility and apply the over all test to states responsibility.

Article 9 of the draft article reads as follows;

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

The circumstances under which this specific article applies relate to exceptional circumstances like civil war and revolutions. The other basic element of this specific article is the fact that the governments do not exercise the usual governmental authority and the third element is the conduct of persons or group of persons become to exercise governmental authority. Meaning, by rendering the government incapable of exercising

normal governmental authority, this person or group of persons discharge governmental authority by themselves. To this end, article 9 of the draft article stipulates that, the conduct of person or group of persons will be considered as the act of state. Therefore, the state will be held liable under international law because of the existence of the concept of imputability inscribed under article 9 of the draft article. However, if the state facing difficulty has made reasonable effort to minimize the suffering or in good faith made all necessary cares, the concept of imputability does not apply to the state under situation. Because, international law stipulates that, when governmental authorities have acted in good faith and without negligence the general principle is the non liability of state for the acts committed by person or group of persons in its territory. Based on this general principle of international law, Ethiopian investment commission has decided not to pay compensation for damage caused to foreign nationals during the course of popular uprisings in 2016.

But as a matter of exception, countries may stipulate otherwise agreement for the purpose of giving protection to foreign investments. Accordingly, countries may agree with each other in the form of bilateral treaty, to give compensation for any damage caused by rebellion, political mob and other disastrous insurrections. Apart from, bilateral treaty designed with the consent of states, international law has also the legal provisions that constitute payment of compensation without admitting liability. To this end, the Ethiopian investment commission clearly asserted that Ethiopia as state has no legal obligation to pay compensation for damage caused to foreign nationals, but for the purpose of portraying the good image of the state of Ethiopia we will pay compensation for the damage caused in our territory.

Article 10 of the draft article on state responsibility for wrongful acts reads as follows;

Article 10

Conduct of an insurrectional or other movement

The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

There are two basic principles under this article, the first one is the acts of insurrectional movement committed before they assume power would be considered as the act of state till they assume the power by overthrowing the government. While the second basic principle is the fact that the act committed by insurrectional groups before they assume power will be attributable to them should they assume power. So, article 10 of the draft article is talking about the successful insurrectional groups. To this effect, if the insurrectional group succeeded to establish new government in the territory of the former state, all acts committed by its member contrary to international law would be attributable to the newly established state. However, if the insurrectional group fails to establish new government and have been able to administer certain portion of the territory of the state, the act committed by those insurrectional group would be attributable to the state.

Article 11 of the draft article reads as follows;

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

This article is all about the situation under which a given state willfully consents to assume responsibility regardless of the absence of liability imposed on the consenting by international law. Therefore, if the country establishes certain acts or omissions as if it was committed by its organ or other representatives, it would be simple logic that the concept of imputability will follow. Under article 11 there is no responsibility to be imposed on state consented to assume responsibility even by applying all forms of imputability discussed in our previous sessions.

Generally speaking, articles related to the concept of imputability are the articles that we have discussed so far. Therefore, regarding imputability the draft article devoted article 4 up to article 11 to different means of establishing imputability or attribution of the act committed by different groups to state of the person or groups.

Responsibility of a State in connection with the act of another State;

By virtue of this specific article, the state who have extended aid or assistance for another state in the commission of an internationally wrongful acts could be held liable under two conditions; the first condition under which the helping state could be held liable is if it has full knowledge about the fact that the other state is committing internationally wrongful acts. Second, if the act would be internationally wrong if committed by the assisting state itself.

Article 17 of the draft article reads as follows;

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and*
- (b) The act would be internationally wrongful if committed by that State.*

Under this specific article we are talking about the direction and control exercised by one state over the other state in the process of the commission of an internationally committed wrongful act. The difference between this article and article 8 of the draft article is, in case of article 8 the envisioned types of control or direction is the direction or control exercised by a state over individual or groups of individuals. Whereas, in case of article 17 of the draft article, the whole matter is the direction or control exercised by state over other equal sovereign state.

Regarding the structure of the article, the way article 17 is structured is exactly similar with that of article 16 of the draft article. Because both article 16 and 17 of the draft article requires knowledge of the state and secondly the fact that the act constitutes crime under international law if committed by the state itself.

Article 18 of the draft article reads as follows;

Article 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

The coercing State does so with knowledge of the circumstances of the act

This article is very much clear, according to this article, if state A. coerces state Z in to the commission of an internationally wrongful acts, the coercing state would be held liable or responsible under international law. Further more, the coercing state should have acted or coerced the other state knowing that the act to be committed by the coerced state constitutes internationally wrongful acts.

Circumstances precluding wrongfulness;

Under this topic we will be dealing about the circumstances when the state will not be held liable internationally due to the existence of certain situation under which the state can preclude liability. In the context of this topic, the concerned state has committed certain wrongful act but the idea here is the will not be held liable under international law for the very reason that certain conditions precludes the imposition of liability on the state concerned.

The draft article starts dealing with this issues from article 20 of the article. Accordingly, article 20 of the draft article reads as follows;

Article 20 Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

This provision is talking about consents of states precludes liability as long as the state acting based on consent acted within the limit provided by the consenting state. International law generally does not allow the state to interfere with the internal affairs of the other states. For instance, in 2006 when Ethiopian troops were sent to Somalia in order to stabilize the situation prevailing in the state of Somalia, the prime minister of Ethiopia was saying, the Ethiopian military was sent to Somalia with the full consent of the state of Somalia. Put differently, had the state of Somalia not consented to the act of Ethiopia, the act of Ethiopia would have resulted in international responsibility to be effected on Ethiopia. Therefore, the existence of consent on the side of inviting state precludes international responsibility of the interfering state. So, the first ground through which international responsibility could be precluded is the existence of consent on the part of the inviting state.

The second ground of precluding liability is found under article 21 of the draft article. This article of the draft provisions reads as follows;

Article 21

Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

By virtue of this article, if state acted in a certain way for the purpose of self defense as prescribed under article 51 of the Vienna convention on laws of treaty, the act of the state will not be considered as an internationally wrongful act. However, this article has practical challenges; among such challenges the first is the fact that, the states do not want to admit that they have opened the war against the other claiming state. Therefore, in order to establish the existence of the concept of self defense there has to be bombardment preceded the act of the state claiming self defense as justification for its act. But, the problem is the country do not want to admit that fact because of different reasons.

Article 22 of the draft article reads as follows;

Article 22

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part three

For the state to be able to raise the issue of counter measures as of precluding liability under international law; there are so many requirements excepted to be fulfilled in the situation in order to constitute the principle of counter measures. Please look at chapter 2 of the draft article particularly article 49 up to article 58 of the draft. These provisions lists conditions that have to be fulfilled for an act of state to be considered as a lawful counter measures. Among these conditions the following are very important;

The action must be taken in response to the previous internationally wrongful acts.

The injured state must have condemned the state committing the act to discontinue its wrongful act.

The act that the state take in the form of counter measures should be proportional.

If these all requirements have been met, the state committed an internationally wrongful act can validly raise the defense of counter measures so as to scape liability under international law.

Article 23 of the draft article reads as follows;

Article 23

Force majeure

1. *The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.*

2. *Paragraph 1 does not apply if:*

(a) *The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or*

(b) *The State has assumed the risk of that situation occurring.*

The concept of force majeure presupposes the occurrence of certain conditions which in turn renders the state not to act in the way they think fit. But, the condition must be absolute impossibility not difficulty of doing something because of the occurrence of some conditions.

Read article 24 and article 25 and try to differentiate the difference between the concept of force majeure, distress and necessity? The articles have been provided below;

Article 24 Distress

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

Paragraph 1 does not apply if:

(a) *The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or*

(b) *The act in question is likely to create a comparable or greater peril.*

Article 25 Necessity

1. *Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*

Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. *In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

As it can be inferred from the above provided articles, the word necessity in this context refers to a serious situation that impairs somebody from doing the other than what he did. Therefore, in case of necessity there are other possible option to be done, but the possibility of doing these left option is seriously full of risk or cannot be made easily if not impossible. However, in case of force majeure, we are talking absolute impossibility. To this effect, the word distress has to sum extent the same meaning with that of necessity. However, this doesn't mean there is no difference between these two terms. The difference between the two is;

In case of necessity, we are talking about the very difficult situation faced by the state itself. While in case of distress, we are talking about the situation where an individual who represent the state is finding himself in a very difficult situation. For instance, if certain pilot of Ethiopia landed in the territory of the other state where Ethiopia and that territory does not have agreement to use air space of one another and the the usage of the air space had been due to distress under which the pilot was; the liability

of the state of Ethiopia can be precluded as per article 24 of the draft article by virtue of the existence of the concept of distress.

In relation to the applicability of force majeure there is one arbitration decision. This decision is called the rainbow warriors arbitration decision. The facts of the is the following;

In 1985 french agent sunk the the rainbow ship while it was in neuzland water. By then, the ship was floating inside the water found in the territory of neuzland. The dispute was referred to the secretary general of the UN whose decisions was accepted by two countries I.E. neuzland and france. This decision was formalized in the 1986 treaty; this treaty provided interalia that French agent would be transferred to a French military facility on the highland of hower for 3 years except with the mutual consent of the two states. Then, two agents out of the 3 french left the highland without securing the necessary consent from neuzland as agreed. Aggrieved by the situation neuzland went an arbitration so as to get remedy for the wrong doing of the French agents contrary to their agreement.

One of the defense raised circumstances precluding the liability was the circumstance of force majeure. The French government argued that, the two agents were very sick when left the highland which thereby prevented them from asking the consent of the neuzland on the matter. But, contrary to the defense raised by france, the arbitrators ruled that, the circumstance does not constitute the circumstance of force majeure. The arbitrators further asserted that, in order to raise the defense of force majeure, there should be absolute impossibility as opposed to difficulty.

Article 26 of the draft article reads as follows;

Article 26

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

This provision is the most relevant article of the draft article; this specific article strengthen the position that we hold when discussing the status of jus cogens under the Vienna convention on laws of treaties. This specific article is telling us about, if the nature of the obligation is one that can be characterized as preemptory norm of international

law disregard or forget about the circumstances precluding liability or wrongfulness. In fact, this kind of conclusion seems very very logical.

Article 27 of the draft article reads as follows;

Article 27

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

The question of compensation for any material loss caused by the act in question.

This article is also very important article in relation to the consequence of invocation of circumstances precluding wrongfulness. This article provides that, even when there are circumstances precluding wrongfulness, first the state relying on the circumstances should continue to discharge its obligation starting from the time when this circumstances precluding wrongfulness cease to exist or operate. In other words, soon after the cessation of the circumstances rendered the state incapable of performing something comes to an end or sufficiently cleared out, the earlier position of the state will revive and will continue in the normal condition of its prior times.

The second element entrenched under article 27 of the draft article is the fact that, even when there are circumstances that could validly preclude wrongfulness, this doesn't mean that the state relied on such circumstances is free from payment of compensation.

In this regard, payment of compensation could be considered as one consequences of international responsibility. Hence, even if the concept of liability is precluded by virtue of defenses available under this draft article, the country excluded the liability would still be required to compensation in terms of money for the injured country. For instance, if state A. caused certain damage to state B. and justified its act by the circumstance of necessity. State A. might be required to make the damage good under international law in accordance with sub (b) of article 27 of the draft article.

Invocation of state responsibility;

Whenever the state has sustained certain damage because of the commission of the wrongful act by another state what should the state suffering damage do? In order to grasp some point as regards the above raised points it would be much relevant to consult the provisions of the draft article on state responsibility for wrongful acts starting from article 42.

Article 42 of the draft article reads as follows;

*Article 42**Invocation of responsibility by an injured State*

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

That State individually; or

A group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State; or

(ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Here the question is, who can invoke the responsibility of the state that has engaged in the commission of internationally wrongful acts? The answer of this question can simply be gathered from article 42 of the draft article. Accordingly, the legitimate state to invoke state responsibility is the injured state. But, the question is who can be characterized as injured state? To this end, if the obligation is owed to single state in particular, the obligation that has been violated is owed particularly to a given state which thereby is considered as injured state. For instance, in case of bilateral treaty, one of the parties can invoke state responsibility of the other should the other state party fail to perform or discharge its obligation.

On the other hand, if the obligation is owed to groups of states; however, because of the responsible state violated the obligation. Violation of such obligation hurts one particular state out of the group. In other words, though an obligation is owed to the groups of state if one single state can claim that the wrongful act affected in particular its interest, this single state can invoke state responsibility.

Finally article 42 of the draft article has also contained the third dimension of invocation of state responsibility; this third dimension is all about the obligation owed to group of state and non compliance by responsible state affects the interests of the all members of the group. Hence, these 3 different category of injured state are the only state allowed to invoke state responsibility under international law.

Article 48 of the draft article reads as follows;

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. *The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.*

The principle entrenched under article 48 sub (a) is the revision of major principle that we have discussed above; but, the element involved under sub art (b) of the same provision is very important here. Because, it talks about the obligation that have the nature of erga omnes obligation. Therefore, if the nature of the obligation is one that owed to international communities, it is to be considered as erga omnes obligation. For instance, if you take the issue of genocide, obligation not to commit genocide is an obligation owed to international communities as whole. Therefore, every country can invoke state responsibility in case of the commission of genocide regardless of whether they are the victim of the genocide. Because, the title of article 48 by itself used invocation by non injured states. Therefore, for the very reason that, certain obligation is owed to international communities, every country can invoke state responsibility should the obligation underlined breached or not complied with.

This kind of obligation has the direct relationship with universality principle of jurisdiction; because, under universality principle of jurisdiction, all states have valid jurisdiction even though the crime alleged was not committed in the territory of each states. Therefore, if the obligation maintained has the nature of erga omnes principle, every country found in the world can invoke state responsibility by virtue of article 48 sub art (b) of the draft article on state responsibility for wrongful acts.

The principle of nationality of claim and diplomatic protection;

Article 44 of the draft article reads as follows;

Article 44 Admissibility of claims

The responsibility of a State may not be invoked if:

The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

The basic principle under this specific article is that, any claim against the responsible state can only be brought by the state that has such claim under the principle of nationality of the claims. As you remember, our discussion regarding subjects of international law, under international law state remained to be the most relevant subjects of international law. Accordingly, international law in principle does not allow individuals to bring certain claim against countries in principle. But, nowadays, efforts are made to bring individuals to the status of having full international personality as state does under international law.

Therefore, according to the principle of nationality of the claim, it is only sovereign state that can represent individuals and invoke the responsibility of another sovereign countries; in this regard, there is one very related notion which is called the principle of diplomatic protection. The principle of diplomatic protection simply means, the state is under duty to protect its nationals and to take up their claims against other states. Here you should note that, diplomatic protection is different from diplomatic immunities. Because, when we say diplomatic protection we are talking about the duty of each state to protect their nationals and whenever necessary to take up the claim of their nationals against another sovereign states.

States can do this through consular action, mediation and judicial of arbitral proceeding. However, there is no obligation imposed on state to provide diplomatic protection for their nationals under international law. So, single individual cannot complain for the maintenance of diplomatic protection by his own country.

Therefore, diplomatic protection is not the obligation imposed on the states rather it is something that each state is expected to do or should do in normal condition. Based on the principle of nationality of claim, if the state does not make the nationality link with an individual who suffered as a result of non compliance by another country the case of an individual will no more be admissible by virtue of article 44 of the draft article.

As we have pointed out in our previous discussion, the matter of nationality is left to municipal laws to be determined. International law does not determine the nationality of individuals; but, the question is which law determines the nationality of other subjects of international law like multi national companies and other NGOs as well as corporate intities? The nationality of corporate intities would be decided by national laws of each

country. Different tests might be used in order to determine the nationality of legal persons; place of registration, place of incorporation and place of head quarter could serve as essential tests of determining nationality of corporate entities.

In relation to this, we have one interesting case which is called the Barcelona attraction case. Barcelona attraction was a company incorporated in Canada. While most of its share holders were Belgium nationals. The company was operating in Spain; the company used to produce electrical equipments. Meanwhile Spain adopted some measures and legislations that affected the normal operation of Barcelona attraction. Further more, because of the adoption of the new legislation and measures the company couldn't able to continue in its normal business. Since the company is not allowed to present its case before the ICJ in its contentious jurisdiction, Belgium instituted the case before ICJ by alleging that, the act of Spain constitutes an indirect expropriation of the company (creeping expropriation). To this end, the first issue that the ICJ framed was does Belgium have sufficient link to the corporation to justify its claim on behalf of the company. The Belgian authority tried to justify their claim by invoking the fact that most of the companies share holders were Belgian nationals.

Like it has been tried to be mentioned above, the company under discussion do not belong to Belgian nationals or government. Accordingly, the court rejected the claim proposed by Belgian authority by saying Belgian authority does not have sufficient link as regards the matter at hand. The court further asserted that, although the share holders are Belgian national, if the wrong was done to the company, it is only the right of the company that have been infringed and thereby entitled to institute the action before the court. Had the rights of the share holders were affected by the act of Spain government, the share holders would have entitled to bring the suit before the court by being represented by Belgian authority. So, the court clearly pointed out that, the right affected in the case of Barcelona attraction case is the right of the company not the individual share holders. Based on this analysis, the court found that the Belgian authority did not satisfy the criteria of the nationality of claims test.

Accordingly, what can be inferred from the decision of the ICJ in this regard is the fact that the issue of the nationality of claim also applies in the case of corporate entities.

To this effect, the other element remained to be discussed here is the issue of the exhaustion of local remedies; this issue has been provided under sub art (b) of the same provision. Since, this issue has been entrenched under domestic legal system sufficiently discussing this matter deeply does not serve any purpose.

Treatment of foreign nationals;

Regarding the treatment of foreign nationals there are 2 types of standards currently used widely. These are; 1. The national treatment standard. 2. International minimum standard.

According to the national treatment standard, aliens are entitled to all the rights that nationals are entitled to under the domestic law of each country. Hence, all benefit or treatment that the Ethiopian company gets should be also accorded to the foreign company operating in the territory of Ethiopia. In fact, this kind of position was reflected by least developed countries. On the other hand, the most developed nations were argued that, aliens (physical persons or juridical persons) are entitled to an international minimum standard. Those minimum standards are basically such minimum standards which are applicable globally and constitute higher threshold of standard when compared with that of national treatment standard. For instance, according to international minimum standard you cannot expropriate the property of the given company. If you do so, you are expected to compensate the company so expropriated. To this end, the issue of which of the two standards should be applicable is not a settled matter under international law. However, nowadays, countries are using international minimum standard in the form of bilateral treaty.

Consequences of an internationally wrongful acts;

The issue of consequences of an internationally wrongful acts have been discussed under article 30 of the draft article of state responsibility for wrongful acts. Accordingly, article 30 of the draft article reads as follows;

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Under this specific article we are talking about the consequences of an internationally wrongful acts, by virtue of this the first obligation imposed on the wrong doing country is the obligation to cease the non compliance. In fact, this obligation does not work for all cases; this obligation typically works for the act that have continuity in its commission.

The other obligation prepared under this specific article is the obligation to provide guarantee or assurance that the wrong doing country will not going to do the same action which are in violation of its obligation.

So, the obligation to make full reparation under international law constitutes the first obligation of the wrong doing states should they engaged in the breach of certain international law principles. In this regard, the obligation to make full reparation is the principle recognized under customary international law as basic principle to be respected by states. Therefore, the codification of the pre existing basic rule in the form of articles.

Article 34 of the draft article reads as follows;

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

As it can be understood by reading the above cited article, there are three forms of reparation; these are,

1. restitution

2. compensation

3. satisfaction

Restitution comes in to picture only in the case of the existence of the condition where it is possible to restitute or to bring back the normal state of the happening. If you consult the municipal law in this regard, they will tell you the fact that restitution may be used as the form of addressing the non performance of the obligation by one party of the contract. For instance, in case of invalidation we might have such kind of remedies even under national law of a given state. As we said above, the obligation of restitution presupposes the existence of the condition under which it is possible to bring the earlier

normal condition. Cases like nationalization of the property belongs to another state may entail the obligation of restituting the property nationalized.

The second type of obligation is the remedy based on the payment of compensation as the case may be. Since, the concept of restitution does not apply in every situations, the payment of compensation constitutes preferable way of discharging obligation of breach under international law. Therefore, the country might be required to pay compensation should the state did certain wrongful acts contrary to the prescribed international law principles.

The third way of redressing the issue of damage occurred to another state is the concept of satisfaction. Satisfaction is the remedy for those injuries that could not be financially assessable. Most of the time, if there is non material damage sustained by certain single country, the payment of compensation might not be adequate means of remedy for the injured state.

Satisfaction may include all elements mentioned in the article cited above. To this effect, in the case of rainbow warriors case the court decided the remedy of satisfaction. The court in deciding satisfaction as appropriate remedy has justified that in rainbow warriors case, there is no monetary value to be calculated based on the damage therefore deciding compensation would be illogical and it should be satisfaction that should be imposed here in the form of remedy.

Lecture 23

Chapter 8

State Succession

There are different circumstances, happenings, occurrences that lead to the issue of state succession. When we say state succession it is used to describe a branch of international law which deals with the legal consequences of a change of sovereignty of a given territory. The different circumstances that lead to a change in sovereignty are mergers, dissolutions (dismemberment), decolonization, and secession (Crimea case /joined another state/ and Eritrea case /formed a new state/). When such things happen what would be the effect of the previous treaties, properties, debts, archives. Most of the rules relating to state succession are found under customary international law.

The ILC has come up with two drafts. The first one was the Vienna Convention on Succession of States in respect of Treaties which was drafted in 1978 but it came into force in 1996. The second convention is the Vienna Convention on Succession of States in respect of State Property, Archives and Debts which was drafted in 1978 but never came into force. The reason why the former came into force after 18 years and the latter never came into force is because this aspect of public international law is the most controversial part. Among the number of disagreements the one that stood out from the bunch was that for western countries it was the very fact that the second treaty dealt with state property but failed to address private property. Most western states are capital investing states that have various citizens invested much in the rest of the world.

There are two questions that are very important when we study this part of international law; whether there is a continuity state or if the predecessor state doesn't have a continuity state. For state succession it is very important to know after dissolution/merger/secession if there is a continuity state. Continuity state is a state that assumes the mantle of the mother state. The Russian state was recognized as the continuing state after the dissolution of the U.S.S.R. That is the very reason why the Russia assumed the U.S.S.R's seat of permanent Security Council member. In relation to states where there is no identified continuity state the issue of state succession becomes even more difficult. The Serbian republic was denied to be the continuity state of the former Yugoslav republic.

State Succession with Respect to Treaties

There are three categories of treaties for the purposes of state succession. These are treaties dealing with rights over territories (territorially grounded treaties), treaties of political or personal nature and others.

Treaties dealing with Rights over Territories

These relates to territorially grounded treaties under which rights and obligations are imposed directly upon a recognizable territorial units. They create rights and duties in relation to borders, servitudes and international watercourse. There exists a widely accepted international law principle which asserts that there is an automatic succession to such treaties. In other words a change in sovereignty over a territory doesn't affect

the application of such treaties. The automatic succession to treaties comes in sharp contrast to the clean state theory. According to the clean state theory a new state that has acquired territory starts clean without rights and obligations. This theory was very famous in Africa during the period of decolonization. The theory was encapsulated by the Julius Nyrere and it was known as the Nyrere Docterine.

Especially with regards to boundary treaties there is a principle known as uti possidetis juris. This concept originated in Latin America, where the administrative divisions of the formers Spanish colonies was recognized as the boundaries of the newly formed South American states. The principle simply implies that the former internal boundary would become an international boundary when new states were gaining independence from the Spanish empire. This rule was adopted by the Organization of African Unity in 1964 were member states pledged to respect colonial borders. The Siadde Barre government in Somalia refused to accept the OAU resolution as they had the ambition of creating a greater Somalia and they didn't want to accept the colonial borders that Italy signed with Ethiopia and Britain. One pack of groups argue that if colonial borders were not respected they would have resulted in chaos while others argue that it even created problems as the boundaries were artificial (they considered the convenience of colonizing states rather than cultural religious and ethnic consideration). They claimed that they were artificial. The principle of succession to colonial borders was further asserted by the ICJ decision in the case between Burkina Faso and Mali. In addition to this article 62 (2) of the Vienna convention on the law of treaties accepts that principle that boundary and border treaties will not be affected by fundamental changes of circumstances (Rebusic Stantibus). The Gabicikova nagyimaras case decision of the ICJ also indicates that watercourse treaties are territorial treaties and therefore are automatically succeeded.

Political or Personal Treaties

These are treaties that establish rights or obligations deemed to be particularly linked to the regime in power in a given state. Such treaties do not in principle bind successor states as they are seen as exceptional closely tied to the nature of the state and the regime which concluded them but which has seized to govern this state. A good example of such treaties would be a treaty of alliance such as the Warsaw Pact. If a treaty has a political or personal nature it is argued that they are not automatically succeeded.

Other Treaties

With respect to other types of treaties the succession rules that apply differ or vary according to the nature of the territorial change that has taken place.

The first principle we have under here is the principle of moving treaty boundaries. The principle of moving treaty boundaries states that when an existing state loses a territory it (the losing state) loses its rights and obligations under treaties in so far as those treaties used to apply to those lost territory. An example could be Belgium's surrendering of Alsace and Lorraine to France in the early nineteenth century.

This principle has also another facet; when an existing state acquires a territory it doesn't succeed to the predecessor states obligations but its own treaties become applicable to the new territory.

This rule of moving treaty is codified under article 15 of the Vienna conventions on the law of treaties. This principle applies in cases where an existing state transfers sovereignty of part of its territory to another existing state.

The second and third principles are related to decolonization and the formation of a new state. The first of these principles is that with respect to multilateral treaties to which the predecessor state was a party the new state can succeed if it wishes to inherit that multilateral treaty. This is purely optional, if the new state doesn't want to be a member of that treaty it won't be forced. That is how Sudan entered into various multilateral treaties after independence.

The second principle with regards to bilateral treaties concluded by predecessor states; the newly independent state becomes party to the treaty only if the other states and the newly created state both wanted to continue the treaty. The Vienna convention more or less adopts a clean state theory for decolonized states with the exception of territorial treaties. This is also true for secession by virtue of customary international law. Succeeding states should start as fresh and shouldn't be barred by any encumbrances.

However in the case of secession, disintegration and mergers, article 34 asserts that there is automatic succession to the treaties of predecessor states. The Czechoslovakia case is a good example of the rule under article 34. There is some contradiction between secession in the Vienna treaty and customary international law.

State Succession with Respect to State Property, Archives and Debts

International claims for compensation for illegal acts are regarded as strictly personal and therefore no succession occurs for the rights of the claimant state or to the obligation of the defending state. However the strict application of this creates problem and thus there is great contradiction.

With regards to public property, when a state acquires the territory of another state it succeeds to all the property of that other state under international law. Thus public property follows the territory. On the other and however, if the state merely loses some of its territory most of the public property situated in territory retained by the predecessor state or in third states constitutes property belonging to the predecessor state.

Private property rights do not lapse automatically when territories transfer. Countries have the rights to expropriate properties of nationals and exceptionally non-nationals under limited circumstances. However there should be a sufficient reason behind the expropriation and there should be an adequate compensation in the case of foreign nationals.

Succession to debts is usually dealt with by agreement. For example, the Russians took a huge chunk of U.S.S.R's debt in return for being the continuity state after disintegration of the soviet republic.

Chapter 9

The UN & its Charter

9.1. The charter of the UN

The UN was created at the second attempt to establish a global international organization to maintain peace and security through a system of collective security. The term United Nations was coined by the then American president, Franklin D. Roosevelt. The United Nations was initially created by 50 states in the San Francisco conference.

The UN charter defines the purposes for which the UN was established. The charter of the UN is not just a multilateral treaty but it is also the constitution of the UN. There are five official texts of the United Nations each of which is authentic and are written in the official language of the UN. These are English, French, Spanish, Chinese and Russian.

The only exclusion is Arabic which doesn't have an authentic UN edition despite being one of the official languages of the UN.

The charter is characterized from being very general. Such a generic nature is attributed to it because of it being drafted by politicians rather than lawyers.

Purpose of the UN

Article 1 of the charter of the UN states the purposes and they are;

To maintain international peace and security: The major purpose of the UN is maintenance of peace and security as stipulated under article 1(1) of the charter. This is done by the use of collective security system and prior prevention of situations that would lead to threat to peace and security.

To develop friendly relations among nations: The second purpose is promotion of friendliness among nations based on equal rights of nations.

To achieve international cooperation: The UN aims bolster cooperation to solve social, cultural, economic or humanitarian problems. This cooperation shall be done on the basis of non-discrimination.

To be a center harmonize these goals: The ILC is an embodiment of this purpose which aims to harmonize these other goals of the UN.

These purposes are written in a very general term which might be very hard and confusing to get a specific purpose out of them. There have been issues in the past and even today on the priority among the purposes. The charter doesn't say which one is the superior purpose of the UN. For western countries the most important and fundamental purpose has always been maintenance of international peace and security while on the other hand for developing states it is cooperation with the view to tackling economic, social and humanitarian problems that take the forefront.

Principles of the UN

Article 2(7) states the principle of limited jurisdiction of the UN. This is also known as the principle of non-intervention in the domestic jurisdiction. But the principle shall not affect UN's enforcement measures under chapter 7. For example the UN intervened in the Gulf war or Iraqi aggression of Kuwait, such intervention is permitted by virtue of the exception under the last sentence of 2(7) of the Charter.

A matter is less likely to be regarded as falling within a state's domestic jurisdiction, (1) if it amounts to breach of international law, (2) if it is an infringement of the interest of other states or, (3) if the acts constitutes a threat to international peace or is a gross violation of human rights. However this are standards developed by practice.

9.2. Practice and membership

It is states and states only that can be members of the United Nations. Article 3 and 4 deal with membership of states. Article 3 states that the original members are the ones that were part of the San Francisco conference and have ratified the charter.

Article 4 talks about new members. And there are a set of tests these are that the new members that should be (1) states, (2) the states have to be peace loving and (3) the proposing state should be willing and able to carry out these obligations (This topic was an issue for micro states as to whether they can contribute troops and so on, however now a days the ability of a state is presumed). The admission of any such state to membership in the United Nations will be effected by a decision of the (two third vote in favour of admission) General Assembly upon the (positive) recommendation of the Security Council (article 4(2)).

A state against which a preventive and enforcement measures have been taken by virtue of article 39 would be suspended if the measures taken haven't had any difference according to article 5. Article 6 talks about expulsion if the suspension is deemed to insufficient. Both suspension and expulsion of a state is made by the general assembly upon the recommendation of the Security Council. The charter deliberately avoids discussing about the withdrawal from the UN. Amidst the start of the Second World War the Japanese government withdrew from the league when it was being pressurized by the league.

There is no discussion of any other types of involvement other than membership. However the observer status has developed according to the practice. In 2012 the state of Palestine was upgraded from non-member observer entity status to a non-member observer state status. Indirectly they are saying if it was the General assembly alone that was deciding on membership, Palestine would have been a state. The US threat to veto the Palestinian bid is the reason why the Security Council is not giving a positive recommendation to the United nations General Assembly.

The other obstacle to membership was during the start of the cold war. Then countries wanted to add further political criteria. The eastern group wanted to accept communist states only while the western states wanted to accept capitalist states only. It was during this time the UN asked for the advisory opinion of the ICJ. The first admissions case was in 1946. The question was if it was legal under international law and under the charter for voting countries in the GA and SC to factor in additional elements when voting on the admission to the UN. ICJ stated that when a given treaty (multilateral and bilateral) lists down requirements then it should be assumed that the requirements are meant to be exhaustive. Thus factoring in of additional admission requirements other than those stated under article 4 is prohibited.

In 1950 there was another issue with regards to membership. The question was whether the General Assembly can admit members on its own without the positive recommendation by the Security Council. The reason for this request was because the membership of more than twenty countries was stalled for many years. The US vetoed communist states while USSR vetoed western states. In the second admissions case the ICJ decided that the way article 4(2) was drafted shows that the general assembly necessarily requires the recommendation by the Security Council before it makes the final decision on admission of a new state. Both admissions cases were not helpful in solving the deadlock. However later on through negotiations both parties agreed to reciprocally accept a set of members from each camp.

Lecture 25

9.3. The UN system (the principal organs of the UN)

The UN as six principle organs that are the General Assembly, the Security Council, The Secretariat, the Economic and social council, the Trusteeship Council and the International Court of Justice.

1. General Assembly

The general assembly is the parliamentary body of the insured and it consists of representative of all member states. Each member has one vote despite the size, politics or economic power of states.

Article 18 (2) states that Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace

and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

Article 18(3) states that decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Except for certain internal matters on issues of budget the general assembly cannot bind its members. Resolutions of the general assembly are in principle non-binding. GA resolutions are purely recommendatory. But such resolutions may be binding one if they reflect rules of customary international law and the resolutions could be very vital as they might reflect the opinion juris. The GA is a forum for deliberations and discussions which is not required to be sitting the whole year but rather annually in the normal course of events. The assembly has established several ad hoc and permanent bodies or committees.

The UN general assembly has wide ranging powers including the power to deal with issues of international peace and security. However the principal priority for such duties is given to the UNSC, which puts a limitation on the powers of the assembly (article 12). However the Security Council could be paralyzed or in active the GA can bring the matter to the attention of the Security Council (article 14).

2. Security Council

The council was intended to operate as an executive wing of the UN with limited membership but continual functioning. The Council was created with a vision of creating an effective strong executive link or organ of the UN. Originally the council was created with eleven members five of them permanent members enjoying the veto power while the remaining six were non-permanent rotating members without a veto power. However in 1963 the charter of the UN was amended (articles 23 and 27). The Security Council currently has fifteen members five of which are permanent members enjoying the veto power while the remaining ten were non-permanent rotating members without a veto power.

Article 27

- 1. Each member of the Security Council shall have one vote.*
- 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.*
- 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.*

With regards to voting, as a matter of general principle each member has one vote. When the voting with regards to procedural matters what is required for the motion to pass is an affirmative vote of nine out of fifteen. On all other matters (those that aren't procedural) a motion to pass requires an affirmative vote of nine members including the positive votes of all the permanent members. The need for the positive votes of all permanent members is what we call veto powers. If one of them cast a negative vote the motion is relegated despite all the other members of the UNSC voting in favour.

***The Notion of Double Veto:** Who decides whether certain issue is procedural or not is the Security Council and in order for it to pass there need to be an affirmative vote of nine members including the positive votes of all the permanent members.*

Lecture 26

The powers and functions of the Security Council are stated under Article 24 of the UN charter. Maintenance of peace and security is the main priority of the UNSC but that doesn't mean it is the General Assembly has no role. Perhaps the most important power of the UNSC is provided for under article 24 which states that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". This is the provision that makes the Security Council decision binding.

Q. What is the effect of abstention in the UNSC? Does it have any difference with an abstention in the General Assembly?

The charter doesn't have any response to the above question. However during the San Francisco conference the discussion was held on this matter and the consensus was that abstentions by permanent member is considered like an affirmative vote. So if a permanent Security Council member abstains then that abstention is considered as fulfilling the

requirements under article 27 (3). The abstention is to be considered as a positive vote and therefore fulfilling the concurring vote of P5 requirement under Article 27. If it was to be construed as a negative vote then it would have been a veto that failed to fulfill the concurring vote requirement set for the P5's. Abstention is considered as a positive vote in relation to the P5's. Abstention of a P5 in procedural matters is regarded as a negative vote. Abstention of the non-permanent members both procedural and non-procedural matters is seen as a negative vote.

If abstention was a negative vote the recently presented UNSC resolution to bar Israeli settlement in the west bank wouldn't have passed as the US a P5 had abstained.

Normally abstention under international organization is seen as a negative vote. Similarly, abstention is seen as a negative vote in the General Assembly. The only exceptions are the UNSC permanent member's abstention and with regards to opinion juris of the abstaining country in relation to that matter (if it wanted to object to the decision it would have given a negative vote).

Q. What happens if one or more permanent member of the Security Council is absent?

Historically this happened only once and that was when the USSR in protest boycotted the Security Council meeting over the issue of the North Korean invasion of South Korea in 1950. The USSR boycotted the UNSC because it thought that the Chinese should be represented by the People's Republic of China government in Beijing rather than the Republic of China government in Taiwan that held seat in the Security Council until 1975. Regardless of the absence of the USSR the Security Council decided to take an enforcement measure against North Korea.

USSR protested that this resolution was against article 27 thus invalidating the resolution. On the other hand the US and her allies argued that under article 28 the UNSC shall be in session continually and the members shall send the delegates at all times. Thus they argued that Russia failed to undertake its obligation. Following the session without the USSR, the US and its allies in the Security Council ordered a collective security measure in Korea. Because of what happened in the Korean incident the absence of a permanent member shall not be interpreted as affecting the Article 27(3) requirement. The Security Council presently has various permanent committees. They also have ad hoc subsidiary bodies such as the ICTY and ICTR. The defendants in these courts opposed the

courts claiming that the courts don't have jurisdiction to handle the cases. However both courts asserted that they have jurisdiction by virtue of article 41 of the charter, which states that the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. The council has two kinds of powers under chapter 7; measures not involving the use of armed force (article 41) and measure involving the use of force (article 42).

The Security Council has several powers involving admission of new members, suspension and expulsion of already existing members. Amendments to the UN charter requires the ratification of all the permanent members of the council. The ICJ courts are elected by the general assembly upon the recommendation of the Security Council.

The general assembly resolution No.377 (the uniting for peace resolution) was mainly initiated by the US to counteract USSR's veto paralysis of the UNSC. This resolution asserted that when the council is indecisive the general assembly shall take action. These actions were peace keeping missions. The paralysis of the UNSC during the cold war gave increased dominance to the general assembly and the secretary general.

3. The Secretariat

The secretariat of the UN consists of the secretary general and his staff which together constitute an international civil service. According to article 97 of the charter the secretary general of the UN is appointed by the general assembly upon the unanimous recommendation by the Security Council. The secretary general constitutes a chief administrator of the UN.

4. Economic and social council

Much of the works of the UN in relation to economic and social activities is undertaken by the ECOSOC. It has 54 members currently and carries out its activities through different agencies such as the UNICEF, UNFPA... We see less of the politics being exhibited in the ECOSOC.

5. Trusteeship Council

The trusteeship council was established in order to supervise the administration of trust territories created after the Second World War. These territories were the colonies of the then defeated axis powers. Some of them gained immediate independence while the others were put under the trust system. With the independence of Palau, the last

remaining trust territory, on October 1, 1994 the trusteeship council suspended its activities.

6. International Court of Justice

While the four organs are bodies the ICJ and the secretary general are divisions. The ICJ was established in 1946 as a successor to the PCIJ. The ICJ is the continuation of the PCIJ. The ICJ has fifteen judges and these are elected for a term of nine years. It is the general assembly and the Security Council voting simultaneously that decide on who should be an ICJ judge. Judges are elected by an absolute majority in both organs. However no right of veto is to be exercised by the permanent members of the UNSC.

The statute says all the major legal systems have to be represented. Nevertheless the statute doesn't provide the geographical apportionment of the judge appointment. The current practice has shown a trend of geographic quota's being used to elect judges. These are three from Africa, two from Latin America, three from Asia, five from Western Europe, Canada, USA and Australia and two from Eastern Europe.

The ICJ doesn't handle individual criminal responsibilities, that is handled the by the ICC. When a state becomes a member of the UN ipso facto it also becomes party to the ICJ statute. The contentious jurisdiction allows the court to dispose of cases presented to it by states only. Even the contentious jurisdiction is based on consent (consent of both parties). There are three ways a consent can be expressed. After a dispute has arisen the parties to the dispute could agree through a written formal communication to the ICJ expressing their consent (compromis). The second way is that even before a dispute arises countries can opt to subject themselves to the jurisdiction of the ICJ (1/ for any state bringing a case or 2/ for any state that has agreed to subject themselves to the ICJ jurisdiction). The decision it renders based on its contentious jurisdiction are binding as far as those countries are concerned. The advisory jurisdiction of the court is only open to the UN its organs and agencies that are given the power to present a case.

Lecture 27

The Collective Security System

The collective use of force under the UN system is what we call the collective security system under the UN Charter. Collective security system is a system provided under the charter by which an attack an aggression on one state will be responded to by a coordinated

effort of countries coming together. The charter provides a framework by which all other countries come together join hands and repel an attack/aggression. One can say the collective security system is the most important part of the charter. The major failure that people easily identify about the League of Nations is that it lacked an effective collective security measure. The founders of the UN thought that the use of a collective security measures would make the world a peaceful one.

Under article 39 of chapter 7 the Security Council is given the power to determine on the existence of any threat to peace, breach of the peace or an act of aggression. For the UN to activate the collective security system (for different countries to take collective measures against a state) the UNSC shall determine that there exists any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken. Even without the coming into picture of article 39 the UNSC can take provisional measures if it feels that there are some problems which fall short of threat to international peace or breach of peace or act of an aggression by virtue of article 40.

However once a determination has been made under article 39 the Security Council has two options. The first one is the option under article 41; using non-military measures. Embargos, no fly zone impositions and more recently targeted sanctions. A council can take this non-military measures with the view to abort the existing threat to peace or aggression.

CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights,

claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

If by taking the nonmilitary measures under article 41 the Security Council are inadequate or having been applied the situation has not been reversed it can proceed to take measures under article 42. The measures are armed measures military measures.

The system envisaged under the charter was that the UN would have a standby unit that would be composed of by the prior contribution of states through the signing of special agreement. Thus a UN force was supposed to be created under the charter however this could not materialize because of disagreement by the P5's. That is why UN forces are gathered post facto. Thus what the UN does is not use UN forces but authorizes other countries to use force. That was what happened in Korea and Iraq. This is different from peace keeping missions because in peace keeping missions the UN forces are not allowed to use force unless in self-defense. However the UN forces under collective security will surely use force. This ineffective application of the charter has resulted in the unsuccessfulness of the collective use of force. However this doesn't imply complete failure, in limited situations the CSS has worked. Examples of these are Iraq and Korea. On the other hand measures under article 41 (non-military measures) are used abundantly although the success or effectiveness is arguable.

Prohibition on the Use Force

Prohibition on the use of force is an international law rule that is fundamental and this customary international law rule as attained the status of ius cogens norm. When this rule emerged is quite unclear. During the time of Hugo Grotius times (15th and 16th century) there was the principle of just war. States had or were assumed to have rights to wage war if there is a legal or just cause. In the 18th century international law maintained that sovereign states had an unlimited power to use force. As time went by the first instrument to bar the use of force was the League of Nations covenant. In 1928 it was further strengthened by the Kellogg-Briand Pact. The pact was on the renunciation of use of force. The emergence of these pacts coupled with the state practice of nations gave it the customary law status. However finally the charter gave it effect under article 2(4).

Article 2

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article one of the charter lays down the functions while the article 2 lays down the principle. Despite the inclusion of this article under the charter there is still confusion. We have two school of thoughts; Permissive approach and Restrictive approach. These are interpretative approaches used to interpret article 2(4). According to the permissive approach article 2(4) coexists with the preexisting customary international law rule which allows states to use force. They claim that in principle states are free to use force but exceptionally by virtue of article 2(4) the states have agreed not to use force in the conditions set out by the charter. They argue that use of force is only or specifically prohibited against the territorial integrity or political independence of a state. Thus they argue that anything short of that you can use force, on situations such as war on terrorism, humanitarian intervention, protection of nationals abroad (the Entebbe Raid). They argue that Israeli forces entered into Ugandan territory and used force for the purpose of freeing its citizens not to occupy the territory of Uganda.

The restrictive view holds that the only exception to the prohibition on the use of force is the one that we have under article 51 of the UN charter. This is the article of the charter that talks about self-defense. Isn't self-defense enough of for the exception? Isn't the goal of the UN to strengthen the existing prohibition on the use of force rather than expand it? That is the goals you see when you overlook the documents (background

documents) that were used in creating the UN. Even when we look at state practice, there are only few states that openly support the permissive approach (This is Israel).

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The methods through which the charter allows self-defense is different from self-defense under customary international law. Customary international law provides for a very expansive right of self-defense. It includes anticipatory self-defense. The UN charter narrows down the existing customary law on self-defense. There has to be actual armed attack under the UN charter however in practice there is an argument that there is anticipatory self-defense (this gained momentum after the 9/11 attack). Some say that the charter even states that there is an inherent right of self-defense thus the charter hasn't barred the existing expansive rights of self-defense under customary international law. The proponents of this argument assert that article 51 hasn't narrowed down the right. They say that there needs to be no need for actual armed attack for there to be a self-defense measure.

One thing that has to be noted is that self-defense is a provisional measure until the Security Council takes measures.