ADDIS ABABA UNIVERSITY

College of Law and Governance Studies

School of Law

The International Law Principle of *persona non grata* and International Organizations: An Appraisal of the Ethiopian Government's Expulsion of United Nations Officials in 2021

By

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Declaration

I **Daniel Gebreananiya**, hereby declare this thesis titled **'The International Law Principle of *persona non grata* and International Organizations: An Appraisal of the Ethiopian Government's Expulsion of United Nations Officials in 2021'** is my original work and has never been presented for the degree in this or any other Academic Institution. All sources of information have been duly acknowledged, and the thesis complies with the ethical standards of research and academic integrity set forth by Addis Ababa University.

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Thesis Approval Sheet

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Acronyms

- IO International Organizations
- UN United Nations
- UNGA United Nations General Assembly
- UNSC United Nations Security Council
- ICJ International Court of Justice
- ILC International Law Commission
- General Convention – Convention for the Privileges and Immunities of the United Nations
- Special Convention – Convention for the Privileges and Immunities of the Specialized Agencies
- VCDR Vienna Convention on Diplomatic Relations
- VCCR Vienna Convention on Consular Relations
- WHO World Health Organization
- IMF International Monetary Fund
- UNICEF United Nations International Children's Emergency Fund
- UNOCHA United Nations Office for the Coordination of Humanitarian Affairs
- ILO International Labor Organizations
- WMO World Metrological Organizations
- FAO Food and Agriculture Organization
- ICAO International Civil Aviation Organization
- UNESCO United Nations Educational, Scientific and Cultural Organization
- ECSC European Coal and Steel Community
- EEC European Economic Community
- OAS Organization of American States
- IAEA International Atomic Energy Agency
- FDRE Federal Democratic Republic of Ethiopia
- HPR House of Peoples Representatives
- HoF House of Federation
- MFA Ministry of Foreign Affairs
- TPLF Tigray Peoples Liberation Front

- EU European Union
- DRC Democratic Republic of Congo
- AU African Union
- USA United States of America
- UPU Universal Postal Union
- WWI First World War
- BC Before Christ

Abstract

Recently, various states have declared persona non grata officials of International Organizations, one of them being the Ethiopian government expelling seven officials of the United Nations in 2021. Such declarations have not been well received by the International Organizations, mainly the UN, which claims the principle of persona non grata is not applicable in the case of UN officials and such declarations as violations of international law. This thesis discusses the development of privileges and immunities in general, especially focusing on privileges and immunities of international organizations. Diplomatic immunities are one of the oldest doctrines in international law in state-to-state relations, attaining the level of international customary law. As International Organizations are recent phenomena themselves, the idea of privileges and immunities is not well developed as it is a treaty-based system. The paper analyzes the applicability of persona non grata in relation to International Organizations. It also discusses the specific declaration of the Ethiopian government on UN officials in 2021 and examines its legality under the proper international legal instruments. It also discusses the mechanisms available for States to utilize in dealing with abuse of privileges and immunities under the legal instruments of different organizations, focusing on the General Convention and Special Convention. The thesis employs legal analysis on the principle of persona non grata and its applicability in relation to International Organizations. The finding of the study indicates, even though the principle of persona non grata is not available in the legal instruments of different International Organizations, there is no clear normative legal ground that prohibits states from declaring it. Which makes the issue very argumentative. But it can be observed that currently states are declaring persona non grata against officials of International Organizations, which can be seen as emerging state practice that can develop to attain customary international law status. The matter needs to get normative ground to be settled, through inclusion in the international legal instruments or decision and advisory opinions of international judicial institutions like he ICJ.

Key Terms: *persona non grata, Privileges and Immunities, International Organizations, General Convention, Special Convention*

CHAPTER ONE

Preliminary

1.1. Research Background and Problem

Diplomatic immunity is a commonly utilized privilege in the diplomatic world. Historically, diplomatic immunity from the domestic legal process has been called ‘the oldest established rule of diplomatic law’.[1] Members of diplomatic missions use these privileges to be an exception to the local laws of the receiving (host) state. It is enjoyed by the head and members of diplomatic missions, consular missions, personnel of international organizations, and personnel of national missions to international organizations (IO).

Different IOs have international privileges and immunities for the institutions themselves and their personnel. The United Nations (UN), as per its charter, enjoys the privileges and immunities that are necessary for the fulfillment of its purposes.[2] Representatives of the members of the UN and officials also enjoy privileges and immunities that are necessary for the independent exercise of their functions in connection with the organization.[3] Detailed privileges and immunities have been provided under the Convention on the Privileges and Immunities of the United Nations[4] (General Convention) and the Convention on the Privileges and Immunities of the Specialized Agencies (Special Convention).[5] Other IOs use different agreements for the same effect. The European Union has enacted Protocol No. 7 on the Privileges and Immunities of the European Union.[6] The African Union used the General Convention on the Privileges and Immunities of the Organization of African Unity.[7]

[1] Frederick Rawski, ‘To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations’ (2002) Vol 18, Connecticut Journal of International Law 103, 106.
[2] Charter of the United Nations (signed 26 June 1945, came into force 24 October 1945) 1 UNTS XVI Art 105(1)
[3] ibid Art 105(2)
[4] Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS (General Convention)
[5] Convention on the Privileges and Immunities of the Specialized Agencies (adopted 21 November 1947, entered into force 2 December 1948) 33 UNTS (Special Convention)
[6] Protocol (No 7) on the Privileges and Immunities of the European Union (8 April 1965), which is based on Article 343 of the Treaty on the Functioning of the European Union and Article 191 of the Treaty Establishing the European Atomic Energy Community
[7] General Convention on the Privileges and Immunities of the Organization of African Unity (adopted and entered into force on 25 October 1965)

The aim of giving the privileges and immunities is to guarantee their effective functioning without the interference of local laws of the member states in which they perform their activities.[8]

It is customary in the diplomatic community to declare and expel a member of a diplomatic mission if a state suspects that person has broken their immunity either before or after the person is assigned to the state.[9] This declaration by a state is called *persona non grata*.[10] A state by declaring *persona non grata* can make a member of a diplomatic community unwelcome in its land and expel them.

Declaring *persona non grata* for various reasons is a developed and long-practiced principle in the diplomatic community, especially in the state-to-state relationship, and has been provided under the Vienna Convention on Diplomatic Relations (VCDR)[11] and the Vienna Convention on Consular Relations (VCCR).[12]

As it is provided in the constituting acts of different IOs, privileges and immunities are awarded to their personnel.[13] States have declared members of IOs to be *persona non grata* at various times, and mostly it causes disagreements between the state and the international organizations. The most recent and controversial was the Federal Democratic Republic of Ethiopia (FDRE) government's declaration of *persona non grata* on seven officials of UN Humanitarian agencies on September 30, 2021.[14] The FDRE government has requested the officials to leave '…the country within … 72 hours'.[15]

The UN promptly protested this claim made by the FDRE government.[16] The UN Secretary-General, Mr. Guterres, in a briefing to the Security Council on October 6, 2021, said: '…declaration

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[8] Charter of the UN (n 2) Art 104 & 105: Protocol (No 7) on the Privileges and Immunities of the European Union Art 8, General Convention on the Privileges and Immunities of the Organization of African Unity, (n 7) preamble.

[9] Nehaluddin Ahmad, Gary Lilienthal, Arman bin Haji Asmad, 'Abuse of Diplomatic Immunities and Its Consequences Under the Vienna Convention; A Critical Study' (2021) Vol. 30, Journal of Transnational Law and Contemporary problems 165, 169

[10] Bryan A. Garner, *Black's Law Dictionary* (9th Edition, WEST, A Thomson Reuters business, 1990) 1260 defines it as "unwanted person" or "a diplomat who is not acceptable to a host country".

[11] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964), UNTS Vol. 500 (VCDR) Article 9

[12] Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967), UNTS Vol. 596 (VCCR) Article 23.

[13] Charter of the UN, (n 2) Article 104 & 105; General Convention: Special Convention: Protocol (No 7) on the Privileges and Immunities of the European Union, Article 17; General Convention on the Privileges and Immunities of the Organization of African Unity, Article 6

[14] The declaration was made on Twitter. <https://twitter.com/mfaethiopia/status/1443596419068305408?t=zp-gAj0og9blRh9Y9aCRcQ&s=19> accessed 19 April 2022

[15] Ibid.

[16] <Ethiopia: Decision to expel UN staff could put aid operations at risk | | UN News> accessed 19 April 2022

of the officials as *persona non grata* and its demand for their relocation outside its territory is inconsistent with Ethiopia's obligation under the UN Charter and the fundamental principles of international civil service'.[17]

This made it a point of disagreement between the UN and the FDRE government. It even grew to become a matter of discussion in the UNSC at its 8875th Meeting.[18] There are other similar instances. Burundi's declaration of *persona non grata* of the World Health Organization (WHO) expert team on 12 May 2020,[19] Somalia's declaration of *persona non grata* to the UN envoy on 1 January 2019,[20] Mali's declaration on the Director of the UN mission in Kidal in December 2019,[21] and Israel declaring *persona non grata* on the appointed Special Rapporteur to the UN on human rights issues to the Palestinian Territories in March 2008[22] can be mentioned as instances.

These disagreements between the IOs and their member states about the application of *persona non grata* are the main basis for this study. This study will focus on investigating the international legal instruments regarding the immunity of the institutions and their personnel and analyze the principle of *persona non grata* and its application to IOs personnel.

1.2. Significance of the Study

As Ethiopia is a hub of international organizations, hosting their diplomats is a frequent occurrence. As privileges and immunities are provided to these diplomats, they need to be handled in a way to that did not violate international agreements Ethiopia is party to. This study investigates the applicability of the principle of *persona non grata* in regard to these specific diplomats. The findings would advise practitioners as to the treatment of the specific diplomatic community. It may also contribute to the scholars and practitioners by raising questions for further study on specific or broad areas relating to the subject matter.

[17] <Secretary-General Denounces Ethiopia's Expulsion of Senior United Nations Officials as Security Council Delegates Differ on Potential Response | Meetings Coverage and Press Releases> accessed 19 April 2022

[18] United Nations Security Council Meeting Minute, "*Secretary-General Denounces Ethiopia's Expulsion of Senior United Nations Officials as Security Council Delegates Differ on Potential Response* (6 October 2021), can be accessed at <https://www.un.org/press/en/2021/sc14657.doc.htm> accessed 19 April 2022

[19] <https://www.theguardian.com/world/2020/may/14/burundi-expels-who-coronavirus-team-as-election-approaches> accessed 14 June 2022

[20] <https://apnews.com/article/d8d26da29345410292f8eedf163fa008> accessed 14 June 2022

[21] <https://www.aa.com.tr/fr/afrique/mali-les-azawad-r%C3%A9agissent-%C3%A0-l-expulsion-du-directeur-de-la-minusma-%C3%A0-kidal-/1670815> accessed 17 June 2022

[22] <Nobel author 'persona non grata' in Israel over inflammatory poem (nbcnews.com); My expulsion from Israel | Richard Falk | The Guardian> accessed 18 April 2022

1.3. Objectives of the Study

1.3.1. General Objective

The overall objective of this study is to critically examine the applicability of the international law principle of *persona non grata* in relation to international organizations and their officials.

1.3.2. Specific Objectives

This study intends to achieve the following Specific objectives:

- Analyze the immunity structure of international organizations under international law by exploring international legal instruments.
- Analyze the principle of the *persona non grata* and its application to the personnel of international organizations.
- Analyze practical scenarios regarding *persona non grata* and international organizations in line with international legal instruments and the stands held by international organizations and their member states.
- Examine the legality of the decision of the Ethiopian government to expel UN officials in 2021 as per the appropriate legal instruments.

1.4. Research Question

The main question the study set out to answer is this: Is the international law principle of *persona non grata* applicable to personnel of international organizations?

In order to answer the above research question, it will necessarily respond to the following specific questions.

- What are the historical, theoretical, and legal basis of privileges and immunities of international organizations?
- What are the legal and theoretical basis of *persona non grata*?
- Was the Ethiopian government's declaration of *persona non grata* of seven UN officials as per relevant international laws?
- What are the available mechanisms for dealing with abuses of privileges and immunities by officials of international organizations?

1.5. Literature Review

Persona non grata is 'a diplomat who is unacceptable to a host country'.[23] This means the diplomat is no longer welcome in the government to which he is accredited.[24] The doctrine allows a host country to unwelcome or expel a diplomatic agent who has immunity due to their diplomatic status. This doctrine has a long history dating back to the Sixteenth Century, starting with the case of Spanish Ambassador Don Bernardino de Mendoza during Queen Elizabeth I's reign, who was given 15 days to leave.[25]

Diplomatic immunity gives diplomats an exception from the local jurisdictions[26] to those who hold the position. Diplomatic immunity from the local process has been called 'the oldest established rule of diplomatic law'.[27] It is believed that immunity creates a protected space that is necessary for diplomats to fulfill their functions independently and free from interference by the government of the state in which they are posted.

Immunities can be categorized into two types: immunity *rationae persona* and *rationae materie*. The former assumes all actions are public therefore immune, while the latter, based on functionalism, differentiates between the actor and the subject matter.[28]

The type and level of immunity held by them, and their personnel is to be described on their constitutive international legal instruments and/or their consecutive agreements for this specific description.

Regarding the UN, Art 105(1) of the UN Charter provides that 'the organization shall enjoy in its territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purpose'.[29] It further provides that 'representatives of the members and officers of the

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[23] Garner (n 10).
[24] Ahmad, Lilienthal, Asmad, (n 9) 169; Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th Ed, Oxford University Press 2016) 74
[25] Ahmad, Lilienthal, Asmad, (n 9) 171; Denza, (n 24) 73.
[26] Dr. Amer Fakhoury, 'Persona Non Grata: The Obligation of Diplomats to Respect the Laws and Regulations of the Hosting State' (2017) Vol. 57, Journal of Law, Policy and Globalization 110, 112
[27] Ahmad, Lilienthal, Asmad, (n 9) 167
[28] Kristen E. Boon, 'The United Nations as Good Samaritan: Immunity and Responsibility' (2016) Vol.16, No 2, Chicago Journal of International Law 341, 362
[29] Charter of the UN (n 2) Art 105(1)

organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization'.[30]

As it has been provided in Art 105(3), two conventions have been enacted to determine the details of the privileges and immunities provided in sub 1 and 2. These are the Convention on the Privileges and Immunities of the United Nations (General Convention) and the Convention on the Privileges and Immunities of the Specialized Agencies (Special Convention). One common privilege provided in both conventions is to "be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registrations"[31]

Scholars argue that the extent of immunity held by the UN as per the UN Charter is limited.[32] Art 105(1) of the Charter, states the extent of immunity by saying, '…the Organization shall enjoy … privileges and immunities that are necessary for the fulfillment of its purpose'.[33] By providing this, the Charter gives the UN and its officials limited 'functional' immunity.[34]

The General Convention under Section 2 provides that the UN 'shall enjoy immunity from every form of legal process except insofar as ... it has expressly waived its immunity'. This language expands the UN's immunity from functional immunity to something closer to absolute immunity.[35] Regarding the organization under the General Convention Article II, section 2, the organization enjoys immunity from 'every form of legal process' unless there is an express waiver.[36] The Convention in essence undermines the functional necessity standard of the Charter by granting the organization absolute immunity from both civil and criminal suits.[37] However, the majority of officials of the UN are entitled to the limited immunity provided under Article V, Section 18 of the General Convention.[38]

Article V, Section 20 of the General Convention provided that 'Privileges and Immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the

[30] Ibid Art 105(2)
[31] General Convention (n 4) Article V Section 18(d); Special Convention (n 5) Article VI Section 19(c)
[32] Farhana Choudhury, 'The United Nations Immunity Regime: Seeking a Balance between Unfettered Protection and Accountability' (2016) Vol 104, Georgetown Law Journal 725, 732
[33] Ibid (n 31)
[34] Frederick Rawski (n 1) 107
[35] Farhana Choudhury (n 32)
[36] Frederick Rawski (n 1) 111 referring to Article II Section 2 of the General Convention
[37] Ibid
[38] Ibid 110 - referring to Article V Section 18 of the General Convention

individuals themselves.' No provision has been dedicated for what amounts to and what the result will be for abuse of the privileges and immunities under the General Convention.

In the Special Convention, Article VII is dedicated to the abuse of privilege. Under Section 24 of the same, the first option provided for a member state to resort to when believing an official of a UN specialized agency has abused his/her privilege is consultation with the Specialized Agency. If the consultation fails, then the case about abuse of privilege or immunity will be taken to the International Court of Justice (ICJ). For this effect, Article VII, Section 25 [2(II)] provides that:

> 'In the case of an official to whom section 21 is not applicable, no order to leave the country shall be issued other than with the approval of the Foreign Minister of the country in question, and such approval shall be given only after consultation with the executive head of the specialized agency concerned; and, if expulsion proceedings are taken against an official, the executive head of the specialized agency shall have the right to appear in such proceedings on behalf of the person against whom they are instituted.'

This shows an official of a Specialized Agency can be ordered to leave by a member state on the fulfillment of conditions. This means it can declare *persona non grata* with the approval of the Foreign Affairs Minister after consultation with the executive head of the agency.

Regarding when the immunity and privileges will end, the General Convention provides only withdrawal by the Secretary-General as a way to do so. Such a mechanism is also provided in the Special Convention for the Specialized Agencies to be waived by the Agency.[39]

Regarding the European Union (EU), the privileges and immunities are based on two treaties. The Treaty on the Functioning of the EU Article 343 states:

> 'The Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Union. The same shall apply to the European Central Bank and the European Investment Bank.'

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[39] General Convention (n 4) (Article V Section 20 for Officials); (Article VI Section 23 for Experts on Mission for the UN).

The second one holds a similar essence in Art 191 of the Treaty Establishing the European Atomic Energy Community, which states:

> 'The Community shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol on the privileges and immunities of the European Union.'

The preamble of the Protocol (No. 7) on the Privileges and Immunities of the EU provides that '… the European Union and the EAEC shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of their tasks'. Article 17 of the protocol further provides that 'privileges, immunities, and facilities shall be accorded to officials and other servants of the Union solely in the interest of the union.'

When we come to the African Union, the preamble of the General Convention on the Privileges and Immunities of the Organization of the African Unity, as a reason for the adoption of the Convention states:

> '…the representatives of the Members of Organization of African Unity and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their function in connection with the organizations.'

International Organizations provide detailed privileges and immunities in their treaties and protocols. However, states have made members of IOs *persona non grata*, causing disputes between host states and specific IOs, particularly the UN, which claims absolute immunity.

The immediate initial point of this research is the declaration of the Ministry of Foreign Affairs (MFA) of the FDRE government for who '… declare '*persona non grata'* for seven individuals who have been working for some UN humanitarian agencies in Ethiopia …' [40] on 30 September 2021. It was posted with an attachment listing seven officers of different sections of the UN. The following day, the MFA issued a two-page press release in which it ordered '…some officials of UN agencies to leave the country' stating its reasons for the decision.[41]

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[40] <https://twitter.com/mfaethiopia/status/1443596419068305408?t=zp-gAj0og9blRh9Y9aCRcQ&s=19>accessed on April 8, 2024

[41] <https://twitter.com/mfaethiopia/status/1443978921872171026 or Ministry of Foreign Affairs Press Release on the Expulsion of UN Officials | Embassy of Ethiopia, London (ethioembassy.org.uk)> accessed 08 April 2024

On 01 October 2021, Farhan Haq, the Deputy Spoken Person of the UN Secretary-General, stated the 'long-standing legal position of the Organization not to accept the application of the doctrine of *persona non grata* with respect to United Nations officials', as the UN is not a state.[42]

After the Secretary-General referred the matter to the UN Security Council (UNSC), it was an issue of discussion at its 8875th meeting on 6 October 2021, in which Antonio Guterres said, 'The United Nations believes that Ethiopia is not right to expel these individuals. 'We believe Ethiopia is violating international law in doing so.'[43] It further states, '… Addis Ababa's declaration of the officials as '*persona non grata'* and its demand for their relocation outside its territory is inconsistent with Ethiopia's obligation under the United Nations Charter and the fundamental principles of international civil service'.[44]

In response, Taye Atskeselassie, the then-Ethiopian Government's permanent representative to the UN, responded by saying the matter is an issue within the sovereign right of Ethiopia and shouldn't be an issue of discussion in the council, pointing previous same cases that have never been presented to the council. He also stated that Ethiopia is not under obligation to provide justifications or explanations for its decision.[45]

Such disputes have been observed multiple times between different international organizations and host states. So, the main aim of this study is to examine the legality of the declaration of *persona non grata* on international organizations according to international law.

1.6. Scope and Limitation of the Study

The research focuses on analyzing principle of *persona non grata* under international law and examining the appropriateness of utilizing this principle on personnel of international organizations. To address this, discussions will be made as to the privileges and immunity platform in general, and under international organizations in particular. The principle will be the main discussion point.

[42] <Daily Press Briefing by the Office of the Spokesperson for the Secretary-General | Meetings Coverage and Press Releases (un.org)> accessed 17 April 2024
[43] <Secretary-General Denounces Ethiopia's Expulsion of Senior United Nations Officials as Security Council Delegates Differ on Potential Response | Meetings Coverage and Press Releases> accessed 08 April 2024
[44] Ibid
[45] Ibid

It will also discuss the Ethiopian Government's decision to expel seven officials of different UN agencies by declaring them *persona non grata* for various reasons, as it is the triggering issue to conduct this study. However, the study will not address the details of the reasons for the declaration, as it is outside of its scope.

Due to the uniqueness of the issue raised in the study, it was not easy to find related academic documents that discussed the specific matter in detail.

1.7. Research Method

This thesis employs a dual methodological framework, integrating both doctrinal and qualitative research approaches to comprehensively address the research question.

The study employs doctrinal research as it aims to analyze the understanding of the principle of *persona non grata* and its development and application, especially focusing on International Organizations, by analyzing and interpreting relevant international legal instruments.

To achieve the objective, primary sources like VCDR, VCCR, UN Charter, General Convention, Special Convention, etc... have been utilized. In order to understand the primary sources and principles, books and articles written by different scholars, UNSC minutes, court decisions, press releases, web resources, etc.… have been used as a secondary source.

The qualitative research method compliments the doctrinal approach by providing insights on the application of the principle. The declaration by the FDRE government of *persona non grata* of seven UN officials on Sep 30, 2021 is the case study to analyze the applicability of the principle regarding International Organizations.

The doctrinal research will lay the foundation for understanding legal principles, while qualitative methods will enhance the exploration of their application and impact in the legal field.

1.8. Thesis Organization

This thesis consists of five chapters, the immediate being the preliminary, that includes the research background and statement of the problem, significance and objective of the study, research question, literature review, the scope of the study, limitations of the study and methodology.

Chapter Two is about privileges and immunities and international organizations. Here the fundamentals of diplomatic immunity in general and international organizations in particular and their personnel will be discussed, as it's the basis for the research question at hand.

Under Chapter Three, the international law principle of *persona non grata* will be discussed in detail.

Chapter Four will be titled The Use of the International Law Principle of *Persona Non Grata* Concerning International Organizations. Here we will analyze the applicability of the principle considering international organizations, in a way that will address the research question.

The final chapter will consist of conclusions and recommendations reached based on the analysis provided.

CHAPTER TWO

Fundamentals of Privileges and Immunities Vis-a-Vis International Organizations

2.1. Privileges and Immunities in General

2.1.1. Definition

Immunity is defined as 'Any exception from a duty, liability, or service of process.'[46] Immunity is awarded to various individuals like members of parliaments, ambassadors, delegates, witnesses, etc. These privileges can emanate from different legal instruments like constitutions, international agreements, conventions, bilateral agreements, other local laws, etc. Those individuals provided under those legal instruments will be an exception from the law to the level and duration of time provided in the instrument.

An example can be the FDRE constitution, which provides the immunity of the members of the House of Peoples Representatives (HPR)[47] and House of Federation (HoF).[48] Members of both houses will not be prosecuted for their opinions or votes without the approval of their respective houses, except for *Fragrante Delicto*. Another example is witnesses and whistleblowers being provided with 'immunity from prosecution for an offense for which he renders information'.[49] The witnesses and whistleblowers will be immune from being prosecuted for their participation in the crime, to which they gave information.

The focus of this study is when immunities are granted to international entities and their personnel. This will allow them not to be subject to the jurisdiction of the hosting state. In this case, it is mostly referred to as jurisdictional immunity.

Jurisdictional immunity, which is immunity from legal and judicial processes, bars domestic courts from subjecting certain persons to their judicial process.[50] It covers the entire judicial process from

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[46] Bryan A. Garner, *Black's Law Dictionary* (9th Edition, WEST, A Thomson Reuters business, 1990) 817

[47] Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 54(5-6), Proc. No 1, Neg. Gaz. Year 1, no. 1

[48] Ibid, Art. 63

[49] Protection of Witnesses and Whistleblowers of Criminal Offences, 2010, Art. 4[1(f)], Proc. No. 699, Neg. Gaz. Year 17, no. 16

[50] Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, 2018) 4

the initiating of the proceedings, trials, interim orders, judgements and to the execution of judgements. Regarding diplomatic agent that holds jurisdictional immunity, the court of a receiving state will be 'incompetent to pass upon the merits of action brought against such a person'.[51] This kind of immunity can be given to members of a diplomatic mission based on VCDR and VCCR, and as to officials of International Organizations based on their respective constitutive instruments (like the UN Charter), subsidiary international legislations (like the General Convention), headquarters agreements and so on.

One of the prominent types of immunity is Diplomatic Immunity. It is defined under Black's Law Dictionary as 'The general exemption of diplomatic ministries from the operation of local law'.[52] This means diplomatic missions will become exempt from the local laws of the host state. The mission's premises, personnel, and belongings can be subject to the provided immunity.

Some Scholars create a distinction between privileges and immunities granted to diplomatic agents of states and those granted to international functionaries, by terming the former 'diplomatic privileges and immunities,' and the latter 'international privileges and immunities'.[53]

One of the differences between the two is their purpose. The purpose of international privileges and immunities is to ensure the independence of the international organization and its officials from the influence of states while the purpose of diplomatic privileges and immunities is to prevent the interference of the receiving state in the business of the sending state.[54]

The other difference can be their basis, as diplomatic privileges and immunities are seen to be based on the sovereign equality of states and reciprocity, while the privileges and immunities of international organizations are necessitated by the effective exercise of their function, as international organizations are unable to grant immunities based on reciprocity.[55]

Despite their differences, the two maintain long-standing relationships by extending diplomatic privileges and immunities to encompass newly developed international privileges and immunities.

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[51] Dr. Franciszek Przetacznik, 'History of the Jurisdictional Immunity of Diplomatic Agents in English Law' (1978) Vol. 7, No. 4, Anglo American Law Review 348, 351

[52] Garner (n 46) 818

[53] David B. Michaels, *International Privileges and Immunities; A Case for a Universal Statute*, (Martinus Nijhoff, The Hague, 1971) 20-1; citing Carol M. Crosswell, *Protection of International Personnel Abroad: Law and Practice Affecting the Privileges and Immunities of International Organizations* (Oceana Publications, 1952) v-vi

[54] Michaels (n 53) 25

[55] Malcolm N. Shaw, *International Law* (8th ed, Cambridge University Press, 2017) 1007

This can be seen in three ways. First, the traditional rules of international law relating to privileges and immunities of states and their diplomatic agents have been extended to include a new class of persons, which is international organizations and their agents.[56] Second, the subject matter covered by the two are for the most part identical, but occasionally the special function given to international organizations necessitates the adoption of special rules covering new subject matters.[57] Third, although the authors of the constitutional instruments of most of the recent international organizations carefully avoided mentioning "diplomatic privileges and immunities" for the organizations and their agents (except Article 19 of the ICJ Statute), there is hardly any doubt as to the similarity of the substantial rules of international and diplomatic privileges and immunities.[58]

Jurisdictional immunity signifies that persons enjoying it cannot be brought before the courts for any illegal acts or offenses committed in the receiving state during the period of their functions in the permanent diplomatic mission, which extends to all jurisdictions, criminal, civil, or administrative.[59]

Diplomatic agent means the person authorized by the sending state to act in the capacity of its official representative in the receiving state.[60] The traditional function of a diplomatic agent is to act as a mouthpiece of his government and the official channel of communication between the government of the sending and receiving state.[61]

Regarding the notion of immunity and privilege, there are differences between different scholars. Ch. Morton defines privileges as 'the right to do something that other people have no right to do' and immunities as 'the right by virtue of which one need not do what other persons are obliged to do' while I.P. Blishchenko and N.V. Durdenevskij define immunity as 'exemption...of diplomatic agents ...staying abroad from compulsory jurisdiction of the courts, financial organs and those of the security service of the country in which they are staying...and in particular from summons,

[56] Hans Aufricht, 'The Expansion of The Concept of Sovereign Immunity; With Special Reference to International Organizations' (American Society of International Law at Its Annual Meeting, Washington D.C., April 24-26, 1952) 86
[57] Ibid
[58] Ibid
[59] Przetacznik (n 51) 351
[60] Ibid
[61] Sir Ernest Mason Satow, *Satow's Guide to Diplomatic Practice* (Lord Gore-Booth ed, 5th Ed, Longman Group UK Limited, 1979) 14

arrest, search, investigation, embargo and requisition'.[62] By the term privilege, they understand 'special legal prerogatives ...of diplomatic agents'.[63]

2.1.2. Historical Background

a. Early History of Privileges and Immunities

The history of diplomatic privileges and immunities is an old and most established principle under international law and practice.[64] States used to send temporary envoys and diplomatic missions for specific matters like negotiating an alliance or settling a dispute, in the name of their rulers, until the establishment of permanent diplomatic missions.[65]

The early records indicate special missions between Greek city-states, which by the fifth century BC had become so frequent that a system similar to our regular diplomatic intercourse was achieved'.[66] The Greek city-states even had a system where they allowed foreigners living in Greece to choose representatives to act as representatives between them and the local authorities. Greek settlers in Egypt also had similar privileges in the sixth century BC.[67]

During the earliest times, states would use priests and monks to undertake diplomatic missions, providing their religious status was sufficient for their safety.[68] The other practice was for the state to issue a 'safe conduct' to the foreign sovereign (which must be made on each individual case) or their envoys stating safe arrival, the performance of their mission, and safe return to their own country.[69]

In the fifteenth century, permanent diplomatic missions originated in Italy, Venice being the center.[70] In 1469 Venice established a permanent mission in Burgundy and ten years later in France.[71] By the sixteenth century, they had ambassadors in Vienna, Paris, Madrid, and Rome.[72]

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[62] Ibid
[63] Przetacznik (n 51) 352
[64] Michaels (n 53) 7
[65] Przetacznik (n 51) 349
[66] B. Sen, *A Diplomate's Handbook of International Law and Practice* (Martinus Hijhof, The Hague 1965) 3
[67] Satow (61) 211
[68] Margaret Buckley, 'Origins of diplomatic immunity in England' (1966) Volume 21 No. 2, University of Miami Law Review 349, 349; Montell Ogdon, 'The Growth of Purpose in the Law of Diplomatic Immunity' (1937) Volume 31, No 2, American Journal of International Law 449, 449
[69] Buckley (n 68) 349
[70] Satow (61) 84
[71] Przetacznik (n 51) 349
[72] Satow (61) 84

In the 16th century, the permanent diplomatic mission expanded to other countries, becoming general in the 17th century.[73] By the early sixteenth century, there were several resident ambassadors in England.[74]

For centuries, diplomatic privileges and immunities persisted solely under customary international law.[75] In 1708, the British Parliament formally recognized diplomatic immunity and banned the arrest of foreign envoys. The United States Congress in 1790 enacted a law that provides for absolute criminal and civil immunity for foreign diplomats, their families, and servants and staff of the diplomatic mission.[76]

Despite the historic development of diplomatic law and immunity as customary international law, efforts to establish a formal conventional international law governing these areas date back to as early as 1815, with various nations attempting to create local laws to protect diplomatic missions.[77] During the Congress of Vienna in 1815, they began formulating rules of diplomatic relations with the Vienna Regulation and the Protocol of *Aix-la-Chapelle* of 1818.[78] A major effort to formulate diplomatic officers rights, duties, and privileges, limited to the American Republics, was undertaken in 1928 at the Sixth International Conference of American States held at Havana.[79] Even though the convention was much broader than the Vienna Regulation and the Protocol *Aix-la-Chapelle*, it failed to provide a complete statement for the privileges and immunities of all members of the diplomatic mission and the rights and duties of the receiving and sending state.[80]

In 1953, the UNGA requested the ILC to undertake codification of the diplomatic law, which led to the drafting of the Vienna Convention on Diplomatic Relations (VCDR), which was signed on 18 April 1961 and entered into force on 24 April 1964.[81]

[73] Przetacznik (n 51) 349
[74] Buckley (n 68) 350
[75] Anna Raphael, 'Retroactive Diplomatic Immunity', (2020) Vol. 69, Duke Law Journal 1425, 1428
[76] Ibid 1432
[77] Claudia H. Dulmage, 'Diplomatic Immunity: Implementing the Vienna Convention on Diplomatic Relations' (1978) Vol. 10, No 3, Case Western Reserve Journal of International Law 827, 827
[78] Albert H. Garretson, 'The Immunities of Representatives of Foreign States' (1966) Vol. 41, No 1, New York University Law Review 67, 69
[79] Ibid
[80] Ibid 69
[81] Veronica L. Maginnis, 'Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations' (2003) Vol. 28, No 3, Brooklyn Journal of International Law 989, 997-8

b. Emergence of International Organizations

As discussed above, diplomatic privilege and immunity have longstanding historical roots. This is different when we come to the privileges and immunities of international organizations, as the history of international organizations is relatively recent. The *Convention sur l'octroi de navigation du Rhin* was signed in 1804 between France and the Holy Roman Empire, which created the Rhine River Commission, the 'first modern permanent supranational administration with functional powers'.[82] As per the convention, the Commissioner and its staff were entrusted with the responsibility of regulating the navigation of the Rhine River, which made them the first civil servants, which gave rise to the commutation 'international civil servants' that applied to permanent officials and staff members of the institutions and other functionaries their primary employment is devoted to the organizations.[83] Other examples of international organizations during the second half of the twentieth century can be the likes of the International Committee of the Red Cross (1863) and the International Law Association (1873).[84]

Before the nineteenth century, there was an already developed international law and practice for the protection of an international person (the Papal emissary) with no allegiance to a political entity that serves an international organ (the Universal Church at Rome) that is 'endowed by the civilized world with an influential position transcending national boundaries and to a greater or lesser extent influenced the political, economic, and social interrelationship among nations'.[85]

Regarding the development of privileges and immunities of personnel of international organizations, the *Convention sur l'octroi* grants 'independence and neutrality' to the Rhine River Commission and its personnels.[86] Another example is provided under the Convention of Contingents of the Panama Congress of 1826, which allows members of the Commission to enjoy all the immunities and exemptions of a diplomatic agent wherever they reside.[87]

Even though different international organizations provide privileges and immunities, before 1920 it was given as an exception based on the particular treaties, as no such privileges existed in

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[82] Michaels (n 53) 1
[83] Ibid
[84] Shaw (n 55) 983
[85] Michaels (n 53) 12
[86] Ibid 2
[87] Josef L. Kunz, 'Privileges and Immunities of International Organizations' (1947) Vol. 41, No 4, American Journal of International Law 828, 828

different organizations like the Pan American Union, Financial Control Commissions, River Commissions, or Administrative Unions.[88] This was because most of the international organizations, the likes of the Universal Telegraphic Union and the General Postal Union, established did not require privileges and immunities because they did not have a political mandate; therefore, the rationale for immunity doesn't exist.[89]

When states create international organizations to manage international problems having political dimensions, states provide them with jurisdictional immunities to make sure the organizations do not fall under the control of any particular state, institutions established for the implementation of WWI are good examples.[90]

The Covenant of the League of Nations provides 'officials of the League, when engaged in the business of the League, shall enjoy diplomatic privileges and immunities'.[91] This was due to the growth in the interrelationship of diplomatic privileges and immunities enjoyed by regular diplomatic agents and those enjoyed by personnel of international organizations as can be seen in the experience of the League of Nations.[92]

The Covenant does not define what constitutes diplomatic privileges and immunities, leaving it for subsequent agreements, and, for this reason, the Secretary-General reached a preliminary agreement with the Swiss in 1921 and a final *Modus Vivendi* in 1926.[93] By these documents, the immunities granted to diplomatic missions and personnel under Swiss law have been extended to the League of Nations and its officials by dividing the League's officials into two categories as per the Swiss restrictive approach.[94] The first category includes the League's high administrative and research staff, which enjoy complete immunity, and the second is given to the League's administrative staff and clerical workers, given jurisdictional immunity only for their official acts.[95]

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[88] Ibid 829-30
[89] Maginnis (81) 1010; Charles H. II Brower, 'International Immunities: Some Dissident Views on the Role of Municipal Courts' (2001) Vol. 41, No 1, Virginia Journal of International Law 1, 9
[90] Brower (n 89) 9-10
[91] Ibid 11
[92] Michaels (n 53) 11
[93] Brower (n 89) 12
[94] Ibid
[95] Ibid

Arguably, by the 1930s, the use of diplomatic privileges and immunities to international organizations and their personnel had evolved, as the organizations claimed diplomatic immunities for their personnel even in the absence of functional grounds and demanded their extension beyond their constitutive agreements.[96]

Application of diplomatic privileges and immunities to international organizations created problems like member states denying immunity to individuals serving in their home jurisdiction, as under traditional diplomatic law diplomatic agents do not enjoy immunity from the jurisdiction of their home states.[97] This can be seen from the negotiation between the League of Nations and Switzerland relating to the diplomatic immunity of officials with Swiss nationality, finally, they reached a compromise that allowed Swiss officials to have immunity for acts performed in their official capacity.[98]

As the problem became obvious in the 1940s, the drafters of the UN Charter avoided reference to diplomatic immunities and adopted the functional doctrine that gave the UN and its personnel the minimum immunities necessary to perform their objectives.[99] This can be seen from the words of Article 105 of the UN Charter.

This general provision of the Charter becomes the basis for two subsequent agreements with detailed privileges and immunities of the organizations and their personnel, named the Convention on the Privileges and Immunities of the United Nations[100] and the Convention on the Privileges and Immunities of the Specialized Agencies.[101]

The ILC from the 1960s to the 1990s aimed to codify diplomatic relations laws by discussing a generic convention for the privileges and immunities of international organizations, with the aim

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[96] Lawrence Preuss, 'Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest' (1931) Vol. 25, No 5, The American Journal of International Law 694, 695-6; Aufricht (n 56) 88
[97] Brower (n 89) 13
[98] Ibid 13-5
[99] Maginnis (81) 1011
[100] Entered into force on 17 September 1946 (162 party states): https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=_en accessed 22 April 2024
[101] Entered into force on 2 December 1948 (131 party states): https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-2&chapter=3&clang=_en accessed 22 April 2024

of completing the law of diplomatic relations. The first topic was the agents of the state, and the second topic was the agents of organizations and the organizations themselves.[102]

For the first topic, after several deliberations, the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character was adopted on 13 March 1975. As the Special Rapporteur El-Erian describes, the Convention aimed to provide general rules and common denominations to regulate diplomatic relations between states and international organizations. However, the draft faced difficulties due to division between sending states, which supported liberal expansion of the ILC draft, and host states, who favored limiting privileges and immunities, particularly for observers. This division made the ratification process too slow after the Convention's adoption.[103] The Convention has not entered into force yet.[104]

The ILC has been deliberating on a second topic from 1976 to 1992, but many members believe it is already regulated through international instruments, agreements, and domestic laws.[105] This led to the end of the ILC's work on this topic in 1992, indicating that efforts to codify diplomatic rules, particularly about privileges and immunities of international organizations, have not been successful, contrary to those on state relations.[106]

2.2. The Theories Underlying Privileges and Immunities

As we have discussed earlier, during the time of the temporary diplomatic missions, envoys and agents were highly dependent on persons with a religious character to facilitate the performance of their mission.[107] Since the early sixteenth century, the establishment of permanent diplomatic missions has strengthened diplomatic immunity and privileges, making them widely accepted as channels for diplomatic relations, necessitating appropriate protection for their performance.[108]

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[102] Peter H.F. Bekker, 'The Work of The International Law Commission on "Relations between States and International Organizations" Discontinued: An Assessment' (1993) Vol. 6, No 1, Leiden Journal of International Law 3, 6-7

[103] Ibid 6

[104] <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-11&chapter=3&clang=_en> accessed 26 April 2024

[105] Bekker (n 102) 13

[106] Ibid 16

[107] Przetacznik (n 51) 353

[108] Ibid

Various theories have been proposed to justify the existence of diplomatic privileges and immunities, three being the ones that get widespread acceptance: extraterritoriality, personal representation (also known as representative character), and functional necessity.[109]

The ILC has also mentioned these three theories to be the basis for the diplomatic immunities and privileges under VCDR on its thirteenth session report in 1958, which states:

> (1) Among the theories that have exercised an influence on the development of diplomatic privileges and immunities, the Commission will mention the 'exterritoriality' theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State, and the 'representative character' theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending state.
>
> (2) There is now a third theory that appears to be gaining ground in modern times, namely, the 'functional necessity' theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions.[110]

2.2.1. Theory of Extraterritoriality

The theory of extraterritoriality was widely employed in the eighteenth and nineteenth centuries.[111] It is derived from the notion of personal and territorial jurisdiction.[112] Under this theory, a diplomat is treated as if he were still living in the sending state, and the premises of the diplomat's mission are treated as an extension of that state's territory.[113] The theory provides a host state may neither enter nor be subject to legal process, a real property held by another state. A host state lacks personal jurisdiction over the diplomat and therefore cannot compel him to appear in its courts as the theory follows the idea 'that the ambassador must be treated as if he still is living in the territory of the sending state' and is therefore not subject to the jurisdiction of the receiving state.[114]

[109] Raphael (n 75) 1429-30; Kunz (n 87) 837

[110] International Law Commission, *Report of the International Law Commission; Covering the Work of its Tenth Session 28 April – 4 July 1958* (13th Session Supplement No. 9 (A/3859) 1958) 16-17

[111] Robert A. Wilson, 'Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations,' (1984) Vol. 7, No 1, Loyola of Los Angeles International and Comparative Law Journal 113, 116

[112] Przetacznik (n 51) 353

[113] Wilson (n 111) 116

[114] Ibid

In the 16th century, Western Europe's emphasis on territorial integrity led to a growing emphasis on national laws' supremacy over all within a territorial state, regardless of nationality. This led to the development of the fiction of extraterritoriality to ensure diplomatic agents' security and mission performance.[115]

The theory of extraterritoriality, proposed by Hugo Grotius, asserts that diplomatic agents and their entourage are not governed by the laws of the receiving state, thereby excluding them from its jurisdiction.[116]

He based his concept on the nature of two fictions:

a) …that ambassadors, as if by a kind of fiction, were considered as the personifications of those who sent them; and
b) by a similar fiction, ambassadors were held to be outside the limits of the receiving state.[117]

This Grotian thought was vastly recognized by English writers in the eighteenth century, and it found an expression in the decisions of courts, which served as a juridical basis for the jurisdictional immunity of diplomatic agents, like in the 1975 case between *The King vs. Guerchy,* in which an English court granted not to be prosecuted on an incident in which a French ambassador attempt assassination by deciding the ambassador owed no subjection to the court of the receiving state but was supposed, by a fiction of law, to still be a resident of the sending state.[118]

This theory is criticized, first as the term "extraterritoriality does not provide adequate guidelines to determine the scope and limitation of diplomatic privileges and immunities. Second, the strict application of this theory can have dangerous consequences as the notion presupposes unlimited immunities and privileges. Finally, the theory assumes diplomatic immunity is based on the absolute independence of nations, while the question of immunity is raised only because nations are interdependent.[119]

[115] Przetacznik (n 51) 353
[116] Ibid 353-4
[117] Ibid
[118] Ibid 354-5
[119] Wilson (n 111) 117

Concerning international organizations, this theory cannot be applied as they have no territory of their own.[120] Due to this, the theory of extraterritoriality cannot be used to justify the privileges and immunities of international organizations as they cannot extend territorial jurisdiction, as they don't have territory to begin with.

2.2.2. Theory of Representative Character (Personal Representation)

This theory provides that, a diplomatic agent represents a sovereign state whose independence was assimilated to himself.[121] It states the diplomat is the 'alter ego' of his ruler, so he enjoys the rights and privileges that would be given to his master by the receiving state.[122]

The idea that a diplomatic agent is a personification of the ruler or of a sovereign state whose independence must be respected was expressed by Ch. de Montesquieu by saying:

> '[t]hey [diplomatic agents.--F.P.] are the voice of the prince who sends them, and this voice ought to be free; no obstacle should hinder the execution of their office: they may frequently offend because they speak for a man entirely independent; they might be wrongfully accused if they were liable to be punished for crimes; if they could be arrested for debts, these might be forged'.[123]

Other theorists have also described this theory. A. Gentili defines an ambassador as 'one who has been sent not only by the state, but also in the name of the state, and as the representative of the state'. H. Grotius also asserted that '…ambassadors by a kind of fiction are identified with the persons who sent them'.[124]

The best of all judicial decisions that describe this theory is the case of *Magdalena Steam Navigation Co. v. Martin,* where the judge states the diplomatic agent '…has at least as great privileges from suit as the sovereign he represents'.[125]

The two major criticisms of this theory are:

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[120] Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2002) 147
[121] Przetacznik (n 51) 355
[122] Wilson (n 111) 115
[123] Przetacznik (n 51) 355
[124] Ibid
[125] Ibid 356

1) Making a diplomat entirely beyond the reach of the law of the host state merely because he personifies his sovereign makes the scope of the diplomat's right too broad, and
2) The concept of 'personal representative' is too difficult to apply to the modern form of government, as it will be difficult to ascertain which section of the authority of a democratic government the diplomat represents.[126]

The theory of personal representation lost its credit following the American and French revolutions, and the divine monarchy fell and gave rise to modern democracies.[127] This theory, like the previous one, cannot be used to justify the privileges and immunities of international organizations, as they are not considered sovereign in their rights.[128]

2.2.3. Theory of Functional Necessity

The recently used justification of diplomatic immunity is based on the theory of functional necessity, which states the purpose of such immunity and privilege is not to benefit the individual but to ensure the efficient performance of the functions of the diplomatic mission.[129] The theoretical root can be traced back to Grotius who states, 'an ambassador must be free from all coercion'.[130]

Diplomacy would be ineffective if diplomats were unable to communicate with their sending state securely or if their diplomatic bags could be opened by the receiving state and they could read the contents and access their correspondents.[131]

Unlike the predecessors, this theory provides some rational basis for restricting the immunity of diplomats, if the restrictions do not hinder the diplomat from accomplishing his functions.[132]

This theory is criticized for being vague as it fails to indicate the limits to which immunities essential to the accepted practice of diplomacy are to be extended and what the 'accepted practice of diplomacy' is.[133]

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[126] Wilson (n 111) 115
[127] Raphael (n 75) 1430
[128] Klabbers (n 120) 147
[129] Wilson (n 111) 117
[130] Przetacznik (n 51) 354
[131] Raphael (n 75) 1430
[132] Maginnis (81) 996
[133] Wilson (n 111) 118

The theory of functional necessity is used to justify the privileges and immunities of international organizations, based on the idea that they enjoy immunities that are necessary for the exercise of their functions in the fulfillment of their purposes.[134]

2.3. Types of Privileges and Immunities

Jurisdictional immunity, based on what it is attached to, can be categorized as immunity *ratione personae* or immunity *ratione materiae.*

2.3.1. Immunity *ratione personae*

Immunity *ratione personae* is a type of immunity that is attached to a person irrespective of the nature of the act.[135] This broad type of immunity is enjoyed by a small group of senior state officials, especially heads of state, heads of government, and foreign ministers, diplomats, and other officials in special missions in foreign states.[136]

Those high-ranking state officials, as long as they remain in office, will personally be immune to the jurisdiction of foreign courts regardless of the nature of their act or the subject matter of the judicial proceedings.[137] The rationale for *ratione personae* immunity is the need to preserve 'each state's independence and capacity to govern itself'.[138]

The immunity *ratione personae* come to an end with the termination of the function of the diplomatic agent, or if he stays in the receiving state when a reasonable time elapsed.[139] An example of this can be observed in the first sentence of Art 39(2) of the VCDR, which reads, 'Privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict'.

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[134] Klabbers (n 120) 148
[135] Yoram Dinstein, 'Diplomatic Immunity from Jurisdiction Ratione Materiae' (1966) Vol. 15, No 1, The International and Comparative Law Quarterly 76, 76
[136] Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) Vol. 98, No 3, The American Journal of International Law 407, 409
[137] John H. Currie, *Public International Law* (Essentials of Canadian Law, 2nd Ed, Irwin Law Inc, 2008) 367
[138] Ibid
[139] Dinstein (n 135) 78

This shows immunity *ratione personae* is a privilege and immunity given to the diplomat himself during the time of his function.

2.3.2. Immunity *ratione materiae*

Immunity *ratione materiae* is the type of immunity that is attached to the official acts of a foreign state rather than the person enjoying it.[140] When a question of the existence of immunity arises in *ratione materiae* immunity, the focus will be the nature of the relevant act or transaction, not the identity of the actor.[141] If the action is the official act of the state, *ratione materiae* immunity will be attached to shield the foreign state from the local judicial jurisdiction regarding the act or transaction. This will be true even if the act or transaction is done by a low-ranking representative or ad-hoc agent of the state, which normally will not hold such an immunity.[142]

Immunity *ratione materiae* is the kind of immunity that is restricted in application to official acts performed in the discharge of diplomatic duties, but its duration is indefinite.[143] This can be observed in the second sentence of Art 39(2) of VCDR, saying, 'With respect to acts performed by such person in the exercise of his function as a member of the mission, immunity shall continue to subsist'.

As can be understood from the reading of Art 39(2), both immunity *ratione personae* and immunity *ratione materiae* can exist at the same time.[144] This 'overlapping coexistence' of the two during the time when the diplomatic agent is operating has been explained by different writers in various ways, one is by Harvard Research on Diplomatic Privileges and Immunities by creating a dichotomy of 'exemption from jurisdiction' on one side and 'non-liability for official acts' on the other.[145]

The distinction between immunity *ratione personae* and immunity *ratione materiae* was a basis in the International Court of Justice (ICJ) Case of *Democratic Republic of Congo Vs Belgium*.

[140] Currie (n 137) 367
[141] Ibid
[142] Ibid
[143] Dinstein (n 135) 78
[144] Okeke (n 50) 346
[145] Dinstein (n 135) 79 9

It all began when Belgium issued an arrest warrant to the Minister of Foreign Affairs of the DRC on charges of war crimes and crimes against humanity in violation of the Geneva Convention.[146] DRC applied to ICJ, claiming the warrant was against the immunity to be enjoyed by foreign ministers. In its decision, the court described foreign ministers as not being granted immunity for their personal benefit, but to 'ensure the effective performance of their functions on behalf of their representative states' and it also concluded that 'the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability'.[147] It further describes:

> 'In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another state on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting state on an 'official' visit or a 'private' visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed in an "official" capacity or a 'private' capacity…' [148]

The court decided in favor of DRC reasoning the mere issuance of the warrant violates the customary international law diplomatic immunity that renders foreign ministers absolutely inviolable from the process of foreign courts while they are in office.[149]

[146] Mark A. Summers, 'Diplomatic Immunity Ratione Personae: Did the International Court of Justice Create a New Customary Law Rule in *Congo V Belgium?'* (2007) Vol. 16, No 2, (Michigan State Journal of International Law 459, 468

[147] Currie (n 137) 369; Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), (2002), International Court of Justice (ICJ), No 121, <https://www.refworld.org/jurisprudence/caselaw/icj/2002/en/91772> [accessed 30 April 2024] Paragraph 53-54

[148] Currie (n 137) 370; Democratic Republic of the Congo v. Belgium (n 147) Paragraph 55

[149] Summers (n 146) 460

This means immunity *ratione personae* will give the entitled agent of state immunity to both official and non-official acts during his time in office, but after he leaves office, immunity *ratione materiae* will give protection for acts performed in an official capacity on behalf of the state.[150]

2.4. Approaches on the Extent of Privileges and Immunities

2.4.1. Absolute Immunity

Absolute immunity is when the entity enjoys privilege and immunity for its conduct that can be both official and non-official.[151] The concept of absolute immunity arose due to the uncomplicated role of the sovereign and the government in the eighteenth and nineteenth centuries, which makes the sovereign 'completely immune from the foreign jurisdiction in all cases regardless of circumstances'.[152]

The basis for absolute sovereign immunity was the principle of *par in param non habet imperium,* which means equals do not have authority over one another, by which 'the courts of a country will not implead a foreign sovereign that is, they will not, by their process, make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages'.[153]

2.4.2. Restrictive Immunity

The restrictive immunity approach was developed by various nations due to the growth of activities of states, especially in commercial areas. Several governmental agencies and public corporations, nationalized industries, and other state organs created a reaction against the concept of absolute immunity, to adhere to the restrictive approach of immunity.[154]

The rationale for the restrictive approach was better described in the case *Kuwait Airways Corp v Iraqi Airways Co and others* which the judge described as:

> The rationale of the common law doctrine of restrictive immunity . . . is that where the sovereign chooses to doff his robes and descend into the marketplace, he must take the

[150] Okeke (n 50) 346
[151] Shaw (n 55) 526
[152] Ibid
[153] Okeke (n 50) 97
[154] Shaw (n 55) 526

> rough with the smooth, and having condescended to engage in mundane commercial activities, he must also condescend to submit himself to adjudication in a foreign court on whether he has in the course of those activities undertaken obligations he has failed to fulfill.[155]

In the restrictive immunity approach, immunity is given only to governmental activities and not to commercial activities.[156] It's the distinction between *acta jure imperii* (public, governmental, or sovereign acts) and *acta jure gestionis* (private, commercial, or non-sovereign acts) that gave rise to the restrictive approach.[157] Based on this approach, immunity has to be given to the *acta jure imperii,* not to the *acta jure gestionis*.[158]

Once restrictive immunity was introduced, it got widespread acceptance by various states due to reciprocity, arguing 'it's imprudent for a state to grant broader immunities than it receives'.[159] The reciprocity is due to the two-way relationship between states in international relations.

This reciprocity approach doesn't work on international organizations, as they may receive jurisdictional immunity from municipal courts, but they cannot grant the same in any context, as no international organization incorporates a judicial organ that exercises compulsory jurisdiction on entities that are outside of the organization.[160]

During the time of absolute state immunity, international organizations claimed and received the same immunities as states, but with the development of restrictive immunity, the question of its application on international organizations was raised. But the doctrine of restrictive immunity doesn't address the unique needs of international organizations.[161]

2.4.3. Functional Criteria for Restricting Immunity

Due to the difficulties of applying the restrictive immunity doctrine on international organizations, most states adopted a different model named the doctrine of functional necessity, which entitles

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[155] Okeke (n 50) 98
[156] Shaw (n 55) 526-7
[157] Okeke (n 50) 99
[158] Ibid 98
[159] Ibid 99
[160] Michael Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995) Vol. 36, No 1, Virginia Journal of International Law 53, 54-5
[161] Ibid 56

international organizations with such immunities that will enable them to exercise their functions in the fulfillment of their purpose.[162]

This doctrine dates back to the foundation of major international organizations like the UN, as can be seen from Article 105 of the UN Charter, which states 'the Organizations shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes'. This is reasonable, as it will be pointless for a state to participate in setting up an international organization to perform certain functional purposes and then act to hinder the international organization in the exercise of the same function.[163]

The question raised about the functional necessity doctrine is how much immunity is required for the international organization to exercise its function. Most international organizations argue that nothing less than absolute immunity should be applied, which is supported by some scholars.[164] But most scholars argue to the contrary, saying international organizations deserve immunities to ensure their survival.[165]

Though this doctrine seems appropriate to establish the limits on immunities of international organizations, it is a difficult standard to be applied as a limitation in practice since it is vague and not well placed to be applied.[166]

2.5. Organizational Practice of International Privileges and Immunities

While diplomatic privileges and immunities are developed through customary law, international privileges and immunities are based on treaties.[167] The treaties relating to international privileges and immunities can be seen in three categories.

The first is establishing agreements. Usually, the constitutive agreements of international organizations declare at least the basic principles of the immunities granted to the organizations.[168]

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[162] Thomas J. O'Toole, 'Sovereign Immunity Redivivus: Suit Against International Organizations' (1980) Vol. 4, No. 1, Suffolk Transnational Law Journal 1, 3
[163] Singer (160) 65-6
[164] Ibid 66
[165] Ibid 66-7
[166] Chanaka Wickremasinghe, 'The Jurisdictional Immunities of International Organizations and Their Officials' (PhD Thesis, London School of Economics and Political Science 2003) 86
[167] August Reinisch, *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies; A Commentary* (Oxford University Press, Oxford, United Kingdom 2016) 5
[168] Paul Szasz, 'International Organizations, Privileges and Immunities' Max Planck Encyclopedias of International Law (1983) 153

Articles 104 and 105 of the UN Charter can be referred to for this effect. Such provisions can be found in different constitutional treaties of international organizations. These provisions will not hold details of privileges and immunities.

The second category of treaties are multilateral, subsequent, and separate agreements that provide the details of privileges and immunities for each international organization.[169] The General Convention and the Special Conventions that deal with privileges and immunities of the UN and its Specialized Agencies, respectively, are good examples. Similar agreements have been used to other international organizations.

The third category is bilateral agreements concluded between international organizations and host states, which are mainly headquarters agreements.[170] Such agreements define the premises of international organizations and the rights and obligations of the organizations and the host.[171] Agreements between the UN and the United States of America for the headquarters of the UN in New York and the agreement between AU and Ethiopia for establishing its headquarters in Addis Ababa are best examples.[172] Other examples of bilateral agreements can be conference agreements, agreements for the provision of technical assistance, and agreements for the stationing of international forces for peacekeeping.[173]

2.5.1. The United Nations System

The United Nations system consists of the UN, the International Court of Justice (ICJ), and the Specialized Agencies.[174] As we have seen above, the issue of privileges and immunities concerning the UN is rooted in *modus vivendi* between the League of Nations and the host nation, Switzerland.

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[169] Reinisch (n 167) 5
[170] Szasz (n 168) 153
[171] Ibid
[172] Agreement between the United Nations and the United States of America Regarding the Headquarter of the United Nations signed on 26th June 1947; Agreement Between the African Union and the Federal Democratic Republic of Ethiopia on the Headquarters of the African Union signed on 25th April 2008
[173] Szasz (n 168) 153
[174] Michaels (n 53) 53: the number of Specialized Agencies grows up to be seventeen https://www.un.org/en/about-us/specialized-agencies accessed 23 April 2024

The UN Charter

Art 105 of the UN Charter provides for the basic principle of the privileges and immunities provided to the UN by saying:

1. The organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

As can be seen from the first sub-article, functional necessity is the basis for the drafting of privileges and immunities to the Organization.

Even though the Charters provision did not provide details on the privileges and immunities, it was written in the belief that:

> The terms privileges and immunities indicated in a general way all that could be considered necessary to the realization of the purposes of the organization, to free the functioning of its organs, and to the independent exercise of the functions and duties of their officials… But if there is one certain principle it is that no member state may hinder in any way the working of the organization or take any measures the effect of which might be to increase its burdens, financial or other.[175]

The General Convention

Following Art 105(3) the General Convention was drafted by the Preparatory Commission, and then it was approved by UNGA on 13 February 1946 and entered into force on 17 September 1946.[176]

[175] Michaels (n 53) 60
[176] Reinisch (n 167) 7-9

The General Convention provides for the personality of the organization, its immunity from jurisdiction and constraints, the inviolability of its archives and premises, its freedom from financial controls, its fiscal immunities, and its freedom of communication. It also deals with the immunities of representatives of the member states, the immunities of officials of the organization and the immunities of experts on mission.

The Special Convention

In addition to the General Convention, the Preparatory Commission of the UN recommended the drawing of the law on the privileges and immunities of the specialized agencies with sufficient flexibility by saying:

> The Preparatory Commission recommends to the General Assembly that the privileges and immunities of specialised agencies contained in their respective constitutions should be reconsidered. If necessary, negotiations should be opened for their coordination in the light of any convention ultimately adopted by the United Nations ... There are many advantages in the unification, as far as possible of the privileges and immunities enjoyed by the United Nations and the various specialised agencies. On the other hand, it must be recognised that not all specialised agencies require all the privileges and immunities which may be needed by others. No specialised agency would however require greater privileges than the United Nations itself. Certain specialised agencies, may, by reason of their particular functions, require privileges of a special nature which are not required by the United Nations. The privileges and immunities, therefore, of the United Nations might be regarded as a maximum within which the various specialised agencies should enjoy just such privileges as the proper fulfillment of their respective functions may require. It should be a principle that no immunities, which are not really necessary, should be asked for.[177]

Based on this recommendation and decision of the UNGA, the Secretary-General entered into consultations with representatives of the Specialized Agencies and later the Legal Committee prepared a draft, which, on 21 November 1947, the UNGA adopted the Convention on the

[177] Wickremasinghe (n 166) 133

Privileges and Immunities of the Specialized Agencies, which then entered into force on 2 December 1948.[178]

The structure of the Special Convention follows the General Convention, with the main difference being the omission of reference to experts on mission, as it will be included depending on the specific need of the Specialized Agency.[179] The main addition to the Special Convention compared to the General Convention is a provision about the abuse of privilege under Article VII Section 24, which reads as:

> If a state party to this Convention considers that a Specialized Agency has been abusing a particular immunity, the matter is first discussed between its Government and the Specialized Agency, with a view to the adjustment of the matter by agreement. If this consultation does not lead to a solution acceptable to both sides, then the question of whether there has been an abuse or not should be submitted in accordance with Section 32 to the International Court of Justice. . .. If the opinion of the Court showed that an abuse had been committed, then the complainant state would have the legal right to withhold the immunity which had been abused.[180]

This provision is considered to be a compromise in the time of abuse of privilege by creating a procedure instead of allowing the affected state to unilaterally withhold privileges and immunities.[181]

Article VII Section 25 is also a new one with no equivalent in the General Convention, and it was inspired by the principle of *persona non grata* of diplomatic privileges and immunities, as it tries to find a balance between the interest of the Special Agency as its officials and representatives of its members can participate in the works of the organizations and the interest of the host state requiring such person to leave their territory in case of abuse of privileges and immunities with high-level consultation between the host state and the Agency concerned.[182]

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[178] Reinisch (n 167) 16-8
[179] Ibid 18
[180] Ibid 19
[181] Ibid
[182] Ibid 19-20

Discriminatory clauses relating to experts on mission, and the non-inclusion of provisions for technical assistance personnel and peacekeeping forces are the deficiencies of the conventions.[183]

2.5.2. Regional Organizations

The application of the functional necessity to determine international privileges and immunities has been used by international organizations other than the UN and its specialized agencies as we have seen above. This principle is used by the EU.[184] This can be observed in Article 343 of the Treaty on the Functioning of the European Union, as it grants the EU '*privileges and immunities as are necessary for the performance of its tasks'*.[185] This was further elaborated in detail in Protocol (No. 7) on the Privileges and Immunities of the EU. These provisions, in particular and the legal instruments in general deal with privileges and immunities of officials and other servants of the Union and its related institutions as it has foreseen in the enactment of the instruments.[186]

Similarly, functional necessity has been used in determining the privileges and immunities of the AU, as can be read from the preamble of the General Convention on the Privileges and Immunities of the Organization of the African Unity and further provisions.

2.5.3. Judicial and Financial Organizations

The ICJ is the prominent judicial organ in the international arena. As it is the principal judicial organ of the UN, it enjoys the immunity provided under Article 105 of the UN Charter.[187] Additionally, Article 19 of the Statute of the Court specifies that its members shall enjoy 'diplomatic immunities' and Article 42 provides the agents, counsel, and advocates of the parties before the Court enjoy the privileges and immunities necessary to the independent exercise of their duties.[188]

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[183] Michaels (n 53) 70

[184] Marek Zielinski, 'What Are the Ultimate Sources for Privileges and Immunities of the European Union? Comment on the Judgement of the Court of Justice, Case C-502/19 Junqueras Vies' (2021) Vol. 10, No 1, Polish Review of International & European Law 139, 140

[185] Consolidated Version of Treaty for the Functioning of the European Union (2007) <http://data.europa.eu/eli/treaty/tfeu_2016/art_343/oj> accessed 24 April 2024

[186] Ramses A. Wessel, 'Immunities of the European Union' (2013) Vol. 10, International Organizations Law Review, 395, 401

[187] Wickremasinghe (n 166) 138

[188] Michaels (n 53) 130

International financial organizations like the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (usually known as the World Bank), which are establishments of the Bretton Woods Agreements of 1944, followed a different route by providing that if the Bank was to be able to raise loans and perform the other functions given to it in the market, it could not be granted immunity from suit.[189] Commercial lenders can ordinarily bring suits to recover their loans, and that makes the Bank a credible borrower and the fact that they don't grant privileges and immunities to representatives of states, experts, and executive heads of the bank made the two different from the UN immunity system.[190] This practice was followed by other international financial organizations like the International Finance Corporation, the International Development Association, the Asian Development Bank, and the Caribbean Development Bank.[191]

[189] Satow (n 61) 372
[190] Ibid
[191] Ibid

CHAPTER THREE

General Observation on The International Law principle of *persona non grata*

3.1. Introduction

The dictionary definition of the term *persona non grata* means an unwanted person, and it is mostly used on diplomats that are not acceptable by the host state.[192] It is a process by which a diplomatic agent who is personally unacceptable to the government of the receiving state is removed.[193] The principle ensures that the receiving state does not continue to suffer due to the unacceptable diplomatic capacity of an individual.[194]

Different names have been used for this practice, like expulsion, request for recall of the diplomat, dismissal, refusal to receive or to continue to receive the diplomat, and sending the diplomat his passports.[195] Whichever name has been used, *persona non grata* is utilized when it is the diplomat personally that has offended the host state.[196] If the displeasure is not with the diplomat personally, but with the policy or conduct of the sending state, the proper course to be used is to break diplomatic relations or to recall the ambassador for consultation.[197]

The diplomatic agent can be unacceptable either before he has arrived in the host state, which means the proposed appointment is unacceptable to the host state and will not be received, or after the accreditation process in response to real or alleged improper conduct of the diplomatic agent.[198]

The host states can have various reasons for the declaration mostly, it can be categorized as either political motivations like interfering in the domestic affairs of the host country or violations of

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[192] Bryan A. Garner, *Black's Law Dictionary* (9th Edition, WEST, A Thomson Reuters business, 1990) 1260

[193] Sir Ernest Mason Satow: *Satow's Guide to Diplomatic Practice* (Lord Gore-Booth ed, 5th Ed, Longman Group UK Limited, 1979) 178

[194] Eileen Denza, *Diplomatic Law; Commentary on the Vienna Convention on Diplomatic Relations* (4th Ed, Oxford University Press, 2016) 61

[195] Satow (n 193) 178-9

[196] Ibid

[197] Ibid 179

[198] Dr. Amer Fakhoury, 'Persona Non Grata: The Obligation of Diplomats to Respect the Laws and Regulations of the Hosting State' (2017) Vol. 57, Journal of Law, Policy and Globalization 110, 111

criminal laws of the host country.[199] Though reasons might be provided, the host state is not mandated to do so.[200]

By this declaration, the host state requires the sending state to recall the diplomat in question, which usually the sending state complies with.[201]

3.2. Origin and Historical Development

The right of a receiving state to declare *persona non grata* is a long-standing one, with multiple practical instances, as it is one of the oldest principles in diplomatic law and dates as far back as the works of the founding fathers of international law like Gentilis, Grotius, and Vattel.[202]

The earliest case of the use of *persona non grata* was in 1580, when a Spanish ambassador named Don Bernardino de Mendoza to Queen Elizabeth I of England, was ordered to leave within fifteen days after an investigation disclosed his involvement in a coup plot against the Queen.[203] Following the declaration, Queen Elizabeth sent an emissary to Spain to show the dispute was with Mendonza personally, not the sending state, and other ambassadors would be welcomed.[204] However, the attempt was unsuccessful, as the King of Spain was not willing to speak to them.[205] But that became the start of the practice of expelling a diplomat whose unwelcome act was considered to be personal and not related to the sending state.[206]

Another known early example was when a secretary to the Spanish ambassador was expelled by Henry IV of France and was escorted to the border after the discovery of his part in the conspiracy against the French regent.[207]

This state practice developed, and in the nineteenth century, the practice applied by most states was that the receiving state notified the sending state that the diplomat was no longer acceptable

[199] Ibid 117-8
[200] Satow (n 193) 180
[201] Nehaluddin Ahmad, Gary Lilienthal, Arman bin Haji Asmad, 'Abuse of Diplomatic Immunities and Its Consequences Under the Vienna Convention; A Critical Study' (2021) Vol. 30, Journal of Transnational Law and Contemporary problems 165, 168
[202] Jean d'Aspremont, 'Persona Non Grata', Max Planck Encyclopedia of International Law (2009) 1
[203] Denza (n 194) 61; Ahmad, Lilienthal, Asmad (n 201) 171
[204] Denza (n 194) 61
[205] Satow (n 193) 179
[206] Denza (n 194) 61
[207] Ibid

and requested his recall, in which the sending state recalls the offending diplomat, as he will no longer be able to perform his proper function.[208]

Scholars like Vattel (in his 1750 writing) were arguing for the unwelcomed diplomatic agent to be expelled by the host state only after appealing to the sending state for 'justice or recall of the offender', and during the nineteenth century, the cases of expulsion disappeared and requests for recall were met with and without reasons, even though the reasons were mostly known.[209]

In 1792, a French mister to the United States named Genest was found to be involved in an armed private ship to attach British commerce, and then the United States representative in Paris named Mr. Moris was instructed by the president to request for Genest's recall, which was immediately granted, and in return the French Government took the advantage and asked for the withdrawal of Mr. Moris, who took part in the effort to effect the escape of Louis XVI from part, which was accepted.[210] This is one of the earliest practices of a request for recall by the host state.

Contrary to the practice of requesting the recall without insisting on the reasons, few governments, the British being prominent, expect reasons to be provided for the recall of their diplomats abroad and also reserve the right to examine the adequacy of the reasons and would not recall unless satisfied.[211]

After the French Revolution of 1848, the Spanish Government implemented a reactionary measure, with the British Minister suggesting the Queen of Spain strengthen its executives. This was seen as interference in Spain's domestic affairs. The British Minister was requested to be recalled, but the British refused, leading to a dispute and two-year diplomatic interruption. The British argued that the British Government should determine the cause of complaint and whether the dignity and interests of Great Britain would be best served by withdrawing or maintaining the diplomat. Conversely, the United States and other governments argued that they did not have a duty to declare persona non grata, and the sending state had to recall the diplomat upon the declaration.[212]

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[208] Satow (n 193) 179-80
[209] Denza (n 194) 61
[210] Satow (n 193) 180
[211] Denza (n 194) 62
[212] Satow (n 193) 183

The two positions came into conflict in 1888 when the British Minister in Washington became *persona non grata* by the United States Government for the publication of a letter advising a former British subject on how to vote during an election campaign for which the British position was provided as:

> 'It is of course open to any government, on its own responsibility, suddenly to terminate its diplomatic relations with any other State, or with any particular minister of any other State. But it has no claim to demand that the other State shall make itself the instrument of that proceeding, or concur in it, unless that State is satisfied by reasons, duly produced, of the justice of the grounds on which the demand is made.'[213]

The United States had provided the reasons and also maintained its position that the British were under a duty to comply with the request by referring to Vattel, saying:

> 'When the government near which a diplomatic agent resides thinks fit to dismiss him for conduct considered improper, it is customary to notify the government which accredited him that its representative is no longer acceptable, and to ask for his recall. If the offence committed by the agent is of a grave character, he may be dismissed without waiting the recall of his own government. The government which asks for the recall may or may not, at its pleasure, communicate the reasons on which it bases its request; but such an explanation cannot be required'.[214]

The principle of *persona non grata* as we have seen above was part of the development process of diplomatic law. During the process of codification, it made part of the Harvard Draft of 1932, even though it didn't indicate whether reason must be provided along with the request to recall, which states, 'If a sending state refuses, or after a reasonable time fails, to recall a member of a mission whose recall has been requested by the receiving state, the receiving state may declare the functions of such person as a member of a mission to have been terminated'.[215]

During the preparatory works of the ILC and the Vienna Conference, there was a general agreement as to the granting of the right to request the recall of an unwanted diplomatic agent, and

[213] Denza (n 194) 62
[214] Ibid 62-3
[215] Jean d'Aspremont (n 202) 2; Ahmad, Lilienthal, Asmad (n 201) 180

reasons for such a request need not be given.[216] But there was a debate regarding two issues regarding this point.

The first dispute was as to whether the absence of an obligation to give reason should be expressly stated, and the ILC left the issue to the discretion of the receiving state.[217] In the Vienna Conference, based on the suggestion of the French delegate and through deliberation, the diverging perspectives were resolved, and they agreed reasons needed no longer be given by the receiving state when requesting the sending state to recall the diplomatic agent concerned.[218]

The second dispute was regarding the obligation of the sending state to abide by the request for recall. They finally agreed that the sending state is internationally obliged to recall the concerned diplomatic agent or to terminate his functions with the mission, but if the sending state refuses or fails within a reason to perform its obligation, the receiving state may refuse to recognize the diplomatic agent as a member of the mission.[219]

The above deliberation process by the ILC and then the Vienna Conference resulted in the inclusion of the principle of *persona non grata* in the enactment of the VCDR under Article 9 and the VCCR under Article 23, which are currently active.

3.3. Purpose of the principle of *persona non grata*

The main intention of the principle of *persona non grata* is to create a balance between the principle of sovereignty and territorial jurisdiction on the one hand and the principle of inviolability and immunity on the other.[220]

Since the beginning of the modern state system, the idea of sovereignty, which is the state's absolute and exclusive authority and control over its territory, has been a determinant part of international law.[221] The idea of statehood in general implies absolute sovereignty over a specific territory so that no external power can claim anything on what goes in that territory.[222] Within its territory, the state has jurisdiction to exercise on persons and properties and the major basis for

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[216] Denza (n 194) 63
[217] Ibid 63
[218] Ibid; d'Aspremont (n 202) 2
[219] d'Aspremont (n 202) 2
[220] Ahmad, Lilienthal, Asmad (n 201) 172
[221] David H. Ott, *Public International law in the Modern World* (1st ed, Pitman Publishing, 1987) 48
[222] Ibid 48

jurisdiction is the territorial principle, which states that a state has an absolute and exclusive authority over people, things, and events in its own territory and therefore exercises jurisdiction over them in all cases.[223]

On the other hand, the diplomatic agent of a state is covered by the principle of inviolability, as the agent concerned is inviolable. This principle of inviolability also covers the premise of the mission, archives and documents of the mission, domicile or private residence, correspondence or papers, and properties of the diplomatic agent. This can be observed from the provisions of the VCDR. The immunity of the diplomatic agent is based on the principle of inviolability as the immunity itself belongs to the state.[224]

One of the exceptions to the principle of sovereignty and jurisdiction is diplomatic immunity.[225] The objective of the privileges and immunities is not to benefit the diplomat or their families, but to ensure the effective and efficient performance of their official missions on behalf of their government, as it is provided in the preamble of VCDR, which states, '…the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states…'.[226]

There is a fundamental dichotomy between the granting of diplomatic immunity and the exercise of jurisdiction by local authorities, for which Grotius said[227]:

> 'On the one side stands the utility of punishment against grave delinquents [even if they be ambassadors] and on the other, the utility of ambassadors, the sending of whom is facilitated by their having all possible security ... the Law of Nations makes an exception in favor of ambassadors and those who come under the public faith. Hence, to put ambassadors under accusation is contrary to the Law of Nations, which permits many things which Natural Law forbids.'

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[223] Ibid 135

[224] Marcel Hendrapati, 'Legal Regime of Persona Non Grata and the Namru-2 Case' (2014) Vol, 32, Journal of Law, Policy and Globalization 161, 164

[225] Ott (n 221)135; Rosalyn Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) Vol. 79 No 3, The American Journal of International Law, Cambridge University Press 641, 641

[226] Fakhoury (n 198) 112

[227] Craig Barker, *International Law and International Relations; International Relations for the 21st Century* (University of Michigan, Bloomsbury Publishers, 2000) 166

Accordingly, although VCDR provides the duty of the diplomatic agents to respect the law and regulation of the receiving state, this duty is subordinate to the long-standing principle of inviolability and immunity.[228]

The primary mechanism that is available to the receiving state in response to the abuse of privileges and immunities by a diplomat or his family is to declare the individual *persona non grata* and request his recall or dismissal.[229] This is why it is said the principle of *persona non grata* keeps the balance between the principle of sovereignty and jurisdiction on the one hand and the principle of inviolability and immunity on the other. *Persona non grata* enables the receiving state to protect itself from the unacceptable conducts of members of the diplomatic mission and becomes a good mechanism of counterweight to the immunities granted.[230]

The ICJ in the case concerning United States Diplomatic and Consular Staff in Tehran (Tehran Hostage Case) stated that:

> 'the Vienna Convention constitutes a "self-contained regime which, on the one hand, lays down the receiving state's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving states to counter any such abuse'.

The ICJ further states Article 9 of VCDR provides a remedy for the abuse of diplomatic functions.[231]

So, declaring *persona non grata* is a mechanism provided for the receiving state when a member of a diplomatic mission offends the receiving state personally, not the sending state, that will enable the receiving state to make him leave while continuing the diplomatic relationship with the sending state.[232]

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[228] Ibid
[229] Ibid 167
[230] Denza (n 194) 64
[231] Ibid
[232] Satow (n 193) 179

3.4. The principle of *persona non grata* under the Vienna Convention on Diplomatic Relations

As we have discussed in previous parts, the principle of *persona non grata* developed as part of diplomatic law as a customary international law. It becomes part of the codification process of ILC to be included in the 1961 Vienna Convention on Diplomatic Relations[233] and the 1963 Vienna Convention on Consular Relations.[234]

Regarding the declaration of *persona non grata* of a consular agent under Article 23 of VCCR, the elements are the same, as it is based on Article 9 of VCDR.[235] Due to this, here we will discuss the details of the principle of *persona non grata* as provided under Article 9 of the VCDR.

Article 9 of the VCDR provides *persona non grata* as: -

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.
2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.

The first thing that can be observed is that a declaration of *persona non grata* of a diplomat is a right reserved for the receiving state. There was no question as to the discretion of the receiving state to terminate the activities of the mission of the sending state as it was developed as an integral part of customary international law; it was only the question of 'how' that had never been defined

[233] Opened for signature on 18 April 1961 and entered into force on 24 April 1964 and now it has 193 parties; <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en> accessed 30 April 2024

[234] Opened for signature on 24 April 1963 and entered into force on 19 April 1967 and now it has 182 parties; <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&clang=_en> accessed 30 April 2024

[235] Luke T. Lee, *Consular Law and Practice* (2nd Ed, Clarendon Press, Oxford, 1991) 102

before the adoption of VCDR.[236] This was due to the divergence of opinions between state practices as discussed in the previous section of this chapter.

Even though the receiving state has this right, it is customary to summon the head of the mission of the sending state, to confirm the position of the receiving state.[237] Although summoning is not provided under Article 9 of the VCDR, it is believed to be the first step of the declaration of *persona non grata*.[238] This step is believed to be based on international customary law, and it can also be observed from Article 3 of VCDR, which provides 'promoting friendly relations between the sending State and the receiving State' as the function of a diplomatic mission.[239]

It is also provided that the receiving state can declare *persona non grata* of the diplomat 'at any time'. Further, Article 9(1) sentence 3 states, 'A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State'. In the case of the head of the mission, this can be based on the process of *agrément* as provided under Article 4 of VCDR, which states:

1. The sending state must make certain that the *agrément* of the receiving state has been given for the person it proposes to accredit as head of the mission to that State.
2. The receiving state is not obliged to give reasons to the sending state for a refusal of *agrément*.

The provision provides no specific procedure for the practice of *agrément*.[240] It can be exercised through different means, like sending the name through the departing ambassador in the case of the first establishment of diplomatic relations by using the delegate of the state in the UN or third state, and so on.[241] The receiving state is at its discretion not to accept the appointment. Due to the delicate nature of the situation, even in circumstances where it is denied, no official information regarding the denial will be published.[242]

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[236] Niklas D. Wagner, Holger Raasch, Thomas Propstl, *Vienna Convention on Diplomatic Relation of 18 April 1961; Commentaries on Practical Application* (Christian Oelfke ed, BWV Berliner Wissenschafts-Verlag, 2018) 93
[237] Ibid
[238] Ibid
[239] Ibid
[240] Denza (n 194) 40
[241] Grant V. McClanahan, *Diplomatic Immunity; Principles, Practices, Problems* (Institute for the Study of Diplomacy, Georgetown University, St. Martines Press, 1976) 126
[242] Ibid

The practice of *agrément* only applies to the head of the mission, not other mission staff members, as Article 7 of VCDR doesn't provide such a requirement, except for 'military, naval, and air attachés'.[243] But the possibility of such a requirement is latent in Article 9 when it provides the person can be *non grata* or not acceptable before his arrival.[244] So by rejecting the request for *agrément,* the receiving state can terminate the diplomat before the arrival into its territory.

Article 9 does not require the receiving state to justify by providing a reason for declaring a member of a mission '*non grata*' or not 'acceptable' and as we have discussed in the previous section of this chapter, this was a point of discussion among different states, the USA and UK being the prominent ones. It was one of the points of discussion in the ILC, in which the majority leaned towards no provision of reasons in consideration of the sovereignty of the receiving state and avoidance of evidentiary problems in cases of abuse of privileges. The exemption of the obligation of the receiving state to provide a reason for the declaration of '*non grata*' or ' not acceptable' means it can be issued for an unlimited number of reasons, without providing evidence of illegal conduct of the member of the mission. [245]

Different countries have different levels for declaration of *non grata*, but the main ones are espionage, involvement in terrorist or subversive activities, and other breaches of criminal law.[246] The UK[247] and Germany[248] even declare *non grata* for parking offenses.

After the declaration of *persona non grata*, the sending state has the obligation either to 'recall the person concerned' or 'terminate his function with the mission'. But if the sending state refuses or fails to perform this obligation within a reasonable time, the receiving state is entitled to refuse the person concerned as a member of the mission by notifying the refusal as per Article 43(b) of VCDR. In such cases, the receiving state can take formal action against the formerly privileged person in the form of expulsion or legal prosecution.[249]

Article 9(2) of VCDR obliges the sending state to perform its obligation to recall the person concerned or terminate his function with the mission within 'a reasonable period' without

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[243] Ibid 127
[244] Ibid
[245] Wagner, Raasch, Propstl (n 236) 97
[246] Denza (n 194) 64-71
[247] Ibid 71
[248] Wagner, Raasch, Propstl (n 236) 96
[249] Ibid 98

providing a definition.[250] In literature, scholars like Eileen Denza claim forty-eight hours is in some cases the shortest possible time limit for departure from the receiving country.[251] Other literature provides any time between twenty-four hours and fifteen days to be appropriate.[252] Since the provisions of VCDR do not provide a reference as to the reasonable time limit, it has to be decided on a case-by-case basis.[253] In December 2005, Eritrea-Ethiopia Claims Commission (Eritrea's Claim 20), the Arbitration Tribunal responded to Eritrea's allegation that the period of twenty-five and forty-eight-hour notice given to its diplomats was unduly short that they were not in breach of Article 9 of VCDR as it was 'under the circumstances of an outbreak of hostilities between the two states' and in practice the Ethiopian government allowed the Eritrean diplomats expelled to gather their families and belongings before departure.[254]

Even though the rules are provided clearly, disputes between the sending and receiving states will not be avoided.[255] The most known dispute of declaration of *persona non grata* occurred in 1971 when the British government requested the withdrawal of 105 officials of the Soviet Union government, many of them being diplomatic staff of the Soviet Union's Embassy in London, which resulted in a prolonged dispute between the two governments.[256]

[250] Ibid
[251] Denza (n 194) 72
[252] Wagner, Raasch, Propstl (n 236) 98
[253] Ibid
[254] Denza (n 194) 72
[255] Satow (n 193) 184
[256] Ibid 184-5

CHAPTER FOUR

The Use of the International Law Principle of *persona non grata* concerning International Organizations

4.1. Introduction

Currently, there are more than 42,000 active international organizations and their number increases by approximate number of 1,200 annually.[257] To ensure their independent functions, most of them will seek privileges and immunities for the institutions, their officers, and their belongings.

With that number of organizations and countless personnel, abuse of privileges and immunities will be unavoidable. So, analyzing and identifying a mechanism for dealing with possible abuses is of tremendous importance.

At various times, different states have declared *persona non grata* on different officials and other diplomats of international organizations. One instance, which became the initial point of this study is the Ethiopian government's declaration of seven UN official's *persona non grata*, which was immediately rejected by the UN. Such instances raise the question as to the legality of such declarations according to international law. Here we will analyze the application of the principle of *persona non grata* concerning international organizations in general, and the Ethiopian government's decision and its aftermath in particular.

4.2. Applicability of the principle of *persona non grata* to International Organizations

4.2.1. General Overview

As we have discussed in the previous chapters, the principle of privileges and immunities is one of the earliest principles under international law.[258] The practice of diplomatic privileges and immunities has been very stable for a long time without even the assistance of international

[257] <The Yearbook of International Organizations | Union of International Associations (uia.org)> accessed 9 September 2024
[258] David B. Michaels, *International Privileges and Immunities; A Case for a Universal Statute*, (Martinus Nijhoff, The Hague, 1971) 7

agreements.[259] It is one of the earliest to be established as customary international law.[260] It is this customary international law that was codified into the VCDR.[261]

The principle of *persona non grata* developed as part of the privileges and immunities principle and, in time and became part of the codification process of the ILC and became Article 9 of the VCDR.[262]

International organizations emerged in the nineteenth century and were initially not considered to have immunity under customary international law as if they were states, as state practice on their privileges and immunities has been inconsistent.[263]

The status of privileges and immunities of international organizations as customary international law is unsettled, as there was no existing customary international law regarding the immunity of international organizations when the UN and its specialized agencies were created and the applicable treaties and conventions on their immunities were drafted, and the General Convention and the Special Convention did not codify any customary international law on the jurisdictional immunities of international organizations.[264]

There are two major ways for the development of customary international law, one being the development of the consistent practice of states, which in due time can form international customary law that can get codified to be a treaty and the second a formed written treaty provision can be developed to get the status of customary international law.[265]

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[259] Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th Ed, Oxford University Press, 2016) 1
[260] Denza (n 259) 1-2; Sir Ernest Mason Satow: *Satow's Guide to Diplomatic Practice* (Lord Gore-Booth ed, 5th Ed, Longman Group UK Limited, 1979) 4
[261] Eric Paul Witiw, 'Persona Non Grata: Expelling Diplomats Who Abuse Their Privileges' (1988) Vol. 9, No 2, New York Law School, Journal of International and Comparative Law 345, 346; Rosalyn Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' (1985) Vol. 79 No 3, The American Journal of International Law, Cambridge University Press 641, 642
[262] Jean d'Aspremont, 'Persona Non Grata', Max Planck Encyclopedia of International Law (2009) 1; Craig Barker, *International Law and International Relations; International Relations for the 21st Century* (University of Michigan, Bloomsbury Publishers, 2000) 167
[263] Michael Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law?' (2013) Vol. 10, International Organizations Law Review 287, 292-3
[264] Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, 2018) 269-74
[265] Ibid 273

If we see the issue of privileges and immunities of international organizations, as we have discussed above, there was no developed customary international law before the adoption of major treaties of privileges and immunities like the General Convention and Special Convention. This can be seen as there is no uniform type of immunity structure in various international organizations. Some assume to have absolute immunity and others functional and some don't even grant immunity. As we have provided in chapter two of this study, it was due to this that the ILC was not able to come up with a codified legal instrument on privileges and immunities of International Organizations and then later abandoned it in 1992.[266]

Regarding the second way of development of customary international law, there must be a treaty first that can be accepted by member and non-member states to be developed to the level it becomes custom. Here treaties or conventions like the General Convention can be relevant sources for the development of customary international law on the privileges and immunities of international organizations.[267] However, since the principle of *persona non grata* is not mentioned in the conventions, its applicability is unsettled and argumentative.

Regarding *persona non grata,* the recent declarations made by various states against officials of different International Organizations can be seen as an emerging state practice. Whether it is developed enough to claim it has attained the status of customary international law needs further study.

States while declaring *persona non grata* of officials of International Organizations, they claim they are acting within their sovereignty. As we have seen in the previous chapter, the purpose of the principle of *persona non grata* is to create a balance between the principle of sovereignty and territorial jurisdiction on the one hand and the principle of inviolability and immunity on the other.[268]

States refer to the basic right of sovereignty as a basis to declare *persona non grata* of officials of International Organizations. This can be seen from the declarations made by states. Sovereignty,

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[266] Peter H.F. Bekker, 'The Work of The International Law Commission on "Relations between States and International Organizations" Discontinued: An Assessment' (1993) Vol. 6, No 1, Leiden Journal of International Law 3, 16

[267] Okeke (n 264) 274

[268] Nehaluddin Ahmad, Gary Lilienthal, Arman bin Haji Asmad, 'Abuse of Diplomatic Immunities and Its Consequences Under the Vienna Convention; A Critical Study' (2021) Vol. 30, Journal of Transnational Law and Contemporary Problems 165, 168

which is a state's absolute and exclusive authority and control over its own territory is an essential feature of international law.[269]

The other argument can be the basis for international privileges and immunities. Unlike diplomatic privileges and immunities, which are based on reciprocity, the basis for international privileges and immunities is functionality.[270] So as long as it is not forbidden in the appropriate international legal instrument of the concerned institution and doesn't affect the function of International Organizations, it is allowed. This goes along with the basis the states are claiming which is sovereignty.

As can be observed from the current declarations made by states, they are expelling a specific official of an International Organization, not the organization itself. After the expulsion, the organizations are assigned for the continuance of the function of the organizations. Which means it is not against the function of the organization.

From the above points, we can see that even though the principle of *persona non grata* is not provided in various International Organizations as a mechanism of dealing with abuse of privileges and immunities of their officials, there is no clear legal stipulation that forbids states from doing so too.

4.2.2. The United Nations System

The privileges and immunities of the UN are mainly based on the UN Charter, the General Convention, and the Special Convention. The UN Charter provides the basic rules for immunities, and the General Convention and Special Convention provide its details. As can be seen from the general observation of the General Convention, there are no provisions dedicated to *persona non grata*.[271] Due to this, the UN has long maintained that the doctrine of *persona non grata* doesn't apply to its officials.[272]

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[269] David H. Ott, *Public International law in the Modern World* (1st ed, Pitman Publishing, 1987) 48
[270] Shaw 1007-8
[271] August Reinisch, *The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies; A Commentary* (Oxford University Press, Oxford, United Kingdom 2016) 295; Yu-Long Ling, 'A Comparative Study of The Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents' (1976) Vol. 33, Wahington and Lee Law Review 91, 155
[272] Reinisch (n 271) 357

One argument raised on the side of the UN is the principle of *persona non grata* is inconsistent with the provisions of the General Convention. As per the principle of *persona non grata*, as provided in Article 9(1) of VCDR, the receiving state 'without having to explain its decision' can determine 'head of the mission or any member of the staff of the mission is *persona non grata* or that any member of the staff of the mission is unacceptable' and once it is declared, the sending state must recall that person, and if it fails to do so within a reasonable time, as per Article 9(2) of VCDR, the receiving state may refuse to recognize that person as a member of the mission. This is inconsistent with Article V Section 18(d) of the General Convention, which gives the right to enter and remain in the duty station by saying, 'Official of the United Nations shall: (d) be immune together with their spouses and relatives dependent on them, from immigration restrictions and aliens registrations'.[273]

Another argument is that the application of *persona non grata* will interfere and be inconsistent with the right and duty of the Secretary-General to determine the act that is the basis for the declaration to have been performed in the course of official duty and whether to waive immunity. As per the principle of *persona non grata*, the host state declares it has the right not to provide a reason and also to refuse to recognize the individual in question to be a mission member after a reasonable time. This way, the theory of *persona non grata* will interfere with the independent role of the Secretary-General and contradict the legal framework that is established and provided by the General Convention to deal with cases of abuse of privileges and immunities of UN officials.[274]

The other argument is based on the provisions of the UN Charter. When we look at the provisions of the UN Charter, Article 101 provides the Secretary-General with the authority to appoint staff of the UN, and Article 100(2) provides for members of the UN to 'undertake to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities'.[275] In other words, 'UN personnel are therefore employed, as determined by the UN Secretary-General, "on behalf of all

[273] Anthony J. Miller, 'Privileges and Immunities of United Nations Officials' (2007) Vol. 4, International Organizational Law Review 169, 217
[274] Ibid 218
[275] Reinisch (n 271) 357

Member States, for purposes chosen by those States as a result of action taken on a multilateral plane"' as explained by the UN Office of Legal Affairs[276]:

> 'the principle of *persona non grata* which applies with respect to diplomats accredited to a government has no application with respect to United Nations staff…who are not accredited to a government but must serve as independent and impartial international officers responsible to the United Nations'

This independence would be in danger and neglected if a host state unilaterally, without a reason, was able to force any official to depart from his workstation.[277]

Even though the above arguments have been provided in support of the UN's argument against the application of *persona non grata* on its officials, there is no legal provision prohibiting states from declaring it and supporting the argument. Which makes the issue open to argument.

There are a number of instances where member states of the UN and its Specialized agencies have declared their official *persona non grata*. Somalia's declaration in January 2019 on the UN envoy, Tunisia's expulsion in February 2020 of the UN envoy, and Burundi's declaration on the WHO representative and three experts in May 2020 are just a few.

The declarations made by the above states didn't provide much explanation. This makes it hard to understand the legal reasoning the states based their decision on. What they have in common is, they mention sovereignty. The arguments provided above will be applicable here too.

Even though the UN condemns the declarations made by states, the issue has never been referred to the ICJ as per Chapter IV of the Statute of the International Court of Justice to get an advisory opinion, which would have provided a detailed understanding of the matter.

4.3. The Expulsion of UN Officials by the Ethiopian Government on September 30, 2021: A Legal Analysis

The Ministry of Foreign Affairs of the Ethiopian Government on 30 September 2021 declared seven officials of the UN *persona non grata* on its official Twitter (currently X) page for 'meddling

[276] Ibid 357-8; citing UN Office of Legal Affairs, Aide-Mémoire to the Permanent Representatives of various Member States concerning the status of military observers serving with a United Nations mission, 23 January 1964, (1964) UNJYB 261, 261

[277] Miller (n 273) 218

in the internal affairs of the Country' and 'Must Leave the Country within the next 72 hours'.[278] In a two-page press release from MFA on October 1, 2021, on the same platform, details and reasons for the declaration have been provided.[279]

In response, the UN Secretary-General issued a statement expressing his 'shock' regarding the declaration by the Ethiopian government.[280] Then the issue was referred to the UN Security Council and became the subject of discussion at the 8875th meeting of the Council on 6 October 2021. In which the Secretary-General provides the position of the UN by saying, 'The United Nations believes that Ethiopia is not right to expel these individuals. We believe Ethiopia is violating international law in doing so.' [281] The formal procedure mentioned is a waiver of immunity.

On the other side, the then Permanent Representative of Ethiopia to the UN, Taye Atskeselassie said:

> 'The sovereignty, territorial integrity and national unity of states must be fully respected in accordance with the Charter of the United Nations. The most fundamental element of the sovereignty of a state has to do with the prerogative to determine who enters, remains in and exits their territory.[282]

The UN argues that the principle of *persona non grata* cannot be applied in the case of international organizations, specifically the UN, as it is not provided in the legal instruments of the organizations. The General Convention and the Special Conventions did not incorporate a provision that is similar to Art 9 of the VCDR, which provides the details of the principle of *persona non grata* in state-to-state diplomatic relations. Rather, the conventions provide a waiver

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[278] Declaration by the Ministry of Foreign Affairs of Ethiopia made on the 30th of September 2021 <https://twitter.com/mfaethiopia/status/1443596419068305408?t=zp-gAj0og9blRh9Y9aCRcQ&s=19> accessed 7 May 2024

[279] Press Release by the Ministry of foreign Affairs of Ethiopia made on the 1st of October 2021 <https://twitter.com/mfaethiopia/status/1443978921872171026> accessed 7 May 2024

[280] Press conference given by the Spokesperson of the Secretary-General of the UN on the 1st of October 2021 <https://press.un.org/en/2021/sgsm20944.doc.htm> accessed on 07 May 2024

[281] Meeting Coverage of the Security Council for the 8875th Meeting Held on 6 October 2021, which can be found at <https://press.un.org/en/2021/sc14657.doc.htm> accessed on 10 May 2024

[282] Speech made by Ethiopian Representative to the UN Taye Atskeselassie on the 8875th meeting of the Security Council, the full speech can be reached at <https://webtv.un.org/en/asset/k1b/k1bz0f6wug> accessed 10 May 2024

of immunity as the main mechanism of dealing with the abuse of privileges and immunities by officials of the organizations.

This is a long-standing position of the UN regarding declarations of *persona non grata* of its officials by different states. In 2019, the UN issued a press release on the Somalia government's declaration of *persona non grata* of the UN permanent representative, claiming:

> 'The doctrine of *persona non grata* does not apply to, or in respect of, United Nations personnel. As described in the 1961 Vienna Convention on Diplomatic Relations, the doctrine applies to diplomatic agents who are accredited by one State to another in the context of their bilateral relations. The United Nations is not a State and its personnel are not accredited to the States where they are deployed, but work under the sole responsibility of the Secretary-General.'[283]

The position held by the UN is based on the non-availability of legal provisions that allow for the use of the principle of *persona non grata* on officials of the UN and its specialized agencies. Even though the UN has expressed this position persistently in the past and for current issues too, various states have declared officials of the UN *persona non grata*, the most recent one being the Israeli government's declaration on UN Secretary-General António Guterres on October 2, 2024..[284]

The Ethiopian government's standing is based on the principle of sovereignty, as it claims it is within the basic sovereign right of the state to declare a UN official's *persona non grata.* This has been expressed by the permanent representative of Ethiopia to the UN in the UN Security Council discussion mentioned above. Various states that made similar declarations have held similar standings, claiming sovereignty to be the source of their authority in declaring *persona non grata*.

Even though *persona non grata* is not provided in the General and Special Conventions, as provided in the VCDR, there is no legal basis that is enough to say it is not applicable. The argument provided by the UN claims *persona non grata* is only provided under Art 9 of VCDR. But, as has been discussed in detail in previous chapters, the principle of *persona non grata*

[283] Press release given by the Spokesperson of the Secretary-General of the UN on January 04, 2019 <https://press.un.org/en/2019/sgsm19424.doc.htm> accessed on January 9, 2025

[284] <https://www.i24news.tv/en/news/israel/diplomacy/artc-israel-declares-un-secretary-general-a-persona-non-grata> accessed on January 9, 2025

developed as part of the practice of the states and attained the status of customary international law before being confined to words in Art 9 of the VCDR.

As we have discussed in previous chapters, the privileges and immunities of International Organizations developed from the diplomatic privileges and immunities. On the other hand, it is not arguable that the principle of *persona non grata* developed as part of diplomatic privileges and immunities. However, it is arguable if the principle of *persona non grata* has attained the status of customary international law regarding the privileges and immunities of International Organizations.

Even though the principle of *persona non grata* is not provided in terms of the General and Special Conventions, as can be seen from this research, there is no clearly stated normative ground that prevents states from utilizing the principle against officials of the UN in particular and officials of International Organizations in general. This stance gets stronger when we look at the issue from the sovereign power of the states, which is the source and main initial point in international law.

In addition to this, even though the UN argues against the use of the principle in relation to the organization and its officials, there is no decision on an advisory opinion provided by the ICJ regarding this specific issue.

Even though the status of the principle of *persona non grata* in relation to International Organizations in general and the UN, in particular, is argumentative, the recent declaration of *persona non grata* by several states against officials of International Organizations, especially the UN, can show the emerging state practice that might develop to become customary international law in the future. The consistent objection by the UN on this issue will not have an impact on this, as International Organizations are not states.

As the practice shows, after the states expel the officials by declaring them *persona non grata*, international organizations like the UN are assigning replacements to carry out the functions of the expelled official. In addition, according to the press release by MFA of Ethiopia in regards to the road ahead, the relationship between the state and the UN will stay the same after the deployment of replacements.[285] This is the main aim of *persona non grata*, which allows the person not

[285] Press Release by the Ministry of Foreign Affairs of Ethiopia made on the 1st of October 2021 <https://twitter.com/mfaethiopia/status/1443978921872171026> accessed 13 January 2025

welcomed by the host state to leave without affecting the existing relationship with whoever sent him.

4.4. Available Remedies for Abuse of Privileges and Immunities in Legal Instruments of International Organizations

The principle of *persona non grata* is a primary way that is available for the receiving state to respond to an abuse of privileges and immunities that is granted to a diplomatic agent or his family.[286] Here we will discuss available remedies provided in legal instruments of international organizations as the principle of *persona non grata* is not provided.

4.4.1. Waiver of Immunity

International organizations that hold privileges and immunities from the jurisdiction of municipal courts can waive this immunity by their own consent or voluntary submission.[287] Waiver of immunity is a means of counterbalancing the exemption from local jurisdiction.[288] A waiver is developed as the procedure of recall (*persona non grata*) is lacking in international privileges and immunities, as international organizations are not nationals of any sovereign states.[289] It is a mechanism to prevent abuse of privileges and immunities by officials and members representatives.[290]

To see how legal instruments provide waivers under Section 2 of the General Convention:

> 'The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.'

As the privileges and immunities of international organizations are functional and not personal, such waivers have to be made by the chief of the mission for its subordinates.[291] For example, Section 20 of the General Convention makes it the right and duty of the Secretary-General of the

[286] Barker (n 262) 167
[287] Okeke (n 264) 313
[288] Josef L. Kunz, 'Privileges and Immunities of International Organizations' (1947) Vol. 41, No 4, American Journal of International Law 828, 839
[289] Ibid 851
[290] Kuljit Arluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (Martinus Nijhoff, 1964) 144
[291] Kunz (n 288) 839

UN to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the UN, while waiver of immunity for the Secretary General is the right of the Security Council.

Most international legal instruments do not define what constitutes a waiver, which makes it disputable. The ILC has recommended that in criminal proceedings the waiver must be expressed, whereas in civil or administrative proceedings the waiver can be expressed or simply implied.[292]

International organizations are not obligated to waive their own immunity but may have a legal duty to waive the immunity of their officials, according to most legal instruments on the privileges and immunities of international organizations.[293] This can be observed from Sections 20 and 23 of the General Convention, as the Secretary-General has to waive the immunity of an official if, 'in his opinion, the immunity will impede the course of justice'. Such duty is provided under Section 14 on Member States regarding representatives of members.

This duty goes with the obligation of the UN as provided in Section 21:

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

A waiver of immunity has been provided under Section 22 of the Specialized Convention, Section 17 of the UPU, Article 21 of the ILO, Article 20 of the WMO, Section 29 (a) of the FAO, Section 25 of the ICAO, Article 24 of the UNESCO, and Section 40 (a) of the IAEA Headquarters Agreements, Article 19 of the General Agreement on Privileges and Immunities of the Council of Europe, Article 13 of the ECSC Protocol, Article 17 of the EEC Protocol, and Article 14 of the OAS Multilateral Agreement.[294]

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[292] Ling (n 271) 124
[293] Okeke (n 264) 315
[294] Arluwalia (n 290) 144

4.4.2. The Right of the Host State to Expel Officials and State Representatives.

a. Section 13 of the Headquarters Agreement Between the UN and USA

Despite the provisions and procedures of the General and Special Conventions, as we discussed above, the Headquarters Agreements of the UN in Austria, Kenya, and the USA include provisions that allow the host states to initiate proceedings to require a specific UN official to leave their territory when there is an abuse of the right of residence.[295]

In the case of the Headquarters agreement between the UN and the USA, Section 11 provides the federal, state, and local authorities of the US will not impose 'any impediment to transit to or from the headquarters district of:

1. Representatives of Members or officials of the United Nations, or of specialized agencies as defined in Article 57, paragraph 2, of the Charter, or families of such representatives or officials,
2. experts performing missions for the United Nations or for such specialized agencies,
3. representatives of the press, or of radio, film or other information agencies, who have been accredited by the United Nations (or by such a specialized agency) in its discretion after consultation with the United States,
4. representatives of non-governmental organizations recognized by the United Nations for the purpose of consultation under Article 71 of the Charter, or
5. other persons invited to the headquarters district by the United Nations or by such specialized agency on official business.

Further Section 12 deals with reciprocity by providing the applicability of Section 11 of the Agreement irrespective of the government of the person referred to in that section and the government of the United States.[296]

In Section 13, it was agreed the laws of the USA regarding the residence of aliens should not be applied in a manner to interfere with the privileges provided in Section 11, and specifically in a

[295] Reinisch (n 267) 359
[296] Carol M. Crosswell, *Protection of International Personnel Abroad: Law and Practice Affecting the Privileges and Immunities of International Organizations* (Oceana Publications, 1952) 52

manner that requires any such person to leave the United States due to any activity performed by him in his official capacity.[297]

As the above protection is provided for the protection of the function of the UN, for the protection of the United States it is provided that in cases of abuse of privileges of residency any person on activities in the United States outside of his official capacity, the privileges provided in Section 11 should not be applicable to exempt him from the laws and regulations of the United States regarding the continued residence of aliens.[298] This is because the protection provided is only for the official acts of the person concerned. While this is the case, no proceedings can be instituted under the laws and regulations to require such a person to leave the United States without the prior approval of the Secretary of State of the United States, after consultation with the appropriate Member in the case of a representative of a Member (or a member of his family), the Secretary-General of the UN or the principal executive officer of the appropriate specialized agency.[299]

From this, we can understand that any of the people provided in Section 11 will enjoy the privileges of residency in the United States for their acts in an official capacity.[300] They can be deported from the United States for the abuse of privilege they commit outside of their official capacity, following the process provided in Sections 12 and 13 of the Headquarters Agreement.

The Headquarters Agreement provides 'every person designated by a Member as the principal resident representative to the United Nations of such Member', 'every person designated by a member of a specialized agency, as defined in Article 57, paragraph 2 of the Charter, as its principal permanent representative' and others provided in Section 15 of the Headquarters agreement are 'entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it'.[301] Further Article 13[b(3)]. the Headquarters Agreement provides that:

> 'In case of abuse of such privileges of residence by any such person in activities in the United States outside his official's capacity, it is understood that the privileges … shall not

[297] Ibid
[298] Ibid
[299] Reinisch (n 271) 359; Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations of 1947 (UN Headquarters Agreement), Section 13 [b (1)]
[300] Reinisch (n 271) 359
[301] UN Headquarters Agreement (n 299) Section 15

be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens, provided that:

> (3) Persons who are entitled to diplomatic privileges and immunities under Section 15 or under the General Convention shall not be required to leave the United States otherwise than in accordance with the customary procedure applicable to diplomatic envoys accredited to the United States.'

By applying this provision of the Headquarters Agreements there is room for the US government to initiate the process on a representative of a member state.[302] This procedure is to be applied with 'the prior approval of the Secretary of State of the United States' and the approval will be given only "after consultation with the appropriate Member in the case of a representative of a Member (or a member of his family)'.[303]

The main question here will be whether the principle of *persona non grata* is going to apply. Regarding this in a report to the General Assembly, the Secretary-General of the UN said 'the procedure for requiring persons entitled to diplomatic immunity to leave the United States "could not be applied in the case of a *persona non grata*"' and further explained there must be an independent act outside of the individual capacity.[304] The principle of *persona non grata* is the right of a government, to which the representative is accredited, to ask for his recall for any number of reasons, political or otherwise, which may make him unacceptable to the government to which he is accredited, but in the case of a representative of a Member of the UN, the accreditation is to the UN and not to the United States, and there should be some act outside the scope of his official functions before the United States could consider itself justified in asking for his recall.[305]

As can be observed from the words of the provisions of the principle of *persona non grata* provided under Article 9 of the VCDR and the procedure of expulsion under Section 13 of the Headquarters Agreement between the UN and the United States, the two have the same effect of expelling the concerned individual from the host state. But regarding the procedures, they are different, as mainly *persona non grata* is an independent act of the government without the need for

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[302] Ling (n 271) 155
[303] UN Headquarters Agreement (n 299) Section 13 [b (1)]
[304] Yuen-Li Liang, 'The Legal Status of the United Nations in the United States' (1948) Vol 2, The International Law Quarterly 577, 587
[305] Ibid

consultation with anyone, which is mandatory under Section 13 of the Headquarters Agreements, as the Secretary of State of the United States, is required to consult with the Secretary-General, Higher Official of the Special Agency concerned, or the member of the Member State representative. This shows the procedure can only be applied within very narrow limits and with much care.[306]

b. Section 25 of the Special Convention

This procedure is mainly provided under Section 25 of the Special Convention, which provides: -

1. Representatives of members at meetings convened by specialized agencies, while exercising their functions and during their journeys to and from the place of meeting, and officials within the meaning of Section 18, shall not be required by the territorial authorities to leave the country in which they are performing their functions on account of any activities by them in their official capacity. In the case, however, of abuse of privileges of residence committed by any such person in activities in that country outside his official functions, he may be required to leave by the government of that country provided that:
2. (I) Representatives of members, or persons who are entitled to diplomatic immunity under Section 21, shall not be required to leave the country otherwise than in accordance with the diplomatic procedure applicable to diplomatic envoys accredited to that country.

   (II) In the case of an official to whom section 21 is not applicable, no order to leave the country shall be issued other than with the approval of the Foreign Minister of the country in question, and such approval shall be given only after consultation with the executive head of the specialized agency concerned; and, if expulsion proceedings are taken against an official, the executive head of the specialized agency shall have the right to appear in such proceedings on behalf of the person against whom they are instituted.

This provision is provided in the Special Convention without having the same procedure of expulsion of UN officials in the case of abuse of privileges of residency in the General Convention, as it is based on Section 13 of the Headquarters Agreement between the UN and the United States.[307] As it is provided in the provision, this expulsion procedure can only be used for

[306] Ibid

[307] Miller (n 273) 215

individuals who abused their privileges and immunities in actions that were out of their official capacity.

This provision has two purposes, one, it provides a clear procedure to deal with how the government of the country in which the official or representative of the member is exercising their functions can deal with the situation when it wishes them to leave due to undesirable activities unrelated to their official function, and the second one is that it provides the officials and member state representatives with safeguards in cases of expulsion.[308]

It also provides procedures to be followed. In the case of representatives of member states and people that fall within the scope of Section 21 of the Special Convention, they will be treated in accordance with diplomatic procedures applicable to diplomatic envoys accredited to the country concerned.

Regarding officials of specialized agencies, the procedure of expulsion can only be instituted provided that the Ministry of Foreign Affairs of the county concerned approves it after consultation with the executive head of the concerned Specialized agency.

Section 22 (e) of the FAO Headquarters Agreement, Section 29 of the ICAO Headquarters Agreement, Section 27 (e) of the IAEA Headquarters Agreement, and Article 9 of the UNESCO Headquarters Agreement, are the same in substance as Section 25 of the Special Convention.[309]

Like we have discussed above relating to the process of expulsion under Section 13 of the Headquarters Agreement between the UN and the United States, there is the same question regarding the application of the process of expulsion under Section 25 of the Special Convention and the principle of *persona non grata*. The procedures provided in the two provisions are the same and are different, as have been already argued. This procedure is not a unilateral decision, as the engagement of the Specialized Agency is required in order to assess the circumstances of the case and duly provide officials with the needed protection for an effective exercise of their functions.[310]

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[308] Reinisch (n 271) 471
[309] Arluwalia (n 290) 152
[310] Reinisch (n 271) 473

CHAPTER FIVE

Conclusion and Recommendations

5.1. Conclusion

International diplomatic law allows members of diplomatic missions to be granted privileges and immunities, ensuring they are not under the jurisdiction of the receiving state, based on the principle of inviolability to protect the sending state's interests.

The principle of *persona non grata* was created to balance the immunity of the sending state with the sovereignty and jurisdictional immunity of the receiving state, allowing the receiving state to demand the recall of an unacceptable diplomatic mission member.

Through time and consistent practice by states, diplomatic privileges and immunities were able to attain customary international law. As part of the immunity doctrine, the principle of *persona non grata* also attained the same status. Then, through the works of the International Law Commission, these customary international laws of diplomatic privileges and immunities became codified to become VCDR and VCCR. As part of diplomatic privilege and immunity, the principle of *persona non grata* was included in the conventions as Article 9 of VCDR and Article 23 of VCCR. In addition to this, the UN adopted the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character in 1971 in an effort to come up with a generic convention for the privileges and immunities of international organizations. But this has failed as it hasn’t been effective yet, lacking enough accession.

Compared to diplomatic privileges and immunities, the beginning of international privileges and immunities, which are immunities of international organizations, is very recent, as the history of international organizations in itself is rather recent. International organizations emerged during the late nineteenth century and developed starting from the interwar era. The biggest growth was witnessed after the emergence of the UN.

Regarding immunity, Art 105 of the UN Charter provides for the functional immunity of the organizations. Based on this provision, the UN further adopted the General Convention and the Special Convention. These two conventions were used as sources while enacting conventions for the same effect by various international organizations.

The two conventions were not developed by the codification of customary international law, like the VCDR and VCCR, as there was no developed customary law of international privileges and immunities. This makes international privileges and immunities treaty-based mechanisms. So, the usage of the principle of *persona non grata* will depend on its existence in the provisions of each convention.

When we observe the provisions of conventions for the effect of international privileges and immunities, especially the General Convention and Special Convention, we wouldn't find any article containing the principle of *persona non grata* as a counterpart to Article 9 of the VCDR.

Recently, various states have declared *persona non grata* on officers of international organizations, mainly the UN. One is the declaration of *persona non grata* of seven UN officials by the Ethiopian Government on the 30th of September 2021, which was immediately objected to by the UN, stating it to be a violation of international law, claiming *persona non grata* cannot be applied to UN officials.

The issue between the Ethiopian Government and the UN became an issue of discussion at the Security Council on 6 October 2021. The Secretary-General argued that there was a procedure provided for such kinds of situations, and it was not followed. The procedure he was referring to is a waiver of immunities. The Ethiopian representative claimed such declarations had been made before by various countries, its government had legitimate reasons for the declaration, and the UN has been part of such discussions as to the declaration of *persona non grata* before. Also, the main basis on Ethiopia's argument is, the decision is within its sovereign right and is not in violation of international law.

It's clear from the words of the General and Special Conventions that *persona non grata* is not a mechanism provided. But this doesn't mean that Ethiopia violates international law by declaring it too. This is due to the lack of normative ground that prevents states from doing so.

In addition to this, the matter at hand has never been referred to the ICJ to get a decision or an advisory opinion on it, even though the UN consistently complained on it. This creates a gap in the law. Regarding the practice, after states expel the officials, the UN in replacing them with other personnel to continue their function.

States are continuing this practice of declaring officials of International Organizations in general and the UN in particular *persona non grata* and expelling them. This shows at least it is becoming an emerging line of state practice that might get the status of customary international law, if it did not achieve the status already. This requires further and detailed study in the future.

Besides the argumentative mechanism of *persona non grata,* international legal instruments provide available mechanisms to be used by host states in times of abuse of privileges and immunities. The main one provided in such instruments a waiver of immunity. As can be seen from the provisions, waiver of immunity can be exercised by the Secretary-General or head of the Specialized Agency in the case of officials, by the Security Council in case of the Secretary-General, and by the member state in the case of a representative of the member state. A waiver of immunity can be made only regarding the activities of the person concerned, which are made out of his official function.

Another mechanism is the procedure of expulsion provided under different headquarters agreements. The main one is the Headquarters Agreement between the UN and the United States. Section 13 of the same provides for the right of the United States to proceed with the expulsion of officials of the UN, specialized agencies or representatives of member states for abuse of the privilege of residence in their acts outside of their official capacity in the United States, to be done only by the Secretary of State after consultation with the Secretary-General and principal executive officer of the appropriate specialized agency concerned. This procedure cannot be applied to acts within the scope of their official capacity. A similar procedure has been provided in the conventions of different specialized agencies. The main one is provided under Section 25 of the Special Convention.

Even though the procedures of expulsion and declaration of *persona non grata* have the same result, which is the withdrawal of the individual concerned from the host state, they are different. States declare *persona non grata* without consultation with anyone for several reasons, even without disclosing the reason, which can be political or other. However, the procedure provided in Section 13 of the Headquarters Agreement or Section 25 of the Special Convention is to be used within limited boundaries, with consultation with the appropriate authorities.

5.2. Recommendations

After a thorough examination of the existence and applicability of the principle of *persona non grata* in the privileges and immunities of international organizations, the study has recommended the following:

- Since the applicability of the principle of *persona non grata* on international organizations is argumentative it is advisable for states to utilize the available mechanisms in the relevant international legal instruments, as a first line of measures to be taken against those officials of International Organizations that abuse their privileges and immunities.
- Even though there is no normative legal ground that clearly allows or prohibit the use of the principle of *persona non grata* in regards to International Organizations, the matter have to be referred to the appropriate international legislative organs and get a decision that will solve the issue. In regards to the United Nations, the issue has to be referred to the ICJ and get an advisory opinion, or a decision in a way that settle the argument.
- States while negotiating in the establishment process of International Organizations that grants privileges and immunities, have to carefully devise the provisions in a way that settles the issue.
- Since there is no developed normative legal ground to allow or forbid states from using the principle at this time, states can develop the emerging practice of *persona non grata* in relation to International Organizations, in a way that best serve their national interests.
- Regarding the use of the principle of *persona non grata* on UN officials, the Organizations have to do much better job that just complaining when states declare it on its officials and expel them and then after replace them with another officials. It should refer the case to the ICJ and get an advisory opinion on the matter.
- On the matter at hand, particular issues like the status of *persona non grata* regarding International Organizations, the emerging state practice of declaring *persona non grata* on officials of different International Organizations and if it is enough to claim it attains the status of customary international law, and others have to be studied in detail to have better picture and develop the level of knowledge on the matter.
- Since Ethiopia is one of the biggest hubs on International Organizations in the world and Headquarter Agreements provide a way for the host state to better protect its interest

regarding the utilization of privileges and immunities, its better for the relevant government organs like the Ministry of Foreign Affairs to negotiate on the terms in a way that best suits the interest of the state. It shall include the right of the state to expel officials of the International Organizations from Ethiopia if and when s/he abuses their privileges and immunities.

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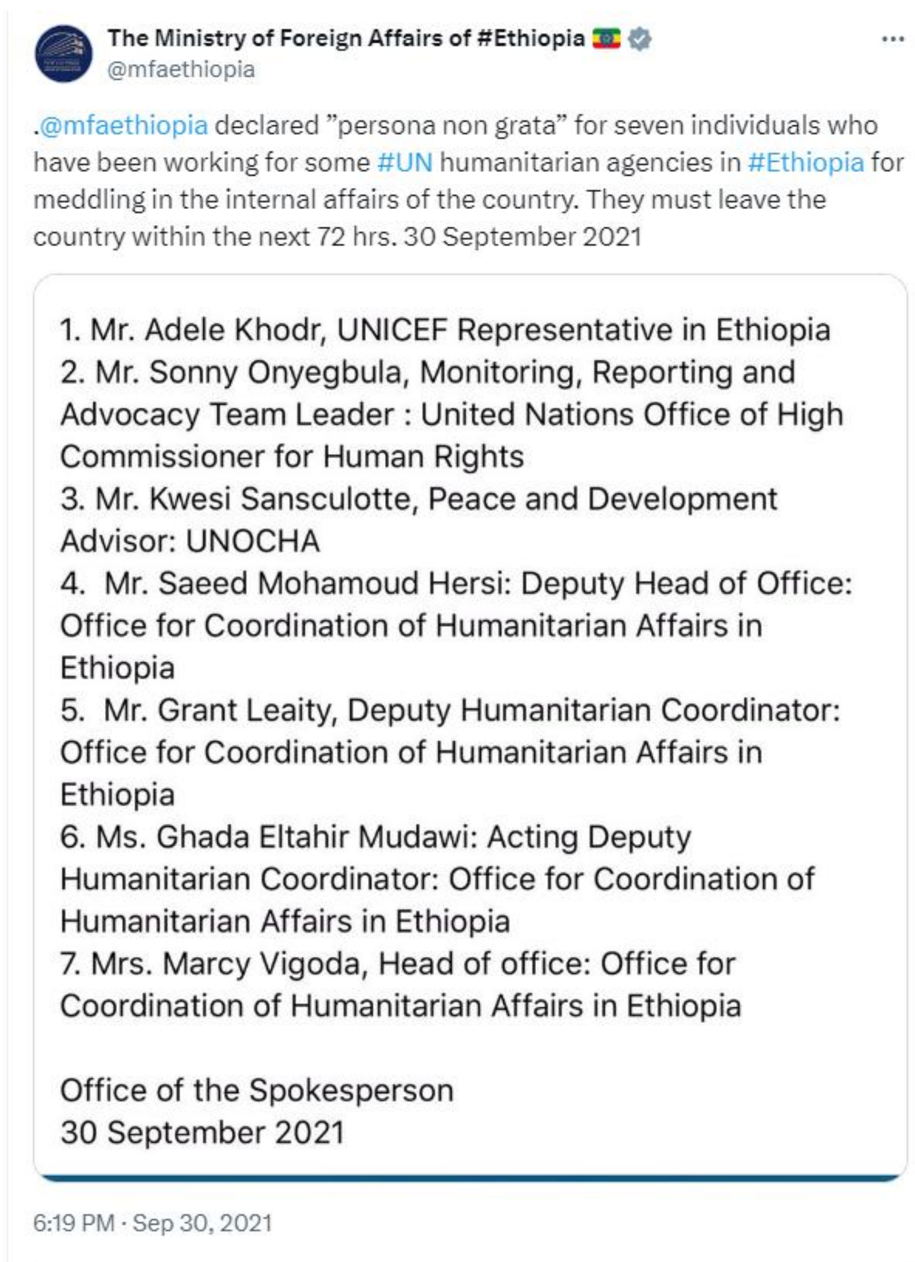
Annex

1. Declaration of *persona non grata* for seven UN officials made by the Ministry of Foreign Affairs of Ethiopia on September 30, 2021, in its official Channel on Twitter (Currently X).



The Ministry of Foreign Affairs of #Ethiopia
@mfaethiopia

.@mfaethiopia declared "persona non grata" for seven individuals who have been working for some #UN humanitarian agencies in #Ethiopia for meddling in the internal affairs of the country. They must leave the country within the next 72 hrs. 30 September 2021

1. Mr. Adele Khodr, UNICEF Representative in Ethiopia
2. Mr. Sonny Onyegbula, Monitoring, Reporting and Advocacy Team Leader : United Nations Office of High Commissioner for Human Rights
3. Mr. Kwesi Sansculotte, Peace and Development Advisor: UNOCHA
4. Mr. Saeed Mohamoud Hersi: Deputy Head of Office: Office for Coordination of Humanitarian Affairs in Ethiopia
5. Mr. Grant Leaity, Deputy Humanitarian Coordinator: Office for Coordination of Humanitarian Affairs in Ethiopia
6. Ms. Ghada Eltahir Mudawi: Acting Deputy Humanitarian Coordinator: Office for Coordination of Humanitarian Affairs in Ethiopia
7. Mrs. Marcy Vigoda, Head of office: Office for Coordination of Humanitarian Affairs in Ethiopia

Office of the Spokesperson
30 September 2021

6:19 PM · Sep 30, 2021

2. Press Release given by Ministry of Foreign Affairs of Ethiopia on October 1, 2021, in its official Channel on Twitter (Currently X).

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THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA MINISTRY OF FOREIGN AFFAIRS

ፕሬስ መግለጫ PRESS RELEASE

Press Release

As a founding member of the United Nations, Ethiopia has through the years amply demonstrated its commitment to the UN Charter. UN agencies, in particular, those in the humanitarian area also had a long presence in Ethiopia providing lifesaving humanitarian assistance to millions. It goes without saying that Ethiopia appreciates all the support that these UN agencies have been extending to our people in need of assistance.

It should be recalled that the Government of Ethiopia has signed a Memorandum of Understanding on Enhanced Coordination Mechanism for Humanitarian Access in the Tigray Regional State with UN agencies on November 29, 2020. This MoU entrusts these agencies with the task of providing lifesaving humanitarian assistance to the affected population.

In connection to the current situation in the Northern part of Ethiopia, we had sadly observed that some UN staff have failed to fulfill their mission independently and impartially in accordance with the abovementioned MoU and the relevant principles of the UN. These serious violations have been brought to the attention of the relevant UN high officials and other international partners on multiple occasions, but to no avail. Despite these communications of concern, the grave violations persisted. As such, as a measure of last resort, the Government of Ethiopia had to ask some officials of UN agencies to leave the country.

Therefore, in order to avoid confusion regarding the measure taken by the Government, we wish to highlight some of the following breaches: which these individuals have committed in violation of their professional code of conduct:

1. Diversion of humanitarian assistance to the TPLF;

2. Violating agreed-upon security arrangements;

3. Transferring communication equipment to be used by the TPLF;

4. Continued reticence in demanding the return of more than 400 trucks commandeered by the TPLF for military mobilization and for the transportation of its forces since July 2021; and

5. Dissemination of misinformation and politicization of humanitarian assistance.

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⊠393 Addis Ababa,Ethiopia

“ የመረጃውን ምንጭ መጥቀስ አይዘንጉ ”

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THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA MINISTRY OF FOREIGN AFFAIRS

ፕሬስ መግለጫ PRESS RELEASE

Ethiopia is deeply disappointed by the fact that some countries are urging the United Nations Security Council to consider this matter. This is a blatant violation of Ethiopia's sovereign prerogative on matters of national security. We are confident the Security Council will reject this undue politicization of humanitarian assistance.

We are confident that the provision of humanitarian assistance will not be affected due to this measure. In fact, TPLF's continued attacks against civilians, forced displacement of people, the killing of cattle, destruction of economic assets, and commandeering of more than 400 trucks happen to be major factors that are exacerbating the humanitarian situation. Unfortunately, some within the international community seem to be intent on downplaying such behavior on the part of the TPLF and problematize the legitimate exercise of a sovereign prerogative by the Government of Ethiopia.

The Government of Ethiopia reiterates its firm commitment to the principles of multilateralism and values enshrined in the UN Charter, while at the same time calling upon the United Nations to continue to uphold the principles of impartiality and neutrality. We will continue to cooperate with the UN and its agencies whose objectives correspond to the task of alleviating the suffering of our people during these difficult times. The Government of Ethiopia would like to make it abundantly clear that cooperation with multilateral agencies, including those of the UN will continue, provided that their activities do not undermine the sovereignty of Ethiopia and pose a threat to its national security interests. We urge the UN to expeditiously replace these personnel to allow the continuation of our cooperation in providing humanitarian assistance. We will work with the UN Secretary-General, the Humanitarian Coordinator, and the Resident Coordinator to facilitate the early deployment of the new personnel.

01 October 2021

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" የመረጃውን ምንጭ መጥቀስ አይዘንጉ "