SUMMARY NOTES ON PUBLIC INTERNATIONAL LAW

These notes are just a guide to help the students in their reading. Students still have an obligation to refer to the main course materials authored by Shaw, Hillier or Harris.

JURISDICTION:

In law, once the word Jurisdiction is mentioned, the mind automatically adverts to the jurisdiction of courts which is the power to adjudicate over and determine a dispute brought before the court.

Jurisdiction however in this context refers to State jurisdiction. State Jurisdiction is an aspect or consequence of sovereignty. It is the competence a state has under international law to regulate the conduct of natural and artificial persons. It is the extent of a state's power to regulate conduct or the consequence of events.

State Jurisdiction usually takes the following forms:-

Prescriptive Jurisdiction – This is the power of the state to make laws.

Enforcement Jurisdiction – This is the power of the State to enforce laws or take executive actions.

Adjudicative/Judicial Jurisdiction – This is the power to take judicial action or the application of municipal law by a court.

State Jurisdiction is usually exercised territorially under International law but can, subject to principles of International law, be exercised extra territorially. International law therefore determines the possible limits of a State's jurisdiction, that is, whether a state is permitted to exercise jurisdiction outside the state's territory and how such extra territorial jurisdiction may be exercised. Municipal law, on the other hand prescribes the extent and the manner in which a state may assert jurisdiction. For example, while International law dictates whether jurisdiction can be exercised over offences or acts done outside the state's territory or by persons not within the state's territory, municipal law dictates how criminals may be prosecuted, what offences they may be prosecuted for and the prescribed punishment.

International law however, does not give states the sovereign right to exercise jurisdiction in whatever circumstances the state so decides to exercise. Under International law, for a state to exercise jurisdiction, there must be a genuine connection between the state seeking to exercise jurisdiction and the subject matter over which the state seeks to exercise jurisdiction. A state has the right to exercise jurisdiction within the limits of sovereignty but is not entitled to encroach upon the sovereignty or sovereign rights of another state in so exercising except as prescribed by rules of International law.

A state also has the right to recognize the corresponding right of jurisdiction inuring to other states. Jurisdiction implies respect for the corresponding rights and sovereignty of other states. In the Lotus case, the PCIJ stated that 'a state may not exercise it power in any form in the territory of another state. Jurisdiction cannot be exercised by a state outside its territory except by virtue of a permissive rule of International law.

We shall focus more on criminal jurisdiction under public international law.

PRINCIPLES OF INTERNATIONAL LAW ON CRIMINAL JURISDICTION:

There are five general principles as identified by the Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935. These principles are not exhaustive but are mainly general

principles used to categorise the type of jurisdiction exercisable by a state under International law.

Territorial Jurisdiction:

This refers to the power of a state to exercise jurisdiction over crimes committed within the territory of the state. Events occurring within a state's territorial boundaries and to persons within the territory of the state are subject to the municipal law and jurisdiction of that state. This principles of jurisdiction is widely accepted within the international community.

There are two categories of Territorial Jurisdiction principles –

The Subjective Territorial principle – This is jurisdiction over crimes or acts commenced within a state's territory even if the acts were completed or consummated elsewhere. See Treacy vs DPP; DPP vs Doot.

Objective Territorial Principle – This is jurisdiction over acts completed or consummated within a state's territory. The acts may have been planned or commenced in another state's territory but were completed within the territory of the state seeking to exercise jurisdiction. See the Lotus case.

The Nationality Principle:

This is where a state seeks to exercise jurisdiction on the grounds that the acts were perpetrated by persons who are nationals of the state at the time the crime was committed.

A state cannot enforce its laws within the territory of another state but can punish or exercise it jurisdiction over its nationals who commit offences abroad. A state under international law can grant nationality to anyone in accordance with its municipal law but there must be a genuine connection between the state and the person. See the Nottebohm case.

The Passive Personality Principle:

Under this principle, a state seeks to exercise jurisdiction where victims of an offence are the nationals of the state. The state, relying on this principle, exercises jurisdiction over the perpetrator of the offence. See the Cutting case; United States vs Yunis.

The Protective/Security Principle:

Under this Principle, states seek to exercise jurisdiction over acts done abroad which are considered injurious to the internal or external security of the state and the integrity or vital economic interests of the state. This principle is not as well defined as the other principles and has not received popular support within the international community. The British House of Lords relied on this principle in the Joyce vs DPP case.

A principle called the Effects Doctrine and linked to the Protective/Security principle was developed by the United States. Under this doctrine, State can claim jurisdiction over acts committed abroad which produce harmful effects within the territory of the state. This doctrine has mostly been utilized by the United States in the area of US anti-trust law and anti-cartel law. See the Alcoa decision. This trend however is yet to be accepted by the International Community.

The Universality Principle:

Under this principle, any state can exercise jurisdiction irrespective of where the offence or act took place. It should be noted that International law is yet to come up with a definition of what constitutes an offence or a crime. However, certain acts have been identified and classified into various

offences under international law despite the fact that unlike, municipal law, there is no concise definition of the word, offence or crime under international law.

This principle applies to acts so heinous that they are considered inimical and detrimental to the interests of the International Community. The justification for the principle is to ensure the prevention of certain acts as a matter of International Public Policy.

The character of the act or offence determines whether the universality principle will apply. The principle originally applied to acts constituting piracy on the high seas under international law and was then extended to other offences such as slavery, hijacking. Universality principle currently also applies to offences classified as Genocide, Crimes against Humanity, War crimes, etc, under international law. See the Eichmann case. This principle can also come into operation as a result of a treaty.

Double Jeopardy

Obviously, there are cases in which more than one country will seek to exercise jurisdiction under any of the principles enunciated above which can lead to situations of double jeopardy, that is, a situation where a person who has been tried and convicted or acquitted for a crimes is subsequently tried again for the same crime. Most municipal laws contain provisions similar to the legal principle of autre fois convict or autrefois acquit. In such situations where the principle applies, then a party who had previously been tried and convicted or acquitted by a state cannot be tried by another state for the same crime so long as the principle is applicable in the latter state.

Extradition

Extradition refers to a process whereby, pursuant to a treaty or agreement or upon the basis of reciprocity, a state surrenders to another state, at the request of the latter state, a person accused or convicted or a criminal offence committed against the laws of the requesting state provided the said requesting state has jurisdiction. The following points should be noted:

Extradition is based on a treaty, agreement or principle of reciprocity.

There must be a request for extradition from a state with jurisdiction.

Extradition is justified under international law on the following grounds:

To ensure that serious crimes do not go unpunished. There are instances where a person who has committed an offence, decided to flee the country where the offence was committed to another state that may lack the resources or even the jurisdiction to prosecute. In such situations, the second state will prefer to surrender the criminal to a state that can prosecute.

The state on whose territory the offence was committed is usually in the best position to prosecute due to the availability of evidence, witnesses, etc in the state.

In order for extradition to take two places, the following conditions must be satisfied:

There must be an extraditable person. In other words, the person sought to be extradited must be an actual human being and not eligible to claim immunity.

There must be an extraditable crime. Acts designated as political offences, military offences or religious offences do not constitute extraditable crimes. It should be pointed out that a political crime is not a terrorist crime. An example of a political crime is where for instance, a person is sought to be prosecuted for expressing his religious views or beliefs in a state that practices a different

religion. Extraditable crimes are usually specified in the Extradition agreement. The offence for which extradition is sought must also constitute an offence in the two states as it is a general principle that a state should not prosecute an offender for any offence other than the one for which he was extradited.

Asylum

Asylum has been defined as the protection granted by a state to someone who has left their home country as a political refugee. A more general definition would be to say that Asylum is the protection granted by a state to a foreign citizen against his own state. Asylum involves two elements – Shelter and protection.

Asylum can be territorial asylum, that is, asylum granted by a state on its own territory: or it could be extra territorial asylum, that is, asylum granted by a state within its consular premises or diplomatic missions situate within the territory of another state. Every state has a right to grant territorial asylum but this right is subject to the provisions of any extradition treaty entered into by the state. There is also a corresponding right to seek asylum inuring to individuals but the right of asylum may not be invoked in cases of prosecutions genuinely arising from non-political crimes or from acts contrary to the purpose and principles of the United Nations.

The granting of territorial asylum is regarded as an aspect of state territorial sovereignty. The United Nations General Assembly adopted a resolution, the UN Declaration on Territorial Asylum, adopted on 14 December 1967 recommended a number of practices and standards to be adopted in granting asylum viz:

A person seeking asylum from persecution should not be rejected at the frontier – the individual case should be considered properly. This is generally known as the principle of non-refoulement.

If a state finds difficulty in granting asylum, international measures should be taken to try and alleviate the burden:

Asylum should be respected by all other states.

The principle of non-refoulement has been accepted as part of customary international law.

There exists no general right to grant diplomatic asylum in cases of extra-territorial asylum. Extra-territorial asylum may be granted in exceptional cases such as:

As a temporary measure to individuals in physical danger.

Where there is a binding local customary rule that diplomatic asylum is permissible.

Where there is a special treaty providing for extra-territorial asylum.

IMMUNITY

Immunity under International law refers to immunity from enforcement of the law over certain people, things and events. It does not equate to immunity from the law itself. States, as stated above have jurisdiction within their territory, thus, persons within a state's territory and their properties are within the state's jurisdiction. However, although the law still governs within that state's territory, international law recognizes that certain persons, by virtue of their positions, even though situate within a state's territory, are entitled to be exempted from enforcement of the law. Immunity has been defined as the tool or principle that protects the sovereignty and independence of states by preventing them or their agents from being prosecuted before foreign courts.

Individuals entitled to immunity from jurisdiction can thus avoid legal pursuits before the court of another state.

Immunity does not mean non-justiciability. Non-justiciability means that a court lacks the power to exercise jurisdiction. A non-justiciable matter cannot be deliberated before a municipal court. Immunity arises where a court ordinarily can exercise jurisdiction but due to the identity or position of the party or parties involved, will refrain from exercising its jurisdiction. Immunity can be waived but waiver does not however apply to a non-justiciable matter.

Immunity is applicable to the following category of persons under International law:

State Immunity – enjoyed by foreign states or foreign head of states.

Immunity enjoyed by foreign armed forces.

Diplomatic Immunity – enjoyed by diplomatic agents or representatives and consuls of foreign states.

Immunity enjoyed by International Organisations.

State Immunity

This derived from the personal immunity of sovereign heads of state. At International law, all sovereigns are considered equal and independent. The principle of sovereignty would be eroded if one sovereign could exercise power and authority over another sovereign. See Exchange vs McFaddon.

State immunity has also been linked to the prohibition on one state interfering in the internal affairs of another state under international law. See Buck vs AG.

Immunity can arise ratione personae or ratione materiae, that is, immunity is applicable because of the identity or category of persons involved or immunity is applicable because of the subject matter or the acts involved. In other words, in other to determine whether immunity ought to be granted, the identity of the person claiming immunity is first ascertained and then the act in question is also ascertained in appropriate cases.

Traditionally, Immunity was absolute and applied to all actions of foreign states. See the Parlement Belge; Krajina vs the Tass Agency. However, with the growth of commercialization, it was argued that there ought to be a distinction between public acts of states (known as acts jure imperii) and private or commercial acts (jure gestionis). A restrictive view of immunity then developed in which case, only acts jure imperii were entitled to immunity. See Trendtex Corporation Ltd vs Central Bank of Nigeria; I Congreso del Partido. It should be noted however that the doctrine of absolute immunity applies to Heads of States and is usually extended to such members of their families that form part of their household.

Foreign Armed Forces Immunity

Members of the armed forces of a state enjoy a limited immunity from local jurisdiction while in the territory of another state. It should be pointed out that such immunity only applies where the foreign armed forces is in the territory of a state with the consent of the host state.

The extent of immunity to be enjoyed and the nature of same depend on the circumstances under which the foreign armed forces were admitted into the territory of the Host state and the agreement between the two states. The status and immunities to be enjoyed by the armed forces are usually

specified in the agreement. Usually, the host state as the receiving state is deemed to have impliedly agreed not to exercise jurisdiction in such a way as to impair the efficiency and integrity of the foreign armed forces.

It has been said that the general rule is that the commander of the visiting forces has exclusive jurisdiction over offences committed within the area where the force is stationed or while members of the force are on duty.

Diplomatic Immunity

This is governed by the Vienna Convention on Diplomatic relations 1961. The Vienna Convention codifies existing rules of Customary law which previously governed diplomatic relations. The principles enshrined in the Vienna Convention have been codified in Nigeria into the Diplomatic Immunities and Privileges Act.

It has been said that diplomatic immunity can be justified on the following basis:

Personal Representatives – This theory is predicated on when diplomatic relations involved the sending of personal representatives of the sovereign. Immunity extended to these personal representatives were seen as an extension of sovereign immunity.

Extra-Territoriality – This theory was founded on the belief that the offices and homes of the diplomat were to be treated as though they were the territory of the sending state. It should be pointed out that currently, although the offices and homes of the diplomats are accorded immunity, they are not accorded immunity because they are considered the territory of the sending state.

Functional Necessity – Privileges and immunities attaching to diplomats are necessary to enable them perform their diplomatic functions effectively. It is necessary for a diplomat to move freely and negotiate on behalf of their governments unhindered and also send back reports to their governments without fear.

There is no right to diplomatic relations. Diplomatic relations exist only by consent and a receiving state may declare any member of a diplomatic mission persona non grata. Where this happens, the sending state must withdraw the diplomatic agent or run the risk of the receiving state withdrawing immunity. See Article 9 of the Vienna Convention.

Article 22 of the Vienna Convention provides that the premises of the Diplomatic Mission, including the Embassy buildings, compound and the residence of the head of the mission are inviolable. Agents of the receiving states wishing to gain access to the premises of the Diplomatic Mission must first seek the consent of the Head of the mission. The receiving state is also under a duty to provide adequate and all reasonable protection to the diplomatic mission.

There are five main categories of persons entitled to immunity under the Vienna Convention –

The head of the Mission; and

Members of the diplomatic staff.

The head of the mission is usually the Ambassador. The appointment of the head of the mission requires the consent of the receiving state. The sending state, also has the obligation of sending details of all members of the diplomatic mission to the receiving state in order to be entitled to invoke immunity.

The head of the mission and the members of the diplomatic staff are referred to as diplomatic agents and receive the highest level of immunity. The person of a diplomatic agent is inviolable and they shall not be subject to any form of arrest or detention and the receiving state is under a duty to ensure their protection- Article 29. They also enjoy complete immunity from criminal jurisdiction of the receiving state and also enjoy extensive immunity from civil and administrative jurisdiction – Article 31. See also Articles 33 to 36.

These immunities extend to their families if they are not nationals of the receiving state – Article 37. Article 30 deals with the immunity extended to the premises of a diplomatic agent, his papers and correspondence. Article 32 deals with waiver of immunity while Article 38 provides for the immunity to be enjoyed by a diplomatic agent who is a national of the receiving state.

The members of the administrative and technical staff.

The members of the administrative and technical staff and their families enjoy similar immunities to that enjoyed by diplomatic agents provided that these members of the administrative and technical staff and their families are not nationals of the receiving state. While the immunities enjoyed by members of the administrative and technical staff (who are not nationals), with respect to immunity from criminal jurisdiction, are as extensive as that enjoyed by diplomatic agents, they only enjoy immunity from civil and administrative jurisdiction in respect of official acts. Acts performed outside the course of their duties are not entitled to immunity.

The members of the service staff.

Members of the service staff who are not nationals of the receiving state enjoy immunity in respect of acts performed in the course of their duties.

Private Servants.

Private servants who are not nationals of the receiving state enjoy exemption from local taxation only unless there is a specific agreement extending the immunity to be applicable to them.

Article 24 of the Vienna Convention makes the archives and documents of the diplomatic mission inviolable. Article 27 provides for free communication and mandates the receiving state to allow and protect freedom of communication for the mission. It also makes the official correspondent of the mission inviolable and stipulates that the diplomatic bag shall not be opened or detained.

Consular immunity extends to consulates, vice consulates and consular posts. A consulate is the office of a consul and is a subordinate branch of a diplomatic mission situate in the same country but in a different part of the country. The job of a consular officer is to represent and deal with nationals of the sending state. Consular officers and the consulate also enjoys certain immunities but not as extensive as the immunities enjoyed by diplomatic agents. The Vienna Convention on Consular Relations deals with consular immunity.

The law on consular relations is similar to the law on diplomatic relations and exists only by agreements between two states. Similarly, a consular official can be declared persona non grata. The Consular premises, archives and documents are inviolable and consular staff are entitled to freedom of movement subject to the requirements of national security. They also enjoy freedom of communication. Consular officials do not however enjoy complete immunity from criminal jurisdiction like diplomatic agents. Consular staff cannot be arrested or detained except where the crime committed is a grave crime. They can also be subjected to criminal proceedings. Immunity from civil and administrative jurisdiction can only apply to acts performed in the exercise of consular functions. Members of the consular staff's family do not enjoy significant immunities.

International Organisations.

There is no general law applicable to the immunity enjoyed by international organisations or governing the relations between these organisations and their host states. The Immunity and privileges to be enjoyed by international organisations are usually the subject matter of specific agreements between these organisations and their host states. These immunities and privileges are also usually found in the constituent charter establishing such organisations and which are binding on states who are signatories to the charter.