

INVIOABILITY OF DIPLOMATIC PREMISES: A FUNCTIONAL NECESSITY AND REPRESENTATIVE THEORY ANALYSIS

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Abstract

Diplomatic premises provide a very crucial administrative and residential forum for the performance of diplomatic functions. On the one hand is the necessity to guarantee the protection of the diplomatic premises. On the other hand, is the necessity to prevent abuse of diplomatic premises. The first is secured through the inviolability of the diplomatic premises, including the preclusion of entry by the receiving State except by consent of the sending State. No effort is however made to prevent or deter abuse of diplomatic premises. This paper examined the justifications of inviolability of diplomatic premises using the functional necessity and representative theories. The doctrinal research methodology was adopted. The Vienna Convention on Diplomatic Immunities constituted the primary source of data. Secondary sources used were books, journal articles and online materials. The paper found that the fundamental basis of the immunity is twofold: representative and functional necessity. By representation, diplomatic immunities and privileges derive from the sovereign status of States in international law which excludes a State from being subject to the jurisdiction of another State. The functional necessity basis on the hand is anchored on the argument that the immunities and privileges are necessary for the performance of diplomatic functions. It argued that, there is no justified basis on the functional theory why the receiving

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State should not be granted a limited or qualified right to enter the diplomatic premises and search where there is reasonable suspicion that the premises is used for criminal enterprises. It concluded that diplomatic relations should be anchored on transparency and openness rather than approached as a secret mission in the receiving State. Therefore, the totalitarian posture of immunity of diplomatic premises under the VCDR needs to be reviewed to better protect the national security interests of the receiving State and enhance openness in international relations.

1. INTRODUCTION

A strategic institutional, administrative and policy framework for diplomatic relations is very crucial in international law. This is in consideration of the inevitability of State interactions between and among themselves. The point needs to be made that it is indisputable that no country of the world is an Island. Put differently, no country can survive in isolation and exclusion from other countries.¹ This is as a result of different factors including differences in skills and technological know-how, climate, natural resources and level of development. Countries must therefore necessarily inter-relate through the building of socio-economic, political, health, entertainment, and military co-operations among others.² The interdependence of nations, which has resulted in globalization, becomes therefore both inevitable and desirable for shared global prosperity.³

Beyond the above, international friendly relations is inevitable for the socio-economic development of any State. This is because there is no

¹ J M Hans, *Politics Among Nations* (6th edn, Kalyani Publishers 2012) 130.

² N S Okogbule, 'Globalization and Human Rights in Africa: Exploring the Legal and Historical Perspectives' [2012] (3) *R/S UJPL* 37, 39.

³ A Olunta, *Political Economy of the Third World; A Discourse* (Olusaloa Concepts 2011) 128-129.

State that is self-sufficient with regards to all its national developmental needs. This is as a result of the diversity of natural products and technological knowledge among States such that mutual exchange and cooperation become inevitable to drive both international and national development. This exchange at the international level has received further boost from modern means of communication and transportation which has fast-tracked international exchanges.⁴

Within the larger circumference of diplomatic relations, diplomatic immunity allows for necessary confidentiality and security. This immunity is considered to be among the oldest customary norms of international relations traceable to ancient Roman and Greek governments where envoys enjoyed special status as sovereign emissaries even where the sending State and receiving State were at war.⁵ This immunity has evolved over the decades to now include inviolability of the diplomatic premises. The Vienna Convention on Diplomatic Relations 1961 provides the international legal framework for diplomatic relations including the recognition and guarantee of diplomatic immunities and privileges.⁶

However, despite the argued justifications for diplomatic immunities and privileges, the rising cases of abuse have continued to challenge these justifications. Common crimes associated with immunities and privileges include traffic offences, money laundering, human trafficking, drug smuggling, arms dealing, domestic abuse, sexual

⁴ K Ristovska and A Ristovska, 'The Impact of Globalization on the Business' (2014) (7) (3-4) *Economic Analysis* 83, 84-89.

⁵ A Abass, *Complete International Law: Text, Cases, and Materials* (2nd edn, Oxford University Press 2014) 407.

⁶ Vienna Convention on Diplomatic Relations 1961 arts 29-31.

offences and in some extreme cases murder.⁷ One of the most popular cases of abuse of diplomatic premises was on 17th April 1984 in the United Kingdom, resulting in the murder of a police officer Yvonne Fletcher in front of the Libyan embassy. In reaction to a protest at the embassy, sub-machine guns from the embassy opened sporadic fire at the protesters resulting in the death of the police officer and injuries to many others.⁸ Of course because of diplomatic immunity, the embassy could not be immediately searched and the persons involved were neither arrested nor prosecuted.

This paper challenges the justifications for the inviolability of diplomatic premises in international law. It adopts the functional necessity and representative theory perspectives to question the necessity of absolute inviolability of diplomatic premises considering rising cases of abuse.

2. DIPLOMATIC PREMISES

The diplomatic premises under the Vienna Convention on Diplomatic Relations 1961 is the administrative and residential premises of the diplomatic mission. The diplomatic mission is the administrative arrangement through which diplomatic relations is maintained. That is, diplomatic mission consists of the totality of all administrative arrangements of a sending State in the host State for the purpose of administering its diplomatic relations. The diplomatic mission includes the diplomatic agents, diplomatic staffs, diplomatic premises and other

⁷ D Olanrewaju and A O Omodele, 'Abuse of diplomatic privileges and immunities in Nigeria and the United States of America'[2022] (2)(1) *International Journal of Law, Justice and Jurisprudence* 4, 5-7.

⁸ Ibid, 7.

institutional arrangements for the coordination of management of diplomatic relations.⁹

From the above, diplomatic mission being an umbrella term, the basic distinction that needs to be done from the very beginning is the fact that the diplomatic mission does not represent a legal entity by itself. That is, diplomatic mission is constituted in administrative-organizational manner, as the secretarial organ of the sending State. That means that the diplomatic mission, from normative aspect, does not perform the activities in its own name since it is not a person or a single identifiable entity in international law. It is rather an abstract concept covering all diplomatic personnel and facilities of the sending State used for its diplomatic practice.¹⁰

The diplomatic mission is an administrative organ of the sending State performs the following functions:

- a) Representing the sending State in the receiving State;
- b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
- c) Negotiating with the Government of the receiving State;
- d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
- e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations; and

⁹ I Masalkovski and M Ristovska, 'Judicial Immunity of Diplomatic Missions as Part of the Scope of the Diplomatic Protocol' [2018] <
<https://www.researchgate.net/publication/329211873> > Accessed 23 March 2026.

¹⁰ VCDR (n 6), art 2.

f. Consular functions where so directed.¹¹

The diplomatic mission is superintended by the head of mission, who is a person so designated in be in charge of the mission and to act in that capacity. The head of the mission and the members of staff constitute the members of the mission. The staff of the mission is the diplomatic staff consisting of administrative, technical and service staff of the mission.¹²

The diplomatic premises is the official buildings housing the diplomatic mission. The importance of the diplomatic premises cannot be overemphasised. It provides the physical infrastructure for the performance of the functions of the diplomatic mission. It consists of the totality of the physical work station of the diplomatic mission in the receiving State. The Vienna Convention on Diplomatic Relations provides that the “‘ premises of the mission’ are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.”¹³

Several legal points are deducible from the above definition of diplomatic premises. The first is that it extends beyond the buildings to ancillary land. Second, it is irrelevant whether or not the building or ancillary land is actually owned by the diplomatic mission. The fundamental consideration in designating a building and ancillary land as diplomatic premises is the usage of the premises for the functions of the diplomatic mission. Interestingly, the residence of the head of the mission also constitutes part of the diplomatic premises.

¹¹ VCDR (n 6), art 3(1).

¹² Ibid, art 1(a), (b) and (c).

¹³ Ibid, art 1(i).

This is justified considering that the functions of the head of the mission already highlighted.

Beyond the above, diplomatic premises also covers the furnishings of the diplomatic mission and other property thereon and the means of transport of the mission.¹⁴ The diplomatic premises is very important in any discuss of diplomatic immunity because of its significance to the diplomatic mission. It is therefore very crucial to delineate the properties covered or designated as diplomatic premises in international law.

The application of diplomatic immunity in international law covers a broad range of subject matters one of which is the diplomatic premises. The Vienna Convention on Diplomatic Relations provides: that ‘the “premises of the mission” are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.’¹⁵ The definition adopted is a functional one and broad. Buildings are in the plural such that it is only one. The premises also covers the land or ground ancillary to the building.

One crucial point to note is that the diplomatic premises is defined by function not ownership. That is, the legal title of the premises need not vest in the diplomatic mission. What is important is that the premises is used for the purpose of diplomatic mission. This is the hallmark of diplomatic premises. Practically, a diplomatic mission may choose to lease premises rather than purchase one. Hence, title is not important. It seems also that once the premises is no longer used for diplomatic

¹⁴ VCDR (n 6), art 22(3).

¹⁵ Ibid, art 1.

mission purposes, it ceases to be diplomatic premises. The residence of the head of the mission is also considered diplomatic premises.¹⁶

2.1. Inviolability of the Premises of Diplomatic Missions

Article 22 of the VCDR provides that the premises of the mission shall be inviolable. Put differently, the premises is not to be violated or trespassed. The legal implications of the inviolability of the diplomatic premises are as follows:

- a) The agents of the receiving State may not enter them, except with the consent of the head of the mission;
- b) The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage;
- c) The receiving State is under a duty to prevent any disturbance of the peace of the mission or impairment of its dignity;
- d) The premises of the mission, their furnishings and other property thereon and the means of transport of the mission are immune from search, requisition, attachment or execution,¹⁷
- e) Exemption from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.¹⁸

The totalitarian nature of the immunity of the diplomatic premises calls for deeper reflection. This is because it can be easily abused to further a criminal enterprise. The receiving State has no right to enter and to search, but in addition has a duty to ensure the premises is not disturbed by non-State actors. This reflects the absolute importance

¹⁶ Masalkovski and Ristovska, (n 9).

¹⁷ VCDR (n 6), art 2.

¹⁸ Ibid, art 23.

that the international community attaches to diplomatic premises. Two theoretical perspectives adopted by this paper are useful in understanding or attempting to justify the nature and extent of this immunity. They are the restrictive and representative theories.

3. FUNCTIONAL NECESSITY THEORY OF DIPLOMATIC IMMUNITIES AND PRIVILEGES

The functional necessity theory of diplomatic immunities and privileges distinguishes between official acts or functions of the diplomatic mission and private acts. The theory then restricts immunities and privileges to only in respect of official acts or functions.¹⁹ The theory proposes that diplomatic immunities and privileges are essential for diplomats to execute their duties efficiently, free from fear of harassment or coercion by the host State. This theory, widely accepted, is in consonance with the Vienna Convention on Diplomatic Relations which underscores that the purpose of these privileges and immunities is not to benefit individuals, but to ensure the efficient performance of diplomatic missions.²⁰

The argued justification for the diplomatic immunities and privileges under this theory is that they are necessary for effective performance of diplomatic functions without fear legal liability or other forms of coercion by the host State. This operational freedom is achieved through various immunities and privileges granted under the VCDR, such as personal inviolability, immunity from the host State's

¹⁹ NN Eyina, 'Theoretical Basis of Diplomatic Immunities and Privileges: Its Implications in International Politics' [2024] (10)(1) *Journal of Political Science and Leadership Research* 53, 61.

²⁰ Y Moritani and H Akiyama, 'Securitization Behind Persona non Grata: Implications to the Theory and the Cases Regarding the Russian invasion of Ukraine in 2022' [2024] <
<https://www.semanticscholar.org/paper/e89a8973251c622806c8c50571f65c78ef884e0c> > Accessed 23 October 2024.

jurisdiction, and inviolability of diplomatic premises and correspondence. Even then, the immunities are justified only to the restrictive extent that they are in respect of official functions.²¹

It is argued that for effective performance of diplomatic functions, diplomats should be able to communicate confidentially with their sending States, move freely and have their integrity of their offices and residence protected.²² This will extend to exemption from jurisdiction of host States considered essentially to free performance of diplomatic duties-*Parkinson v Potter*.²³

This theory holds that diplomats engaging in official acts are immune to the jurisdictions of host courts. Under this line of reasoning, diplomatic immunity protects those acts incidental to the mission but "does not, however, afford protection and benefits to the diplomat as a person."²⁴ Hence, under this theory, when a diplomat acts outside of the normal sphere of conducting international relations, a question arises as to whether immunity still applies.

A closer examination of the VCDR demonstrates how functional necessity theory pervades its text, purpose, and spirit. For instance, the plain text of the VCDR's preamble expresses the very tenets of functional necessity theory by stating that although diplomatic privileges and immunities are necessary to diplomatic functions, their purpose "is not to benefit individuals but to ensure the efficient

²¹ Ibid.

²² G V McClanahan, 'Diplomatic Immunity' [1997-1998] (32)(21) *Hasting International and Comparative Law Review* 572.

²³ [1885] 16 QBD 152.

²⁴ N M Bergmar, 'Demanding Accountability Where Accountability Is Due: A Functional Necessity Approach to Diplomatic Immunity Under the Vienna Convention' [2021] (47) *Vanderbilt Law Review* 501, 508.

performance of the functions of diplomatic missions as representing States." The preamble's disaggregation of "individuals" and "diplomatic missions" is perhaps most telling of the notion that official acts rather than individuals are the subjects of diplomatic immunities and privileges.²⁵

The primary advantage of this functional necessity is that it is adaptable and has safeguards against excessive demands for privileges and immunities. In other words, it restricts immunity to the functions of the diplomat rather than giving him absolute immunity. That is, immunity relates covers only those functions that are necessary or incidental to the performance of diplomatic functions and nothing more. A disadvantage is that it does not fully address the real need for diplomatic immunity to cover other acts performed by diplomats outside their official function.²⁶

3.1. Representative Theory of Diplomatic Immunities and Privileges

Representation, in terms of standing and acting for others, is a core function of diplomacy. Representation in a nutshell is "a relation between two persons, the representative and the represented or constituent, with the representative holding the authority to perform various actions that incorporate the agreement of the represented." The representative theory is compared to republican system of government wherein people are elected to exercise the sovereign will of the State on behalf of the electorate.²⁷

²⁵ Ibid, 508-509.

²⁶ M Moutzouris, *Sending and Receiving: Immunity Sought by Diplomats Committing Criminal Offences* (Rhodes University Press 2022) 24-25.

²⁷ C Jönsson, *Diplomatic Representation in the 21st Century* (German Institute for International and Security Affairs 2017) 3.

The entirety of diplomatic relations pivots strongly around representation. In fact, diplomatic relations developed from historical practices wherein diplomats or envoys represented their rulers or kingdoms in negotiations and events. They were understood to represent the sending authority. They were to be treated “as though the sovereign himself were there.” This formed the representative theory of diplomatic immunity. Today, the status of diplomatic representatives is similar to early periods and it is understood as symbolic representation of the sending State.²⁸

Diplomats “personify both their nation’s traditions and its contemporary culture to the officials and people where they are assigned.” Consequently, diplomatic immunity is argued to be a natural consequence of the sovereignty of the sending State which the diplomat represents. That is in international law, the diplomat is the sending State and the privileges enjoyed including immunity are merely enjoyed on behalf of the State.²⁹

Representation implies not only status (standing for the State) but also behaviour (acting for the State). That is, in accordance with the laws of the sending State, the diplomat may enter legal relations in the name of the State and thereby bind the State. This practice derives from economic theory of agency and principle and the political theory of representative government. Principal-agent relations arise whenever one party (principal) delegates certain tasks to another party (agent) to act in his name and on his behalf.³⁰ In the political science perspective,

²⁸ E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford University Press 2012) 114-119.

²⁹ Denza (n 28).

³⁰ S N Joseph and O K Robert, ‘Transnational Relations and World Politics’ [2014] (25)(3) *The University of Wisconsin Press Journals Division* 330, 331-337.

diplomats and elected politicians are of agents, who have been entrusted with certain tasks from their principals (State/electorate).³¹

However, the representational theory, while still relevant, has limitations in explaining the complexities of modern diplomatic practice. In the contemporary international system, the role of the individual diplomat is less emphasized, with the focus being on the State or the government they represent. In this context, diplomats are seen more as representatives of their States rather than personifications of the sovereign.³²

Moreover, the rise of multilateral diplomacy and international organizations has further complicated the landscape. Diplomats today often represent their States not only to other states but also to international organizations. In these settings, the traditional persona of the diplomat as the embodiment of the sovereign is less applicable. Additionally, the representational theory does not account for the accountability and conduct of diplomats. While diplomats are granted immunities and privileges, they also have responsibilities and duties, both to their home State and the host State. This attempts to address the risk of abuse of privileges and immunities.³³ The theory provides explanation of the underlining philosophy of diplomatic immunity. As representing the sending State, diplomats stand in the stead of the State.

³¹ D Armstrong, T Farrell and H Lambert, *International Law and International Relations* (Cambridge University Press 2012) 72-85.

³² A Alkhatatneh, 'Legal Regulation of Diplomatic Immunities and Privileges' [2023] (27(8) *Al-Balqa Journal for Research and Studies* 67.

³³ G Hernández, 'Immunities. International Law' [2019] <
<https://www.semanticscholar.org/paper/57fbf431b0629f845edaeac2781b51a1aeaf6c9d>> Accessed 23 October 2024.

3.2. Inviolability of Diplomatic Premises: Functional Necessity Theory Analysis

The VCDR expressed the realisation that 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.³⁴ The fundamental consideration here is that the law guarantees conditions necessary for the mission to function optimally. Another way to look at it is that there must be a direct positive relationship between the protections provided under the law and the performance of the functions of the mission.³⁵

That is, practically, to justify the immunity of the diplomatic premises based on functions, one must outline the functions and determine logically whether the immunity is necessary for the performance of the functions. Broadly speaking, functional explanation of law seeks to account for the existence of legal norms and question their justification based on the function of the norm (as in this case, immunity of diplomatic premises). This narrower context is important for a focused and more critical analysis.³⁶

It should be recalled that under article 22 of the VCDR, a diplomatic premises is characterised by the diplomatic functions performed in the premises. It is now necessary to highlight the functions. Diplomatic functions of a mission for diplomatic immunity of the premises are as follows:

- a) Representing the sending State in the receiving State;

³⁴ VCDR (n 6), preamble.

³⁵ G Gómez-Diago, *Functionalist Theory* (SAGE Publications Inc 2020) 1.

³⁶ M Barkun, 'International Law from a Functional Perspective' [2021] (1)(2) *Georgia Journal of International and Comparative Law* 19.

- b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
- c) Negotiating with the Government of the receiving State;
- d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
- e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
- f) Performance of consular functions by a diplomatic mission.³⁷

The considered view of this thesis is that the above functions do not require absolute immunity of the premises to be performed. Ordinarily, they are functions that should be performed openly and transparently. The duty of the receiving State to provide adequate security and protect the diplomatic premises from trespass and disturbance is ordinary sufficient for the performance of the above functions.

The totalitarian nature of the immunity of the diplomatic premises creates an impression of a covert or classified operations or criminal enterprises being carried out in the diplomatic premises. Representation, negotiation, promotion of friendly relations and other related functions which are to be performed from the diplomatic premises do not require such level of immunity. The view of the thesis is that on the contrary, the functions require openness and transparency which are crucial for building trust among nations. The level of secrecy enabled by diplomatic immunity of the premises rather encourages mutual suspicion and distrust and spying.

³⁷ VCDR (n 6), art 3.

This thesis should not be misunderstood as being out-rightly against immunity of diplomatic premises. Some level of privacy is necessary. Even for individuals, international law recognises the right to privacy. This is stated thus: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”³⁸ The emphasis here is that privacy is not absolute. What the law protects against is arbitrary interference with the privacy and not absoluteness of privacy. The submission of Megwara,³⁹ is that “the right to private life encompasses the right to live in isolation of others”.

The absoluteness of privacy of diplomatic premises which the VCDR secures is neither necessary nor justifiable based on the function theoretical approach. This thesis adopts the view of Solove,⁴⁰ argues that “the value of privacy must be determined on the basis of its importance to society, not in terms of individual rights. Moreover, privacy does not have a universal value that is the same across all contexts. The value of privacy in a particular context depends upon the social importance of the activities that it facilitates.” The view in international law has always been not on the invasion of privacy of a home for instance but arbitrariness of the invasion as absoluteness of the privacy of a home is not considered justified in law- *Konovalova v Russia*.⁴¹

Practical Guide on Admissibility Criteria 2021 issued by the European Court of Human Rights provides as follows in items 300 and 301:

³⁸ Universal Declaration of Human Rights 1948, art 12.

³⁹ L Megwara, *The Law and Practice of Human Rights in Nigeria* (Olive Printing and Publishing House 2010) 202.

⁴⁰ D J Solove, *Understanding Privacy* (University Press 2008) 39.

⁴¹ *Konovalova v Russia*. Application No. 37873/04, § 1, ECHR 2014

When the Court is called upon to examine interference by the public authorities with the exercise of one of the above-mentioned rights, it always analyses the issue in three stages. If there has indeed been “interference” by the State (and this is a separate issue which must be addressed first, as the answer is not always obvious), the Court seeks to answer three questions in turn:

- a. Was the interference in accordance with a “law” that was sufficiently accessible and foreseeable?
- b. If so, did it pursue at least one of the “legitimate aims” which are exhaustively enumerated (the list of which varies slightly depending on the Article)?
- c. If that is the case, was the interference “necessary in a democratic society” to achieve that aim? In other words, was there a relationship of proportionality between the aim and the restrictions in issue?

The point here is justified and necessary interference rather than blanket privacy (immunity) of diplomatic premises, which the VCDR guarantees. The immunity in line with best practices of privacy of homes ought to be qualified. The approach adopted under the Convention may facilitate the use of the premises for criminal enterprises and particularly State-sponsored terrorism. The view of this paper is that there is no justified basis on the function theory why the receiving State should not be granted a limited or qualified right to enter the diplomatic premises and search where there is reasonable suspicion that the premises is used for criminal enterprises. This thesis submits further that the approach adopted by the VCDR raises serious national security issues for the receiving State. The paper maintains that there is no legitimate function performed within the diplomatic premises requiring or justifying a totalitarian immunity.

3.3. Inviolability of Diplomatic Premises: Representation Theory Analysis

The second theoretical foundation relevant to immunity of diplomatic premises is the representation theory of diplomatic immunity. It should be recalled as outlined by this paper that from antiquity to the middle-ages, the entirety of diplomatic presence represented sovereign rulers in the sense that they were perceived to embody their sovereigns when they presented themselves at foreign *fora*. This formed the representative theory of diplomatic immunity. Today, the status of diplomatic representation is similar to early periods and it is understood as symbolic representation of the sending State.⁴²

It follows that the diplomatic premises used in the receiving State represents or symbolises the territory of the sending State in the same way diplomats represent the State or carry the sovereignty inherent in the sending State. The diplomatic representation including the diplomats, diplomatic premises and properties is then a representative and embodiment of the State in the same way that a flag represents a nation.⁴³

Under the VCDR, the heart of diplomatic mission is the representation of the sending State.⁴⁴ The preamble to the VCDR also recognises “the functions of diplomatic missions as representing States”. Beyond doubt, representation is the fundamental function of diplomatic missions. All other functions are ancillary to and derived from the representation function or forms of representation. It is this

⁴² E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Oxford University Press 2012) 114-119.

⁴³ *Ibid.*

⁴⁴ VCDR (n 6), art 3(1).

representation function that enables the mission to negotiate on behalf of the sending State and to protect the interests of the sending State. The diplomatic premises in this context represent a territory of the sending State.

It should be recalled that in international law, the most notorious legal basis for the exercise of jurisdiction, whether legislative, executive or judicial, is hinged on territoriality.⁴⁵ This naturally flows from the integrity and inviolability of territorial boundaries of sovereign States. By virtue of sovereignty, States retain the right to exercise authority over all persons and subject matters in their territory without any external control.⁴⁶ Therefore, the powers of a State over persons and subject matters must have a territorial connotation and limitation in international law.⁴⁷

This theoretical underpinning of the diplomatic premises holds significant legal implications for the diplomatic immunity of the premises. This is because once the premises is conceived as representing or symbolizing the territory of the sending State, the doctrine of extra-territoriality is invoked. By this, the receiving State cannot enter the premises without consent as this violates the territorial integrity of the sending State. This paper concedes reluctantly that the theory of representation justifies the immunity of the diplomatic premises on the ground of territorial integrity.

⁴⁵ D C Menthe, 'Jurisdiction in Cyberspace: A Theory of International Spaces' [1998] (4) *Michigan Telecommunications & Technology Law review* 69, 70.

⁴⁶ Charter of the United Nations 1945 art 2(1) and (4) recognizes sovereign equality of States and precludes interference in a manner that is inconsistent with the Charter.

⁴⁷ A P Alfred, V P Nnanna and S E Ejekwu, 'Corporate Liability of Foreign Parent Companies for Environmental Degradation in the Niger Delta Region of Nigeria' (2022) 2(7) *Journal of Law and Policy* 41.

However, the conceptualization of the diplomatic premises as representing the territory of the sending State in the receiving State is a rather extraordinary doctrine of convenience. Ordinarily, the geographic boundaries of the State including the airspace, land and territorial seas are contiguous. Sovereign territory is naturally not extra-territorial except in cases of colonialism. It is in colonialism that a State forcefully assumes or takes over territories outside its own naturally contiguous territories.⁴⁸

This paper argues that considering that the conceptualization of the diplomatic premises as territory of the sending State is an extraordinary rule, this will also justify extra-ordinary limitations of the integrity of the diplomatic premises. Besides, the diplomatic premises is not a natural territory and should therefore not enjoy the exclusivity of territorial integrity under international law. It is an artificially created territory of diplomatic convenience and should therefore not enjoy totalitarian immunity for the purpose of national security of the receiving State.

It is submitted that even as a representation of the territory of the sending State, the receiving State should be afforded some levels or rights of access under limited conditions to reduce the chances of the diplomatic premises being abused. The incident in the United Kingdom resulting in the cold blood murder of a police officer, Yvonne Fletcher on 17th April 1984 comes to mind. She was shot dead from a submachine gun insider the Libyan embassy in St James Square, United Kingdom. Several persons were either killed or injured from the firing of the machine gun. In all, the UK Police could not

⁴⁸ O Adeyeri and K D Adejuwon, 'The Implications of British Colonial Economic Policies on Nigeria's Development' [2012] (1)(2) *International Journal of Advanced Research in Management and Social Sciences* 1, 2-4.

enter to contain the situation because of the immunity of the diplomatic premises.⁴⁹

The scenario represents the seriousness of the national security risks which the absolute immunity of the diplomatic premises possess. As in this case, the premises can be used for warehousing of illegal firearms, or terrorism coordination and lunch points. Article 22(1) of the VCDR is clear that the State agents of the receiving State cannot enter the premises or conduct any search under any circumstances whatsoever unless with the consent of the sending State. While this paper takes the considered view that the requirement of consent to enter the premises is justified and in line even with national law protection of individual privacy, the challenge lies in the failure of the VDCR to address a situation where consent is unreasonably refused or delayed.

By this failure, the VCDR fails to protect the legitimate interests of the receiving State in its national security. This could have been secured through a mechanism that allows the receiving State to enter the diplomatic premises where consent is unreasonably refused. This is because preventive or precautionary approach is to be adopted above responsive approach. Like in the UK case, the incident could have been prevented if the UK had right to enter the premises. This right would have deterred the stockpiling of firearms in the diplomatic premises. The protection of the diplomatic premises must be balanced against the legitimate interests of the receiving State in its national security and the need to prevent the use of diplomatic premises for criminal enterprises.

4. CONCLUSION

⁴⁹ R Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience' [1975] (79)(1) *American Journal of International Law* 1, 7.

The fundamental basis of the immunity is twofold: representative and functional necessity. By representation, diplomatic immunities and privileges derive from the sovereign status of States in international law which excludes a State from being subject to the jurisdiction of another State. The functional necessity basis on the hand is anchored on the argument that the immunities and privileges are necessary for the performance of diplomatic functions. This will also justify limitation of immunities to the diplomatic functions.

However, rising incidents of abuse of diplomatic immunities and privileges continue to question the argued justifications. The position of this paper is that there are no justified bases on the function theory why the receiving State should not be granted a limited or qualified right to enter the diplomatic premises and search where there is reasonable suspicion that the premises is used for criminal enterprises. Furthermore, the approach of immunity of diplomatic premises adopted by the VCDR raises serious national security issues for the receiving State.

There is no legitimate function performed within the diplomatic premises requiring or justifying a totalitarian immunity. Diplomatic relations should be anchored on transparency and openness rather than approached as a secret mission in the receiving State. Therefore, the totalitarian posture of immunity of diplomatic premises under the VCDR needs to be reviewed to better protect the national security interests of the receiving State and enhance openness in international relations.