

## DIPLOMATIC PRIVILEGES AND IMMUNITIES IN NIGERIA AND THE UNITED KINGDOM: A COMPARATIVE ANALYSIS

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**Abstract:** *Access to diplomatic immunities and privileges (DPIs) has been a dominant custom in interstate relations. However, waves of diplomatic abuses have engineered calls for a change in the legal narrative of customary norms on DPIs. With these calls in focus, this paper attempts to explore and compare the current legal regimes on DPIs in the UK and Nigeria. The paper finds that both regimes still maintain the confounded 'blanket' protection of diplomats, with the position in the UK slightly better off in comparison to that of Nigeria. The author supports moving beyond the traditional justification of absolute protection for making diplomats 'above the law' and recommends modification of the current legal position to a more stringent one, not intended to strip those DPIs off the diplomats but to portray the state's intent to protect its laws and citizens against wanton unchallenged abuse.*

**Keywords:** Diplomatic Immunities, Privileges, Abuse, Nigeria, UK

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### 1. BACKGROUND

Inter-State diplomatic relations are conducted through various channels including diplomatic visits by Heads of States, the establishment of permanent missions in each other's territories, special envoys, and permanent representatives at international organisations.<sup>1</sup> From time immemorial, courtesies have been accorded to these conductors to facilitate the smooth running of affairs between the states. These courtesies took forms of immunities from the jurisdiction of the foreign courts and certain privileges to the members of the diplomatic legations.

Discourse on Diplomatic Privileges and Immunities (DPIs) are by no means novel, the existing literature is replete with expositions on historical developments, theoretical justifications, classifications, and codification of DPIs, especially under international law. Although the aim of this study is not to reproduce such discussions; however a brief highlight of some important details will be made to form a background for the subject-matter of the study.

Historically, DPIs were propelled by the evolution of inter-state economic and political relations which necessitated the exchange of envoys across sovereign nations. In attempts to ensure peaceful coexistence and exchange of information between States, they developed the custom of granting diplomatic envoys an inviolable status right from ancient Greek civilizations some three thousand years ago.<sup>2</sup> These diplomats include political informants and negotiators, usually Ambassadors or Nuncios, and consuls who dealt with judicial and economic matters between the mercantile states and also conducted diplomatic

tasks.<sup>3</sup> These immunities were conferred on the said diplomats both in peaceful reigns and times of crisis or war.

The diplomats were also granted certain privileges such as exemption from paying taxes on merchandise and the opportunity to choose the best of accommodation within the foreign courts. These customs of immunity and privileges became widely recognised and attained the status of customary international law. The universality of such customs was arrived through bilateral and multilateral treaties between States initially having variant laws for diplomats. This custom of inviolability of diplomats as earlier buttressed by religion and fortified by reciprocity became codified as international, cum national laws.<sup>4</sup>

Theoretically, several theories have been identified as the basis of granting such immunities and privileges to foreign envoys. The most popular are the personal representation theory, extraterritoriality, and functional necessity.<sup>5</sup> The personal representation theory which was premised on the 'representative character' of the diplomat was propagated on grounds that the diplomatic envoy personifies the sovereign of the sending state. Therefore, such envoy should be granted any immunity and privilege accorded to the sovereign. Whereas, the extraterritoriality theory posits that the diplomat, diplomatic premises, and archives are considered not within the territory of the host state but as an extension of the territory of the sending state.<sup>6</sup> Therefore, the sending state cannot assume jurisdiction over the territory of another sovereign state. Finally, the functional necessity theory was developed to counter the earlier theories, largely due to abuses of such immunities by the diplomats. The theory stipulates that immunities and privileges are necessary for the mission to perform its functions effectively. However, it recognises the need to check the excesses of diplomatic abuses of such immunities and privileges. Thus, even though diplomats are not exempted from respecting the laws of the receiving State, they are immune from being subjected to the interpretation of those laws within the state. Thus, the fundamental rationale for diplomatic immunity is to minimize interference with the diplomat's functions by the host state. However, the host state is granted certain remedies where the diplomatic envoy violated its laws. The State can either declare such erring diplomat persona non grata (unwanted) or seek a waiver of the diplomat's immunity from the sending state.

The gradual acceptance of this position led to the codification of the rules governing DPIs. The key international instruments that codified these immunities and privileges are the Vienna Convention on Diplomatic Relations 1963 (VCDR)<sup>7</sup>, Vienna Convention on Consular Relations 1963 (VCCR)<sup>8</sup>, Convention on Privileges and Immunities of Specialized agencies of the United Nations 1947 (UN Convention), Convention on Special Missions 1969, and Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character 1975.

Contextually, diplomatic immunity is the protection accorded to a recognized representative in the foreign country to which he is accredited as an envoy or assigned on a mission. The diplomats/representatives are immune to the legal jurisdiction and inviolable from searches and arrests in the foreign state. This inviolability extends to the premises and archives of the diplomatic mission. Diplomatic privileges, on the other hand, are courtesies

extended to such individuals to do certain things not ordinarily allowed for citizens within the host state. These rights include the safe passage, non-payment of taxes, and freedom of communication. Both immunities and privileges are often extended, with certain variations, to members of the envoy's family and entourage<sup>9</sup>.

Immunities can be divided into personal immunity (also known as immunity *rationae personae*) and functional immunity (also known as immunity *rationae materiae*). Personal immunity is the protection granted to the diplomatic envoy which entails absolute immunity from the legal jurisdiction of the host state for private acts or omissions. This immunity subsists while the diplomat is in active service. It can either be waived by the diplomat himself or his sending state and ceases when he is no longer in the service of the sending state. While functional immunity is the protection granted to representatives of the sending state for official acts or omissions done on behalf of the state. Thus, this immunity does not cover the personal acts of the diplomat. In contrast to personal immunity, functional immunity is permanent and cannot be waived by the sending state, as it is the conduct itself and not the personality of the diplomat that forms the basis of that immunity.<sup>10</sup>

The context of the above immunities to be granted and on whom they shall be granted is outlined in the conventions mentioned earlier. The VCDR accorded absolute immunity from criminal prosecution and limited immunity from civil jurisdiction to diplomats and their families. Lesser levels of protection are accorded to technical and administrative staff members, who are given immunity only for acts committed in the course of their official duties. The VCCR also accords restricted immunity on consular staff and makes them amenable to the jurisdiction of the host state in respect of grave crimes. They also enjoy absolute immunity for official acts.<sup>11</sup> Other Conventions extended similar immunities and privileges to representatives on special missions and personnel of international organizations.<sup>12</sup> Such immunities and privileges of international organizations and specialized agencies are contained in their respective constitutional agreements. High officials such as the Secretary-General and the Assistant Secretaries-General of the UN, Executive Heads of specialized agencies, possess diplomatic status in the States which have become parties to the Conventions or agreements<sup>13</sup>. Other officials are granted restricted functional immunity and privileges. For instance Paragraph 2 of Article 105 of the UN Charter read as follows: "Representatives of the Members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organizations".

However, abuses and violations of these diplomatic privileges and immunities have become a threat to peaceful relations between sovereign states. There have been several calls for the international community to review these DPIs worldwide for over three decades. Even though the Conventions made attempts to restrict the immunities and privileges granted to diplomats, their families, and staff and also provide certain remedies to aggrieved states, the status quo of our domestic laws which give credence to the Conventions need to be called into question. This is because the said conventions serve as a guide to and require the member States to make domestic laws to give effect to the provisions of the respective Conventions; however such States maintain the leverage to modify their laws to suit the local

circumstances of their diplomatic relations, hence the desire to examine the developments of such laws in the UK and Nigeria. The paper attempts to analyse and compare the relevant provisions of the laws regarding DPIs in the respective states. The origins of diplomatic immunities both in the UK and Nigeria can be considered the same due to the colonial effect of the former over the latter, hence the decision to compare the developments in the two to see where they converge and diverge, whether in principle or practice.

## **2. CLARIFICATION OF TERMS**

For their usage in this paper, the following terms and expressions shall be adopted to have the meanings as prescribed by the VCDR and the VCCR as follows:

- 'members of the diplomatic mission' are the head of the mission and the members of the staff of the mission;
- 'members of the staff of the mission' are the members of the diplomatic staff, of the administrative and technical staff and the service staff of the mission;
- 'members of the diplomatic staff ' are the members of the staff of the mission having diplomatic rank;
- 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission;
- 'members of the service staff ' are the members of the staff of the mission in the domestic service of the mission;
- 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the mission including the residence of the head of the mission;
- 'diplomatic envoy' constitutes all classes of staff of the foreign mission;
- 'consular officer' means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;
- 'consular employee' means any person employed in the administrative or technical service of a consular post;
- 'member of the service staff' means any person employed in the domestic service of a consular post;
- 'members of the consular staff' means consular officers, other than the head of a consular post, consular employees and members of the service staff;
- 'Consular premises' means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the consular post;
- 'Consular archives' includes all the papers, documents, correspondence, books, and registers of the consular post, together with furniture intended for their protection or safekeeping.
- 'FCO' means the Foreign & Commonwealth Office of the United Kingdom<sup>14</sup>
- 'Foreign Secretary' means the Secretary of State for Foreign and Commonwealth Affairs, United Kingdom
- 'Minister' refers to the Minister of Foreign Affairs, Federal Republic of Nigeria

- 'UK' means the United Kingdom

### 3. DIPLOMATIC IMMUNITY AND PRIVILEGES IN THE UK

#### *3.1 Introduction*

As mentioned earlier, diplomatic missions were established to facilitate communications either for political or business relations. It is reported that such diplomatic activity did not become pronounced in England until the end of the fifteenth century, with the establishment of Resident Ambassadors common by the 16th century.<sup>15</sup> As their numbers increased, questions arose as to their position concerning the law of the country in which they were stationed. Relying on the personal law theories, the Ambassadors were granted personal immunity on the premise that the ambassador should be subjected to the law which he carries as opposed to the law of the country in which he resided. With time, this practice resulted in conflicts between the national law and the status of resident ambassadors. These conflicts were finally resolved with the propagation of the theory of extraterritoriality.<sup>16</sup>

Even as the extraterritoriality theory gained credence across England in the 16th-17th centuries, certain historical excerpts show that the immunity of the ambassador was not always recognized in England during this period. Some Ambassadors accredited to the English courts were either arrested and punished or expelled for wrongful political conduct.<sup>17</sup> However, there were no records of any ambassador prosecuted for any crimes against private persons, though the Ambassadors have always been immune to a civil suit.<sup>18</sup> Over time, detailed regulations were made to regulate the nature of immunities and privileges recognised by law in England.

Conversely, it is argued that consular institutions predate the sovereign state and diplomatic relations.<sup>19</sup> Even though there are recounts of British Consuls sent overseas in 1825 to either represent varying interests related to commerce, there has been no specific regulation on the immunities and privileges of such Consuls in England until the late 20th century with the passing of the Consular Conventions Act of 1949 (CCA).<sup>20</sup> However, they were still granted those immunities and privileges recognised under customary international law. The main legislation relating to diplomatic immunities and privileges actively in force in the UK will be discussed below.

#### *3.2 Diplomatic Privileges Act 1708 (Act of Anne)*<sup>21</sup>

The first codification of diplomatic immunity in England was the Act of Anne which exempted ambassadors from civil suit and arrest. The Act was passed as a result of an incident in 1708 when a Russian Ambassador was arrested and imprisoned for failing to honour his debts.<sup>22</sup> S. 3 of the Act prescribed that all writs and processes against an ambassador or his domestic servants shall be null and void if they could result in their arrest or imprisonment or the seizure of their chattels. S. 4 added that anyone issuing such writ or process was liable to penalties to be decreed by the Lord Chancellor, the Lord Chief Justice and the Chief Justice of the Common Pleas, or any two of them. Subsequently, a combination of judicial interpretations and juristic thoughts entrenched the doctrines of diplomatic immunities in English diplomacy and later incorporated in English laws.

The 1941 Act provided for absolute immunities and privileges of an envoy of a foreign government, accredited to His Majesty. The same immunities were extended to high officials of the governments of such foreign powers and those of provisional governments if these governments were (i) allied with Britain and (2) established in the United Kingdom.

With the proliferation of representations from international organizations in Member states, it became pertinent to enact laws for their protection also. Therefore, another Diplomatic Privileges (Extension) Act was made in 1944. The Act dealt with privileges, immunities, and capacities of international organizations, their officers, and government representatives.<sup>23</sup> Immunities and privileges accorded to resident ambassadors and their envoys in the UK were extended to the representatives of international organizations through the Diplomatic and Privileges (Extension) Acts 1944 and 1950, before they were consolidated by the International organizations (immunities and Privileges) Act 1950. Summarily, according to the Act, the organization, its high officers, and government representatives who are not British nationals are granted absolute immunity and privileges as that of a diplomatic envoy. Conversely, high officers and representatives who are British nationals and other officials or staff of the organization are only granted immunity in respect of official acts or omissions done on behalf of the organization or in the course of discharging their duties. Except for British nationals who permanently reside in the UK, such officers are also exempted from paying income-tax in respect of emoluments received from the organization.

In 1952, an inter-departmental committee on state immunities was commissioned and mandated to consider whether having regards to the principles of international law, the diplomatic immunity law of the United Kingdom is wider than necessary or desirable.<sup>24</sup> The committee reported that the existing immunities in the law were either 'certainly or probably required by international law'. However, the committee recommended that the foreign secretary should no longer accept any British national as an officer in a foreign embassy even as a domestic servant, except on the condition that such person shall not enjoy personal diplomatic immunity. Also, that consideration should be made as to whether legislation should be made to reduce the immunities accorded to the embassy or mission of any foreign country to correspond with the immunities granted by that foreign country to the UK missions. The recommendations led to the enactment of the Diplomatic Immunities (Restriction) Act of 1955. Conclusively, both Act of Anne and the Diplomatic Immunities Restriction Act of 1955 were repealed by S. 8(4) and Schedule 2 of the Diplomatic Privileges Act of 1964, which is now in force in England.

### *3.4 Consular Conventions Act 1949 (CCA 1949)<sup>25</sup>*

The CCA 1949 was made to implement sixteen conventions concluded by the United Kingdom. However, the Act did not incorporate the provisions of the said Conventions because they were either declaratory of existing common law and practice or could be implemented administratively.<sup>26</sup> Therefore, contrary to the expectation that the CCA 1949 will provide detailed regulations for the implementation of consular services and functions of consular officers, the Act merely governs the exercise of certain powers of consular officers

to wit having the representative capacity to act on behalf of their non-resident nationals in cases involving estates of deceased persons within the UK and to amend or repeal some provisions relating to the subject-matter in previous laws.

### *3.5 The Diplomatic Privileges Act 1964 (DPA)<sup>27</sup>*

After the VCDR came into force, DPA was enacted to amend the law on diplomatic privileges and immunities and give effect to the VCDR. The relevant provisions of the Conventions are applied in the UK by S. 2 of the DPA. It domesticates the application of some provisions of the VCDR which are set out in Schedule 1 of the Act. The relevant articles of the VCDR expressly mentioned in the DPA 1964 include Articles 1, 22-24, and 27-40.

S. 3 of the DPA stipulates certain restrictions on the privileges and immunities conferred on the diplomatic envoy and its mission. The restrictions merely emphasize the reciprocity of the DPIs. It empowers the regulators to measure such privileges and immunities so conferred on an envoy or mission of a State with those offered to the British Envoy/mission in that State.

S. 7 provides a window for the UK to make bilateral agreements with foreign countries for the extension of DPIs to be conferred on the diplomatic staff of such countries. Some such agreements were made concerning consular officials before the amendment in 1991 which extended the privileges and immunities of the diplomatic envoys to consular officials. An example is the agreement made between the UK and China. The Consular Relations (Privileges and Immunities)(People's Republic of China) Order 1984<sup>28</sup> which has only 6 articles outlines privileges and immunities of members of Chinese consular posts, their families, residences, and premises. The Order extends the provisions of Article 29 (exemption from liability to arrest or detention) to such staff and members of their families forming part of their households but makes such exemption only pending trial. The Order also extended the personal inviolability, immunity from criminal jurisdiction, and exemption from the duty to give evidence or liability to measures of execution on members of the Chinese consular posts and their families as provided in the Act. Such restrictive civil and administrative immunity granted to service staff of diplomatic missions under Article 31 is also extended to members of the service staff of a Chinese consular post. Such immunity is further restricted by Article 3(ii-b) of the order which lifts such civil immunity in respect of actions by a third party for damage arising from an accident in the United Kingdom caused by a vehicle, vessel, or aircraft contracted by the service staff. Additionally, Consular employees and members of the service staff of a Chinese consular post who are British citizens shall not enjoy such immunities; they are, however, still exempted from liability to give evidence in the UK courts.

The DPA was amended in early 1991 to extend the privileges accorded to diplomatic envoys under Articles 22, 27,29,30,31 of the VCDR as outlined in Schedule 1 to the DPA 1964, to members of a consular post and their families, consular officials, and premises. These included inviolability and protection of the consular mission and private residence of consular officials, freedom of communications of a consular post, inviolability, and immunity from jurisdiction and arrest of consular officials, and exemption from the duty to give

evidence. The amendment further added Article 45 of the VCDR which provides the obligations of the receiving state towards the diplomatic mission and its officials where diplomatic relations are broken off between the two States, or if a mission is permanently or temporarily recalled.

The Act was further amended in July 1991, 1992, 1993, 1994, 2011 mostly to repeal obsolete laws referred to by the Act or import fiscal amendments or to extend the provisions to effect bilateral agreements on diplomatic immunities between the UK and other sovereign states. The final amendment was made in 2019 to extend the privileges of exemption from capital gains taxes to-

1. visiting forces and official agents/staff or designated allied headquarters from foreign countries for the period of official assignments within the UK,
  2. official agents of Commonwealth countries or Republic of Ireland;
- Except where such persons are permanent residents in the UK.

### *3.6 Consular Relations Act 1968 (CRA)<sup>29</sup>*

In a similar context with the DPA, the CRA was also enacted to give effect to the Vienna Convention on Consular Relations and other agreements concerning consular relations between the United Kingdom and other countries. The Act is considered not to be a comprehensive law on consular relations but merely an attempt to 'adjust existing municipal law in accordance with the numerous treaty obligations incurred by the UK'.<sup>30</sup> The Act gives effect to the relevant provisions of the VCCR(S. 1), reiterates the reciprocity of extent of DPIs accorded to Consuls of foreign governments (S. 2), and stipulates the right of the UK government to enter into agreements concerning any additional DPIs to be granted to consular officials of a foreign government. The act also restricted the jurisdiction of UK courts concerning certain matters on board foreign ships or aircraft. It further empowered diplomatic agents and consular officers to administer oaths and do notarial acts in certain cases.

### *3.7 The Code for Crown Prosecutors (CCP)<sup>31</sup>*

The CCP, as agreed to by the Director of Public Prosecutions and the UK Foreign Commonwealth Office (FCO), also sets out general principles for prosecutors on the dictates of the laws and practice of diplomatic privileges and immunities in the UK. It expatiates and clarifies the application of some of the provisions of the laws. Some of the notable provisions of the code include the following:

- Criminal immunity and inviolability in the UK are conferred on all Diplomatic Agents, Administrative and Technical Staff of foreign diplomatic missions, and on Consular Officers and Employees in foreign consular missions and their families stationed within London. However, Service Staff at such London-based foreign missions are granted criminal immunity only in respect of the acts performed in the course of their duties, such staff is not inviolable. The families of such Service Staff are not granted any immunity or inviolability.
- Whereas staff at consular missions based outside of London are not inviolable:



1. in respect of grave offenses which are punishable on conviction, as a first offence, with a sentence of five years or more; and
2. In execution of a decision by the competent judicial authority.

Such staffs are granted immunity only in respect of acts they perform in the exercise of their consular functions. Their families are not granted any inviolability or immunity.

- The Code further clarifies the immunity granted to members of the mission and their families who are either nationals or hold dual-citizenship including that of the UK. It reiterates the position of the UK regarding the non-acceptance of its nationals or holders of permanent UK residency as members of the diplomatic envoy. However, dual UK-Commonwealth citizens recognised by the government as members of foreign missions are entitled to the immunity and inviolability similar to other staffs who are not British citizens. This does not extend to any of their families who may also hold dual UK-Commonwealth citizenship. This clarification is according to Article 2 of The Diplomatic Privileges (British Nationals) Order 1999<sup>32</sup>.

- Enhanced immunity and inviolability may be afforded to the consular staff of those countries with which the UK has made a Consular agreement. As of January 2019, there are 31 countries in such agreements with the UK. Such enhancements are relative and depend on the respective country's agreement.<sup>33</sup> Such agreements are made according to S. 7 of the DPA provided above.

- Additionally, the Code specifies that the period considered as reasonable time within which the immunities and privileges of diplomatic or consular officials will cease upon the termination of their functions with their mission or severance of diplomatic relations between the UK and their home country is 31 days unless extended by the foreign office.

- London based staff and their families who are inviolable may only be detained as a last resort (such as being in danger of harming others or themselves) except where a waiver of such immunity is granted by the sending state. Staff at consular missions based outside of London and who are inviolable can be detained in the case of a grave crime (as explained above) or as a last resort also.

- A diplomat cannot waive his or her immunity. Waivers can only be granted by the sending State upon the request of the FCO through the diplomatic mission of such state. Where the diplomatic or consular officials commit minor offences, such as traffic offences, the FCO when notified will write to the Deputy Head of Mission (DHM) at the foreign mission concerned, and ask the DHM to remind his staff of the need to respect UK laws. No waiver of immunity is needed in such cases.

- Where a serious offence is committed by the said officials, and the Police consider the case as one that merits seeking a waiver of immunity, certain bureaucratic procedures are conducted to determine if the case warrants prosecution. If so, the FCO decides to either bring the offence to the attention of the Head of Mission and request the withdrawal of the alleged offender from the UK; or ask that the Head of Mission to waive immunity so that a prosecution can proceed. A serious case is defined under the FCO

guidance as 'an offence that might carry a custodial sentence of over 12 months'. Even if the case does not satisfy the criteria for prosecution, the FCO may still decide that the alleged offender be withdrawn from the UK.

The above provisions serve as guidelines for UK security operatives and prosecutors in dealing with diplomatic officials.

### *3.8 Diplomatic and Consular Premises Act 1987<sup>34</sup>*

The Act is made to deal with acquisition and loss of land under diplomatic or consular status, vesting of former diplomatic or consular premises in the government of the UK, and few amendments to the DPA 1964 and other Acts concerning such premises.

## **4. DIPLOMATIC IMMUNITIES AND PRIVILEGES IN NIGERIA**

### *4.1 Introduction*

Diplomatic immunities in Nigeria can be traced back to the colonial era with the reception of the Act of Anne, as a statute of general application. Before its independence in 1960, Nigeria was not recognised as a sovereign nation thus had no formal diplomatic missions established in foreign jurisdictions separate from that of the UK. Thus the Act of Anne sufficed for the protection of diplomats who visited the region then. However, due to the regular political and educational voyages that became popular between the protectorates and foreign countries, consular activities were well established. Therefore, the Consular Conventions Act 1949 of the UK was received and implemented in Nigeria in 1950.

### *4.2 Consular Conventions Act 1950 (The CCA 1950)<sup>35</sup>*

The CCA and Orders made thereunder were to give effect to the provisions of Consular Conventions concluded with foreign governments and regulate certain matters connected with consular missions. It was modelled after the CCA 1949 of UK on the implementation of 8 consular conventions with foreign countries and powers of Consular officers concerning the property of deceased foreigners in Nigeria (S. 2,3,5). It had additional provisions establishing the inviolability of the consular office in execution of a legal process subject to the consent of the consulate or that of the Minister (S. 4). It further provided 3 exceptional circumstances where such inviolability can be waived (S. 4(1-a,b,c)).

### *4.3 Diplomatic and Privileges Act 1962<sup>36</sup>*

With its newly acquired independence and a strong desire to gain international recognition through diplomacy with other sovereign States, the DPIs' law in Nigeria was modelled based on the proscriptions of the earlier cited international Conventions. The Diplomatic and Privileges Act was made on 27th December 1962. Its provisions cover the immunities and privileges of foreign envoys, consular officials, international organizations, and representatives of special missions.

#### *4.3.1 Immunities and privileges of Diplomatic envoys and representatives of foreign governments*

The Act grants all members of a diplomatic envoy, their families, their official and domestic staff, and their families' absolute immunity from all legal actions; both civil and

criminal (S. 1(1)). The Act also made their persons, residence, and official archives inviolable (S. 1(1)). However, the Act recognises the right of the foreign envoy or consular officer to waive the immunity or inviolability conferred on him or his family members, and his official/domestic staff or their families (S. 2).

The Act also confers similar immunity and inviolability to the chief representative of a Commonwealth country, his family, official/domestic staff, and their families (S.s 3-4). Representatives of Commonwealth countries attending conferences within Nigeria are also granted immunities and privileges of a diplomatic envoy (S. 6).

The Minister is empowered to make additions and subtractions to the list of persons attending the conference for a diplomatic status (S. 6 (1, 2)); to withdraw such immunities and privileges conferred where such is not reciprocated by the foreign government; and to grant and revoke exemptions from any tax or levy or duty to the foregoing classes of persons (S. 9).

However, non-resident full Nigerian nationals (not having dual citizenship) who are either members of a foreign envoy or staff of foreign representatives are only granted functional immunity in respect of acts or omissions in the course of discharging their official duties and are excluded from having any personal immunity (S. 6). Therefore, their families are also not entitled to any immunity. It is inferred that they are however allowed to enjoy the same privileges as those conferred on their foreign counterparts such as inviolability and exemption from tax, dues, and levies.

Conversely, a Nigerian national who is resident within Nigeria and is either a member of the official or domestic staff of a foreign envoy or foreign consular officer; or a chief representative of a commonwealth country or is attending a Commonwealth conference in Nigeria, is not entitled to any immunity or such privilege as conferred on their foreign counterparts (S. 10). S. 20 of the Act empowers the President to make regulations conferring immunity and Inviolability on any additional persons in the service of foreign governments.

#### *4.3.2 Immunities and privileges of international organisations and persons connected therewith*

The Act also grants immunities and privileges to representatives of international organizations of which its members are sovereign governments. The Minister is empowered to declare any organization or persons as a beneficiary of the privileges and immunities under this category (S. 11). The operation of these organizations within Nigeria is regulated by Notices and Orders in Council as provided in the List of Subsidiary Legislation under the Sixth Schedule of the Act. The Orders confer the immunities and privileges on the representatives of such organizations and their families. The Minister can also amend, revoke, or replace any of such Orders (S. 11(5)). The Act further mentions that such international Organizations include 'National liberation movements' (S. 11(4)).

The Orders confer the legal capacity of a body corporate on the organizations. They are granted immunity from legal actions and given the right to waive their immunity in respect of legal proceedings. A separate waiver is required to execute any judgment arising from any such proceedings.<sup>37</sup> Its official premises and archives are inviolable, exempted from

taxes, and prohibitions and restrictions on the import and export of goods for official purposes.

However, the Orders categorize the extent of privileges and immunities to be accorded to the representatives. High officials of the organization in persons of the Director-General or Deputy Director-General, their spouses, and children below 21 years are granted absolute immunity and inviolability as is accorded to a diplomatic envoy and his family accredited to Nigeria. Whereas other representatives of Member States to such organizations (including Board Executives and their advisers, delegates, deputy delegates, advisers, technical experts, and secretaries of the delegations) are only granted functional immunity and inviolability and exempted from paying taxes on personal baggage. S. 11(2c) empowers the Minister to extend such privileges and immunities to the family and staff of the representatives to the extent prescribed in the orders regulating the respective organizations they represent.

Persons serving in committees or employed in missions on behalf of the organization (other than officials of the organization) are also granted functional immunity and inviolability. Their papers and documents relating to the work of the organization are also inviolable. Such immunity shall continue notwithstanding that the person concerned is no longer employed on missions on behalf of the Organisation. Other officials of the organization are only granted immunity from legal actions in respect of acts or omissions and words spoken or written by them in the course of performance of their official duties, and exempted from payment of personal income tax on emoluments received by them as officers or servants of the organization.

Additionally, the Minister is empowered by the Act to grant certain immunities and privileges to the Judges and registrars of the International Court of Justice, and the suitors to the court, their agents, counsels, and advocates, which are necessarily incidental to 'give effect to any resolution of, or convention approved by the General Assembly of the United Nations' (S.s 12-13). These are set out in the Diplomatic Privileges (United Nations and International Court of Justice) Order<sup>38</sup>.

## **5. COMPARISON AND ANALYSIS**

The convergence between the two regimes of DPIs in UK and Nigeria is observable from the discussions above both in terms of origins and context. Both jurisdictions began with codifications of customs recognised under international law which grants absolute immunity to diplomatic envoys and later recognizing only functional immunity to consular missions. They have also maintained the long practice of granting DPIs to members of diplomatic envoy depending on their rank and status. The heads of diplomatic missions and High officials of international organizations and their families are granted absolute civil and criminal immunity from the jurisdiction of the sending state. Other diplomatic officials and representatives of foreign governments are granted functional immunity only.

Even though both regimes have glaring similarities in their legal terrain, there is a slight divergence in terms of application of the laws. For instance, both jurisdictions consider the issuance of a certificate either by the Minister or foreign secretary to be conclusive as to

whether a person is entitled to immunity or not. However, the UK has used CPC to give some additional dimensions on DPIs as discussed earlier. It reduces the immunity of consular staff stationed outside London in comparison to London based staff and their families and it also specifies the period considered as reasonable within which DPIs will cease after expiration of term or declaration of persona non grata.

Similarly, the UK does not accept its nationals or holders of permanent UK residency as members of the diplomatic envoy. This is obviously to avoid contradictions between the power of the State over its citizens and the immunity of the representative of a foreign government. However, the position in Nigerian law is that its nationals or permanent residents can be accepted as members of a diplomatic envoy but are not entitled to DPIs granted to their counterparts. This may create hostility between Nigeria and the sending state where such a person's official assignments are disrupted because of the deprivation of the DPIs. In the same vein, families of diplomats holding dual-citizenship including that of the UK are not entitled to any immunity, unlike their counterparts in Nigeria who enjoy such immunity.

The UK has a functional monitoring and reporting system on diplomatic abuses and violations. The FOI publishes the number of criminal offences allegedly committed by UK diplomats working abroad.<sup>39</sup> The FCO also publishes details of crimes committed by persons with diplomatic immunity within the UK.<sup>40</sup> Conversely, no such system exists in Nigeria. Diplomats are given excessive protection and leverage by the system and consider it almost a taboo to 'stalk' and report the wrongful acts of diplomats. Such acts are only reported in the few cases that get to a court.

Conclusively, while the UK can be seen to have made efforts to shift its stance from the customary practice of absolute immunity granted to the diplomatic envoy in certain contexts, Nigeria has maintained the long-established civil and criminal immunity for international organisations, diplomats, and consular agents both in law, as seen above and in practice. A review of the current trend in some judicial decisions within the Nigerian courts show that the country is still practicing the absolute immunity approach.<sup>41</sup>

## **6. THE RETHINKING DEBATE**

Just like the adage: 'old habits die hard', the existing international regime and supporters of the current regimes see nothing wrong in the customary DPIs. To some of such supporters, diplomats/diplomatic premises and archives are an extension of their sovereign states thus must be absolutely protected from invasion by another state, while others see DPIs as essential tools for the smooth conduct of diplomatic functions by the diplomats<sup>42</sup>. The preamble of the VCDR says that the purpose of diplomatic immunity is not to benefit individuals but to ensure efficient performance of the diplomatic function.

However, there have been criticisms and counter arguments to the above submissions. These largely stem from early recounts of diplomatic abuses.<sup>43</sup> Some scholars and even diplomats have criticized and called for a rethink of DPIs.<sup>44</sup> Ross believes that the protection essentially amounts to a license to break the law, without any redress for the potential victims whatsoever.<sup>45</sup> She called for the establishment new guiding principles that could define

reasonable limits to diplomatic immunity. Geoffrey Robertson QC agrees with her position and posits that DPIs should be redrafted to limit diplomatic immunity, especially in civil issues.<sup>46</sup> Others argue against the absolute diplomatic immunities from a human rights perspective. Ben-Asher posits that victims of human rights violations by diplomats should not be left without remedies and recommends, among others, the introduction of compulsory arbitration provision into the Vienna Convention.<sup>47</sup> Having served at several embassies and US missions, former envoy Elizabeth Shackelford posits that some diplomats have the habit of souring their diplomatic reputations through serial abuses of their DPIs. She mentions that Nigerians are 'notorious' for some of these abuses.<sup>48</sup> There is absolute need to do something about such abuses.

This paper tilts more towards those calling for a rethink of DPIs because recounts of diplomatic abuses world over are a stark indication of the need for such reform. As a starting point, a distinction should be drawn between Diplomats who are considered to represent their countries in personam (such as Ambassadors and High Commissioners) with other officials who work on behalf of their countries (such as consuls and representatives in international organisation). This is because the former are considered as direct substitutes for their sovereign states, therefore represent the state and are treated as same, while the latter are employed to perform various services for and on behalf of their State outside its territory.<sup>49</sup> Therefore, they should not qualify for equal immunities and privileges. Recognizing the existence of this distinction, as far back in 1925, T.J. Lawrence says 'Consuls are commercial, not diplomatic agents'.<sup>50</sup>

Additionally, the surge in using embassies/consulates for granting asylum and commission of crimes has always raised brows over the inviolability of such premises. The recent cases of Julian Assange<sup>51</sup> and Jamal Khashoggi<sup>52</sup> are classical here. The asylum granted in the former case has put a lot of economic pressure on both the UK<sup>53</sup> and Ecuador.<sup>54</sup> Similarly, the latter case has occasioned worldwide condemnation of inviolability granted to consulates because the heinous crime committed could have been prevented, and better investigated if not for such immunity. Several other recounts of antecedents of abuse of privileges and immunities have occurred.<sup>55</sup>

Additionally, some countries either for economic or political reasons cloth undeserving persons with the diplomatic immunity cloak, who are likely to exploit such DPIs. A classic example is that of the appointment of Sheikh Walid Juffali by the Caribbean Island of Saint Lucia as its permanent representative to the International Maritime Organisation (IMO) in 2014 in a bid to shield him from the law.<sup>56</sup> Therefore, due to the vulnerability of some less powerful countries, an international approach is needed towards the alteration of the current regime rather than amendments of domestic laws by individual states. This will also be a better approach towards achieving harmony on what is acceptable by the vast majority of the States.

## **7. CONCLUSION**

Diplomatic immunity is classified into personal and official, and dependent on the rank of the beneficiary. The bulk of such immunities and privileges enjoyed by diplomats are diversified ranging from criminal, civil, and administrative immunities to certain social and procedural prerogatives recognized worldwide. These DPIs gained international recognition from customary usage and became codified as international law. These codifications serve as guiding principles to the Nation States to develop their local laws on DPIs. It is equally accepted both in theory and in practice that the functional basis of DPIs is to protect the diplomats and prevent interference with their official duties, hence they are not subject to the laws of the receiving State. However, those customary principles of DPIs are at crossroads now. Abuses of the DPIs over time have resulted in calls for a paradigm shift from the old tradition of absolute immunities to restrictive immunities. Some countries such as the UK are making efforts towards that shift, while Nigeria appears not to follow suit. The paper recommends that the United Nations should explore the possibility of adjusting the current regime on DPIs from absolute immunity to a restrictive one. Due to the reciprocity principle of DPIs, States can also use bilateral agreements to draw yardsticks on the extent of DPIs within their territories. Nigeria, in particular, which many consider a haven for offenders, should take stern measures by making appropriate regulations and monitoring mechanisms concerning DPIs. These will show the need for foreign government representatives to respect local laws and behave in the best manner fit for their portfolios.

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