

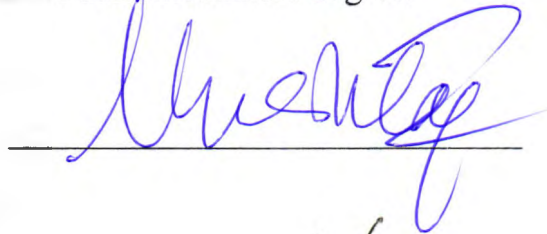


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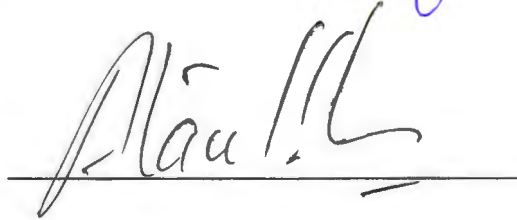
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This is to certify that we evaluated the thesis titled “Diplomatic Immunity or Diplomatic Protection? Revisiting the Discourse in the Light of the Principles of Islamic Law and the Emerging Trends in International Law” submitted by Mr. Izuddin Imad under University Reg No. 236-FSL/LLMIL/F15, in partial fulfillment of the requirements for the award of the degree of LL.M (International Law). This thesis fulfills the requirement in its core and quality for the award of the aforementioned degree.

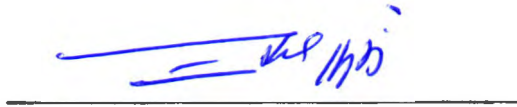
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Diplomatic Law

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Declaration

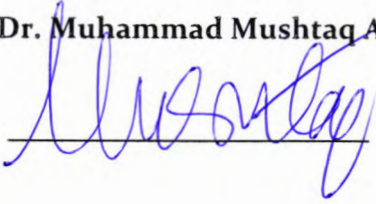
I, **Izuddin Imad**, hereby declare that this dissertation is original and has never been presented in any other institution and all information is duly acknowledged.

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DEDICATION AND AKNOWLEDMENTS:

To my respectful parents, May Allah give them long healthy life, to my siblings, especially Engineer Saifuddin Imad and Engineer Noor Uddin Imad, who supported me financially and spiritually, Allah bless them all.

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LIST OF ACRONYMS:

ACHPR:	African Charter on Human and Peoples' Rights
CEDAW:	Convention for Elimination of Discrimination against Woman
ECHR:	European Convention on Human Rights
ICESCR:	International Covenant Economic, Social and Cultural Rights
ICCPR:	International covenant on Civil and Political Rights
ICC:	International Criminal Court
JASTA:	Justice Against Supporters of Terrorism Act
UDHR:	Universal Declaration on Human Rights and Cultural Rights
VCDR:	Vienna Convention on Diplomatic Relation 1961

Introduction:

The immunities related to diplomatic personnel of various kinds grew up in international law on the grounds of the doctrine of sovereignty, extra-territoriality, personal representation and functional necessity, and such relations are conducted through the medium of ambassadors and diplomatic envoys and missions.

The provisions of Convention on Diplomatic Immunity (CDI) 1961 and Convention on Consular Relations (CCR) 1963 which give absolute immunity to diplomats are contradictory with the Quranic verse: "Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal." But if any one remits the retaliation by way of charity, it is an act of atonement for himself". And if any fail to judge by (the light of) what Allah hath revealed, they are (no better than) wrongdoers" and other Principles of Islamic law of nations and the whole legal system of Islamic law. Imam Shafi also says "And if a Harbi *Mustamin* commits a criminal act, he is liable for Qisas"²

The Islamic law has the concept of *Aman* (protection)³, which should not be violated, and it can be detracted any time either, by departure or by receiving state

¹ Abdullah Yousuf Ali, *The Holy Qurān*, (Saudi: King Fahad Qurān Printing Complex, 1987), Surah al-Mai'da, Verse 48, p50.

² Abū 'Abdillāh Muhammad ibn Idrīs al-Shāfi'ī, *Al-Umm*, Part 6, Book of Qisas, Hodood, Diyat, (Mansura: Dar al-Wafa), 118.

³ Cherif Bassioni, *Protection of Diplomats under Islamic Law*, American Journal of International Law, (1980), 609.

through expulsion. And it is based on *'Ismah* (the legal protection), and not on the doctrine of sovereignty or extra-territoriality, and in Islam's sovereignty concept, the human being is representative of sovereign and is also liable for a crime committed by him.

Thesis Statement

Instead of recognizing immunity for diplomats on the basis of the doctrine of sovereignty, Islamic law accords legal protection (*'Ismah*) to them after granting them peace (*Aman*) and, thus, in case of violations it allows civil as well as criminal proceedings against diplomats which is also compatible with the norms of contemporary human rights law.

Literature Review:

1- Immunity Or Impunity: A Critical Appraisal Of The Immunity Of Diplomats In International Law And Its Status In Shariah:

A contemporary Muslim Scholar of Islamic Law Prof. Dr. Muhammad Munir. in his article "Critical Appraisal of the Immunity of Diplomats in International Law and its Status in Shariah"⁴ discussed the privileges of diplomats and elaborated that how these privileges were codified. He elaborated the concept of immunity with

⁴ Muhammad Munir, "*Immunity or Impunity: A Critical Appraisal of the Immunity of Diplomats in International Law and its Status in Shariah*" *Journal of Law and Society*, vol, xxii, no. 35 (2000), 39-57.

examples (precedents) from the perspective of international law as well as from Islamic international law, also, he has talked about the financial immunity, which he says is compatible with Islamic law.

However, he has not discussed whether the laws of receiving state will apply on them under the Islamic law or not and whether such *Pacta Sunt Servanda* rule applies in treaties which are against the Shariah's basic principles or not, and I want write on this.

2- Protection Of Diplomats Under Islamic Law:

Muslims scholar of international law and Islamic law, M. Cherif Bassiouni, in his article, protection of diplomats under Islamic law⁵, has discussed that there is protection for diplomats from being killed , molested , injured or hurt and has analyzed single event i.e. detention of US diplomats in their embassy by students in Iran. He analyzed it from both international laws as well as from Islamic law.

But he didn't discuss that if a diplomat violates Hudood laws, fundamental and constitutional, human right of citizen of the host state, whether he will be held liable or not, under Islamic law, and whether or not the law will be applicable on them or not under Islamic law, and I want to do research on this.

3- Al -Alakat al -Dablomasia al -Dawliaala fidhaw'e al-Shar'ia al-Islamia:

⁵M. Cherif Bassiouni, "Protection of Diplomats under Islamic Law", the American Journal of International Law, 74:3(1980)609-633.

Muhammad Mute Al-Rahman, and research scholar in his thesis of LLM Shariah⁶, has generally discussed the diplomatic relations in the light of Islamic law, kinds of diplomacy , characteristics of diplomacy, diplomacy in peace and war, purpose of diplomacy in Islamic law.

Moreover, he has generally included some of the articles of Vienna convention, but has not exactly discussed the diplomatic immunity. Also has not discussed critically or comparatively anything in it. In addition, he has not discussed the judicial aspects of immunity in national law and international law in his thesis, but has only discussed the diplomatic relations in Islamic law. So his discussion is generally around the rules of diplomatic relations in Islamic law, and has not discussed whether such treaties, which are against the basic principle of Islamic judicial system are valid or not. Whether the national laws of receiving state will be applicable on him under Islamic law or not. In addition, I want to do research on this issue.

4- Al Hasana al-Diblomasiya Baina al-Shariah al-Islamiawa al-Qanoon al-Dowalee:

Abdul Azeen Ahmad Mustafa Fazal, in his thesis, Al-Hasana al-Diblomasiya Baina al-Shariah al-Islamia wa al-Qanoon al-Dowalee⁷, has written about the diplomatic

⁶Muhammad Mute al-Rahman, *al-Alakat al-Dablomasia al-Dawlia fi Dhaw'e al-Shariah al-Islamiah (Diplomatic Relations in Islamic Law)*, Arabic unpublished thesis submitted to the Faculty of Shar'ia and Law , IIUI, Islamabad, 1994.

⁷*Al-Hasana al-Diblomasiyah Bain al-Shariah al-Islamiawa al-Qanoon al-Do'walee*, LLM Thesis, International Islamic University , Islamabad, 2002.

immunity that in Islamic law there is also absolute immunity, mentioning the Hadith of the Prophet (P.B.U.H) to the emissaries of Musailimah al-Khadhab, to the diplomatic emissaries and has generally compared it with international law.

However, he has not legally discussed whether they will be liable for their criminal act and civil wrongs, which he commits it against the individual/ Citizen of the receiving state, in the receiving state, under Islamic law or not, and I want to do research on this issue.

5- Ahkam al-R'usul wa al-Sufara fi al-Fiqh al-Islami:

Jamal Ahmad, in his MS Shariah thesis, *Ahkam al-R'usul wa al-Sufara fi Fiqh al-Islami*⁸, has discussed the general rules/ principles for the diplomatic relations in Islamic law, he in its third chapter has discussed the judicial immunity of diplomatic emissaries, and has agreed with the absolute immunity for diplomatic envoys in Islamic law. And I want to do research on this whether the laws of receiving state will apply on diplomatic missions, if they violates the criminal and civil laws of receiving state, in Islamic law.

Research Question/ Framing of Legal Issues:

Whether or not the diplomats can be given absolute immunity, because they are representative of sovereign, in Islamic law.

⁸*Ahkam al-Rusul Wa al-Sufara fi al-Fqh al-Islami*, University Of Najah, (2008)
Nabulus Palestine,.

- (a) Whether or not, the Islamic law confers power to the Muslims ruler to give such immunity under the Syasah (Administrative) power, and whether or not, he can pardon them for their criminal acts involving the right of individual.
- (b) Whether or not it is lawful in Islamic law to accept absolute immunity for diplomats under the doctrine of *Pacta Sant Servanda*, and principle of reciprocity which is some time lawful to be used and accepted in humanitarian agreements and issues
- (c) Whether or not, the emissaries and diplomats are liable for persecution if they violate the national law of the receiving state?
- (d) Where, If the citizen of receiving state suffers from the hands of diplomat, which right will prevail, the Constitutional or Privileged.
- (e) Whether it is in contradiction with the Quranic verses and some other principles of the judicial system of Islam, such as “.....life for life, eye for eye, and nose for nose”⁹
- (f) Whether or not there are any kind of areas of compatibility and incompatibility in different kinds of immunities given by international such as financial, premises, material, and personal immunity
- (g) Whether it is immunity or legal protection?

⁹Abdullah Yousuf Ali, *The Holy Qurān*), Surah al-Mai'da, Verse 48, p50.

Outline of Thesis:

This Thesis contains three chapters:

First chapter deals with juridical principles of diplomatic immunity, kinds of immunities given in international law to the diplomats, and comparison between the juridical principles of immunity for diplomats in international law and Islamic law.

Second chapter deals with the legal protection of diplomats in Islamic law, arguments of special cases happened in the time of the Prophet (p.b.u.h), these cases are discussed analytically from aspect of *Dars*, and some other jurisprudential principles like concept of *Aman* etc... and the views of Islamic jurists are mentioned at every stance of the cases. It talks about Islamic legal system from criminal laws, civil laws to Syasah power of Imam regarding pardon; it also discusses the compatibilities of international law regarding immunities with Islamic law if any.

Chapter three deals with the accountability of diplomats in the courts of U.S.A, and with international tendencies in the international human rights law regarding all kind of Immunities

Chapter I

The Juridical Bases of Diplomatic Immunity in Contemporary International Law

1.1. Introduction:

Diplomatic immunity is based on few ancient jurisprudential concepts like representative of sovereign theory, functional necessity theory and the theory of extra-territoriality. These theories used to be the base of almost every legal system of the world until it attained international status in contemporary international law when the Vienna Convention on Consular Relations (VCCR) 1963 and Vienna Convention on Diplomatic Relation (VCDR) 1961, but such principles are not recognized/ recognizable in Islamic legal system.

The chapter has three parts, first part of the chapter deals with juridical principles of diplomatic immunity in international law, the second part deals with the kinds of immunities given in international law to the diplomats, third part deals with the comparison between the juridical principles of immunity for diplomats in international law and Islamic law.

1.2. Theories:

There are few bodies that are immune from jurisdiction of receiving states' courts, first is sovereign and second is diplomats.

Different countries have codified the international law regarding immunity and have made acts for legalizing the immunity on national level i.e. European convention on state immunity 1972, Foreign Sovereign Immunities Acts 1976 U.S.A, State Immunity Act 1978 by U.K, Foreign State Immunity Act 1985 by Australia. All these theories are based upon few theories, on the base of which the diplomats are given full immunity in international law:

1.2.1 The representative of sovereign theory:

The sovereignty theory became popular in 16th century as described by Jean Bodin and Thomas Hobbes¹⁰. The immunity to the diplomats has developed on some of juridical principles. One such principle is the doctrine of representative of sovereign, which became popular after the middle ages in renaissance period and after that the representatives of sovereigns received a great welcome and treatment by the states. Grotius says, "The character which they sustain is not that of ordinary individuals, but they represent the majesty of the sovereigns, by whom they are sent, whose power is limited to no local jurisdiction"¹¹

¹⁰Akehurst, *Modern Introduction to International Law*, 7th Edition, (London and New York: Routledge Publisher, 1997), 17.

¹¹J, Craig Barker, *The Protection of Diplomatic Personnel*, (New York: Routledge

He further adds:

It is natural to suppose that nations have agreed in case of ambassadors to dispense with that obedience, which everyone by general custom owes to the laws of that foreign country in which at any time he resides. the character which they sustain is not that of ordinary individual, but they represent the majesty of sovereign by whom they are sent, whose power is limited to no local jurisdiction¹²

Therefore, in his view the ambassadors at all are inviolable due to the ancient common custom between people, and people consider the diplomats higher than any other individual, and shall not be tried by any local court.

The U.S chief justice marshal has stated the rationale of the representative character theory in case of schooner exchange v M. Fadon. He said that: "The assent of sovereign to the very important and extensive exemption from territorial jurisdiction which are admitted to attach to foreign ministers is implied from the consideration that without which exemption every sovereign would hazard his own dignity by employing a public minister abroad"¹³

The Bynkershoek, a positivist scholar, argues that: "The sole reasons why ambassadors are exempted from the power of those to whom they have been sent is that they should not while performing the duty of their office change their status

Publisher, 2016,), 42-43, Can be Read at:
<https://books.google.com.pk/books?id=siGgCwAAQBAJ&printsec=frontcover#v=onepage&q&f=false> accessed on 24, 11, 2016.

¹²Hugo Grotious, *The Rights of War and Peace: Including the Law of Nature and of Nations*, Volume 2, (Montana, U.S.A: Kessinger Publishing, 2004,.) 231

¹³<https://supreme.justia.com/cases/federal/us/11/116/case.html>, Accessed on 27.3.2016.

and become subject to another while they are acting as the representative of their prince."¹⁴

Therefore, this theory is based on the principle of sovereignty and the ambassadors or diplomats, who are the representative of sovereign, will not be subjected to the national laws of receiving state.

1.2.2 The Theory of Extra- Territoriality:

The extra-territoriality theory based on jurisdiction, which is of different kinds:

- I- Legislative Jurisdiction
- II- Judicial Jurisdiction
- III- Enforcement jurisdiction

And all are powers of a state on its territory and certain crimes can be punished by national courts of a country, which are called international crimes, "State has jurisdiction to define and prescribe punishment as of universal concern such as piracy, slave trade, attacks on or hijacking aircraft, genocide, war crimes and certain acts of terrorism"¹⁵. As in Eichmann case, or crimes committed by a national of a

¹⁴J, Craig Barker, *The Protection of Diplomatic Personnel*, p43, Can be Read at: <https://books.google.com.pk/books?id=siGgCwAAQBAJ&printsec=frontcover#v=onepage&q&f=false> Accessed on 24, 11, 2016.

¹⁵Akehurst, *Modern Introduction to International Law*, 7th Edition, (London and New York: Routledge Publisher, 1997), P112.

country abroad, but the sovereigns and their representatives are immune from it except if he is national of it.

The French theorists have found the doctrine of extra-territoriality and jurists like Pierre Ayrault in 15th century, and he in his theory had insisted that some people are considered to be outside the territory of a foreign sovereign and shall not be subjected to the local jurisdiction of the court.¹⁶

In the contemporary international law, under the doctrine of extra-territoriality, the diplomats are considered to be absent in the territory of the receiving state and they are considered to be present on their own territory. Therefore, they shall not be subjected to the jurisdiction of the receiving state and they shall not be subjected to the criminal or civil laws of receiving state.

The Grotius and Samuel later gave great importance to his theory and in the era of Queen Anne of Great Britain, it gained widespread acceptance and passed an act named privileges of ambassadors 1708, but it mainly included privileges in cases of civil cases not criminal but later these privileges were extended to criminal cases as well¹⁷.

¹⁶<http://legal-dictionary.thefreedictionary.com/Extraterritoriality> accessed on 17,01,2017.

¹⁷Recueildes Cours, Collected Course of the Haque Academy of International Law, 1990, V. III, Edited by Académie de Droit international de La Haye, (Dordrecht/Boston/London: Martinus Mijhoff publishers, 1991. Can be Read at: https://books.google.com.pk/books?id=P-jGl6kzaF8C&printsec=frontcover&redir_esc=y#v=onepage&q&f=false Accessed on 18, 01, 2017.

The French Jurist Pierre Ayrault states, "He is held to be absent and to be present in his own country"¹⁸. A Dutch positivist scholar Cornelius Van Bynkershoek has also agreed with the extra-territoriality theory and says, "Ambassadors are thought of as being outside the territory of him to whom they are sent as ambassadors"¹⁹

In the above theories, the diplomats are considered to be outside the territorial jurisdiction of the receiving state²⁰. However, some of the writers have criticized extra territoriality and have treated it as a fiction as the Francois Pietri²¹ says, "If rights and duties were grounded in a territorially defined state and if states defined their jurisdiction territorially, it was illogical to exempt persons from such territorial jurisdiction"²²

Some of the contemporary scholars and writers of international law consider the doctrine of extraterritoriality as a fiction and believe that it is near to be

¹⁸Muhammad Basheer Ismail, *Islamic Law and Transnational Diplomatic Law*, 1st Edition, (London: Palgrave Macmillan, 2016), 82.

¹⁹J. Crag Barker, *International Law and International Relations*, (London: Continuum, 2000), 162. Can be Read at: <https://books.google.com.pk/books?id=IELUAWAAQBAJ&printsec=frontcover#v=onepage&q&f=false> accessed on 30-11-2016.

²⁰ As well as it is a limitation and a kind of interference in the doctrine of sovereignty. Francois Pietri was ambassador of France to Spain, had been minister of few ministries and lawyer by profession.

²² Douglas Howland, *International Law and Japanese Sovereignty, The Emerging Global Order in 19th Century*, (London: Palgrave Macmillan, 2016), 61. Can be Read at: https://books.google.com.pk/books?id=eBR_DQAAQBAJ&pg=PA61&lpg=PA61&dq=jurist+about+the+extraterritoriality+of+ambassadors&source=bl&ots=7Dygb4zNG9&sig=73sjaj8v5LENP7WZ7jpHmQl2ILM&hl=en&sa=X&redir_esc=y#v=onepage&q=jurist%20about%20the%20extraterritoriality%20of%20ambassadors&f=false accessed on 18-01-2017.

abandoned in international law "The fiction of extra-territoriality is abandoned in international law"²³.

1.2.3 The Theory of Functional Necessity:

The theory of functional necessity presents that in order to perform the functions of the diplomats efficiently there shall be no compulsion on them from receiving state as the Grotious says, "An ambassador ought to be free from all compulsion in order that he may have full security"²⁴

To answer the question that why the people in the past granted partial immunity to the diplomatic agents, Ogdon mentions, "Rules and regulations governing the sanctity of public diplomatic agents and recognizing some kind of immunity are found among remotely located peoples"²⁵. In addition, such rules can be justified on the doctrine of necessity of diplomatic relation; he concludes his statement by saying that:

These practices of ancient people in different periods and under peculiar circumstances exhibit a fundamental relationship between the function of the embassy and the reason why diplomatic immunity was allowed to thrive. Embassies were dispatched upon missions of the greatest import in the life of the receiving as well as the sending political organism. The importance of embassy seems in itself to have been reason enough for receiving and

²³Muhammad Munir, "Immunity or Impunity: A Critical Appraisal of the Immunity of Diplomats in International Law and its Status in Shariah", *Journal of Law and Society*, Vol, xxii, no.35(2000),39-57, 42.

²⁴J, Craig Barker, *the Protection of Diplomatic Personnel*, p 48. Can be Read at: <https://books.google.com.pk/books?id=siGgCwAAQBAJ&printsec=frontcover#v=onepage&q&f=false> accessed on 24, 11, 2016.

²⁵ Ibid, p31.

ambassador, for communicating with him and for allowing him freedom to return with a message to his native camp²⁶

According to Grotius's principle regarding the immunity "*Omnis Coacti Abesse a Legato Debet*", (all compulsions should be removed from ambassador) the Paul Guggenheim states that "it was in the collective interest of international relations that diplomatic representative enjoy certain immunities and privileges"²⁷.

Therefore, for such purposes the international law commissions took in consideration the guidance of all these theories, of functional necessity, extraterritoriality, and representation of the sovereign, of the ancient jurists while making the Vienna Convention on diplomatic relations.

In order to represent the independent states, there shall be no fear on them regarding the civil and criminal jurisdiction and the immunity is required for them under the functional necessity theory, thus, there will be no interference in the relation of independent states²⁸.

Also in the Vienna Convention on Diplomatic Relation has taken in its preamble the functional necessity theory where the immunity is referred to be due to the functions of diplomatic missions' functions and not for the diplomatic

²⁶ Ibid.

²⁷ B.S Murty, *The International Law of Diplomacy, The diplomatic Instrument and World Public Order*, (U.S.A: New Haven Press, 1989) 343 Can be Read at: <https://books.google.com.pk/books?id=yvoLbSGNBqsC&printsec=frontcover#v=onepage&q&f=false> Accessed on 19, 01, 2016.

²⁸ David b, Mechaels, *International Privileges and Immunities*, (HagueNetherlands:Martinus Nijhoff, 1971).

personnel. So it has not left any question for that whether the immunity is given for person or his function and for this purpose this theory has overlapped the sovereign representation theory:

The functions of a diplomatic mission consist inter alia in: (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.²⁹

However, the problem is this that the beneficiary of such immunity is diplomat and not the diplomatic functions, because in diplomatic function no one can perceive that the diplomatic functions are to commit crimes and breach the laws. In addition, no one can perceive that the diplomatic personnel will have the intention to commit the crime, because the diplomatic relations and diplomatic functions are only for the interest of the sending state to protect its own economic, political and other interests and cooperation with the receiving state, and shall have respect laws and interests of receiving state.

So that the real scope of diplomatic relation will get wider than before, also someone may ask why the absolute diplomatic immunity is given on the bases of functional necessity. In addition, is that necessary to give absolute immunity to diplomatic personnel

²⁹ See Article 3(1) of VCDR 1961.

to have good relations? Cannot both states have good relations without having any such immunity?

1.3 Diplomatic Immunity in VCDR 1961:

Diplomatic immunities accord a special legal position to diplomats by receiving state, and they are not subjects to the ordinary process of law. The Vienna convention on diplomatic relation includes 53 articles with preamble, and accord to Diplomats different types of immunities³⁰.

1.3.1 Personal Immunity of diplomatic agent:

Immunity from jurisdiction: diplomat has immunity from

- a- criminal
- b- civil, except in the cases of:
 - i- A real action to private immovable property
 - ii- An action relating to succession
 - iii- An action relating to any professional and commercial activities
- c- In addition, administrative jurisdiction of the receiving state, which means that he, has judicial immunity. ³¹

Immunity from the jurisdiction will not mean that the diplomat is above the law but such law is unenforceable on him, which means that the diplomat cannot be

³⁰Vienna Convention on Diplomatic Relation, 1961.

³¹Muhammad Munir, "Immunity or Impunity: A Critical Appraisal of the Immunity of Diplomats in International Law and its Status in Shariah", Journal of Law and Society", vol. xxii, no.35 (2000), 39-57, 43-44.

subjected to any form of coercion and the receiving state cannot exercise its jurisdiction on him.

In addition, there shall be no coercion on them to give evidence³² and both the sovereign immunity and diplomatic immunity can be waived so that the law, which was unenforceable, will become enforceable on them:

- a- By sending state
- b- It should be express, by stating that the immunity is waived.
- c- And the receiving state shall be informed regarding this waiver³³

Article 32(2) of the Vienna Convention 1961 says that waiver must always be express, but it is doubtful whether this provision reflects customary law, so it cannot necessarily be applied by analogy to sovereign immunity. If states or diplomats appear as plaintiffs, they are deemed to waive their immunity in respect of counter-claims arising out of the same subject matter³⁴

Therefore, some time it may be implied even if a diplomat defends the action without challenging the jurisdiction of the court over him, for example if a state sold good to a person and later the person did not make payment to it he will be deemed that the state has waived the immunity.³⁵

³² Ibid.

³³ Article 37, VCDR 1961.

³⁴ Akehurst, *Modern Introduction to International Law*, 7th Edition, (London and New York: Routledge Publisher, 1997), 128-129.

³⁵ Ibid.

1.3.2 Financial Immunity:

The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission³⁶

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.³⁷

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal taxes, with some exceptions

- a- Dues and taxes on private immovable property
- b- Taxes on estate or succession
- c- Dues and taxes on private income of commercial nature
- d- Indirect taxes included in the price of goods
- e- Tax to which exemption do not apply like dues and charges for services rendered.

In addition, members of service and personal staff are exempt from dues and taxes for their emoluments they receive³⁸ and all types of missions are exempt from customs duty, taxes and related charges their families; administrative and technical staffs enjoy exemption from custom duty³⁹

³⁶Article23, VCDR 1961.

³⁷Article28, VCDR, 1961.

³⁸Muhammad Munir, *Immunity or Impunity: A Critical Appraisal of the Immunity of Diplomats in International Law and its Status in Shariah*, 46.

³⁹ Ibid.

1.3.3 Immunity of mission's premises, property and archives:

The premises of the mission shall be inviolable and the agents of receiving state will not enter it except by consent, and the receiving state shall take appropriate steps to protect the premises, also the means of transport of the mission will be immune search, requisition, attachment and execution.⁴⁰

The archives and documents of the mission shall be inviolable at any time and wherever they may be, and it is common between convention on diplomatic relations, convention on consular relations, and convention on special mission⁴¹. In addition, the diplomatic bag shall not be opened or detained⁴² The personal baggage of a diplomatic agent shall be exempt from inspection⁴³, unless there are serious grounds for presuming that it contains articles not covered by the exemptions, such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

1.4 Comparison between the Two Jurisprudential Concepts:

Below, there is a brief comparison between the jurisprudential concepts of in Islamic Law and western laws:

⁴⁰Art.22, VCDR 1961.

⁴¹Muhammad Munir, *Immunity or Impunity: A Critical Appraisal of the Immunity of Diplomats in International Law and its Status in Shariah*, 43.

⁴²Art.27 VCDR, 1961.

⁴³Art.36, VCDR, 1961.

1.4.1 The Concept of Sovereignty in Islamic law and Sovereign Representative in Islamic Law:

Sovereignty is the one of the most fundamental principle in Islamic law, especially, in the political system of Islam, so all humans are needed to accept sovereignty of Allah over the entire universe. As he has created the entire universe and has full control over it, thus his creature shall make their actions according to his commands and obey him as the supreme lawgiver to them and merely acceptance of his commands would question his sovereignty.

The Pharoah had also claimed the Godhood, and he wanted to be obeyed by people, and claimed sovereignty over the people of that territory where he had power. The contemporary states are also like that, they claim sovereignty and want to be obeyed in every point even if it contradicts with the laws of Allah, they shall be obeyed and this is the difference between sovereignty of Allah and sovereignty of states.

However, "لا طاعة لمخلوق في معصية الخالق" there is no obedience to his creature if they contravene Allah's rules and laws even though Allah has assigned and delegated his power to man and made him Khalifah in the earth. However, he shall obey and work according to his rules and principles otherwise he will go astray and may become disbeliever, unjust and transgressor, unlike the states ruler whom people shall obey it even in big contradictions with Islam.⁴⁴

⁴⁴Sayyid Abul Ala Maududi, *The Islamic law and constitution*, translated by Khurshid Ahmad, (Lahore: Islamic Publications Public Lmted), p 171 to 177.

In the Islamic law the sovereignty belongs to the Allah Almighty only⁴⁵: "Sovereignty in all its aspects, is only to God, he alone is the creator and the real ruler of this universe therefore to him belongs the sole right of being the sovereign over all this creation"⁴⁶, and the human is his representative of sovereign in the earth.

Almighty Allah says: "Behold, thy Lord said to the angels: "I will create a vicegerent on earth." They said: "Wilt Thou place therein one who will make mischief therein and shed blood? Whilst we do celebrate Thy praises and glorify Thy holy [name]?" He said: "I know what ye know not"⁴⁷

Almighty Allah says to that Prophet Dawud:

O David! We did indeed make thee a vicegerent on earth: so judge thou between men in truth [and justice]: Nor follow thou the lusts [of thy heart], for they will mislead thee from the Path of Allah: for those who wander astray from the Path of Allah, is a Penalty Grievous, for that they forget the Day of Account⁴⁸.

The above verse proves that the sovereign is only Allah and the man is his representative. Like the Prophets are representatives of sovereign, who are also liable for the actions & wrongs if they commit it against others, and there are many

⁴⁵ Unlike the concept of sovereignty of contemporary international law which is the creature and result of the Westphalia treaty 1648.

⁴⁶ Sayyid Abul Ala Maudidi, *The Islamic law and constitution*, translated by Khurshid Ahmad, (Lahore: Islamic Publications Public Lmted), 212.

⁴⁷ Abdullah Yousuf Ali, *The Holy Qurān, Surahal-Noor, SuraAl-Baqara, Verse 30, 2*

⁴⁸ Abdullah Yousuf Ali, *The Holy Qurān, Surah Saad, verse 26, p228.*

evidences we find it in the life of the Prophet (p.b.u.h) and his companions for proving such claim some incidents during the era of Prophet (p.b.u.h) are mentioned

- i- After the victory of Makkah , the Prophet(peace be upon him) ordered Bilal (R.A) to prepare and call the Muhajireen and Ansar for prayer. Prophet addressed in the Masjid al-Rasool, while giving speech people cried, the Prophet said that I call you by God, if you have any complain/ grievance regarding me, so he shall stand and shall take Qisas from me before taking Qisas in the Day of Judgment. And after third time when he repeated the same statement, Ukasha (R.A) ,stood who was of old age, and said that after victory in a war you hit my waist whether it was intentional or not. Alot of Sahaba offered to Ukasha to take Qisas few time bigger than that, but the Prophet did not accept this and said to Ukasha. " hit if you are hitter", Ukasha said that you hit me while I was bare-belly, so the Prophet (P.B.U.H) opened to him his belly , and when the Ukasha saw the belly of the Prophet he kissed it, and said that who can afford to take Qisas from you. Prophet said "either you hit or pardon" he said I pardoned for that The God will pardon me on the day of judgment, the Prophet said

who wanted to see my friend in paradise he shall look to this person

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The above Hadith is witness and proof for any kinds of liability of representative of sovereign as the Prophet (p.b.u.h) clearly says that take Qisas from me if any of you have it to take it from me. Ukasha who stood to take it, but he pardoned it after he delayed to take Qisas from the Prophet (p.b.u.h), the Prophet gave him two options either to take Qisas or to pardon, then he pardoned, so the Hadith shows that even the Prophet (p.b.u.h) who is the representative of sovereign in Islamic law can be sentenced under Islamic law.

- ii- In another incident, the Prophet (P.B.U.H) was distributing the booty, a person came, and the Prophet unintentionally injured the face that person slidely, the Prophet told him that come and take Qisas, and then he said that I pardoned O! Prophet. ⁵⁰

The Hadith is proof of the liability and equality of even the representative of Sovereign before the law in the Islamic law judicial system as the Prophet (p.b.u.h) clearly hears his complaint and then decides to come and take Qisas and he pardons him.

- iii- In another incident which took place in the Khilafa of the Ameerul Mumineen Omar (R.A) and said: "O people! I saw a male and female

⁴⁹Al-Tabarani, Sulaiman Bin Ahmad, *Almujam al-Kabeer*, VOL.3 (Cairo: Maktaba Ibni Taymiyah,), 54-56.

⁵⁰Imam Majd al-Din al-Mubarak Ibn al-Athir, *Jami' al- Usul fi Ahadith al-Rasul* , VOL.11, Hadith 8833, (Kuwait: Maktaba Darul Bayan), 257.

committing Zina by my eyes, the Ali (R.A) replied, do you have witnesses? He said no, Ali told to him that if you mentioned their name we would lash you 80 lashes”⁵¹.

The above Hadith is proof of application of Hudood on the Khalifas who are considered representative of sovereign in the earth and the warning 80 lashes by Ali (R.A) is a good express evidence for that.

1.4.2 Extra-Territoriality in Islamic Law:

The basic principle is that Islam is an international/worldwide religion, it has come for whole people, not for a specific tribe or specific races, and its law is not applied but only on the territory/places where the Muslims have power. Moreover, this debate based on the theory of *Dars*, which is according to Hanafis the world is divided into two *Dars*, *Dar al-Islam* and *Dar al-Harb*, so those who are in *Dar al-Islam* they are to be dealt with the laws of *Islam*.

Imam Abu Yousuf says that the Shariah is applied for the crimes being committed on *Dar al-Islam*, which means that all the crimes and wrongs which are committed within the territory of Islam by any of category of people for example by those:

- i- Who live permanently like Muslim on the territory of Islam

⁵¹<http://www.startimes.com/?t=24982119> accessed on 28/11/2016.

- ii- Or by *Dhimi*⁵² who is a non Muslim permanently living on the territory of Islam
- iii- Or those who are temporarily living on the temporarily on the territory of Islam like *Mustamin*

Imam Abu Yousuf mentions the reasons of why the law shall be applicable on all these categories:

- a- The Muslim is bound by Islam to accept the rules of Islam
- b- The *Dhimi* is bound by the contract of *Dhimma* which makes to him permanent *Aman*
- c- The *Mustamin* abides by all the laws given to him by temporary contract of *Aman*
- d- In addition, the contract of *Aman* is common thing between the *Dhimmi* and *Mustamin*, thus he is liable for the crimes he commits on Dar al-Islam.⁵³

According to Imam Shafi the world is considered one *Dar*⁵⁴, so automatic result of this theory will that the law shall be applied on every person across the earth. Also in this theory, the theory of *Aman* and *Dhimma* will be abolished directly,

⁵²*Dhimmi* is a person to whom legal protection is given permanently against some consideration for their protection and becomes full citizen of Muslim State.

⁵³ 'Ala al-Din Abu Bakr ibn Mas'ud al-Kasani, *al-Badaye Wa al-Sanaye fi Tarteeb al-Shara'i*, vol. 7, (Berut: Dar al- KutubAl Ilmiya 2003), P134.

⁵⁴ Abo al-Harith al-Ghizze, *Mawsua al-Qawaid al-Fiqhya*, (N.O.D), Vol 1, P 507. Can be Read At: <https://books.google.com.pk/books?id=4jM-CwAAQBAJ&printsec=frontcover#v=onepage&q&f=false>

because *Aman* and *Dhimma* are given for people living on the territory of war (*Dar al-Harb*) and if someone does not accept such *Dar* then the *Aman* and *Dhimma* are of no legal Value to him.

However, the question remains how you will apply your laws on him while you are not having power over that territory! and the impossibility of doing such will object such theory, and the question of not applying the law on *Mustamin* cannot be raised at all, because when the world is one *Dar* then automatically the law of Islam will apply on every person living on any part of the earth. Also it is not in line with the principles of Islamic law, because the Quran says that who did not migrate to your territory (territory of Muslims) and stayed in old territory, you do not have their guardianship (*Wilayah*). But only helping them in religious matters and such help shall not be against the agreements done with non-Muslim state by Muslim State unless the Muslim state declare it expressly null and void. Only then, the Muslim state can do such help, so the separation of *Dar* has legal consequences over the application of laws as the Prophet (P.B.U.H) says that I am not responsible for those who live among *Mushriks*.⁵⁵

⁵⁵ Sayyid Abul Ala Maudidi, *The Islamic law and constitution*, translated by Khurshid Ahmad, (Lahore: Islamic Publications), 185-187.

Helping the oppressed religious minority in a country is in accordance with the principles of contemporary human rights law as there are many conventions for the protection of minorities, also the Israeli Commando forces had some operations in Yemen to protect their religious minority (Jewish) there and thus they got them out of Yemen to Israel in start of 2016.

See: ILAN BEN ZION, "17 Yemenite Jews secretly airlifted to Israel in end to 'historic mission", march, 21, 2016 Can be Read at: <http://www.timesofisrael.com/17-yemenite-jews-secretly-airlifted-to-israel/>

In Islamic law, there is division of the world into two *Dars*, every *Dar* has its own power, and the Muslim state cannot override the rule of territorial jurisdiction. In addition, we see many evidences in al-Mabsoot of Imam al-Sarakhsi, also Abu Busayr and his party, who fled from Makkah due to persecution, and created their own party attacking the caravans of Makkans, but they were outside the jurisdiction of Madina that's why they did not come under the treaty of Hudybiyah⁵⁶ which was for extradition.

So according to Hanafi Fiqh there is no value of the theory of extra-territoriality and not applying the law on different category of people living and committing the crimes on the territory of Islam. Especially the division of the world into *Dar* and legal reasoning of Imam Abu Yousuf for applying the law only in *Dar al-Islam*, , and those who commit a crime on the territory of Islam shall be liable for his actions and shall be punished for the laws of the *Dar al-Islam*. Therefore, the principle that is derived from above discussion is that: (The law is applied on all those who stay in *Dar al-Islam*).

1.4.3 The Doctrine of Necessity in Islamic Law:

⁵⁶For further discussion on *Dar al-Harb* and *Dar al-Islam* see "The Notion of *Dar al-Islam* and *Dar al-Harb* in Islamic Jurisprudence: With Special Reference to Hanafi School", Islamic Research Institute, International Islamic University, Pakistan, 2008".

In the Islamic law, the doctrine of necessity has a legal value that can be used in some of the extra-ordinary and in extreme necessity cases, but that is mostly limited to the civil cases. The Islamic law Legal maxim: "Necessities legalize prohibition"⁵⁷.

However, the other principle is that:

- a- "The necessity does not invalidate the right of others"⁵⁸

Both are used in different legal issues, which are of different categories:

- i- In the time of necessity and extreme need the unlawful things become lawful

for example the Quran says:

He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of Allah. But if one is forced by necessity, without willful disobedience, nor transgressing due limits,- then is he guiltless. For Allah is Oft-forgiving Most Merciful⁵⁹

Thus to eat the unlawful things like to eat pork or drink alcohol are lawful subject to the necessity.

- ii- The action is unlawful but due to the *Rukhsah* it becomes lawful i.e. if someone's home is burning and there is necessity that it will burn more places around it, so it is lawful to destroy the house without permission of the owner. Or "Anyone who, after accepting faith in Allah, utters Unbelief,-

⁵⁷Wahbah Mustafa al-Zuhayli, *Nazryah al-Dhaman*, (Damascuss:, Dar al-Fikr), 220-221.

⁵⁸ Ibid.

⁵⁹Abdullah Yousuf Ali, *The Holy Qurān, Verse, Sura al-Baqara, Verse 173*, p12.

except under compulsion, his heart remaining firm in Faith - but such as open their breast to Unbelief, on them is Wrath from Allah, and theirs will be a dreadful Penalty”⁶⁰

So the necessity allows confessing the Kalima (Words) of Kufr due to the coercion “Ikrah” subject to the confidence of the heart.

- iii- The action is unlawful and remains unlawful even if there is necessity like killing an innocent person, or committing the prostitution.

But regarding the immunity this principle shall be used in the cases of robbery and it should be due to great hunger and subject to *Daman* “guarantee”, because “The on hand is return what it took it”⁶¹. Therefore, even if someone eats someone else’s edible items without his permission, he should either give to the owner the thing which he has taken or pay its price to the owner and he shall not be subject to the Had of Sariqa due to doubt (Shubah). So the functional necessity cannot legalize the crimes/wrongs but in some exceptional cases as mentioned and discussed above and these exceptions are equally applicable on all without making further exceptions to any special group of people including Diplomats because there is no such exception mentioned for them.

⁶⁰Abdullah Yousuf Ali, *The Holy Qurān*, Surah al-Nakhl, Verse 106, P130.

⁶¹ This is basically one of the Islamic legal maxim which is based on Hadith (عليه السلام) ما اخذت حتي توديها

http://library.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=79&ID=5881 Accesse on 20, 01, 2017.

Conclusion:

The juridical bases for the diplomatic immunity in the contemporary international law is having no legal value in Islamic law, as the Islamic law does not confess on any of them and knows no exception for the representative of sovereign and the sovereign is Almighty Allah and human being is the representative of sovereign in the Islamic law. However, in the contemporary international law sovereignty belongs to man and ambassadors & diplomats are considered to be representatives of sovereign. Also Islamic law considers the person living within the territory of Islam to be counted as present in the territory of Islam and shall not be considered to be absent from that territory , also the functional necessity cannot legalize the crimes committed by a person except in few civil cases but that is subject to limitations.

CHAPTER II

Diplomatic Legal Protection in Islamic Law

2.1 Introduction:

Islamic law has given the Syasah power (administrative power) to Imam to do treaties, he is bound to abide by all the treaties he does it, but there are conditions, and limits are there for signing such treaties. also Islamic law has allowed the Imam to use the principle of reciprocity in some cases especially in humanitarian cases but whether the principle of reciprocity can be used for granting the absolute immunity to diplomats or not. In addition, whether the Islamic legal system allows any of privileges to some special category of people, and to have immunity from ordinary process of law or not In addition, whether it is absolute immunity or legal protection, these questions shall be answered in this chapter.

This chapter has four parts: first deal with the legal protection of diplomats in Islamic law, the second part deals with the arguments of special cases faced by our Prophet (p.b.u.h) and his companions. These cases are discussed analytically from aspects of *Dars* and some other jurisprudential principles and the views of

Islamic jurists are mentioned at every stance of the cases, third part talks about the general Islamic legal system from criminal laws, civil laws to Syasah power of Imam regarding pardon. Part four deals with the compatibilities of international law regarding immunities with Islamic law.

2.2 Legal Protection:

Islamic law has given legal protection to non-Muslims coming with permission to *Dar al-Islam*, as the Quran says:

If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure. That is because they are men without knowledge.⁶²

In the verse above, Almighty Allah orders the Prophet (p.b.u.h) to give me protection to those who want to come to *Dar al-Islam* and until the period of *Aman* is finished then he shall be returned to his home safely, as the Imam Ibni Kather says while commenting on the verse above:

In addition, the purpose is those who came to *Dar al-Islam* from *Dar al-Harbor* diplomatic purposes, or trade, or for doing peace treaties, or for living permanently on *Dar al-Islam* or for similar other purposes and they wanted from the Imam or his presenter *Aman* he may give him *Aman* until he is in *Dar al-Islam*⁶³

⁶²Abdullah Yousuf Ali, *The Holy Qurān, Suraal-Taubah*, Verse 6, 85.

⁶³ Ibni, Kaseer, *Tafseer Al-Qurān al-Azeem*, (Riyadh: Dar al-Tayyiba Publisher, 1999), 113.
Abū 'abd Allāh Muḥammad Ibn 'umar Ibn Al-ḥusayn Fakhr Ad-dīn Ar-rāzī, *al-Tafsir al-Kabir*, (Beirut: Dar al-Fikr, 1981) 233.

The Prophet (p.b.u.h) says that those who killed the *M'uwahid* will not taste the smell of Jannah ⁶⁴ which is a great Daleel of inviolability and protection of the *Mustamin* and *M'uwahid* his property, honor etc. In addition, the Diplomats are within the category of *Mustamins* because there are given Protection on the base of *Aman* not on any other base where they can be dealt with specially and can be granted special immunities.

The Prophet (p.b.u.h) says: Bukhari and Muslim transmitted on the authority of Ali (R.A), "The protection granted by one Muslim is like one given by them all, and this right is extended to the most humble of them"⁶⁵. So whenever any of the Muslim gives *Aman* to them it cannot be breached by other Muslims and becomes binding on them⁶⁶.

Islamic law has permitted diplomatic relationship and has given safety and inviolability to the diplomatic envoys, in the shape of *Aman*, since fourteen centuries as it in the treaty of "Hudaybiyah" as the Prophet (p.b.u.h) declared not imprisoning or harming of envoys in such treaty.

⁶⁴http://library.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=71&bookhad=18160 Accessed on 30-11-2016.

⁶⁵Abū 'Abd Allāh Muḥammad ibn Ismā'īl ibn Ibrāhīm ibn al-Mughīrah ibn Bardizbah al-Ju'fī al-Bukhārī, Hadith 6755, Translation taken from: <https://sunnah.com/urn/2115970> accessed on 20,01,2017.

⁶⁶ Unfortunately some of the terrorists groups in Muslims countries attack some of the foreign civilians as they claim it be part of their jihad, which is totally against all the principles of Islamic law, as it recently occurred in turkey.

In the Cherif Bassouni's words "its negotiating history demonstrate the sanctity of emissaries, that a violation of an ambassador's immunity as a *casus belli*, and that no ambassador may be detained or harmed" ⁶⁷

The Prophet was sending and receiving the ambassadors for different purposes to different countries, the first ambassador in Islam was Mus'ab Bin Omair who was sent to Madinah, to teach to its people the Islam⁶⁸.

Muhammad Hamidullah says in *The Muslim Conduct of State*: "envoys along with those who are in their company enjoy full personal immunity (protection) they must not be killed, nor be in any way molested or maltreated".⁶⁹ Therefore, the *Sunnah* of the Holy Prophet (p.b.u.h) has expressly established the principle of respect and honor granted to envoys.

The Holy Prophet (p.b.u.h) sent various emissaries to various places for religious or political reasons. He received many delegations and embassies warmly in his holy mosque at a place designated as Ostuwanat al-Wufuud (the pillar of delegations)⁷⁰. We can understand the high esteem of his respect and honor granted to foreign envoys from a Hadith in which it is reported that on his deathbed he

⁶⁷Cherif, Bassioni, "Protection of diplomats under Islamic law", *American Journal of International Law*, (1980), 611.

⁶⁸<http://www.kettaneh.net/islam/islam/man1.htm>, Accessed on 30, 11, 2016.

⁶⁹Muhammad Hamidullah, *Muslim Conduct of State*, (Lahore: Ashraf Publishers 2011), 151.

⁷⁰Hilmi M. Zawati, *Is Jihad A Just War? War, Peace and Human Rights under Islamic and Public International Law*, (The Edwin Mellen Press, Wales 2001), 77.

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instructed his companions to grant gifts to envoys as he himself used to award during his lifetime⁷¹.

Moreover, the emissaries are considered as guests in Islamic state and the Holy Prophet (p.b.u.h) generally cherished the honoring of guests. He said, "Every person who believes in Allah and the Day of Judgment should be hospitable with his or her guests."⁷²

When we go back to period of first four Caliphs, we find their many instruction, advices and orders for the immunities and privileges of envoys. I give only one example that was the clear instruction of first caliph Abu Bakr (632-634 AD) to Yazid Bin Abi Sufyan that if emissaries of the adversary come to you, deal them with hospitality.⁷³ In addition, In Islamic law the breaching of the inviolability of diplomats is considered one of the causes of war, as the Prophet waged war against the Romans who had killed Haris Bin Umair.⁷⁴ Also the Prophet when heard that the 'Usman (R.A) has been martyred, when went to sign the treaty of *Hudaybiyah*, he called the people to wage war against *Mushrikeens* and the people did pledge of allegiance with him and it was called "*Bayat al-Ridhwan*" but the Usman (R.A) returned back alive and the war did not happen⁷⁵.

⁷¹Muhammad Hamidullah, *Muslim Conduct of State*, 146.

⁷² Abubakr Jabir Al-Jazaairi, *Minhaaj al-Muslim*, (Madinah: Maktabat al-'ilum Wal-Hakam, , 1995), 112.

⁷³Arjoun, Sadiq Ibrahim, *Khalid Ibn al-Walid*,(Dar Al-saudiah, 1981), 244.

⁷⁴ Abo Ismail Shariah, *Nazaryah al- Harb fi al-Shariah*, (Kuwait: Maktaba al-Falah, 1983), 69.

⁷⁵http://www.alsardaab.org/articles.aspx?selected_article_no=201 Accessed on 30-11-2016.

2.3 The Case of Emissaries of Musailama Al-Kadhab:

Some of the Islamic Law researchers have relied on the following Hadith for proving the absolute immunity to the diplomats: Narrated Nuaym Ibni Mas'ud: "I heard the Messenger of Allah (ﷺ) say when he read the letter of Musaylimah: What do you believe yourselves? They said: We believe as he believes. He said: I swear by Allah that were it not that messengers are not killed, I would cut off your heads"⁷⁶. Moreover, the question is that why they were not killed even though they committed the crime punishable with *Had*. For this, we shall discuss the following questions and then conclude.

2.3.1 The Concept of Dar al-Islam and Dar al-Harb:

In the Islamic law, especially in the Hanafi jurisprudence, the world is divided into the two *Dars* (territories)

a- *Dar al-Islam* (The territory of Islam)

b- *Dar al-Harb* (The territory of war)

وعند ابي يوسف و محمد : اذا اظهروا احكام الشرك فيها فقد صارت دارهم دار حرب, لان البقعة انما تنسب اليها و اليهم باعتبار القوة والغلبة , فكل موضع ظهر فيه حكم الشرك فالقوة في ذلك الموضع للمشركين فاكانت دارهم دار حرب, و كل موضع كان الظاهر فيه حكم الاسلام فالقوة فيها للمسلمين⁷⁷.

⁷⁶Sunan Abu Dāwūd, Hadith# 2761, translation taken from:

<https://sunnah.com/abudawud/15/285> Accessed on 03-12-2016.

⁷⁷Abu Bakr Muhammad bin Ahmad al-Sarakhsi, *al-Mabsoot*, Vol.10, (Beirut: Dar al-Marifa, 1989), 114.

If they showed their rules in that territory then it becomes *Dar al-Harb*, because belonging of a place to them and us is to have power and *Ghalaba* over that area. So in every place where there are rules of *Shirk* the role and power on that place is with them is *Dar al-Harb*, and every place where there is rule of Islam, the power there is with Muslims.

Therefore, the base of *Dar al-Islam* and *Dar al-Harb* is:

- a- Power over a territory
- b- Prevailing laws over that territory

2.3.2 The Status of *Dar al-Ridda* in Islamic Law:

In the Islamic law, the *Dar al-Ridda* is considered as *Dar al-Harb*, because the two basic characteristics are found in it.

- a- Power over that territory
- b- Prevailing laws of that territory

Moreover, for proving the *Dar al-Ridda* to be *Dar al-Harb* we shall see the following discussion:

If the emissaries were not killed I would kill you, which may mean that:

- They were from *Dar al-Ridda* and were *Murtadden*
- They got power over that territory, because they fought the Khalid Bin Waleed in Uqraba near to Yamama.

- So that territory was not considered as Islamic territory, but was considered as *Dar al-Harb*, because the Abo Bakr (R.A) applied to them all the laws, which are applied on the *Muharibeen* from execution to enslavement, and this is something which is not allowed in ordinary situations.

Imam Al-Sarakhsi says:

المرتدون في حق المسلمين كاهل الحرب فانهم في دار الحرب⁷⁸

Murtaddin are like the people of war because they are in territory of War.

So Had of *Ridda* will be applied to them when the Islamic state attacks them and they denied to accept Islam and if they accepted Islam then they should not be punished for Had of *Ridda*. But temporarily when Islamic State does not have power over that territory nor its laws are not prevailing there, then that *Dar* is considered *Dar al-Harb*, therefore, Muslim Jurists say that under Islamic Law the people of *Dar al-Harb* can be given *Aman* and there can be *Muwada'a* with them:

The Muslim Jurists also say:

لو ان المرتدين منعو الدار وحاربوا سبي نساءهم وذراريهم واجبروا على الاسلام كما سبي ابويكرذاري من ارتد من

العرب من بني حنيفة وغيرهم و كما سبي علي بن ابي طالب بني ناجية⁷⁹

⁷⁸ Abu Bakr Muhammad bin Ahmad al-Sarakhsi, *Al-Mabsoot*, Vol. 10, 119-120.

⁷⁹ Abu Usuf, *AL-Kharaj*, (Beirut: Dar al-Marifa 2010), 67.

If the *Murtaddins* prohibited a territory and fought, their females should be enslaved and they shall be forced to accept Islam, as the Abo Bakr did enslavement of those who became *Murtaddin* from Arabs of Bani Hanifah and Ali enslaved Bani Najjah.

لو ان قوم ارتدوا عن الاسلام وحاربوا المسلمين وغلبوا علي مدينة من مدائنهم في ارض الحرب و معهم نساءهم و
ذرائعهم ثم ظهر المسلمون عليهم فانه تقتل رجالهم و تسبي نساءهم و ذرائعهم⁸⁰

If some people become *Murtaddin*, fought the Muslims, and took control of a city of Muslims in the time of war and they have their females and then when if the Muslims retake the control of it, their males will be killed and the females enslaved.

2.3.3 Jurisdiction of Muslim State over *Dar al-Ridda*:

According to the Muslim jurists whenever there is effective control of Muslims on a territory, that territory is counted as *Dar al-Islam* otherwise that is not called the territory of Islam and thus the Muslims do not have jurisdiction over that territory.

Those emissaries of Musailamah al-Kadhab were from *Dar al-Ridda*, where the *Murtaddin* got their power as they fought Khalid Bin Waleed in the place of Uqraba near to Yamama, and that territory was not more counted as Islamic territory. Thus, the Muslim state ceased to have jurisdiction on that area but after capturing that area that will become *Dar al-Islam*. Also the Had of *Ridda* will be applied to them when the Islamic state attacks them and if they deny to accept Islam they should be punished for Had of *Ridda*. However, temporarily when it does not have power over

⁸⁰Abu Bakr Muhammad bin Ahmad al-Sarakhsi, *Al-Mabsoot*, Vol.10, 113-114.

there then that is considered *Dar al-Harband* the Islamic state shall apply on them the principles that are to applied on *Dar al-Harb*.

2.3.4 The Legality of doing *Muada'ah* and giving *Aman* to *Murtaddin* And its Legal Implications Regarding Immunity (protection):

According to the Muslim Jurists, *Aman* can be given to *Murtaddin* in some situations and there can be *Muwada'ah* with them.

Imam Al-Kasani says:

وتجوز موادة المرتدين اذا غلبوا علي دار من الاسلام وخيف منهم⁸¹

It is lawful to do *Muwada'ah* with *Murtaddin* if they took control of any territory of Islam and there is fear from them.

He further says that:

المرتدين وان طلبوا الموادة مدة لينظروا في امورهم فلا بأس بذلك⁸²

If *Murtaddin* wanted to have *Muwad'ah* for a term to have time to look in their affairs, then there is no problem in it.

⁸¹Kasani, *Al-Badaye Wa al-Sanaye'*, vol. 9, (Beirut: Darul Kutub al-Ilmiya, 1986), 422.

⁸² Abu Bakr Muhammad bin Ahmad al-Sarakhsi, *Al-Sabsoot*, Vol.10, 117.

And the *Hukm* of *Muada'ah* is like *Aman* where the *Muada'en* will be protected, their persons, their property and their females because the contract of *Muada'ah* is like the contract of *Aman*⁸³

2.3.5 Applying The Rules for *Muharibeen* by Abo Bakr, During The War on *Murtaddin* and Its Legal Implication With Regard To *Dar al-Ridda*:

Imam Al-Sarakhsi says:

المرتدون في حق المسلمين كاهل الحرب فانهم في دار الحرب⁸⁴

(*Murtaddin* are like the people of war because they are in territory of War).

That is why Abo Bakr (R.A) applied the rules of *Muharibeen* on *Murtaddin* when he attacked the territory of *Murtaddin*, as their females were made slaves and their properties were made *Ghanimah*. But the rules for *Bugha* were not applied, because the females of *Bugha* can not be enslaved nor their property be made *Ghanimah*, because Ali (R.A) did not do that otherwise the Aisha (R.A) would be made slave.

The discussion above means that their territory was considered as *Dar al-Harb* and they were considered as *Muharibeen*, and the envoys of *Muharibeen* cannot be killed or molested etc if they prove that they are diplomats so they will automatically be given *Aman*! Imam Abo Hanifah and Abo Yousuf say:

⁸³Abu al-Hasan Ali Ibn Muhammad Ibn Habib al-Mawardi, *al-Hawee al-Kabeer fi Fiqh Imam al-Shafi'i*, Vol.14, (Beirut: Dar al-Kutub al-'Ilmyah, 1994), 382.

⁸⁴Abu Bakr Muhammad bin Ahmad al-Sarakhsi, *Al-Mabsoot*, Vol.10, (Beirut: Dar al-Marifa, 1889), 119-120.

if a person from *Dar al-Harb* is captured in *Dar al-Islam* and he claimed that I am the diplomat of the king to the governor of Muslims. And said: that I entered without *Aman*, because I am a diplomat, so if it is known from his proofs that he is the diplomat of his king then he is protected even if entered with *Aman* or without *Aman*⁸⁵

2.3.6 Applying the Hudood (Hadd of Ridda) Laws by Abo Bakr after Capturing The Dar al-Ridda And Its Legal Effects:

Abo Bakr (R.A), when captured the *Dar al-Ridda*, he applied on them the Had of *Ridda*, because at first it did not have jurisdiction over it, and the *Dar al-Ridda* was considered as *Dar al-Harb*, and those who had not accepted Islam were punished with *Had of Ridda* and those who accepted it were not punished with *Had of Ridda*. That is why the emissaries of Musailama al-Kadhab were not subjected to *Had of Ridda*, because their *Dar* had temporarily become *Dar al-Harb*, and while entering the territory of Islam they were given *Aman*.

2.4. The Case of Execution of Ibni al-Nawahah (One of The Emissaries of Musailama) And Its Legal Effects Regarding the Absolute Immunity:

Narrated Abdullah Ibn Mas'ud:

Harithah Ibn Mudarrib said that he came to Abdullah Ibn Mas'ud and said (to him): There is no enmity between me and any of the Arabs. I passed a mosque of *Banu Hanifah*. They (the people) believed in Musailamah. Abdullah (Ibn Mas'ud) sent for them. They were brought, and he asked them to repent, except Ibni An-Nawahah. He said to him: I heard the Messenger

⁸⁵Imam abiYousuf, *Book of Kharaj*, 203.

of Allah (ﷺ) say: Were it not that you were not a messenger, I would behead you. But today you are not a messenger. He then ordered Qarazah Ibni K'ab (to kill him). He beheaded him in the market. Anyone who wants to see Ibni An-Nawahah slain in the market (he may see him).⁸⁶

In other Ahadith:

قال كنت اتقيكم به: فضرب عنقه بالسيف⁸⁷

Ibni Al-Nawahah had told that: "I was preventing you by it, and then they cut his head".

قال قد اتيت بك مرة فزعمت انك قد تبت وارك قد عدت فقتله⁸⁸

The reporter to Ibni Mas'ud while talking to Ibni al-Nawahah: "I came to you once so I thought that you have repented, but I see you have returned back, and killed him".

Ibni Al-Nawahah was one of the diplomats of the Musaylimah al-Kadhab and Abdullah Ibn Mas'ud executed him in Iraq. He had come for communication with the Prophet (p.b.u.h), and he was declared officially by the Prophet to be diplomat and he had the status of *Mustamin* at that time while in later case there are few possible situations why he was given death penalty:

- a- Was he living in Iraq as a *Mustamin* Muslim or as a Muslim Citizen in time of execution? Imam Thanawi comments in his book and says:

لو لا انك رسول لضربت عنقك كان مبنيا علي قول ابن النواحة برسالة مسيلمة الكذاب ونبوته وارتفع ذلك بتوبته و دخوله في الاسلام فلم يكن لابن مسعود ان يقتله بمجرد قوله ص هذا. ما لم يعثر منه علي ردة بعد الايمان و الا لقتله قبل اشهاد الشهود عليه واحتال بقتله ولكنه اخره سنين عديدة فلما عثر علي ذلك منه قتله

⁸⁶Sunan Abu Dawud, *Book of Jihad*, Hadith #286.

<https://sunnah.com/abudawud/15/286> Accessed on 30-11-2016.

⁸⁷ Al-Mohaddith, al-Othmani al- Tanawi, I'lawu Al-Sunan, vol.12, (Karachi: Idara al-Qurān wa al-'Uloom al-Islamiya, N.O.D), 606.

⁸⁸ Ibid 607.

من غير استتابة لزندقته و اظهر كونه مستحقا لقتل من اول امره وان النبي انما قد خلى سبيله لكونه رسولا وهو اليوم ليس برسول وقد ثبتت زندقته فلا يخلي سبيله فافهم⁸⁹

If you were not diplomat I would beheaded you, was based on belief of Ibni al-Nawahah on Musailamah Al-Kadhab and his prophecy, and on his repentance and entering to Islam. so it was not allowed to Ibni Mas'ud to kill him just on the saying of the Prophet to Ibni Al-Nawahah "if you were not diplomat I would kill you". But he killed him due to *Ridda* after accepting Islam, or otherwise he would kill him before producing the witnesses on him, but he differed his killing for few years and when he knew his apostasy then he killed him for *Zindiqyat* without giving him chance of repentance.

He says that he was living as a Muslim citizen of Islamic State because Punishment of *Zindiqyat* is applied when there is constant commitment of *Ridda*, and in this case, it must have happened that is why he did not give chance/time of repentance for him. Therefore, he had declared Islam to the government to be considered as citizen of Islamic State, but hid his *Kufr* in himself, and he was given death penalty for being *Zandiq*, this is what the Hadith of "I was preventing you by it, and then they cut his head" affirms that.

Therefore, the case would be that he was showing himself a Muslim, and was considered a citizen of Islamic State, to people but hiding his *Kufr*, so he became *Zandiq* and was *Murtad* because the witness was a proof on his *Ridda*. so he was given death penalty for being *Zandiq*, and it is the *Syasa* authority of Imam to give time for repentance to *Zandiq* or not, as mentioned in Hadith that all others were given time to repent but Ibni al-Nawahah was not given chance of Repentance and that maybe due to repetition of his *Zindiqyat* and *Ridda*.

⁸⁹ Al-Mohadith, Al Othmani Al- Tanawi, I'lawu Al-Sunan, vol. 12, 608.

Imam Abo Hanifa (R.A)) says:

kill Zandiq, because his repentance is not known, and Abo Yousuf has not criticized his view. Imam Malik says that *Murtad* should be given chance for three days, if he accepted Islam then good if not then he should be killed, and if he became apostate hidden in himself he shall be killed and shall not be given chance to repentance as the Zandiqs are killed and not given chance to repentance⁹⁰.

Imam Al-Jassas comments and says that what we take from it that the Tawba (repentance) of Zandiq is not accepted, because he (Ibni Mas'ud) asked for repentance from people, who were showing their Kufr, but Ibni al-Nawahah was not asked for repentance, because he confessed that he was hiding his Kufr and showing his Islam using Tuqyia. because he (Abdullah Ibni Mas'ud) had consulted the Sahaba regarding this, and he also wrote to Usman (R.A) about them, and Usman (R.A) replied that tell to them to come to the right religion and accept the true Islam. and those who confessed and converted back then do not kill them, and those who stayed on the religion of Musailama then kill them, then some people accepted that and some of them did not so then they were killed⁹¹.

In addition, the statement of Ibn Mas'ud is so related to the case of *Aman* when he told Ibni al-Nawaha that today you are not diplomat, which means:

⁹⁰ Imam Ahmad Ibni Ali al-Jassas, *Ahkam al-Qurān*, V3 (Dar Ihya al-Torath al-Islami, Beirut, 1992), 274

⁹¹ Ibid 76.

- a- That you are not a *Mustamin* because entering as a diplomat is like to enter as a *Mustamin* to the territory of Islam and for the previous crimes after giving *Aman* that person cannot be punished for the crimes committed on *Dar al-Harb*. As Abo Bakr (R.A) did this to *Murtaddin* while captured them and applied on them only Had of *Ridda* because this crime was committed on territory of Islam before converting to *Dar al-Ridda*. and they were not punished for the crimes they committed on territory of *Ridda* because Umar R.A while saw Tolaiha al-Asadi, who was leader of *Murtaddin* and had killed Ukasha bin Muhsin, and later because Muslim, Umar told him that I do not like you because you have killed Ukasha and other Sahabi. Therefore, he did not take revenge, because such crime was committed on *Dar al-Riadda*.
- b- It is also lawful to give *Aman* even to do *Muad'ah* with *Murtaddin* as the Muslim jurists say that.
- c- His statement will also mean that if any *Murtad* enters without *Aman* to Muslim territory he shall be punished for Had of *Ridda* if he is not diplomat. And if he is diplomat then he shall not be punished for it.
- d- It will also mean that if a *Mustamin* commits Had of *Ridda* constantly then he shall not be punished for that. That is why he used the words "if you were not a diplomat I would beheaded you" to him, so the Had of *Ridda* will be exception to *Mustamin*, according to this case, and he shall not be punished for it.

2.5. The Case of Imprisoning the Emissaries by the Prophet (P.B.U.H):

The Prophet (p.b.u.h) detained the envoys of people of Makkah during the negotiation on the treaty of Hudaibya has a report reached to the Prophet that the Usman (R.A) is detained, and he did this only to put political pressure on the Makkans to make their safe release. But in Islamic law one person cannot be punished for the action of another person nor he will be made liable for it

Shall I seek for [my] Cherisher other than Allah, when He is the Cherisher of all things [that exist]? Every soul draws the meed of its acts on none but itself: no bearer of burdens can bear the burden of another. Your goal in the end is towards Allah: He will tell you the truth of the things wherein ye disputed⁹².

So why did the Prophet imprison such diplomats without committing any wrong personally! It may imply that the Prophet would punish/imprison them if they had committed any crime/wrong personally.

2.6. Criminal Laws, Civil Laws and T'azir Laws of Receiving State and its application on Mustamin (Diplomat):

Imam Abo Hanifah agrees with Abu Yousuf that the Islamic law is applied for the crimes committed on *Dar al-Islam*, whoever the committer will be even if he is Muslim or *Dhimmi*, but who lives temporarily on the base of temporary *Aman* he shall not be punished for the crimes that involve fully the right of Allah. In addition,

⁹²Abdullah Yousuf Ali, *The Holy Qurān, Surah al-An'am*, Verse 164, 67.

he mentions the reason 'illah of not applying such law on him that he did not enter *Dar al-Islam* for permanent residence.⁹³ Moreover, the other punishments which are related to the rights of people and individuals, those may be imposed upon *Mustamin*.⁹⁴ Imam Muhammad al-Shaybani also has this opinion.⁹⁵

But if we take the opinion of not applying the law related the violated rights of citizens then it will cause a greater danger to the citizens of Islamic State both to *Dhimmi* and Muslim it will definitely lessen the status of the real citizens of Islamic State in the eyes of law. Because the law will give more value to *Mustamin* compared to the real citizens, and the *Mustamin* will have free hand to do what he wishes and will go free without punishment and there shall be no justice for those whose right is violated by him. Also it is a real danger for the society as the citizen will feel unsafe and it will mean that there is no value to the blood, honor, property of citizen to the state even though the blood of Muslim and *Dhimmi* is much valuable then *Mustamin*. According to the Muslim Jurists, if the citizen of Islamic state kills the *Mustamin*, Qisas shall not be taken from his killer that is due to the existence of *Shubah* in his blood.

So it means that the law has given much value to the blood of citizen of Islamic State, so how can the *Mustamin* be not killed if he kills the citizen of Islamic state

⁹³ Abdul Qadir Awda, *Al-Tashre'e al-Jinaye al-Islami*, vol.1, (Beirut: Dar al-Katib, 2008), 280.

⁹⁴ Abu Bakr Muhammad bin Ahmad al-Sarakhsi, *Sharah al-Siyar al-Kabir*, Vol. 1, (Dar al-Marifa, Beirut, 1989), 306.

⁹⁵ Ibid.

despite the value and worth given to his blood under the law? In addition, why shall the law not apply Qisas on *Mustamin* for taking the blood of citizen? However, the duty of the state is to provide peace and justice to its people so when there is no feeling of peace due to immunity and no justice is provided for victims then this state will not have any value in the eyes of its citizens.

According to Imam Malik, a *Mustamin* may be punished under Hudood laws. Abu Yousuf school of law from Shafi S⁹⁷ Awzai-lafi School of law and a from Han⁹⁶ has also this opinion. The Islamic Law has given some of the judicial power to Imam to decide by his own which and how much punishment will be suitable for certain actions. Abu Zuhra says, "It is right to enter *T'azirat* under the immunities of diplomats."⁹⁸ As some of the incidents took place in front of Muhammad (p.b.u.h) where the diplomats and special envoys abused the Prophet but he did not punish him for that.

The secondary sources of Islamic law; '*Urf* (custom) and *Masalih al-Mursalah* (welfare of the people) also require that the diplomats may not be punished for unserious *T'azirat* cases.

⁹⁶Ibid.

⁹⁷Abu Yusuf, *Al-Radd 'Ala Siyar al-Awza'e*, (Ihya Al Marif Al Nomaniya, Hyderabad, India) 94, Can be read at:

<https://www.scribd.com/document/236973530/%D8%A7%D9%84%D8%B1%D8%AF-%D8%B9%D9%84%D9%89-%D8%B3%D9%8A%D8%B1-%D8%A7%D9%84%D8%A3%D9%88%D8%B2%D8%A7%D8%B9%D9%8A-pdf>

Accessed at 1.1.2017.

⁹⁸Abu Zuhra, *Al-'Ilaqat al-Duwalayah fil-Islam*, (Cairo: Dar al-Fikr al-Arabiya, 1995).77, Abu Zuhra, *Al-Jarimah wa al-'Uqobah fil Fiqh al-Islami*, (Cairo: Dar al-Fikr al-arabiya, , 1998), 296.

2.7. The Legality of Reciprocity and its principles in Islamic Law Regarding Granting Absolute Immunity, The Syasah Power of Imam for Signing Treaties & Pucta Sunt Servanda Rules:

As the Islamic law has given a wide administrative (Syasah) power to Muslim ruler to make different kind of covenants, and abide by and fulfill all the treaties, it has put some restrictions on it too.

2.7.1 Fulfillment of covenant and its rules in Islamic law:

Quran says regarding the fulfillment of covenants:

“O ye who believe! Fulfill (all) obligations.”⁹⁹ “Come not nigh to the orphan's property except to improve it, until he attains the age of full strength; and fulfil [every] engagement, for [every] engagement will be enquired into [on the Day of Reckoning]”¹⁰⁰

The Above Verses insist on fulfillment of covenants, treaties etc.

The Prophet (p.b.u.h) says regarding the conditions in different dealings, contracts and covenants: “Whoever imposes such a condition as is not in Allah's Laws, then that condition is invalid even if he imposes one hundred conditions, for Allah's conditions are more binding and reliable”.¹⁰¹

⁹⁹Abdullah Yousuf Ali, *The Holy Qurān*, Surah Al-Maida, Verse 1, p47 .

¹⁰⁰Abdullah Yousuf Ali, *The Holy Qurān*, Surah Al-Isra, Verse 34, p133.

¹⁰¹al-Bukhari, Book of Sales and Trade, Hadith# 2155. Translation taken from:
<https://sunnah.com/bukhari/34/106> Accessed on 03-12-2016.

Kathir bin 'Amr bin 'Awf al-Muzani narrated from his father, from his grandfather, that the Messenger of Allah (ﷺ) said: "Reconciliation is allowed among the Muslims, except for reconciliation that makes the lawful unlawful or the unlawful lawful. And the Muslims will be held to their conditions, except the conditions that make the lawful unlawful, or the unlawful lawful".¹⁰²

The Ahadith above means that the Islamic law has put some conditions for making covenants, which should not be:

- a- It should not be against the Quranic verses
- b- It should not be against Sunnah of the Prophet (p.b.u.h)
- c- There shall not be any condition in it which make lawful unlawful and unlawful lawful
- d- It should not be against the other principles of Islamic law like objectives of Shariah

There are many Islamic legal maxims, which put limitations on the imam's power:

"Act and order of a judge is not executed unless it is according to the Islamic law"¹⁰³.

2.7.2 Legality of Principle of Reciprocity in Islamic Law:

¹⁰²Jami' al-Tirmidhi, The Chapters On Judgements From The Messenger of Allah, Hadith# 1352. Translation Taken from: <https://sunnah.com/tirmidhi/15/32> Accessed on 03-12-2016.

¹⁰³<http://islampost.com/d/2/hnf/1/1/2.html> Accessed on 03-12-2016.

In Islamic law the principle of reciprocity has a wide and vital role in the international relations and the Islamic law has given this right the Muslim ruler to use it in different aspects of dealing with non-Muslims for *Maslaha* as it is widely used in the humanitarian law of Islam. The legality of reciprocity is derived from the Quran "And if ye do catch them out, catch them out no worse than they catch you out: But if ye show patience that is indeed the best [course] for those who are patient"¹⁰⁴

In another verse Almighty Allah says:

The prohibited month for the prohibited month, - and so for all things prohibited, - there is the law of equality. If then any one transgresses the prohibition against you, Transgress ye likewise against him. But fear Allah, and know that Allah is with those who restrain themselves¹⁰⁵.

In the verses above, there is Daleel that the Prophet had to use the principle of reciprocity against those who wage war against him and that is to start war against him. The following Hadith is the supporter of the verses above: Abu Hurairah (May Allah be pleased with him) reported: The Messenger of Allah (ﷺ) said: "Do not wish for an encounter with the enemy. Pray to Allah to grant you safety; (but) when you encounter them, show patience."¹⁰⁶ Therefore, when the enemy attacks, at the reciprocity the Muslim army shall also encounter them.

Anas reported that:

¹⁰⁴Abdullah Yousuf Ali, *The Holy Qurān, Surah al-Nahal* , Verse126, p131.

¹⁰⁵Abdullah Yousuf Ali, *The Holy Qurān, Surah al-Baqara*, Verse 194, 13.

¹⁰⁶Riyad as-Salihin, The Book of Jihad , Hadith# 1351. Translation taken from: <https://sunnah.com/riyadussaliheen/12/67> Accessed on 02-12-2016.

A Jew killed a girl of the Ansar for her ornaments and then threw her in a well and smashed her head with a stone. He was caught and brought to the Messenger of Allah (ﷺ), and he commanded that he should be stoned to death. So he was stoned until he died.¹⁰⁷

In this Hadith the reciprocity was used by the Prophet (p.b.u.h) and that stoned a person who had stoned another person, and took the Qisas from the Yahoodi.

The Islamic law has also given power to Muslim ruler to use the principle of reciprocity in the humanitarian cases, as the Muslim jurists say that there can be such kind of treaties

- a- which can make the safe release of the war prisoners
- b- Which forbid the execution of war prisoners
- c- On the other hand, for that the war prisoners are released on ransom
- d- On the other hand, by dealing both soldiers by exchanging the prisoners of war etc...

This is because the Islamic law has given this power to Muslim ruler with such options, as the Quran says:

Therefore, when ye meet the Unbelievers [in fight], smite at their necks; At length, when ye have thoroughly subdued them, bind a bond firmly [on

¹⁰⁷Sahih Muslim, The Book of Oaths, Muharibin, Qasas (Retaliation), and Diyat (Blood Money), Hadith# 1672. Translation Taken from: <https://sunnah.com/muslim/28/22> Accessed on 02-12-2016.

them]: thereafter [is the time for] either generosity or ransom: Until the war lays down its burdens. Thus [are ye commanded]: but if it had been Allah's Will, He could certainly have exacted retribution from them [Himself]; but [He lets you fight] in order to test you, some with others. But those who are slain in the Way of Allah,- He will never let their deeds be lost.¹⁰⁸

If the enemy of Muslims mutilate Muslim soldiers, can the Muslim soldiers do the same to their enemy soldiers?, it is not allowed in Islamic in this situation to use the principle of reciprocity and do the same what the enemy do, and the Islamic laws principles should be considered here which is not mutilation of the soldiers of enemy. Here in this case too there shall be no treaty, which is against the Express Nusoos of Quran and Sunnah as Mutilation, and other things are prohibited and are not allowed in reciprocal basis the treaty that violates such Nusoos and other established rules will not be allowed.

2.7.3 Granting Immunity under the Syasah power in Islamic Law:

After considering all the above discussion regarding the reciprocity and the *Pucta Sunt Servanda* rules of Islam it is understood that the Islamic law has granted power to the Muslim ruler which is called "the *Syasa*h power of Imam" to conclude the treaties with different tribes, nations and countries. As the Prophet (p.b.u.h) had done it during his prophecy with different tribes in different situations, in war in peace both, but it cannot be against the rules which are for making such treaties and these rules are not derogable.

¹⁰⁸Abdullah Yousuf Ali, *The Holy Qurān, Surah Muhammad, Verse 4, 257.*

Some of the articles in the convention of diplomatic relation 1961 are against the prescribed rules of Islam, as it gives full judicial personal immunity to the diplomatic mission even if they commit crime touching the right of individual and public. In the Islamic law, Imam does not have right to give free hand and exception to some people or someone that such person shall not be punished even if he commits a crime.

2.8. The Right of Pardon of Imam In Case of the Violated Right of an Individual in Islamic Law:

In Islamic law, there is a great importance of justice, this is something what is found in the life of Prophet of (p.b.u.h), and there are many incidences that denote that:

'Ayshah (May Allah be pleased with her) reported:

The Quraish were anxious about a woman from Bani Makhzum who had committed theft and asked: "Who will speak to the Messenger of Allah (ﷺ) about her?" Then they said: "No one will be bold enough to do so except Usamah bin Zaid, the (Companion who was) dearly loved by the Messenger of Allah (ﷺ)." So Usamah (May Allah be pleased with him) spoke to him and the Messenger of Allah (ﷺ) (angrily) said, "Are you interceding regarding one of the punishments prescribed by Allah?" He then got up and delivered an address in which he said, "Indeed what destroyed the people before you was just that when a person of high rank among them committed a theft, they spared him; but if the same crime was done by a poor person they inflicted the prescribed punishment on him. I swear by Allah that if Fatimah daughter of Muhammad should steal, I would have her hand cut off."¹⁰⁹

¹⁰⁹Riyad al-Salihin, The Book of the Prohibited Actions, Hadith# 1770.
Translation Taken from:
<https://sunnah.com/riyadussaliheen/18/260> Accessed on 03-12-2016.

The *Hadith* is a great practical example for equality and justice between people, and denotes, that the *Hodood* of Allah are applicable on every person without any discrimination and distinction. And it should be applied on *Mustamin* (Diplomat) too because the Prophet clearly says that not doing justice and giving high rank to a category of people will finally result the injustice and destruction of the whole community and indeed it is one of the basic *Fasad* on the earth.

In the Islamic law, the rights are divided into two basic categories:

- a- The rights of Allah
- b- The right of individual

However, some time the right is found to be the right of individual and Allah both.

It is narrated from 'Amr bin Shu'aib from his father, from' Abdullah bin 'Amr that the Messenger of Allah said:"Pardon matters among yourselves that may deserve a *Had* punishment, for whatever is brought to my attention, the *Had* punishment becomes binding."¹¹⁰

The Above Hadith is a distinct Daleel that there cannot be any pardon in the cases of Hads. it is in the Islamic law's judicial system that whenever the criminal case is brought to the court the court has to decide the case, and the imam has no right of pardon nor the plaintiff has the right to get back the case except in the case

¹¹⁰Sunan al-Nisai, The Book of Cutting off the Hand of the Thief , Hadith#4886.
Translation Taken from: <https://sunnah.com/nasai/46/17> Accessed on 04-12-2016.

of Qisas. In another Hadith the Prophet (p.b.u.h) insists that if anyone's intercession intervenes as an obstacle to one of the punishments prescribed by Allah, Yahya ibn Rashid narrates:

We were sitting waiting for Abdullah Ibn Umar who came out to us and sat. He then said: I heard the Messenger of Allah (ﷺ) as saying: If anyone's intercession intervenes as an obstacle to one of the punishments prescribed by Allah, he has opposed Allah; if anyone disputes knowingly about something which is false, he remains in the displeasure of Allah till he desists. And if anyone makes an untruthful accusation against a Muslim, he will be made by Allah to dwell in the corrupt fluid flowing from the inhabitants of Hell till he retracts his statement¹¹¹

The Hadith above denotes that there can be no *Shafa'a* in the cases for which punishment is prescribed which is punishment of Had, and those who do it so are against Allah, so the even Imam cannot do *Shafa'a* in such cases. Another Hadith also insists that if the case of Had went to the imam, the imam cannot pardon, nor there can be *Shafa'a* in such cases.

Yahya related to me from Malik from Rabia ibn Abd ar-Rahman that az-Zubayr Ibn al-Awwam came across a man who had taken hold of a thief and was intending to take him to the Sultan. Az-Zubayr ibn al-Awwam interceded for him to let him go. He said, "No. Not until I take him to the Sultan." al-Zubayr said, "When you reach the Sultan with him, Allah curses the one who intercedes and the one who accepts the intercession."¹¹²

¹¹¹Sunan Abi Dawud, The Office of the Judge (Kitab Al-Aqdiyah), Hadith# 3597. Translation Taken from: <https://sunnah.com/abudawud/25/27> Accessed on 04-12-2016.

¹¹²Muwatta Malik, Book of Hudood, Hadith# 1533. Translation Taken from: <https://sunnah.com/urn/515320> Accessed on 04-12-2016.

The Hadith talks about the incident of theft took place, and when Zubayr Ibni al-Awam interceded for him to let him go, but the man refused and insisted on taking the thief to the sultan. and Zubairs' replying that Allah curses who do so such intercession after the case is reached to the Imam/Judge, so there cannot be any intercession (Shafa'a) in cases of Hudood at all even by Imam or by an ordinary person. In addition, there are many Islamic legal maxims which says that whenever the case of Had is reached to the ruler then there shall be no retracting of the case nor there can be Shafa'a in it and the ruler has to decide the case.¹¹³

2.8.1 About the pardon in T'azir cases:

- a- Pardon in T'azir cases involving the Right of individual: T'azir in the case of right of individual it can be pardoned only by him because it is the right of individual, as he has the right of pardon in case of Qisas, except had of Qadhf, where he cannot pardon that even though that involves his right ¹¹⁴.
- b- Pardon in T'azir cases involving the Right of Allah: The T'azir for which there is Nas(text) in the Islamic law that cannot be pardoned by Imam and for the cases where there is no Nas (text) in the Islamic law that can be pardoned by imam if the imam saw a *Maslaha* in it.

¹¹³ See: Abo Bakr, Abd al-Razaq al-San'ane, Almusannaf, Vol.7, 441.

¹¹⁴ Ibni Abideen, *al-Rad Al-Mukhtar 'Ala Dar al-Mukhtar*, Book Of Hudood, V6, (Riyadh: Dar Alam al-Kotob 2003,) 123, Can Be Read At:

<https://books.google.com.pk/books?id=LixLCwAAQBAJ&printsec=frontcover#v=onepage&q&f=false> Accessed on 30, 12, 2016

In addition, if such T'azir involves fully the right of Allah then there will be no pardon in it.¹⁵ Moreover, there are a lot of Ahadith, which denote the above: Narrated Aisha, Ummul Mumineen: "The Messenger of Allah (ﷺ) Said: Forgive the people of good qualities their slips, but not faults to which prescribed penalties apply"¹⁶. So there can be pardon in cases of other than Hudood as the Hadith above denotes that.

'Abdullah reported:

The Messenger of Allah (ﷺ) distributed spoils (of war). Upon this a person said: This is a distribution in which the pleasure of Allah has not been sought. I came to the Messenger of Allah (ﷺ) and informed him in an undertone. He (the Holy Prophet) was deeply angry at this and his face became red till I wished that I had not made a mention of it to him. He (the Holy Prophet) then said: Moses was tormented more than this, but he showed patience¹⁷.

It means that the case of misbehavior/misconduct, which happened with the Prophet (p.b.u.h), he pardoned it, and there can be pardon to *Mustamin* and *Dhimmi* too.

Al-Zubair quarreled with a man from the Ansar because of a natural mountainous stream at Al-Harra. The Prophet (ﷺ) said "O Zubair! Irrigate

¹⁵Ibid 124-125.

¹⁶Sunan Abi Dawud, Book of Prescribed Punishments (Kitab al-Hudud), Hadith# 4375. Translation Taken from: <https://sunnah.com/abudawud/40/25> Accessed on 05-12-2016.

¹⁷Sahih Muslim, The Book of Zakat, Hadith# 1062. Translation Taken from: <https://sunnah.com/muslim/12/185> Accessed on 05-12-2016.

(your lands and the let the water flow to your neighbor The Ansar said, "O Allah's Messenger (ﷺ) (This is because) he (Zubair) is your cousin?" At that, the Prophet's face became red (with anger) and he said "O Zubair! Irrigate (your land) and then withhold the water till it fills the land up to the walls and then let it flow to your neighbor." So the Prophet (ﷺ) enabled Al-Zubair to take his full right after the Ansari provoked his anger. The Prophet (ﷺ) had previously given an order that was in favor of both of them Al-Zubair said, "I don't think but the Verse was revealed in this connection: "But no, by your Lord, they can have no faith, until they make you judge in all disputes between them"¹¹⁸

The Hadith denotes that the Prophet did not punish the person who used unfit/unsuitable words to the Prophet (p.b.u.h), and misbehaved and did not obey the judgment of the Prophet (p.b.u.h), but the Prophet (p.b.u.h) pardoned him. Because he did not punish him, the *Mustamin* especially the diplomat can be pardoned in similar cases because he is a guest and under special protection of law.

2.9 Compatibility between Islamic Law and International law:

The compatibility of between Islamic law and international regarding different immunities is discussed below:

2.9.1 Material Immunity in Islamic Law and International Law:

In the Islamic law, there is a general text of Quran and Sunnah, which forbids entering the premises/houses of the people. Quran says: "O ye who believe! Enter

¹¹⁸ Sahih al-Bukhari, Prophetic Commentary on the Qur'an (Tafseer of the Prophet (pbuh), Hadith# 4585. Translation Taken from: <https://sunnah.com/urn/179150> Accessed on 05-12-2016.

not houses other than your own, until ye have asked permission and saluted those in them: that is best for you, in order that ye may heed [what is seemly]"¹¹⁹.

The verse is explained further in one of the Hadith of the Prophet (p.b.u.h): The Prophet (p.b.u.h) says: "Allah has not permitted you to enter the houses of the people of the Book without permission, or beat their women, or eat their fruits when they give you that which is imposed on them"¹²⁰

It is understood from the Verse/Hadith above, that the entrance to some ones house/property is not allowed in ordinary situation and it is the general guidance for Muslims not to do so. Therefore, there can be no entrance in the premises/house/property of *Mustamin* too, but in extra-ordinary situations; there can be exception for entering so under the doctrine of necessity.

The material immunity, which include Premises like embassy, houses of diplomats, archives, documents, baggage from inspection, should not be used against the receiving state. As in Iraqi embassy 1973 case, as the Pakistani forces entered the Embassy, which was also against the 41(3) of the diplomatic relation article which says that the premises should not be used any matter incompatible with the provisions of the convention, and the Islamic law would take the same

¹¹⁹Abdullah Yousuf Ali, *The Holy Qurān, Surah al-Noor, Verse 27, 171.*

¹²⁰Alama Al-Manawe, *Faiz al-Qudus Sharh al-Jami al-Sagher*, V3, (Beirut: Dar al-Marifa 1972), 146. Can be Read at:
<https://books.google.com.pk/books?id=hTjICwAAQBAJ&printsec=frontcover#v=onepage&q&f=false> Accessed on 05-12-2016.

stance. As in the Islamic law, we do not have principles of giving any harm to others nor shall we receive any harm from them.

a- "There is neither injury nor return of injury":

Yahya related to me from Malik from Amr ibn Yahya al-Mazini from his father that the Messenger of Allah, may Allah bless him and grant him peace, said, "There is neither injury nor return of injury."¹²¹

b- "Warding off the evils is first from catching the benefits"¹²².

After considering above legal maxims which are basically Ahadith of the Prophet (p.b.u.h) nor shall the citizen and the security of state receive any threat from them nor shall the receiving state and its nationals give them any harm, so that their premises, baggage, vehicles shall be checked if the situation wanted that and there is necessity for it.

2.9.2 Financial Immunity in Islamic Law and International Law:

The principle of reciprocity can be used regarding financial immunity to the diplomats in Islamic law, if they use it in financial immunity to the diplomat of a Muslim state in their countries. Then the Muslim state shall also use it with them,

¹²¹Wahbah al-Zuhaiyele, *Nazryah al- Dhaman*,(Damascus: Dar al-Fikr, 2012) , 221-222.
Muwatta. Imam Malik, Books of Judgements , Hadith# 1435. Translation Taken from:

<https://sunnah.com/urn/514340> Accessed on 07-12-2016.

¹²²<http://www.alukah.net/Shariah/o/87689/> Accesssed on 07-12-2016.

if they take no tax, and the Muslim state shall take no tax from them. And if they take some percent, the Muslim state shall take the same percent from them, and this principle was used by Umar (R.A) during his khilafa, when he was asked about the tax to be taken from people of *Dar al-Harb*, he said: how much do they take? People replied that ten percent, he said, take from them ten percent too¹²³.

¹²³Abu Bakr Muhammad bin Ahmad al-Sarakhsi, *Sharh al- Siyar al-Kabeer*, Vol.5, (Beirut: Dar al-Kotob al-'Ilmiya 1989,) 68.

Conclusion:

Islamic law has given greater importance to diplomatic relationship and thus has given legal protection to diplomats some of the research scholars mention the case of Emissaries of Musailama al-Kadhab as the sole base for proving the absolute immunity while the fact was that the Muslim state did not have jurisdiction over that area! That's why they were not subjected to Islamic State laws at that recent time! Later they all were subjected for rules and Had of Ridda after the wars against *Murtaddin*. In addition, It is lawful to give *Aman* to the *Murtaddin*. And in fact one of the emissaries of Musailima al-Kadhab was executed, who was living in Iraq, and the Ibni Maus'uds' words establish that *Mustamin* shall not be punished for Had of Ridd. As the jurist count it in Had involving fully the right of Allah, and the Imam had the option not to give him time for Tauba (Repentance) and considered him as *Zandiq*, in front of people in a public place. In addition, the *Dar al-Ridda* is considered as *Dar al-Harb* so all the rules of *Dar al-Harb* during the war and peace will apply to them. In addition, it is lawful in Shariah to accept and do *Muada'ah* with *Murtaddin*. And Islam has also given power to Imam to make treaty and abide by all treaties but there are limitations for it.

CHAPTER III

Immunity in the Growing Trends of International Human Rights Law

3.1 Introduction:

international law keeps on changing, and some recent changes which are very special regarding immunity are of much importance, it will be discussed whether the recent growing trends and norms in international law are against the existing law regarding immunity or not, and whether there is exact practice of what the international law requires it or not.

This chapter has two big parts, first part deals with the accountability of diplomats in the courts of U.S.A, part two deals with the international tendencies in the international human rights law regarding all kind of Immunities.

3.2 Accountability of diplomats in U.S.A:

The U.S officials have declared formally that the diplomats or other nationals shall be held responsible for trafficking and other crimes. Hillary Clinton stated on one of the official meetings “ whether they are diplomats or national emissaries of whatever kind we all must be accountable for the treatment of the people we employ” thus And it is now easier than before to make the diplomats responsible with the need of time¹²⁴. In addition, the congress passed TVPA (trafficking and violence protection act) 2000 which established new penalties for human trafficking in U.S, it also allowed the trafficked domestic workers to pursue the civil cases against the diplomatic abusers¹²⁵.

3.2.1 Diplomatic Immunity in the Courts of U.S.A:

There were many criminal cases in the different courts of U.S.A against the diplomatic missions involved in different kinds of crimes, and the court has responded to most of them, and the implication of criminal prosecution of diplomats and foreign officials and giving remedies to the plaintiffs have raised questions regarding the diplomatic immunity.

¹²⁴ Martina E. Vandenberg & Alexandra F, “*Human Trafficking and Diplomatic Immunity: Impunity No More?*,” *The Journal of Intercultural Human Rights Law Review*, vol.7, 11/28/2012, 78-79. Can be Read at:
<http://www.htprobono.org/wp-content/uploads/2014/04/Diplomatic-Immunity-Article-St-Thomas-1.pdf> accessed on 26/12/2016.

¹²⁵ *Ibid* P 96.

**3.2.1.1 Implications for Criminal Prosecution of Diplomats and Foreign Officials
Criminal Remedies:**

3.2.1.1.1 U.S. v. Abdal Kader Amal:

Abdal Kader Amal was a former Moroccan defense attaché in the Moroccan embassy, and had diplomatic visa to the United States of America in Washington D.C. They were living on island; he and his wife were charged that they had brought a woman from morocco as a house cleaner. So they were charged with trafficking of domestic worker from morocco to U.S.A, also for forced labor and not paying the full salary. And the claimant was promised that they will pay her four hundred US dollars per week, but she was paid only nine thousand US dollars in three years, thy both pled guilty and said that they will pay 52700 US dollars for the victim, Amal received sentence of 3 months home confinement, and 2 years probation. The victim F.H also filed federal civil trafficking cases and alleged that Amal trafficked and used her forced labor and raped her, which ended in an undisclosed settlement¹²⁶.

3.2.1.1.2 U.S. v. al-Homoud:

A military official of Qatar and his wife were charged with forced labor of two persons who were brought in 2014 to by al-Homoud and his wife Zainab to work as house cleaner and a servant.

¹²⁶ Martina E. Vandenberg & Sarah Bessell, "Diplomatic Immunity and the Abuse of Diplomatic Workers: Criminal and Civil Remedies in the United States," *Duke Journal of Comparative & International Law*, Vol. 26, (2016), 595.

The complaint alleged the al-Homoud and Zainab for restricting the victims from moving and travelling and were provided little food, for not moving and travelling, they both had withheld the payment of wages to the victims, and they had taken from them their cell phones, passports and visas.

On May 30, 2015 the department of homeland security, immigration and customs, enforcement homeland security investigations, arrested the defendants in Texas and appeared before U.S magistrate judge John Primomo in San Antonio. After that, al-Homoud pled guilty to visa fraud and his wife pled guilty for failing to report knowledge of a felony.

After the conviction, the defendant Al-Homoud was sentenced to 5 years supervised released probation and immediate removal from U.S.A., his wife was sentenced to 3 years probation, and immediate removal from U.S.A. there was restitution in amount of 120000 U.S dollars. They departed United States of America on 2. 10. 2016 and diplomatic immunity was never raised as a defense¹²⁷.

3.2.2 Parking Fines on the Streets of U.S.A. to Diplomatic Missions Vehicles and Its Implication on Material & Financial Immunity:

¹²⁷<http://freedomnetworkusa.org/wp-content/uploads/2012/05/FINAL-Letter-to-Secretary-of-State-re-Suspension-of-Qatar-August-2016.pdf>, accessed on 25/12/2016.
<https://www.justice.gov/usao-wdtx/pr/qatar-military-official-and-wife-charged-engaging-forced-labor> Accessed on 25/12/2016.

One of the formal speakers of New York says that the diplomats have to pay the parking tickets and obey our laws and the foreign minister of Russia replies to this case where a Russian diplomat's car was given a car parking fine that:

We believe this is a violation of international principles and the norms of international law as well stipulated in the opinion of legal advisor of the United Nations, it is creating many problems to us and certainly the conditions for diplomats in New York becoming much worse than the U.N capitals¹²⁸

Therefore, it has a direct effect on the diplomatic immunity where they have personal and material immunity for the things used for their own benefits and interests.

3.2.3 Russian diplomats and the recent U.S.A presidential elections:

The Russian diplomats were warned that they would face criminal prosecution of they had attempted to control the presidential elections the Russian embassy said: "We received mostly negative responses, including threats that our interest and presence at polling stations could be seen as a criminal act." The Russian Embassy also noted, "Some local authorities we approached coordinated their negative decision with the federal government."

¹²⁸ AP Archive, "NEW YORK: DIPLOMATS ARE NO LONGER IMMUNE FROM PARKING FINES", (July, 21, 2016), USA, Retrieved from <https://www.youtube.com/watch?v=6PXwNFS-yml> Accessed on 26/12/2016.

The U.S spokesperson said that:

Moscow is welcomed to observe all the polls but as part of the mission by Organization of Security and Cooperation in Europe (OSCE) and the fact that they [Russia] have chosen to not join the OSCE observation mission makes clear that this issue is nothing more than a PR stunt¹²⁹.

The Russian Embassy strongly replied saying that “monitoring is part of the ordinary/normal functions of a diplomatic mission” according to the Vienna Convention on Diplomatic Relations of 1961.¹³⁰

3.3 The International Tendencies in the International Human Rights Law and international Criminal Law Regimes towards the Ending of All Kinds of Immunities:

Recent developments against the sovereignty and sovereign immunity in international law, Sovereign immunity’s concept has become narrower since the WWII where the victorious countries used their victor justice and put on trial all the officials for war criminals of states, crimes and humanity of Nazi Regime and Japan called the Nuremberg trials and trials against Japan from 1945 to 1949.¹³¹ Moreover,

¹²⁹<https://www.rt.com/news/363774-russia-us-embassy-elections/> Accessed on 27/12/2016.

¹³⁰ ibid

¹³¹<http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/nurembergaccount.html> Accessed on 30,12,2016.

after that the trials of ICTR and ICTY are one of the best examples for trials against persons/states holding sovereign immunity.

3.3.1 United Nations Charter:

United Nation came into existence after World War II and that was due to the failure of League of Nations that failed to avoid occurrence of wars, soon the United Nation established the victorious powers agreed to make rules for organizing and controlling the world of war hence, they made the charter called the U.N Charter.

The purpose of such Charter was to end the war, resolve the disputes peacefully, protect the equality and sovereignty of state, promote, and protect social progress and human rights. It has six main organs, namely:

- i- General Assembly
- ii- Security Council
- iii- Economic and social Council
- iv- Trusteeship Council
- v- International Court of Justice
- vi- Secretariat

The U.N Charter talks about many international issues like International world security and maintaining peace protecting the human rights “promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms

for all without distinction as to race, sex, language, or religion”¹³². In addition, there shall be “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”¹³³. “The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions”¹³⁴

In addition, there is encouragement for respect of human rights “To encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world”¹³⁵

Above all mentioned articles and sections of the United Nations Charter discusses the promotion, realization, respect, encouragement and protection of human rights, further, the United Nation has human rights protection mechanism for every international convention like:

- i- International Covenant on Economic, Social and Cultural Rights
- ii- International Covenant on Civil and Political Rights
- iii- International Convention on the Elimination of All Forms of Racial Discrimination

¹³² See United Nations Charter 1945 Art.13 (B).

¹³³ Ibid Art.55 (C).

¹³⁴ Ibid Article 68.

¹³⁵ Ibid Art 76 (C).

- iv- Convention on the Elimination of Discrimination against Women
- v- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- vi- Convention on the Rights of the Child
- vii- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- viii- Convention on the Rights of Persons with Disabilities
- ix- International Convention for the Protection of All Persons from Enforced Disappearance
- x- Other declarations and conventions dealing with such matters as discrimination, genocide, slavery, and social welfare, progress and development

Moreover, there are treaty bodies/ committees of every convention:

- i- Human Rights Committee created by ICCPR.
- ii- Committee on Economic, Social and Cultural Rights created by the ICESCR
- iii- Committee on the Elimination of Racial Discrimination by (ICERD)
- iv- Committee on the Elimination of Discrimination against Women created by CEDAW
- v- Committee against Torture, created by CAT and Other Cruel, Inhuman or Degrading Treatment or Punishment

- vi- Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment by OPCAT
- vii- Committee on the Rights of the Child, created by CRC
- viii- Committee on Migrant Workers, created by (ICRMW)
- ix- The Committee on the Rights of Persons with Disabilities created by CRPD¹³⁶

Moreover, the human rights reports are properly submitted according to the rules laid down in every convention. Every state is obliged to show in the report what it has done to the implementation of the rights given by the treaty/convention in their legislations, policies and other social campaigns, within specified time. In addition, there is proper ask and answer session by related commission, concluding observations, remarks are given, and further advice for compliance is made for the states¹³⁷ Also all the states are required by U.N charter and other treaties to incorporate such conventions in their laws and give them formal recognition in their legal system and constitution.

Therefore, whenever there is this such kind of vast system for protection of human rights and there is Jus Cogen on such rights then why when such rights are

¹³⁶ E. Steinerte R.M.M. Wallace, "United Nations protection of human rights", Published by the University of London Press, University of London, (2009) 14-15.

¹³⁷ https://www.unesco.de/c_humanrights/l.php accessed on 12.05.2017.

violated by any person are not condemnable! Moreover, and no one shall breach such rights whether he is in working in official capacity or any other.

3.3.2 Universal Declaration of Human Rights (UDHR):

Universal declaration on human rights is a basic human rights law document, which some time is called Magna Carta of humanity. The need for human rights protection came after WWII because there had been huge violations of human rights, U.D.H.R came to protect the dignity of human being, which is vested in him inherently which is the base of natural law. Even though there were many contradictions between socialists and capitalists states but they agreed to make non-binding human rights declaration. The U.D.H.R includes thirty articles:

Article 3 to article 21 talks about the civil and political rights: which discuss some of the basic human rights like equality before law, protection of human rights by law, non-discrimination, right to life, no slavery and torture of human being, no detainment, and right to having fair trial?

Article 22 to 27, there are economic social and cultural rights, which talk about right to work, social security, shelter and food for all. In addition, the basic article Art.30 that no one can take human rights of a human being, so the U.D.H.R has called for the protection of human rights internationally and no one has right to destruct it.¹³⁸

¹³⁸ See Universal Declaration on Human Rights, 10.12.1948.

So if any human being including the diplomats/sovereign representatives even sovereign cannot take such right because they have agreed to give and protect such rights, and those who violate it they must be asked about such violation.

3.3.3 International Covenant on Economic, Social and Cultural Rights:

After the contradictions and discussions made between the socialists and capitalists states, there were two main conventions, one for the capitalists' states and one for the socialists' state.

In this convention there is right to self-determination, employment, no child labor, economic rights, marriage, and right to physical and mental health, right to education, taking part cultural life. In addition, the most important article is about the right to social security so that no one has right make risk to the security of a human being, so the security of a person should be protected in all situations and none can take it.¹³⁹

3.3.4 International Covenant on Civil and Political Rights:

The covenant was adopted by General Assembly on 16.12.1966 and entered into force on 23.03.1976. This covenant has some basic fundamental human rights like right to legal recourse, when the human rights of a person are violated¹⁴⁰. Right to life and

¹³⁹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> accessed on 11,05,2017.

¹⁴⁰ In addition, it is expressly mentioned that "Even if the violator of human rights is acting in official capacity" so the diplomatic immunity is in full contradiction with this article. See ICCPR Art.2.

survival, no inhuman or degrading treatment of any human being, there shall be no slavery and servitude, no arbitrary arrest or detention, there shall be security of the person, the right to freedom of movement, the right to fair trial and the presumption of innocence, the right to equality before law and protection by law.

Therefore the most relevant article regarding diplomatic immunity is the right of having fair trial and equality before law, and the diplomatic immunity negates all such universally legally recognized principles of laws of the states, by all legal systems whether civil law legal system, common law legal system and Islamic law legal systems, and human rights ¹⁴¹

3.3.5 Convention for Elimination of Discrimination against Woman:

It was declared on 18.12.1979, entered into force on 03.09.1981. It called for the equality of rights and respect for human dignity, and considered that the discrimination against women violates the principles of equality of rights and respect for human dignity and it has resulted in the prohibition of women to take part in the service of their countries and of humanity¹⁴².

So whenever the discrimination is the against the human rights, then why not the other oppressions like rape, servitude of woman are not considered to be against human rights. Therefore, when the diplomats violate it then they violate the

¹⁴¹ See International Covenant on Civil and Political Rights 1966.

¹⁴² <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> accessed on 11.05.2017.

universally recognized rights and principles and it shall not be allowed at all in any situation, but unfortunately the diplomatic immunity has given protection for these crimes.

3.3.6 The ICC Statute 1998:

Article 27: Irrelevance of official capacity:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person¹⁴³.

So it provides that the Statute applies to all irrespective of their official capacity and diplomats are clearly also included in it, and there is a great question of universal jurisdiction in it which is also against the state sovereignty and sovereign immunity.¹⁴⁴

3.3.7 European Convention on Human Rights:

¹⁴³ http://legal.un.org/icc/statute/99_corr/cstatute.htm accessed on 31,12,2016.

¹⁴⁴ Article 27, Rome Statute of International Criminal Court, Entered Into Force on 1,7,2002. Can be Read at: <http://www.crimesofwar.org/commentary/the-icc-bashir-and-the-immunity-of-heads-of-state/> accessed on 30, 12, 2016.

This convention came for recognition and securing of the rights declared in Universal Declaration of Human Rights 1948. All rights, which are given in such conventions, are given not only by U.D.H.R but also by other human rights treaties, declarations and conventions.

Right to life, prohibition of torture, prohibition of slavery, right to security, right to fair trial, prohibition of abuse of rights and prohibition of discrimination are the most valuable rights given by the convention. In addition, there are protocols that talk about the protection of human rights and fundamental freedoms¹⁴⁵.

3.3.8 African Charter on Human and Peoples' Rights:

For the enforcement and reaffirmation of human rights, African union made its own charter for human rights called "African Charter on Human and Peoples Rights". It has recognized all the human rights, which are present in ICCPR, ICESCR, other conventions and the rights, which are given and protected in all legal systems. Art.2 of the charter it is written that "everybody is equal before law" "Every individual shall be entitled to equal protection of the law". Art. Four Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Therefore, these are the two basic articles, which provide the basic of recognition, enforcement and protection of rights, so this charter has also insisted

¹⁴⁵ European Convention on Human Rights 1950. and protocols to it. www.echr.coe.int

the equality before law, and no one is above the law, and doing so will be contrary to the charter and law and everybody shall be punished for such infringements.¹⁴⁶

3.3.9 Critique:

In U.N Charter, UDHR, ICCPR, ICSECR, CEDAW, ECHR, there is a great emphasize on human rights. Therefore, whenever these rights are violated it means all the fundamental rights are violated, which are given to every human being by core human rights treaties, national laws and in the constitution of states. So how can we amalgamate the diplomatic immunity, which has led to impunity and breach of all fundamental rights, with the human rights, national laws and constitutions!

In addition, whenever there is violation of human rights, the U.N and Human Rights NGOs, and other organization directly take steps for protection of such rights. So how when there is violation of internationally recognized human rights, such rights are even not derogable in emergency situation and in time of war, so how it would be allowed expressly by a treaty which is in absolute contradiction and negation of such rights.

3.4 The Pinochet Case:

Facts of the case:

¹⁴⁶ African Charter on Human and Peoples Rights Adopted in Nairobi June 27, 1981 Entered into Force October 21, 1986.

Pinochet was a former head of state that through revolution got power in Chile and committed crimes of international concern after 1970, later he came by diplomatic passport to London for surgery.

Scotland was asked by Interpol to detain Pinochet and extradite him to Spain by the request of Spanish judges as they wanted to question him for international crimes and that was under the European Convention on Terrorism, which wants from the countries to help each other. Pinochet was arrested in London under the Extradition Act 1989 and that was due to involvement of Pinochet in Killing the Spanish nationals in Chile under his role. The Chilean government asked the U.K to release him because he had diplomatic immunity. Chilean ambassador claimed that he Pinochet had diplomatic immunity but the British government denied the claim that the passport of Pinochet gives him diplomatic immunity because he was not diplomat.

Decision of Magistrate and Home Secretary: Magistrate said that the Pinochet was involved in torture, conspiracy, hostage taking, and the murder of Spanish citizens and issued the warrant.

Appeal in High Court: High Court began hearing to the lawyers of Pinochet for the writ of habeas corpus and judicial review of Home Secretary's decision to arrest him and they claimed that the heads of states will be put at risk abroad by the this precedent. The Crown's Prosecution said that immunity to acts such as systematic torture and murder because it is not the function of the head of state. The Swiss and

French also ordered his extradition to their countries for disappearance of their citizens.¹⁴⁷

Decision of High Court: High Court decided that the Pinochet has immunity, so the first warrant was finished and Court considered that the murder of Spanish citizens in Chile is not an extraditable crime under U.K law. Therefore, immunity was given to him under UK State Immunity Act that grants to head of the state immunities like diplomats as it is under the Vienna Convention on Diplomatic Relation, but he remained under arrest until the lord's appeal was heard.

Lord Bingham upheld the claim of immunity and said that there should be distinction in official acts of head of state. The human rights groups appreciated the ruling and said that it is good interpretation of international law because the international law does not recognize immunity for crimes against humanity. Therefore, Pinochet was given bail and admitted in hospital. In addition, many victims and human rights groups from Chile and France filed suits and represented at lords' hearing. In addition, Spanish government also filed its formal extradition accusing him for genocide, terrorism and torture, but Spanish lawyers said that Spanish government did not jurisdiction over him.

¹⁴⁷ Madeleine Davis, "*The Pinochet Case*", Institute of Latin American Studies Research Papers, University of London, no.53(2000), 1-76.

Appeal in House of Lord: The House of Lords held former head of state has no immunity for acts of international crimes and crimes against humanity even committed while holding the post. Lord Nicholls said that international law should be interpreted in the light of national laws and Pinochet is not immune, so the internationally recognized crimes through conventions permit the extraterritorial exercise of criminal jurisdiction by national courts. Lord Steyn held that such crimes are beyond the functions of head of state. Two other lawyers opposed the views of other Lords and said that he was acting in a sovereign capacity and gave the rationale that organizing the commission of crimes with other states definitely means that he was acting in sovereign capacity. Moreover, The Home Secretary continued the proceeding of extradition and denied to proceed to Spain.

Rehearing the case by the House of Lords: A new hearing was made before the seven law Lords and they held that Pinochet was not immune for torture and conspiracy to commit torture, also the extradition act required double criminality was available in the laws of both states, but the retrospective rule cannot be applied for extradition.¹⁴⁸

Lord Goff held that Pinochet enjoyed immunity because there is nothing express or implied in the Torture Convention which can construe waiver of immunity and no reasoning can be made for such waiver. Wilkinson stated that the torture is a fully

¹⁴⁸ It was because those crimes were not crimes under the UK law, Criminal Justice Act 1988, at that time because it had not entered into force in UK so it did not constitute offence.

constituted international crime, which set up a worldwide universal jurisdiction, and the continuation of immunity for ex-heads is inconsistent with the provisions of torture convention because torture is not a state action and if a law prohibits something how can it allow it. So all the three countries, Spain, UK, and Chile have ratified it so all can exercise extraterritorial jurisdiction over acts of torture committed by state officials, and Chile cannot object extraterritorial jurisdiction of UK. Lord Saville held that the provisions of torture are in inconsistency with immunity.

According to Lord Millett universal jurisdiction existed even before the torture convention for the crimes committed against Jus Cogens and every state has jurisdiction under international law over such crimes in even in official duties and there is no bar to exercise jurisdiction by a national court. Lord Phillips held that state immunity cannot coexist with international crimes and the states agree to exercise extraterritorial jurisdiction and should not exclude acts done in official capacity.

All Lords agreed that Home Secretary may reconsider the decision and no one stressed that UK is under obligation in Torture Convention for extradition of Pinochet or to any other country, or to send Pinochet to Judiciary for prosecution in UK, so the Home Secretary allowed continuation of extradition proceedings.

After weeks Chile proposed to Spain that the case may be resolved by bilateral arbitration and send to the UK government medical reports which claimed that

health of Pinochet was too bad, also two Spanish diplomats visited British official and told them that Spain has not yet decided that the decision should go against Pinochet or not. The Chilean government said that it would concentrate on the humanitarian case for Pinochet release.

Straw did medical examination of Pinochet and decided to halt the extradition proceedings because he is unfit to stand for the trial due his health, but he gave seven days go human rights Orgs and Spanish government to represent before giving the final decision. They argued that there should be fresh medical tests because first report was not shown to the parties and it is against natural justice, but the Spanish government said that they would not go for judicial review of straw's final decision. The new report said that Pinochet was unable to be put on trial, he did not know what is happening, and he had lost memory.

All four countries including Spain, Belgium, France and Switzerland objected the report and called for independent tests and that his condition to extradition is not bar under international law. Straw argued that he was unfit to be put to trial and Switzerland and Belgium accepted the decision of Home Secretary, even though Spanish government appealed but it was ignored and Pinochet was freed and sent back to Chile¹⁴⁹. The Home Secretary Jack Straw exercised his discretion whether to

¹⁴⁹ Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case", *European Journal of International Law (EJIL)*, vol. 10, (1999), 237-277.

extradite or free Pinochet, but his decision was influenced by political, as there were economic difficulties with Chile, as well as legal consideration.

It is extracted from the case that Pinochet's case is a good case for enforcement of international human rights norms and Jus cogens. In addition, to support the case of Pinochet there were many arrests in the world for violators of international human rights like those that former dictator of Chad had been arrested in Senegal, and for Rwandan war crimes. Tharcises was arrested in London in 2000. In addition, Eichman case, he was abducted, and convicted of Crimes against humanity/Jews by Israeli District Court. In addition, there is arrest warrant for human rights violator Umar Basheer President of Sudan.

By 1992, the consensus in the International Law Commission of the United Nations on its Draft Articles on the Jurisdictional Immunities of States and Their Property was also developing in favor of the restrictive theory of immunity, Even in private international you have to apply the law of that country on yourself or your law is applied there. So jurisdiction cannot be rejected in any case¹⁵⁰.

The modern view is to treat immunities as having a 'functional basis' —that is, as being necessary 'to ensure the efficient performance of the functions of diplomatic missions' in 1952, USA Abandoned absolute immunity and adopted qualified immunity rule. English courts also moved towards qualified immunity rule since

¹⁵⁰ Akehurst, *Modern Introduction to International Law*, 7th Edition, (London and New York: Routledge Publisher, 1997), 124.

1970. In 1978, British Parliament passed State Immunity act that says that there is no immunity in commercial transactions¹⁵¹.

3.5 Very Recent Development in Winding up of the Sovereignty and Sovereign Immunity, the JASTA Law:

JASTA 2016:

(Sec. 3) this bill amends the federal judicial code to narrow the scope of foreign sovereign immunity (i.e., a foreign state's immunity from the jurisdiction of U.S. courts). Specifically, it authorizes federal court jurisdiction over a civil claim against a foreign state for physical injury to a person, property, or death that occurs inside the United States because of: (1) An act of international terrorism, and (2) A tort committed anywhere by an official, agent, or employee of a foreign state acting within the scope of employment! International terrorism does not include an act of war. Federal court jurisdiction does not extend to a tort claim based on an omission or an act that is merely negligent. A U.S. national may file a civil action against a foreign state for physical injury, death, or damage because of an act of international terrorism committed by a designated terrorist organization¹⁵².

Section three the subsection (2) the scope of diplomatic immunity is almost fully abolished and vanished as it is in ICC statute 1998 Art. 27

(Sec. 7) This bill's amendments apply to a civil claim:

¹⁵¹ Ibid 119.

¹⁵²<https://www.congress.gov/bill/114th-congress/senate-bill/2040> Accessed ib 28/12/2016.

Also in this act there is retrospective effect of the criminal law which is one of the basic principles almost in all legal systems.

Also there is a full-fledge legality of universal jurisdiction of U.S.A over the states, sovereigns and people who would commit any injury or civil wrong to the citizen of United States anywhere in the world.

- (1) Pending on or commenced on or after enactment and (2) Arising out of an injury to a person, property, or business on or after September 11, 2001¹⁵³.

As the diplomatic immunity is based on different jurisprudential concepts in the contemporary international law, one of them is representative of sovereign and sovereignty, which has been totally abolished by the recent U.S JASTA law (justice against sponsors of terrorism act 2016). It is a law passed by the United States Congress that narrows the scope of the legal doctrine of foreign sovereign immunity. it almost fully eliminates the concept of sovereignty or the sovereign immunity, and provides justice for victims and for other purposes and it deters terrorism through it. Also the sovereignty was already narrowed in the Foreign Sovereign Immunities Act (FSIA) of 1976, as the supreme court of U.S.A had already given judgments regarding validity of jurisdiction over the foreign sovereign states in several lawsuits. like the case of Argentine Republic v. Amerada Hess Shipping Corp, where one of the sailing oil ship was encountered by argentine jet by air to surface missile outside the war zone. As the war was with Britain and Argentine, forces so they sued the argentine in U.S Supreme court and it argued “that foreign sovereigns are to be made party to a lawsuit and American courts must establish jurisdiction solely under the foreign sovereign immunity act”¹⁵⁴.

¹⁵³ Ibid.

¹⁵⁴ Brohme Jurgen, *State Immunity and the Violation of International law*, (Martinus Nijhoff Publishers,1997, The Hague, Boston, London), P48-49. Can be Read at: https://books.google.com.pk/books?id=AhaMjFEzZQ8C&pg=PA48&lpg=PA48&dq=Argentine+Republic+v.+Amerada+Hess+Shipping+Corp.&source=bl&ots=uWfjobWnjE&sig=cHrUiofVloJRaLrKWT_C3PHLNr4&hl=en&sa=X&redir_esc=y#v=onepage&q=Argentine

The law does mention Saudi Arabia but allow superseding a case against all states especially the Kingdom of Saudi Arabia by the victims and their families that were injured or damaged in attacks of 9/11. The bill will give the right to other countries to make the same kinds of laws based in the principle of “reciprocity”, which is the basic principle of international relations and international law. Therefore, the states and their citizens may also file lawsuits against the United States like for its invasion on Iraq, Vietnam, Afghanistan and other countries where they killed millions of people. In addition, the Jihadi John of ISIS, shall the United Kingdom be sued for it too?, Because he has slaughtered hundreds of innocents?¹⁵⁵

JASTA is against the whole system of international law and is fully in contradiction with the basic principles on which the international law is based, i.e. like state sovereignty and state sovereign immunity in which are very centuries-old principles in international law and are the base for international relations too.

[%20Republic%20v.%20Amerada%20Hess%20Shipping%20Corp.&f=false](#) Accessed on 27/12/2016.

¹⁵⁵Cole Brendan, “New US Terror-Sponsors law Means Britain: Could Be Sued by Jihadi John Victims”, November 28, 2016, Can be Read at:

<http://www.ibtimes.co.uk/new-us-terror-sponsors-law-means-britain-could-be-sued-by-jihadi-john-victims-1593699> Accessed on 28/12/2016.

But it is the question of responsibility of state for acts of state-actors and non-state actors in foreign territories in international law which the Saudi government has denied the claims of being directly and indirectly involved in 9/11 attacks.

Conclusion

In the recent practice of the world, there is a lot which happened. Moreover, it is thought to be against the existing convention regarding diplomatic immunity. As the diplomats are prosecuted for the some of the local criminal law in New York, like for trafficking and others, for civil actions, and there is almost limited material immunity to them. In addition, there is much stress in the U.N Charter, U.D.H.R, ICCPR, ICSECR, CEDAW, Charter of African Union on Human Rights and many other human rights documents even national laws. So it should not be violated because the international law is based on these rights and violation of these rights would result the destruction of international law. In Addition, legal order and sometime the regimes are changed forcefully by western countries for violation of human rights. Also the recent developments in winding of the winding of diplomatic immunity like in the ICC statute which fully rejects the diplomatic immunity as in section 3 the subsection (2) the scope of diplomatic immunity is almost fully abolished and vanished as it is in ICC statute 1998 Art.27. In addition, the juridical base of diplomatic immunity is going to end as the US recent JASTA is a good practical example for that.

Conclusion and Recommendations

Conclusions

The juridical bases for the diplomatic immunity in the contemporary international law have no legal value in Islamic law. As the Islamic law does not confess on any of them and does not know any any exception for the representative of sovereign. Because the sovereign is Almighty Allah and human being is the representative of sovereign in the Islamic law, but in the contemporary international law sovereignty belongs to man and ambassadors/diplomats are considered representatives of sovereign. Also Islamic law considers the person living within the territory of Islam to be counted as present in the territory of Islam and shall not be considered to be absent from that territory , also the functional necessity cannot legalize the crimes committed by a person except in few civil cases but that is subject to limitations.

As the Islamic law has given greater importance to diplomatic relationship, thus it has given legal protection to diplomats some of the research scholars mention the case of Emissaries of Musailama al-Kadhab as the sole base for proving the absolute immunity while the fact was that he Muslim state did not have jurisdiction over that area! That is why they were not subjected to Islamic State laws

at that recent time! Later they all were subjected for rules and Had of Ridda after the wars against *Murtaddin*. Also It is lawful to give *Aman* to the *Murtaddin*. And in fact one of the emissaries of Musailima al-Kadhab was executed, who was living in Iraq and the Ibni Mas'ud words establish that the *Mustamin* shall not be punished for Had of *Ridda*. and the jurists count it in Had involving fully the right of Allah, and the Imam had the option not to give him time for Tauba (Repentance) and considered him as *Zandiq*, in front of people in a public place. In addition, the *Dar al-Ridda* is considered as *Dar al-Harb* so all the rules of *Dar al-Harb* during the war and peace will apply to them. In addition, it is lawful in Shariah to accept and do *Muada'ah* with *Murtaddin*. Moreover, Islam has also given power to Imam to make treaty and abide by all treaties but there are limitations for it.

In the recent practice of the world, there are a lot which happened and thought to be against the existing convention regarding diplomatic immunity as there is practically the diplomats prosecuted for the some of the local criminal law in New York like for trafficking and others, for civil actions and there is almost limited material immunity to them. In addition, there is much stress in the U.N Charter, U.D.H.R, ICCPR, ICSECR, CEDAW, Charter of African Union on Human Rights and many other human rights documents even national laws. Therefore, it should not be violated because the international law is based on these rights and violation of these rights would result the destruction of international human rights law. In Addition, the legal order and sometime the regimes are changed forcefully be western countries for violation of human rights. Also the recent developments in

winding of the winding of diplomatic immunity like in the ICC statute which fully rejects the diplomatic immunity as in section 3 the subsection (2) the scope of diplomatic immunity is almost fully abolished and vanished as it is in ICC statute 1998 Art. 27, also the juridical base of diplomatic immunity is going to end as the US recent JASTA is a good practical example for that

Recommendations

Immunity should be made compatible with the norms of Human Rights Law, particularly the idea of equality before law.

States may have mutual agreements to make their representatives respect the law of receiving states and make them liable for their acts.

There should be a protocol to the VCDR “Vienna Convention on Diplomatic Relations” 1961 to make the distinction between the official and non-official functions.

There may be an international tribunal where the law of the state of the victim will be applied in case of violation of law by the diplomats and the diplomat be punished according to that law.

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