

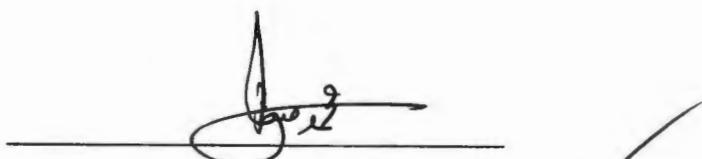
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This is to certify that we have evaluated the thesis titled "Diplomatic Immunity: Absolute Immunity or Some Restrictions? A Study in the Light of Islamic Principles and The Constitution of Pakistan" submitted by Mr. Fahad Bin Naqeeb, Reg. No. 139-FSL/LLMIL/F10 in partial fulfillment of the award of the degree of LL.M in International Law. The thesis fulfills the requirements in its core and quality for the award of the degree.

Prof. Dr. Muhammad Zia-ul-Haq

Director General,
Islamic Research Institute,
I.I.U.I.

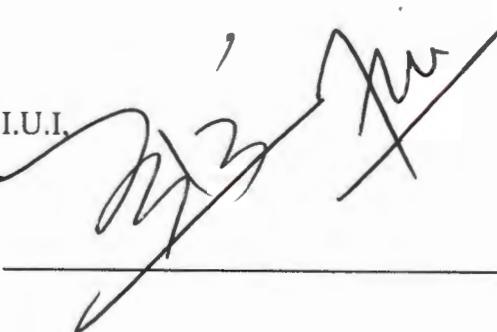
Supervisor:



Dr. Hafiz Aziz-ur-Rehman

Asst. Professor/Legal Advisor to President I.I.U.I,
Faculty of Shari'ah and Law,
I.I.U.I.

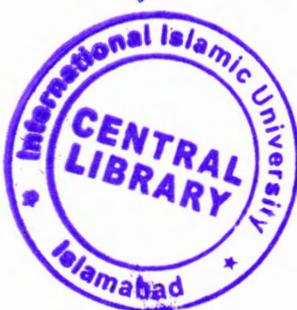
Internal Examiner:



Mr. Osman Karim Khan

Senior Legal Consultant/Prosecutor,
National Accountability Bureau, Islamabad.

External Examiner:



Accession No TH17879



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FAD

Diplomacy - International Law

Diplomatic privileges and immunities (Islamic Law)

DECLARATION

I, Fahad Bin Naqeeb, candidate for the award of the LL.M degree, declare that the work in this thesis was carried out in accordance with the requirements of the University's Regulations. It has not been submitted for any other academic award except where specifically indicated. Any views expressed in the dissertation are those of the author.

Dated: 14.07.2017

Signature: 

Abstract

Since the beginning of the states, diplomacy has been practiced and immunity has been regarded to the messengers. This has now evolved in a complete science and a core principle of international law. Different practices at different times by the states have been now gathered in one piece of legislation, the Vienna Convention on Diplomatic Relations. It has a sister legislation as well, the Vienna Convention on Consular Relations. These two conventions now govern the laws regarding the diplomatic and consular relations of the state throughout the world.

Recently, the misuse and abuse of diplomatic immunity has raised an alarm among the states and international law experts. They are now trying to analyze the causes of these abuses and to find its solutions. There are three basic schools of thoughts; one is in favour of complete immunity; one in less immunities and one in appropriate immunities.

The thesis is divided in to six chapters. Chapter one is the introduction to the research. Chapter two discusses the concept of diplomacy and its historical evolution in the west and Shari'ah. Chapter three explains the codification process of the diplomatic immunities and privileges practiced throughout the history of the international law. Chapter four looks at the different immunities granted to the diplomats as per Shari'ah and discusses the rulings of the Muslim jurists on the subject. Chapter five highlights the abuses of diplomatic immunities across the world and its outcome. Chapter six contains the conclusion and recommendations in the light of the above five chapters.

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- 3- State v. Raymond Davis
- 4- United States v. Iran [1980] ICJ 1

Acronyms

<i>A.S:</i>	Alaihi As-Salaam (the blessings (of Allah) be upon Him)
<i>CIA:</i>	Central Investigation Agency
<i>ICJ:</i>	International Court of Justice
<i>ILC:</i>	International Law Commission
<i>R.A:</i>	Rahimahullah (may Allah have mercy on him)
<i>R.A:</i>	Razi-Allahu Anhu (may Allah be pleased with him)
<i>DHR:</i>	Universal Declaration of Human Rights
<i>UK:</i>	United Kingdom
<i>UN:</i>	United Nations
<i>US:</i>	United States
<i>VCCR:</i>	Vienna Convention on Consular Relations
<i>VCDR:</i>	Vienna Convention on Diplomatic Relations

Acknowledgments

All the praise be to Allah the Almighty who is the creator of all and everything, and without His will nothing is possible. The peace and blessings of Allah be on His last and final Messenger Holy Prophet Muhammad (Peace and blessings of Allah be upon him) who is the only ideal for all the human beings.

I would like to thank my parents for their patience and continuous guidance. It became possible because of them and without them I am nothing. I would like to thank my brothers who have been a support and who motivated me a lot. I am grateful to my wife for her encouragement and my lovely daughter.

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Chapter No. 1

INTRODUCTION TO THE RESEARCH

Chapter No. 1: Introduction to the Research

1.1 Thesis Statement

The doctrine of diplomatic immunity as advocated by the States these days seems to be in clash with the basic principles of Islamic law (*Shari'ah*) and the fundamental rights. This generalized doctrine needs to be specified and well defined so that its misuse/abuse can be restricted and any misconception regarding this doctrine can be cleared.

1.2 Introduction and Importance of the Topic

In order to survive and provide its inhabitants a chance to live a good life, the states need to interact with each other. There is not a single state on the face of the world which can survive on its own. In order to interact effectively with each other the states need experts and those experts should visit other states to deliver the message of goodwill and harmony. These experts which a state sends to the other state are known as diplomats, envoys or messengers. These messengers, while performing their duties, might be subject to some duress or coercion, like false accusations, threat of prosecution etc. by the other state for getting an undue advantage. Such a situation may also arise when the citizens of a state try to influence the messenger. In such like circumstances something like immunities can be very useful as it will protect the messenger from the receiving state's pressure. Therefore, this entire armada of immunities granted to a diplomat is deemed necessary for his effective functioning.

This thesis will help in explaining diplomacy and address the reasons of the immunities, theories put forward by the propagators of these immunities, practices adopted by different states at different timeline, evolution of those practices into the VCDR and the effectiveness and weaknesses of VCDR. An important question in this regard will be that how far does the VCDR have incorporated or regarded the Islamic international law in it.

This thesis will also focus on the concept of diplomatic immunity in Islamic law and diplomatic practices by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) and His (Peace and blessings of Allah be upon him) followers till this day. It will analyze the legal strength of this concept in Pakistan, how has it adopted the VCDR and how is it implemented.

At the end, there will be a conclusion and then recommendations in the light of the conclusion.

1.3 Statement of Research Problem

The excuse of diplomatic immunity is creating a lot of problems for the law enforcing agencies of a receiving state and it is also being misused to fulfill the ill intentions of a sending state by using it for espionage, smuggling or other crimes. The present law regarding the diplomatic immunity also suffers from a major discrepancy with respect to the Muslim states as it lacks any input from their side. Although, the concept of diplomatic immunity exists both in western law and Islamic law but the basis of western law are totally different from that of Islamic law. The international legislation on diplomatic immunity must be streamlined keeping in mind the Muslim states as well, as they constitute a major portion of the world. Also, it must be cleared that whether a

diplomat enjoys absolute immunity or are there any restrictions and exemptions to this immunity.

1.4 Questions of the Research

This research shall focus on the following questions:

- 1- What is diplomacy and what is its importance?
- 2- What were the immunities and privileges enjoyed by the diplomats throughout the world history?
- 3- What is the basis for these immunities?
- 4- Whether the prevailing regime of diplomatic immunities is in consistency with the Islamic principles?
- 5- Whether it violates any settled and universal principles of fundamental rights?
- 6- How Pakistan regulates this doctrine?
- 7- Whether it is absolute immunity or is their certain restriction or limitation?
- 8- If it is absolute then is it beneficial for international relations?
- 9- If it is not absolute then what are the checks on it?
- 10- Is there any forum for holding the diplomats accountable for their acts outside the domain of their functions?
- 11- How can it be controlled without putting the life of diplomats in jeopardy and at the same time, not hindering his functions?
- 12- Is there any need for reformation or amendment in the prevailing legal regime governing this very important component of healthy international relations?

1.5 Hypothesis

A diplomat is considered the eyes and ears of a state in the other state. These eyes and ears play a very vital role in the formulation of policies of a state. This very purpose of these diplomats makes them very important, therefore, with the passage of time certain privileges and immunities were granted to them.

Historically, these immunities have three theories of origin i.e. personal representation, extraterritoriality and functional necessity. The personal representation and extraterritoriality theories are now obsolete and functional theory is universally regarded as the sole basis of the immunities.

The number of diplomats is increasing in foreign states and there is a need for a systematic diplomatic regime. The present diplomatic regime is proving to be inefficient as it is not playing its role in shaping the smooth functioning of diplomatic practices throughout the world. The increase in the abuse and misuse of diplomatic immunity is increasing day by day. This abuse does not only trouble the diplomats but also the sending and receiving states. Theoretically, the functional necessity theory is the most appropriate theory to mould the diplomatic immunities and restrict them to the functions performed by the diplomats as diplomats but practically it has not been able to achieve its desired results. There is a need to revisit the age old laws and principles of immunities and mould them in a way that they are coherent and compatible with the present world's international scenario.

In addition, there is also a need to practically involve the Muslim countries in the international law and treaties. The treaties and laws made at the UN and other

international bodies clearly ignore the presence of such a vast majority of Muslims in the world. The present diplomatic regime also seems to ignore the Islamic jurisprudence in totality and expects the Muslims to adopt the laws and treaties which do not cater for the Islamic laws and at times are opposing them.

If the present diplomatic laws and mechanism of immunities are not changed then it will further deteriorate and cause more problems for international relations. Furthermore, the Muslim countries will feel more left out and it will be hard for them to contribute in the international relations as well as laws.

1.6 Objectives

The main objectives of this research include:

1. Establishing an understanding of the basis and nature of diplomacy and diplomatic immunity.
2. Analyzing its compatibility with Islamic Principles and fundamental rights.
3. Developing a complete understanding and analyzing the compatibility to help in pointing out the weak areas of the diplomatic law.
4. Looking at the misuses and abuses of diplomatic immunity and its reasons.
5. Pointing out the contradictions with Islamic Principles and fundamental rights.
6. Analyzing the checks on the immunity and its effectiveness.
7. Giving suggestions and recommendations for its improvement and effective enforcement, and also making it compatible with the Islamic Principles and streamlining it with the fundamental rights guaranteed by the law and universally accepted by the entire world.

1.7 Literature Review

Diplomatic immunity is one of the oldest concepts in international law. It has progressed greatly, acclimating to the emerging situations and covering almost all the correlated domains. The idea behind the immunities is that these immunities are not for the advantage of any certain individual or group of entities but rather are for the benefit of the states.

In order to understand the immunities enjoyed by these diplomats, first we should know the types of immunities from jurisdiction recognised by the international law in relation to officials of States. According to Malcolm D. Evans (Prof. Malcolm D. Evans is a professor of Public International Law at the University of Bristol, England and a member and Chair of different committees of United Nations); there are two forms of immunities (i) Immunity ratione personae, and (ii) Immunity ratione materiae.

Immunity ratione personae mean those immunities enjoyed by certain categories of State officials by virtue of their offices. These immunities cover the official and private acts of the office holder. This means that they enjoy absolute personal inviolability and absolute immunity from criminal jurisdiction. These immunities are just meant for the smooth working of the particular offices of State.

Immunity ratione materiae mean those immunities which are attached to the official act of State officials. They are determined by the nature of acts in question rather than by reference to the person who performed them. They also apply on the acts of all visiting State officials and in this way cover a wider range of actors but a narrow range of actions.

In early times, when the range of diplomatic communication was less developed, its governing law was less sophisticated. In present era, it has become necessary that in order to establish and maintain international cooperation between States, from which political, economic, social and cultural benefits flow, is entirely dependent on effective process of communication. It, therefore, becomes essential to protect and facilitate the process of communication. For this purpose the diplomatic law seeks to ensure an appropriate balance between interests of sending and receiving States.

The primary source of communication between States is through the establishment of diplomatic relations, usually involving the exchange of permanent diplomatic missions. A diplomatic mission is vulnerable as it is located in a territory of another State, and therefore having limited means to ensure its security. Therefore, international law has provided with certain securities and immunities to the diplomatic missions. These securities and immunities are now being regulated by the Vienna Convention on Diplomatic Immunity 1961.

In present times, this diplomatic immunity has been criticized because of its misuse and different authors have tried to re-define it. Some are in favour of complete immunity, some in partial and some minimal. Each has given reasons for their claim.

One basis is “Theory of Extra-territoriality” which says that diplomats enjoy such immunity and privileges because they are deemed to be outside the jurisdiction of the State in which they are appointed. But according to T. N. Tandon and S. K. Kapoor, this theory has received much criticism and now it has been almost discarded.

Another theory is “Functional Theory” which says that the immunity is due to the special functions which they perform. They say that the nature of their duties is such that they require such immunities otherwise they will be handicapped. This theory is universally accepted as this theory is mentioned and made basis of the present diplomatic immunity as per VCDR.

Then there is another concept “reciprocity” which heavily affects this doctrine of immunity. It is more like a threat for the other states “the way you deal with our diplomat we shall deal with yours”. Just because one diplomat of country A violated a law in country B, and country B declared him persona non-grata, the country A declared the diplomat of country B persona non-grata, whether he did something wrong or not. This concept is absurd and against the essence of international law.

In an article “The Untouchables: Is Diplomatic Immunity Going too Far?” in Reader’s Digest a UN critic Joshua Muravchikis was quoted saying “Immunity invites abuse. And sure enough, the invitation has been accepted.” This article furthermore mentions other abuses like, reckless driving, murders, kidnapping and even rapes, being committed by these diplomats and they get away claiming diplomatic immunity.

In 1967, Burma’s ambassador in Sri Lanka, Sao Boowana, threatened his wife and later on killed him and got away claiming diplomatic immunity. Similarly, a Saudi ambassador to India, Majed Hassan Ashoor, was accused of beating, holding in captivity and repeatedly raping two Nepali women in Delhi but he too got away claiming diplomatic immunity.

But on the other hand, in December 2013, Devyani Khobragade, an Indian diplomat to US, was arrested for employing a maid at below minimum wage. She was not granted the luxury of diplomatic immunity. It was because on the other side there was a super power and where there is super power there is no question of granting immunity.

In 2011, the Raymond Davis incident in Lahore, Pakistan, which shocked the whole nation and activated the whole US Government in which Barack Obama himself came to his rescue saying that Davis enjoys diplomatic immunity so Pakistan should abide by the convention and treat him likewise. So, the question arises here is that whether Raymond Davis was also supposed to follow any law/rule/treaty/convention or not? Does the Vienna Convention only apply to Pakistan or U.S.A. as well? Was he even a diplomat?

Dr. Al-Zuhaili (Chairman of Islamic Jurisprudence, College of Shari'ah at Damascus University, Syria), in his book "The International Relations" (*Bain-ul-Aqwami Taloqat/Al-Ilaqaat Al-Duwaliya*), is of the opinion that keeping in mind the prevailing international laws, a person who seeks protection must also be exempted from punishments which are not mentioned in Qur'an or Sunnah, such as *ta'zir* because *ta'zir* punishments are a matter which is decided by a state.

Similarly, Prof. Cherif Bassiouni writes in his article "Protection of Diplomats under Islamic Law" that a diplomat enjoys complete immunity with regard to the civil and criminal jurisdiction.

Dr. Hamidullah writes in his book "The Muslim Conduct of State" that if the envoy or his company commits a crime in the receiving state and becomes a criminal of the state even then he may not be treated otherwise than as an envoy.

We can also find the diplomatic expeditions and interactions of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) in various books on His (Peace and blessings of Allah be upon him) life, like The Sealed Nectar, *Zad al-Ma'ad*, *Serat-un-Nabi A.S* by Al-Tabari, and history books like, Ibn Khaldoun's *Muqaddimah* (An Introduction to History), Al-Tabari's Book on History, and various books of Ahadith like, *Bukhari*, *Muslim*, *Al-Nisai*, *Al-Tirmizi*, *Sunan Abi Daud*. In learning about the diplomatic practices of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) we can develop a better understanding of this concept as per *Shari'ah*, as he (Peace and blessings of Allah be upon him) is the role model for Muslims in every walk of life.

A person is a diplomat when he has been appointed by one state to represent it in its relations with other governments or organizations (see Vienna Convention on Diplomatic Relations, 1961). They perform a very critical role for a state as they collect and report information or advice in certain situations or convey views of a state that may shape its relations with other states or organizations. They are selected on the basis of their intellect level and ability to negotiate and understand issues.

It is a long tradition that diplomats enjoy certain privileges known as "diplomatic immunity". It is a form of legal immunity that ensures the diplomat's safety from lawsuits or prosecution. Although, it has a long history but it was accepted as an international law in Vienna Convention on Diplomatic Immunity (1961). Now, the standards of privileges and immunities are being regulated by Vienna Convention on Diplomatic Relations (1961), Vienna Convention on Consular Relations (1963) and UN Convention on Special Missions (1969).

The diplomats are to follow strictly the laws of the host state (Article 41(1), Vienna Convention on Diplomatic Relations, 1961) as well as other obligations in the Vienna Conventions and the UN Convention, and in case of any violation they suffer strict consequences, like being declared persona non grata or waiver of the immunity (Article 32 (a), (b) and (c), Vienna Convention on Diplomatic Relations).

1.8 Research Methodology

Initially a descriptive approach shall be adopted to explain the basis behind diplomacy and diplomatic immunity enjoyed by a diplomat throughout the history. It will include examination of the Vienna Conventions and other such treaty bodies and laws with regulate these immunities. Later these immunities shall be compared with the basic principles of immunity and diplomatic immunity as per Islamic law (*Shari'ah*) and fundamental rights using a comparative approach. Analytical and critical approach shall also be adopted in order to unveil certain inadequacies and drawbacks of the currently enforced system, and then to provide certain suggestions and recommendations in order to overcome those inadequacies and drawbacks.

This doctrine of diplomatic immunity comes under the domain of diplomatic law. This law governs all the duties, rights and privileges enjoyed by the diplomats and other entities related to any diplomatic mission (permanent or temporary).

Normally, most of the diplomats act responsibly but, however, in recent times we have seen that states/diplomats have started misusing this privilege (like espionage, smuggling, murders, drug trafficking etc.) which calls for a major reform in the rules/laws of this doctrine.

So, in the light of above examples, there is a need to look at the level of immunity provided to the diplomats, keeping in mind the sensitive nature of their duties. A healthy balance should be maintained so that all humans should also enjoy fundamental rights, and the States integrity and dignity should not be undermined. Also, there shall be no discrimination on the basis of superiority of one state over the other in this regard.

This is a very humble effort from my side to write a thesis on such an important and sensitive topic. I have tried to cover the entire topic as much as I can but as no one is perfect so the thesis may not be perfect as well. Knowledge is the name of learning and correcting one's self, therefore, I am always ready and willing to rectify any mistake or shortcoming that I may have committed while writing this thesis.

Dated: 15-01-2016

Fahad Bin Naqeeb

CHAPTER No. 2

INTRODUCTION AND HISTORICAL EVOLUTION OF

DIPLOMAITC IMMUNITY

Chapter No. 2: Introduction and Historical Evolution of Diplomatic Immunity

Diplomacy in state relations has been practiced by the humans since time immemorial. The present form of diplomacy in state to state relations has a long journey of evolution and transformation behind it; therefore, in order to understand the concept of diplomatic immunity, it is important, firstly, to develop a complete understanding of diplomacy and its usage along with its evolution in the International Law by going through its history.

After that we shall define diplomatic immunity and the reasons behind the necessity of providing immunity to the diplomats, and to what extent those immunities are in conformity with Islamic principles. We shall also analyze the doctrine of diplomatic immunity in the light of the laws of Pakistan.

2.1 Concept of Diplomatic Immunity

Definition of Diplomacy

The word 'diplomacy' is an expression that has been used in English for no more than two centuries.¹ It is derived from the word '*diplome*', which originally meant a folded document.² In the 19th century this expression (diplomacy) came to mean 'a science of foreign relations, for which, as a base, diplomas were issued by the monarch.'³

¹ Yasin Istanbuli, *Diplomacy and Diplomatic Practice in the Early Islamic Era*, (Karachi: Ameena Saiyid, Oxford University Press, 2001), 6.

² *Ibid.*

³ Ernest Satow, *Guide to Diplomatic Practice*, ed. Lord George-Booth, (London: Longman, 1981), 6, as cited in Yasin Istanbuli, *op. cit.*, 6.

William B. Macomber, an ex-official in the United States Department of State and a United States diplomat, defines the modern concept of diplomacy as the art and practice of conducting relations between nations, as in arranging treaties, and managing international relations through negotiations. Negotiations are the method by which the relations are adjusted and managed by ambassadors and envoys. Diplomacy is the business or art of the diplomats; which means the application of intelligence and tact to the conduct of official relations between the governments. It is the technique or skill which reigns over the advancement, in a harmonious manner, of international relations.⁴

According to Oxford's Advance Learner's Dictionary diplomacy means 'the activity of managing relations between different countries' or 'skill in dealing with people in difficult situations without upsetting or offending them'.⁵

Similarly, diplomacy simply is "the conducting of negotiations between nations by means of ambassadors, envoys, and the like, or by correspondence".⁶ Black's Law Dictionary also defines diplomacy as, "the art and practice of conduction negotiations between national governments".⁷

Informally, the word diplomacy is used to denote the "skill in dealing with others without causing bad feelings".⁸

The word diplomacy is a foreign word to the Arabic language as in Arabic language the word used was *safarah*. Its usage can be traced back to the early days by the Arabs,

⁴ William Macomber, *The Angels' Game: A Handbook of Modern Diplomacy* (New York: Stein and Day, 1975), 193-194, as cited in Yasin Istanbuli, op. cit., 6.

⁵ Oxford Advance Learner's Dictionary, 6th ed., (Oxford: Oxford University Press), 370.

⁶ Earl Jowitt and Clifford Walsh, *Jowitt's Dictionary of English Law*, ed. John Burke, 2nd ed., vol. 1 (A-K) (London: Sweet and Maxwell Limited, 1977), 615.

⁷ Bryan A. Garner, *Black's Law Dictionary*, 7th ed., (West Group, St. Paul, Minn., 1999), 470.

⁸ See: <http://www.merriam-webster.com/dictionary/diplomacy> (Accessed: 10-04-2013)

before the introduction of the word diplomacy in the Arabic language in recent times. The word *safarah* was used in the same sense in which the word diplomacy is being used.⁹

Art of conducting relationships for gain without conflict is the principal instrument of foreign policy of any state. The goal of diplomacy is to further the interests of a state and seeking maximum national advantage without resorting to use of force and causing resentment.¹⁰ Rules regulating the various aspects of diplomatic relations constitute one of the earliest expressions of international law.

Diplomatic Immunity

Whenever in history there has been a group of sovereign and independent states co-existing, special customs have established on how to deal with the ambassadors and other special representatives of other states.¹¹ These special customs are regarded as “Diplomatic Law”. Within these customs, diplomatic immunity is the most important and most debated concept. It is considered as the basic ingredient in the efficient functioning of a diplomat. It shields a diplomat from any abuse or undue pressure from the receiving state. According to this concept, a diplomat is considered immune from the civil as well as criminal jurisdiction of the receiving state. However, there are certain checks in order to enjoy this immunity, like it can be enjoyed only for official functions and actions done in pursuance of the assigned duty.

⁹ Muhammad Zia ul Haq, *Daur al-Diplomasiyah fi Siyasat al-Rasool* (Peace and blessings of Allah be upon him) (The Diplomatic era in the Politics of the Messenger (Muhammad) (Peace and blessings of Allah be upon him), (Islamabad: Al-Dirasat Al-Islamiyyah, Arabic Journal of the Islamic Research Institute, Vol. XXXIII No. 4 (October-December 1998), 112-116.

¹⁰ Supra note 8.

¹¹ Malcolm N. Shaw, *International Law*, 4th ed., (Cambridge: Cambridge University Press), 523.

Diplomatic law has ancient roots, and today comprises a large and highly developed body of law, from a variety of sources. These include the 1961 Vienna Convention on Diplomatic Relations (VCDR), the 1963 Vienna Convention on Consular Relations (VCCR), and the 1969 UN Convention on Special Missions.¹² In addition, there are many other conventions and treaties along with judicial decisions of international and national courts that deal with this subject matter. However, diplomatic law is not completely codified and yet certain areas of it are still being conducted by customs and traditions. The nature of diplomacy and diplomatic relations in the early times was not exactly like the present time and was less developed as compared to the modern times.

2.2 Historical Evolution of Diplomatic Immunity

Diplomacy has been there since the emergence of human society and its beginnings were possibly in pre-historic times when cave dwellers came to know that they could bargain over hunting grounds and other issues rather than by fight but the concept of a diplomat is rather new.¹³ Initially, diplomacy did not employ permanent personnel rather emissaries were engaged for a particular mission and after the completion of such mission the emissary was to return to his original duty. In the early stages, the diplomats were selected from the clergymen and later on orators were dispatched to deal with issues using their skills of inducement.¹⁴

¹² Malcolm D. Evans, *International Law; Immunities Enjoyed by Officials of States and International Organisations* by Chanaka Wickremasinghe, 1st ed., (Oxford: Oxford University Press), 388.

¹³ Conway W. Henderson, *Understanding International Law*, (Wiley-Blackwell, 2010), 152.

¹⁴ Supra note 4, 14-15, as cited in Yasin Istanbuli, op. cit., 7.

Now we shall look at the western history of diplomacy as well as Islamic history in order to develop an understanding of the prevailing system of diplomatic immunity and to point out the loop holes and other discrepancies.

2.2.1 The Western History

Diplomacy as a scheme of communication between various parties, including talks between recognized agents, is an ancient institution.¹⁵ It can be traced back to the relations among the city-states of ancient Greece.¹⁶ The Romans, although not as much as Greece, played some role as well in the progression of the art of diplomacy by negotiation. The emperors of Eastern Roman Empire used their diplomats in playing off potential adversaries against each other and used the information given by their diplomats in their favour. Their representatives became so much skilled and trained observers that it extended the practice of diplomacy from mere negotiations to accurate observations and reporting.¹⁷

Modern concept of diplomacy as a profession is said to have arisen in Italy in the late Middle Ages.¹⁸ The Holy See¹⁹ and the Italian city-states developed the system of diplomacy at an early date. The first known permanent mission was established at Genoa in 1455 by Francesco Sforza,²⁰ Duke of Milan. In the following century Italian city-states established permanent embassies in London and Paris and at the court of the Holy Roman

¹⁵ Supra note 6, 523.

¹⁶ Norman D. Palmer. Howard C. Perkins (University of Pennsylvania), *International Relations The World Community in Transition*, 3rd Rev. ed., (Delhi: A.I.T.B.S. Publishers & Distributors (Regd.), 2007), 91.

¹⁷ Ibid.

¹⁸ Ibid., 92.

¹⁹ Holy See means 'the episcopal jurisdiction of the Roman Catholic Church in Rome'.

²⁰ Francesco Sforza (born July 23, 1401, San Miniato, Tuscany (Italy)-died March 08, 1466, Milan), condottiere who played a crucial role in 15th century Italian politics and, as duke of Milan, founded a dynasty that ruled for nearly a century. (see at: <http://www.britannica.com/EBchecked/topic/537340/Francesco-Sforza>) (Accessed: 17-08-2013)

Emperor; a British ambassador was assigned to the residence in Paris; and Francis I of France “devised something like permanent diplomatic machinery.”²¹

Earlier, the diplomacy was mostly used for looking after the interests of the sovereign abroad by various means, direct or devious, fair or foul, and its standards and rules were weak and not specified. This resulted in difficulties with regard to the functions and efficiency of the ambassador and at times the difficulty resulted in wars (e.g. on the question of immunity and affront of an ambassador).²²

The 17th century saw diplomacy as a generally accepted method of international relations and permanent missions were seen as a rule and necessity. It was aided by the rise of nationalism and nation-state system, especially after the Peace of Westphalia²³ of 1648.²⁴

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The 18th century is considered to be the golden age of diplomacy. Strong rulers like Peter the Great of Russia²⁵ and Fredrick the Great of Prussia²⁶ used diplomacy along with force to fulfill their goals and achieve their ends. The late 18th century witnessed something that laid the foundation of the present diplomatic practices when the American,²⁷

²¹ Supra note 16, 92.

²² Ibid.

²³ Peace of Westphalia, the European settlements of 1648, which brought to an end the Eighty Years' War between Spain and the Dutch and the German phase of the Thirty Years' War. The peace was negotiated, from 1644, in the Westphalian towns of Munster and Osnabrück. (see at: <http://www.britannica.com/EBchecked/topic/641170/Peace-of-Westphalia>) (Accessed: 17-08-2013)

²⁴ Supra note 16, 92.

²⁵ Peter the Great (1672-1725) was tsar of Russia from 1682 to 1725. His self-given title was Peter the Great though officially he was Peter I. (see at: http://www.historylearningsite.co.uk/peter_the_great.htm) (Accessed: 17-08-2013)

²⁶ Fredrick the Great (1712-1786) King of Prussia (1740-1786), officially he was Fredrick II. (see at: <http://www.britannica.com/EBchecked/topic/217849/Frederick-II>) (Accessed: 17-08-2013)

²⁷ The American Revolution (1775-83): The conflict arose from growing tensions between residents of Great Britain's 13 North American Colonies and the colonial government, which represented the British Crown. (see at: <http://www.history.com/topics/american-revolution>) (Accessed: 17-08-2013)

French²⁸ and the Industrial²⁹ revolutions redefined diplomacy and history as well. Benjamin Franklin³⁰ represented a nation in the making and symbolized the coming era of democratic diplomacy. Diplomat no more was to represent one person alone but the entire nation; not only feel the pulse of a king or a ruler but of a people. This, as a result, imposed more responsibilities and made duties more complicated for a diplomat. But still there was an issue that the remuneration was so less that it was confined to that group of people who had other sources of income and resultantly it was carried out by the representatives of aristocrats and high ups.³¹

The Congress of Vienna made particular important contribution in standardizing the diplomacy. It laid down certain rules of procedures which are still commonly observed. These rules were embodied in the Reglement of March 19, 1815, and in regulations of the Congress of Aix-la-Chappelle in 1818.³² The diplomatic hierarchy thus established

²⁸ The French Revolution also called Revolution of 1789, the revolutionary movement that shook France between 1787 and 1799 and reached its first climax there in 1789. Hence the conventional term “Revolution of 1789”, denoting the end of the ancien régime in France and serving also to distinguish that even from the later French revolutions of 1830 and 1848. (see at: <http://www.britannica.com/EBchecked/topic/219315/French-Revolution>) (Accessed: 17-08-2013)

²⁹ The Industrial Revolution (1760-1840) denotes the process of change from an agrarian, handicraft economy to one dominated by industry and machine manufacture. This process began in England in the 18th century and from there spread to the other parts of the world. (see at: <http://www.britannica.com/EBchecked/topic/287086/Industrial-Revolution>) (Accessed: 17-08-2013)

³⁰ Benjamin Franklin (1706-1790) was an American printer and publisher, author, inventor and scientist, and diplomat. One of the foremost of the Founding Fathers, Franklin helped draft the Declaration of Independence and was one of its signers, represented the United States in France during the American Revolution, and was a delegate to the Constitutional Convention. (see at: <http://www.britannica.com/EBchecked/topic/217331/Benjamin-Franklin>) (Accessed: 17-08-2013)

³¹ Supra note 16, 92-93.

³² Congress of Aix-la-Chappelle (1818), the first of the four congresses held by Great Britain, Austria, Prussia, Russia and France to discuss and take common action on European problems following the Napoleonic Wars (1800-15). This Congress was attended by Alexander I of Russia, Francis I of Austria, Frederick William III of Prussia, and their representatives. Great Britain was represented by Viscount Castlereagh and by the duke of Wellington. Armand-Emmanuel, duke of Richelieu, represented France. (see at: <http://www.britannica.com/EBchecked/topic/11179/Congress-of-Aix-la-Chapelle>) (Accessed: 17-08-2013)

consisted of (1) ambassadors, papal legates,³³ and papal nuncios;³⁴ (2) envoys extraordinary and minister plenipotentiary;³⁵ (3) ministers resident, later merged with the second rank; and (4) charges d'affaires.³⁶ The ambassador who was senior in terms of his tenure in a country should be the doyen or dean of the diplomatic corps in that country. Since the papacy, as a general practice, changed its representatives less frequently than most states, many of the deans at foreign capitals were papal representatives.³⁷

2.2.2 History of Diplomatic Immunity in Islam

The Islamic history of diplomatic practices starts from the life of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him). In order to have an understanding of the diplomatic principles of Islam we must look at the methods adopted and followed before and after the establishment of an Islamic State in Arab by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) and the Arabs.

2.2.2.1 Pre-Islamic State Era

There are significant incidents of established diplomacy in the era that preceded the establishment of the Islamic State in Arab. The first one was the success of Abdul Muttaleb in retrieving his camels that were captured by the invading army of Abraha. He

³³ Papal Legate, in the Roman Catholic Church, a cleric sent on a mission, ecclesiastical or diplomatic, by the pope as his personal representative. (see at: <http://www.britannica.com/EBchecked/topic/334913/legate>) (Accessed: 17-08-2013)

³⁴ Papal Nuncio, a representative of pope of highest rank permanently accredited to a civil government (see: <http://www.merriam-webster.com/dictionary/nuncio>) (Accessed: 17-08-2013)

³⁵ Minister plenipotentiary is a diplomatic agent ranking below an ambassador but possessing full power and authority. (see at: <http://www.merriam-webster.com/dictionary/minister%20plenipotentiary>) (Accessed: 17-08-2013)

³⁶ Charges d'affaires is the lowest rank of diplomatic representative usually accredited to the foreign minister of the country in which he operates, rather than the head of state, and acts in the absence of the head of the mission—usually an ambassador. (see at: <http://www.britannica.com/EBchecked/topic/106417/charge-d'affaires>) (Accessed: 17-08-2013)

³⁷ Supra note 16, 93-94.

accomplished this by meeting the latter and negotiating their release.³⁸ In spite of being in the state of war, there was no violation of any sort with respect to the immunity enjoyed by a diplomat (in this case Abdul Muttaeb).

The other instance is the consensus throughout North Arabia to consider four months of every year as months of peace and non-aggression, so that the convoys could go through and pilgrimages could take place peacefully.³⁹ This consensus was a result of effective and amicable diplomatic relations.

The third example is the *Fudhul* Pact. There was an agreement among the different tribes of the Quraysh in Makkah to come to the aid of any inhabitant of Makkah if subjected to injustice, and to support him against the oppressor until his rights were restored. It is recorded that this pact was invoked again, during the rule of Muawiyah R.A (the first Umayyad Caliph) when his governor in Medinah, Al-Walid bin Utbeh had a disagreement with Al-Hussain bin Ali R.A (the son of fourth Caliph) over some property. The latter professed that if he were deprived of just treatment; he would go to the Apostle's Masjid and would call for the invocation of the *Fudhul* Pact. Abdullah bin Al-Zubair R.A who was present in the meeting proclaimed there that he would lend him his backing and would fight for him. Two other citizens of Medinah swore to take the same stance. When the Governor became aware of this communal support, he yielded to the disagreement and agreed to Al-Hussain R.A.⁴⁰

³⁸ Supra note 1, 9.

³⁹ Ibid.

⁴⁰ Abd Almalik Ibn Hisham, *Sirat Al-Nabi Kamil* (*The Prophet's (Peace and blessings of Allah be upon him) Biography*), trans. Syed Yaseen Ali Husni Nizami Delhi, 3rd ed., vol. 1 (Lahore-Karachi:Idara-e-Islamiyat Publishers ,1994), 94.

The Muslims' diplomatic approach or practices can be traced back to the time when he (Peace and blessings of Allah be upon him) started preaching Islam. From day one, Muslims were seen as a separate community by the Quraysh tribes and they professed the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) 'as the head of the community, however small, like a state within a state.'⁴¹ When we look at the methods adopted by the two communities, in order to resolve different issues and disputes between them, we can see that the approach was almost the same as present diplomatic practices. Both sides resorted to dialogues and negotiations through their envoys/messengers to reach to a peaceful settlement,⁴² and they also observed the doctrine of diplomatic immunity.

The first diplomatic delegation sent after the advent of Islam in Arab was from Quraysh to Uncle of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) Abu Taleb. This delegation gave two options to Abu Taleb one was to stop his nephew from preaching Islam and calling people away from the religion of their ancestors, and the other was to denounce him. The people selected for this purpose were dignitaries who had influence in the Arab society and who knew how to deal with difficult situations. They explained to Abu Taleb the reason of their arrival and explained the harm that the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) was causing to them regarding their beliefs and traditions. They also pointed it out to him that he himself

⁴¹ Carl Brockelmann, *History of the Islamic Peoples*, (London: Routledge & Keagan Paul Ltd., Broadway House, 1956), 16 as cited in Yasin Istanbuli, op. cit., 12.

⁴² Supra note 1, p. 13.

is in disagreement with his nephew, just like them. But Abu Taleb calmed them down and returned them and did not disrespect them or harm them.⁴³

The second delegation regarding the same issue was sent by the Quraysh, who were very infuriated because of the result of the first delegation, to Abu Taleb which used a threatening tone as the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) didn't stop preaching Islam and he didn't do anything in this regard. Abu Taleb conveyed the concern of Quraysh to Him (Peace and blessings of Allah be upon him) and asked Him (Peace and blessings of Allah be upon him) to not burden him with a load which he may not be able to carry. Upon this, the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) replied that even if the sun was placed in his right hand and the moon in his left he would not stop his mission.⁴⁴ Despite of the usage of a threatening tone Abu Taleb did not reciprocate but returned them with respect.

The third delegation, regarding the same matter, came to Abu Taleb with a third option in which Quraysh offered him an exchange of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) with Ammarah bin al-Walid who was a wise and presentable man from the best family of Quraysh. Abu Taleb refused this sort of bargaining where he "was to deliver his adopted son to be killed while accepting their son to be fed and protected".⁴⁵

⁴³ Supra note 40, 170. See also, Abi Jafar Muhammad bin Jarir Al-Tabari, *TarikhTibri* (Vol. I) *Sirat-un-Nabi* (Peace and blessings of Allah be upon him), trans. Syed Muhammad Ibrahim MA (Nadwi), (Karachi: Nafees Academy), 90-91.

⁴⁴ Supra note 40, 171. See also, Abi Jafar Muhammad bin Jarir Al-Tabari, *TarikhTibri* (Vol. I) *Sirat-un-Nabi* (Peace and blessings of Allah be upon him), Translated by Syed Muhammad Ibrahim MA (Nadwi), (Karachi: Nafees Academy), 91-92.

⁴⁵ Supra note 40, 171.

It is to be noted here that in this three phased negotiations, both the sides observed the prevailing social norms and traditions i.e. to stand by the family even if one doesn't agree with the other and acknowledgment of this tradition by the other party. It is also worth noting that both the sides resorted to verbal skills and persuasive tactics instead of use of force.⁴⁶ The selection of the people of the delegation was based upon certain specific qualities, like, influence on the other party, intellectual level, knowledge, oratory and handling of difficult situations. These requirements are seen to this day as well while appointing a diplomat.

On the same lines, Quraysh sent another of their dignitaries for negotiating with Prophet the Holy Prophet Muhammad (Peace and blessings of Allah be upon him), namely Utbeh bin Rabiah. He was well versed in poetry and soothsaying. Utbeh started his negotiations very systematically from the motives of his arrival and then questioning the aims of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him), and at the end offering rewards for relinquishment of His (Peace and blessings of Allah be upon him) mission. The Holy Prophet Muhammad (Peace and blessings of Allah be upon him) responded in likewise manner and resultantly, on his (Utbeh's) return, he told his people to leave Him (Peace and blessings of Allah be upon him) to what he (Peace and blessings of Allah be upon him) was determined to accomplish.⁴⁷

Failing to reach any conclusion, Quraysh sent another delegation consisting of four dignitaries. They proposed to Him (Peace and blessings of Allah be upon him) that they worship His (Peace and blessings of Allah be upon him) God and he (Peace and blessings

⁴⁶ Supra note 1, 14.

⁴⁷ Supra note 40, 181-182.

of Allah be upon him) worships their gods, and in this way both the parties would benefit from their common practice. This preposition was firmly rejected by Him (Peace and blessings of Allah be upon him) and it is mentioned in The Glorious Qur'an in Surah Al-Kafiroon Verses 1-6.

These encounters can be construed to be aimed at reaching a peaceful conciliation over the disputed matter.⁴⁸ This can be treated as the first recorded diplomatic practice/negotiations in the Pre-Islamic State era. There were many other delegations sent to different other communities by the Quraysh after their failure to reach a settlement with the Holy Prophet Muhammad (Peace and blessings of Allah be upon him),, among them were those sent to Jews and Christians for their help in countering him (Peace and blessings of Allah be upon him).⁴⁹

Another example of diplomatic practice can be seen when after the vindictiveness against the followers of Islam intensified and the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) advised that those who could not secure protection migrate to Abyssinia (because the Abyssinian Negus was the nearest Christian leader who could offer them asylum). This gave rise to another round of diplomatic conduct by the Quraysh when they sent a delegation to Abyssinian Negus asking him to banish the Muslims and renounce the asylum granted to them. The Negus refused to entertain the requests of the Quraysh delegation.⁵⁰ This was another failure of the Quraysh on the diplomatic front despite of having best orators and soothsayers.

⁴⁸ Supra note 1, 16.

⁴⁹ Supra note 40, 188-195, 214-221.

⁵⁰ Supra note 40, 215.

These were some prominent diplomatic encounters between the Muslims and people of Quraysh before the establishment of an Islamic state. It can be seen that throughout these encounters both of the sides resorted to tactful and logical approach and not forceful and vigorous one. Even at times the Quraysh did use a threatening tone but he (Peace and blessings of Allah be upon him) responded in a polite yet firm and determined manner. Also, we can see the difference of approach and vastness of the vision shown by Him (Peace and blessings of Allah be upon him).

2.2.2.2 Post-Islamic State Era

The arrival of Holy Prophet Muhammad (Peace and blessings of Allah be upon him) at Medinah was the first step towards the establishment of an Islamic State. When he (Peace and blessings of Allah be upon him) reached Medina it was inhabited by many different clans and other non-Muslims including Jews and Christians. In the first half of his ten years' leadership in Medina, he (Peace and blessings of Allah be upon him) laid down the foundation of a city-state. The first step in this regard was the construction of a Masjid which would serve as the meeting and information center of the city-state, a school, a court for receiving emissaries and delegations and a place for worship and prayers as well. He (Peace and blessings of Allah be upon him) also established a market place for Muslims and a Muslims army as well. Later on, he (Peace and blessings of Allah be upon him) sent His (Peace and blessings of Allah be upon him) envoys and ambassadors to other states to spread the message of Islam.

The Charter of Medina

The Holy Prophet Muhammad (Peace and blessings of Allah be upon him) addressed those issues which were prevailing in Medinah before the arrival of the Muslims. In this

regard the most important and historical piece of convention came in to the existence “The Charter of Medina”. Through this convention, he (Peace and blessings of Allah be upon him) brought all the inhabitants of Medina together, blood feud was eliminated and lawlessness curbed.⁵¹ Through it, the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) was accepted as the centre of all powers by all inhabitants. It was through this convention that all the Muslims (*Ansar* (Muslims of Medina) and *Muhajiroon* (Muslims of Makkah) were declared as one community i.e. Ummah by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him), and other Jewish communities of Medina as separate entity. The convention also contained the laws regarding war and peace and it was mentioned in the convention that the parties to the Charter would declare war or peace collectively. This Charter contained a certain sort of a concept of immunity that none from the Quraysh or from those who support it would be granted any sort of protection (*Aman*) by the parties to the convention.⁵² It can be said that the concept of immunity prevailed in that time and was well defined as well as universally accepted and practiced. Any state or government, on the basis of their own interests, used this doctrine.

As a result of the Charter, Jewish influence in Medinah was countered and minimized, and the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) secured a fortified front for the Muslims which was the commencement of the first Islamic State on the face of the earth, which later on expanded in to three continents.

⁵¹ Supra note 1, 32.

⁵² Muhammed Hussein Heykal, *Hayat-i-Muhammed (Peace and blessings of Allah be upon him)* (*Life of Muhammed (Peace and blessings of Allah be upon him)*), 13th ed., (Cairo: Maktabat An-Nahda Al-Misreyeh, (Nahda Egyptian Library), 1980), 225-227, as cited in Yasin Istanbuli, op. cit., 33.

Diplomatic Expeditions of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him)

To understand the method adopted by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) it is essential to look at the diplomatic correspondence which he (Peace and blessings of Allah be upon him) undertook Himself (Peace and blessings of Allah be upon him). He (Peace and blessings of Allah be upon him) sent envoys with messages to the monarchs and rulers of Byzantium, Persia, the (Arab) Ghassanid, the Patriarch of Alexandria, and the Governors of Oman, Bahrain, Ailah (Aqaba Port on the Red Sea) and the Najranites.⁵³

In his (Peace and blessings of Allah be upon him) letter to Heraclius⁵⁴ Prophet Muhammad (Peace and blessings of Allah be upon him) wrote:

"In the name of Allah, the Gracious, the Merciful. From Muhammad (Peace and blessings of Allah be upon him) the servant of Allah and Apostle (Peace and blessings of Allah be upon him), to Heraclius, the Grand Chief of Byzantines: Peace be unto those who followed the right path. Thence I call upon you with the call of Islam, submit (to Islam) and you will be safe, (if you do) Allah will reward you twice, if you decline, then you would be liable of the sins of peasants. 'O people of the book! Come to common terms as between us and you, that we worship none but Allah, that we associate no partner with HIM; that we erect not, from among ourselves, lords and patrons other than Allah. If they turn back, say ye: Bear witness that we are Muslims (They who have surrendered)'. "⁵⁵

⁵³ Abdul Rehman Ibn Khaldoun, *Tarikh Ibn Khaldoun, Rasool (Peace and blessings of Allah be upon him) Aur Khulafa-e-Rasool (Peace and blessings of Allah be upon him)*, trans. Hakim Ahmed Hussain Alahabadi, vol. I (Karachi: Nafees Academy, Urdu Bazar), 115.

⁵⁴ Heraclius (born c.575-died Feb. 11, 641), Eastern Roman Emperor(610-641) who re-organized and strengthened the imperial administration and the imperial armies but who, nevertheless, lost Syria, Palestine, Egypt and Byzantine Mesopotamia to the Arab Muslims. (see at: <http://www.britannica.com/EBchecked/topic/262495/Heraclius>) (Accessed: 15-02-2014)

⁵⁵ Abu Abdullah Muhammad bin Ismail Bukhari, *Sahih Bukhari*, trans. Molana Muhammad Daud Raz, vol. 4, hadith no. 2941 (India: Markazi Jamiat Ahl-e-Hadith Hind, 2004), 355-360. See also, Abdul Rehman Ibn Khaldoun, op. cit., Vol. I, 115-116. See also, Abi Jafar Muhammad bin Jarir Al-Tabari, *TarikhTibri (Vol. I)* *Sirat-un-Nabi (Peace and blessings of Allah be upon him)*, trans. Syed Muhammad Ibrahim MA (Nadwi), (Karachi: Nafees Academy, Urdu Bazar), 349.

Heraclius received the envoy of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) Wahya ibn Halifah Kalbi R.A warmly and he read the letter before his audience. He did not respond to the call because of his avarice for his dynasty and the fear of opposition by the Christians.⁵⁶

The Holy Prophet Muhammad's (Peace and blessings of Allah be upon him) letter to Chosroes (Emperor of Persia) reads as follows:

"In the name of Allah, the Gracious, the Merciful. From Muhammad the Messenger of Allah (Peace and blessings of Allah be upon him), to Chosroes, the Grand Chief of the Persians:

*Peace be unto him, who follows the right path and believes in God and His Messenger, and testifies that there is no god but Allah, and that Muhammad (Peace and blessings of Allah be upon him) is His servant and Apostle (Peace and blessings of Allah be upon him), I call upon you to the call of God, that I am the envoy of God sent to all peoples, to give admonition to any who are alive, and that the word may be fulfilled against the disbelievers. Submit (to Islam) and you would be safe, but if you decline, then you will be liable for the sins of Magus".*⁵⁷

The Persian Emperor was furious on receiving the letter and tore it and humiliated the messenger Abdullah ibn Huzafa R.A.⁵⁸ Instead, he sent to his Governor of Yemen to summon the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) to his court. The envoys of the Governor of Yemen were received by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) and there they were informed about the assassination of their Emperor. The Prophet (Peace and blessings of Allah be

⁵⁶ Molana Akbar Shah Khan Najeebabadi, *Tarikh-e-Islam*, vol. 1 (Karachi: Darul Isha'at), 170. See also, Abi Jafar Muhammad bin Jarir Al-Tabari, *TarikhTibri* (Vol. I) *Sirat-un-Nabi* (Peace and blessings of Allah be upon him), trans. Syed Muhammad Ibrahim MA (Nadwi), (Karachi: Nafees Academy, Urdu Bazar), 350.

⁵⁷ Supra note 53, Vol.1, 119.

⁵⁸ Molana Akbar Shah Khan Najeebabadi, op. cit., Vol.1, 171. See also, Abdul Rehman Ibn Khaldoun, op. cit., Vol. I, 119-120. Abu Abdullah Muhammad bin Ismail Bukhari, *Sahih Bukhari*, trans. Molana Muhammad Daud Raz, vol. 6, hadith no. 4424 (India: Markazi Jamiat Ahl-e-Hadith Hind, 2004), 42.

upon him) asked the Yemenite envoys to convey His (Peace and blessings of Allah be upon him) message to the Governor to embrace Islam, and apprising him that he would be then re-instated. The envoys were also presented with gifts before their departure.⁵⁹

The response of Heraclius and the Chosroes shows two different approaches towards diplomatic relations i.e. one hostile response and the second was friendly. Heraclius received the envoy and his message amicably and the Chosroes became furious. But in both the cases the messenger/envoy still remained un-harmed, yet in one he was disrespected. So, it means that there was, at that time as well, a concept of diplomatic immunity prevailing in the international relations. Although, the Chosroes did humiliate the messenger but he wasn't harmed. The behaviour of Chosroes shows that he was enjoying absolute power and was driven blind by it. Such behaviour with the messengers can also be seen in the present era by such like people/entities, recent example US Government's actions against the Indian ambassador Devyani Khobragade.⁶⁰

The letters to the Patriarch of the Egyptian Copts and the Persian Governor of Bahrain were also on the same lines. In the one to the Persian Governor of Bahrain he (Peace and blessings of Allah be upon him) wrote:

*"...God is aware of what is within your hands, and be it known that this faith will come out triumphant all over, to the confines that heel or the hoof can reach."*⁶¹

⁵⁹ Supra note 53, 120-121.

⁶⁰ Tom Watkins and Josh Levs, *Arrest, strip-search of Indian diplomat in New York triggers uproar* (CNN), (Dec. 19, 2013) (Devyani Khobragade was the Deputy Consul General of the Counselate General of India in New York who was charged by the US authorities with committing visa fraud related to her treatment of her housekeeper (Sangeeta Richard), see at: <http://edition.cnn.com/2013/12/17/politics/india-us-diplomat/> (Assessed: 18-02-2014).

⁶¹ Muhammad Hammidullah, *Documents Sur La Diplomatie Musulmane*, (Paris: These, Librarie Oriental et Americane), 32 & 34, as cited in Yasin Istanbuli, op. cit., 47.

The diplomatic approach was not only practiced but preferred by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him). He (Peace and blessings of Allah be upon him) wrote letters and sent envoys to different clans and regimes inviting them towards Islam, the message with which he (Peace and blessings of Allah be upon him) was entrusted by Allah the Almighty. In doing so, he (Peace and blessings of Allah be upon him) adopted all the historical traditions regarded as laws while undertaking diplomatic relations. For example, when he (Peace and blessings of Allah be upon him) was told that the foreign monarchs would not recognize a formal letter if it was not properly sealed, he (Peace and blessings of Allah be upon him) saw to it that a ring made of silver was prepared as His (Peace and blessings of Allah be upon him) seal on which was engraved "Muhammad, the apostle of Allah". The ring was used by His (Peace and blessings of Allah be upon him) successors, the three Caliphs, Abu Bakr, Umar and Uthman R.A, for the same purpose, but was lost later on.⁶²

2.3 Importance of Diplomatic Immunity in International Relations

The main aim of a diplomatic mission in a receiving state is to safeguard the sending state's welfare and interest in the best possible manner without any foreign pressure or blackmailing or threat. For this purpose the doctrine of diplomatic immunity plays a vital role. The concept of diplomatic immunity is the basis for the smooth functioning of an

⁶² Abi Jafar Muhammad bin Jarir Al-Tabari, *TarikhTibri* (Vol.3), *Khilafat-e-Rashida* (Part-2) *Khilafat-e-Farooqi* (R.A) o *Uthmani* (R.A), trans. Syed Muhammad Ibrahim MA, Hafiz Syed Rasheed Ahmed Arshad MA, (Karachi: Nafees Academy, Urdu Bazar), 365-367.

ambassador/diplomat. It is due to this reason that an ambassador enjoys a special form of immunity in a receiving state.

Diplomatic immunity is one of the oldest concepts in international law and had received a worldwide recognition. It has evolved greatly, adapting to the emerging situations and covering almost all the related spheres. The idea behind the immunities is that these immunities are not for the benefit of any particular individual or group of individuals but rather for the benefit of a state and the international community as a whole.⁶³

2.4 Concept and Importance of Diplomatic Immunity in Shari'ah

To understand the doctrine of diplomatic immunity in Islam, first, we need to understand the concept of immunity in Islam. The concept of immunity in Islam is very clear and well defined, and is more diverse and universal than that of the west. We shall see, in detail, the difference between the concept of immunity in Islam and the western concept.

2.4.1 Immunity in Shari'ah

The concept of immunity or protection is termed as “*aman*” in *Shari'ah*. The word “*aman*” means security, protection, safeguard or guarantee etc. The person who has been granted/promised *aman* is known as “*musta'min*”. *Musta'min* is someone who came within the territory of a Muslim State under the pledge of *aman*. The doctrine of *aman* is laid down in the Qur'an and confirmed by the Sunnah and was practiced by the Holy

⁶³ Supra note 12, 406.

Prophet Muhammad (Peace and blessings of Allah be upon him) and His (Peace and blessings of Allah be upon him) followers.⁶⁴ Allah says in the Glorious Qur'an,

"and if anyone of the mushrikeen (polytheists, idolaters, pagans, disbelievers in the Oneness of Allah) seeks your protection then grant him protection so that he may hear the word of Allah (the Qur'an) and then escort him to where he can be secure, that is because they are men who know not".⁶⁵

It is clear from this *Ayah* that if a non-Muslim seeks protection then it must be granted to him so that he may hear the word of Allah (Qur'an) and later when he wishes to depart then he may be left to a place where his security is not threatened. The reason behind this specific *aman* is that they are people who know nothing about Islam and in this way they come to know about Islam and may embrace Islam and become Muslims. This is a general protection granted to anyone who seeks to learn about Islam, as Mujahid (R.A) said that any person who comes to learn about Islam is under *aman* till he hears the word of Allah and safely returns to wherever he came from.⁶⁶

In Arab, the concept of *aman* existed before Islam. The pilgrims of Ka'ba were immune, their protection being secured throughout the four forbidden months and both, envoys and those who requested *aman*, were to be protected. Islam recognized these traditions and further promulgated them.⁶⁷

Jurists have divided *aman* into two categories, namely *aman aam* (general immunity/protection) and *aman khaas* (special immunity/protection).⁶⁸

⁶⁴ Supra note 1, 53.

⁶⁵ Al-Qur'an 9:6

⁶⁶ Hafiz Imad-ud-Din Abul-Fida Ismail bin Umar bin Kathir Al-Dimashqi, *Tafseer ibn-e-Kathir*, trans. Molana Muhammad Junaghari, vol. 2 (Lahore: Maktabah Islamiyah), 535.

⁶⁷ Supra note 1, 145.

⁶⁸ *Muwahib Al-Jaleel*, 3:360 as cited in Dr. Wahbat Al-Zuhaili, *Bain-ul-Aqwami Talooqat*, trans. Molana Hakeemullah, (Islamabad: Shari'ah Academy, International Islamic University), 188.

Aman Aam (General Immunity/Protection)

It is that sort of immunity which is granted to general public without specifying their number, like, for example, the whole district or province. This sort of *aman* can only be given by the leader/ruler or his representative as it is related to the public welfare and interest.⁶⁹

The agreement of cease fire with a nation and the protection granted to the non-Muslim habitants as a result of contract of *jizyah* are the examples of such *aman*.⁷⁰

Aman Khaas (Special Immunity/Protection)

It is granted to a person or a specific number of people. This sort of *aman* can be granted by any capable Muslim.⁷¹

Immunity (*aman*), as per *Shari'ah*, can be granted by the leader of Muslims and by an individual Muslim as well. In both the cases, honouring the immunity granted is a compulsion on the entire Muslim Ummah.⁷²

he (Peace and blessings of Allah be upon him) said,

*“If a man among you whether from the remotest or nearest place gives another man (who is not from among you, i.e. a Muslim) safe conduct (Aman), or waves to him by hand as meaning security, the man because of his signal is given security until he hears God’s word. If he accepts it, he is your brother in religion but if he rejects it, then take him back to his secure place.”*⁷³

⁶⁹ Wahbat Al-Zuhaili, *Bain-ul-Aqwami Taloqaat*, trans. Molana Hakeemullah, (Islamabad: Shari'ah Academy, International Islamic University), 188.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Muhammad Bin Ahmed Al-Saraksy, *Sharh Al-Siyar Al-Kabir*, (The Explanation of Big Book on Muslim International Law), vol. 1 (Lebanon: Dar-ul-Kutub Al-Ilmiyah, Beirut), 175.

⁷³ M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, The American Journal of International Law published by American Society of International Law, Vol. 74, No. 3 (Jul., 1980), 614 (Available at: <http://www.jstor.org/stable/2201651>, Accessed: 07-04-2011), see also: Imam Zaid, *Al-Raodh Al-Nadheer*, 4:229 as cited in Wahbat Al-Zuhaili, *Bain-ul-Aqwami Taloqaat*, op. cit., 180.

Other examples of such immunity given by a common Muslim of his own accord and Holy Prophet Muhammad (Peace and blessings of Allah be upon him) declaring it obligatory on the rest; when Um-e-Hani granted protection to two men at the conquest of Mecca and Ali R.A threatened to kill them, and when Zainab R.A (daughter of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) granted protection to Abu Al-‘As ibn Rabe'e R.A to which he (Peace and blessings of Allah be upon him) said: “even an inferior of Muslims can grant protection.”⁷⁴

At the conquest of Mecca the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) granted special immunity (*aman khaas*) to Abu Sufyan R.A and a general immunity (*aman aam*) to the people of Mecca at large.

Diplomat and *musta'min*

A *musta'min* is, as explained above, a person who has been granted/promised *aman*, and a diplomat is also a person who has been granted immunity or protection or safeguard. So, the question is whether a diplomat is a *musta'min* enjoying *aman* or does a diplomat enjoy something more than just an ordinary *aman*.

As per *Shari'ah*, a *musta'min* does not enjoy a complete immunity as there are restrictions on what he may and may not do. A *musta'min* is not immune from the criminal jurisdiction of the state, while a diplomat is.⁷⁵

⁷⁴ Allama Hafiz ibn Qayyim, *Zad al-Ma'ad*, trans. Syed Raees Ahmad Jafri Nadwi, Part 3, (Karachi: Nafees Academy, Urdu Bazar, 1990), 634. See also, Abdul Malik Mujahid, *Sunehray Faislay*, Dar-us-Salaam, 60-63.

⁷⁵ A. Ouda, *Al-Tashri Al-Jinai Al-Islami (Islamic Criminal Law)*, 2nd ed., 1969, Vol. 1, pp. 324-325 as cited in M. Cherif Bassiouni, *supra* note 73, 614.

If after the promise of *aman* a *musta'min* commits an act which, in anyway, causes damage or harm to Islam then the promise of safety of life and wealth shall be deemed broken. If the ruler (Muslim ruler) is not able to get hold of the wrongdoer then his life and wealth becomes licit for the common Muslims, and whoever gets hold of it shall be considered as its owner. As the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) declared in the peace agreement with the people of *Ayla* that if anyone violated the peace agreement then his wealth wouldn't save him and his wealth shall be the property of the person who possesses it.⁷⁶ This is because if the *musta'min* breaks the pledge for which he was granted *aman* then his *aman* stands revoked.

But when we look at the way the diplomats were treated by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) then we can see that they were a different class of persons who enjoyed immunity at a much larger level than enjoyed by a simple *musta'min*. It is demonstrated while receiving of delegations from people famous for their hatred for Islam, like delegation of Musaylimah Al-Kazzab and a delegation from *Banu Amir*.

The delegation from *Banu Amir*, for example, was lead by Amir bin Tufail, and Arbid bin Qais, Khalid bin Ja'far and Hayyan bin Muslim bin Malik were also in the delegation. Amir bin Tufail came with the intention to kill the Holy Prophet Muhammad (Peace and blessings of Allah be upon him). He made out a plan but his plan failed and on his return he threatened the Prophet (Peace and blessings of Allah be upon him). Upon this, the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) did not react nor did anything to harm the delegation even though Amir had threatened Him (Peace and

⁷⁶ Allama Hafiz Ibn e Qayyim, supra note 74, 115-116.

blessings of Allah be upon him). He (Peace and blessings of Allah be upon him) just prayed to Allah that he should deal with Amir. Resultantly, Amir bin Tufail died of plague.⁷⁷

The conduct of Holy Prophet Muhammad (Peace and blessings of Allah be upon him) clearly defines the status of a diplomat that although he enjoys *aman* yet he enjoys a greater degree of immunity than a *musta'min*. So, a diplomat cannot be considered as an ordinary *musta'min*.

2.4.2 Diplomatic Immunity as per *Shari'ah*

Islam recognized the prevailing pre-Islamic traditions in Arab regarding the rules of immunity e.g. the pilgrims to Ka'ba were immune, the sacredness of the four forbidden months and protection of the envoys and of people who requested *aman*. Islam not only recognized these traditions but refined them as well.⁷⁸

Islam has very minutely defined the status and privileges of an envoy. An envoy is not only granted protection due to the doctrine of *aman* but also for the nature of their task. Even if an envoy misbehaves with the Muslims he cannot be harmed because his mission is noble and is related to the peace of the sending and receiving states or of the world.⁷⁹

The diplomats were granted immunity by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) regardless their beliefs or religion. When he (Peace and

⁷⁷ Ibid., 147-149.

⁷⁸ Supra note 1, 145.

⁷⁹ Supra note 69, 209.

blessings of Allah be upon him) received two envoys from Musaylimah Al-Kazzab⁸⁰ he (Peace and blessings of Allah be upon him) inquired them about their belief regarding Musaylimah. To this they replied ‘they agree to what he says’, and ‘that he is a prophet’. The Holy Prophet Muhammad (Peace and blessings of Allah be upon him) responded by saying ‘By Allah, if it were not (the fact) that envoys could not be killed I would have severed your heads.’⁸¹ Abdullah ibn-e-Masood R.A who reports this *hadith* adds, that “it has been a custom that envoys are not killed.”⁸²

Messengers were considered as ordinary means of communications between the heads of the state, and that messengers were immune from the fury of the host state and were not held accountable for the acts or messages sent by their head of the state.⁸³ This proposition has been supported by the Qur'an in Surah Al-Naml:⁸⁴

“but I (Bilqis) am going to send him a present, and wait to see with what answer my ambassador returns” (27:35)

“(Sulaiman A.S responded to the message conveyed by her envoy) Go back to them, and be sure we shall come to them with such haste as they will never be able to meet: we shall expel them from there in disgrace, and they will feel humiliated.” (27:37)

The envoy delivered the message of *Bilqis* to Prophet Sulaiman A.S and in response Sulaiman A.S didn't humiliate or harmed the envoy but conveyed his response through him. This clearly shows that Islam does recognize the immunity of an envoy.

⁸⁰ Musaylimah bin Habib was a false prophet who claimed prophet-hood in the life of Muhammed (Peace and blessings of Allah be upon him) and was, therefore, known as Musaylimah Al-Kazzab (Musaylimah the Liar).

⁸¹ Imam Abu Daud Suleiman bin Al-Asha'ith Al-Sajistani, *Sunan Abi Daud*, trans. Dr. Abdur Rehman Bin Abdul Jabbar Al-Fariwai, vol. III, hadith no. 2761 (New Delhi: Majlis e Ilmi Dar Al-Dawah), 239-240. Also, Supra note 40, Vol. II, 385.

⁸² *Neil al-Awtar*, Vol.8, p. 29 as cited in Dr. Wahbat Al-Zuhaili, *Bain-ul-Aqwami Taloqaat*, op. cit., 210.

⁸³ M. Cherif Bassiouni, supra note 73, 610.

⁸⁴ Al-Qur'an 27:23-44.

Another example of the inviolability of a messenger is the famous incident of the Treaty of Hudaibiyah. The treaty of Hudaibiyah was signed between the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) and the Quraish tribe of Makkah in the sixth year of Al-Hijra.⁸⁵ In the course of negotiations different delegations were sent and received by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) and the Quraish. Among the delegations sent by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) was Uthman ibn Affan R.A, who was sent because he belonged to one of the most powerful families in Makkah and in case of any mischief by the Quraishites he would have protection.⁸⁶ Uthman R.A got delayed in his return and in the meanwhile rumours of his being killing reached the Muslims at Hudaibiyah. The negotiations were deemed broken and the Muslims took a solemn pledge at the hand of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) that they would not flee and that they would avenge Uthman R.A. This pledge is mentioned in the Qur'an as *Bai'at-ur-Ridhwan* by the Almighty Allah.⁸⁷ After the pledge had been complete, Uthman R.A returned and gave the pledge himself.⁸⁸ Later on, the Quraishites made it known that Uthman R.A was safe and that his person as an envoy was immune.⁸⁹

The incident of Hudaibiyah demonstrates that a violation of an envoy's sanctity is a *casus belli*⁹⁰ and, also, that an envoy can neither be detained nor harmed in any way.⁹¹ During

⁸⁵ Safiur-Rahman Al-Mubarakpuri, *The Sealed Nectar (Al-Raheequl-Makhtoom)*, (Riyadh: Darussalam, 2008), 299.

⁸⁶ Ibid., 301.

⁸⁷ Al-Qur'an 48:18.

⁸⁸ Safiur-Rahman Al-Mubarakpuri, *supra* note 85, 302.

⁸⁹ M. Cherif Bassiouni, *supra* note 73, 611.

⁹⁰ *Casus belli* means 'an event or action that justifies or allegedly justifies a war or conflict', see at: <http://www.merriam-webster.com/dictionary/casus%20belli> (Accessed: 07-04-2011).

the same incident Abu Rafay R.A (who was a non-Muslim before he was sent as a messenger by the Quraish) embraced Islam when he met the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) but he (Peace and blessings of Allah be upon him) sent him back and said “I do not break promise and I do not detain envoys. You must go back and if you feel in your heart as strongly for Islam as you do now then return (as a Muslim)”.⁹²

Similarly, the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) treated the delegations sent by the Kings of Himyar, who were polytheists, which is reported to have come with 80 armed riders to the Prophet (Peace and blessings of Allah be upon him) in the mosque in Makkah, with regard inspite of coming in such an offensive manner.⁹³

Hudood⁹⁴ Crimes; an exception or not?

A diplomat is accorded immunity from arrest, detention and prosecution but this is not the case in all the matters. There are some Islamic scholars (jurists/fuqaha) who acknowledge the possibility of prosecution of a diplomat in *hudood* crimes.⁹⁵

Imam Abu Hanifah R.A held that a *musta'min* cannot be prosecuted for a crime involving the rights of Allah or society except for a *hud* crime, but only for transgressions against the rights of individuals for which *diyah* or compensation was the appropriate remedy.⁹⁶

⁹¹ M. Cherif Bassiouni, *supra* note 73, 611.

⁹² *Sunan abi-Daud 3:110*, as cited in Dr. Wahbat Al-Zuhaili, *Bain-ul-Aqwami Taloqaat*, op. cit., 210.

⁹³ M. Cherif Bassiouni, *supra* note 73, 613.

⁹⁴ *Hudood*, means a penalty prescribed in the Qur'an and the Sunnah as a pure right of Allah. (See, Imran Ahsan Nyazee, *General Principles of Criminal Law (Islamic and Western)*, (Islamabad: Shari'ah Academy, International Islamic University), 163).

⁹⁵ M. Cherif Bassiouni, *supra* note 73, 616.

Ibn e Kathir in his commentary on the Qur'an (*Tafsir ibn e Kathir*) has written under the transliteration of the Ayah 6 of Surah Al-Tawbah that "whoever comes from a land at war (*Dar-ul-Harb*) to the Muslim state, let it be a messenger or a trader or peace seeker or came for peace negotiations or to pay *jizyah*, and the Muslim ruler (*Imam*) or his deputy has granted him immunity (*aman*) then as long as he stays in the land of Muslims (*Dar-ul-Islam*) and does not return to his country killing him is prohibited (*Haraam*)."⁹⁷ Ibn e Kathir further adds that "such a person must not be allowed to live in the land of Muslims (*Dar-ul-Islam*) for more than a year, as he can only stay for a maximum period of four months."⁹⁸

Similarly, the messengers from Musaylimah Al-Kazzab and Banu Amir were not harmed or punished by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him). Even though they committed crimes liable to *hud* (one committed disrespect and the other confessed his act of apostasy) in front of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him).

In the case of the messengers of Musaylimah Al-Kazzab he (Peace and blessings of Allah be upon him) said that he (Peace and blessings of Allah be upon him) would have executed them if there wasn't a custom of not harming the messengers. For the other group he (Peace and blessings of Allah be upon him) prayed to Allah for the revenge as they came to Him (Peace and blessings of Allah be upon him) as messengers as well. But later on, the envoy of Musaylimah was punished by Abudllah ibn-e-Masood R.A for the same crime when he was not an envoy any more, as narrated in Sunan Abi Daud right in

⁹⁶ Ibn Human, 4 *Sharh Fath El-Qaudire*, pp. 152-56 (1st ed. A.H. 1313), as cited in M. Cherif Bassiouni, Supra note 73, 616.

⁹⁷ Supra note 66, 536.

⁹⁸ Ibid.

the *hadith* next to the *hadith* wherein it is narrated that he (Peace and blessings of Allah be upon him) let him go.

The Holy Prophet Muhammad's (Peace and blessings of Allah be upon him) sayings and practices with regard to the diplomatic immunity are very clear. It contains the basic guidelines necessary to further cope up with anything new that may happen in diplomatic practices. The same principles were applied by the *Sahaba* R.A and in the light of those they dealt with the new emerging issues regarding diplomatic practices. The jurists who followed them based their opinions on these teachings and some jurists were of the view that there is no immunity with regard to the *hudood* offences.

The concept of diplomatic immunity is not so different in law as compared to that in *Shari'ah*. Law regards all those immunities and privileges to the diplomat which are there in *Shari'ah*. Similarly, the history of the evolution is same as well i.e. from temporary diplomatic missions to permanent diplomatic missions. The difference is regarding the sources, as in *Shari'ah* the basic sources are Qur'an, Sunnah and *Ijma (Consensus)*, whereas in Law the sources are customary practices, legislation and other pieces of writings. Anything which is contrary to Qur'an and Sunnah cannot be regarded or accepted as a principle in *Shari'ah*, so we are facing the question that how to deal with a diplomat who has committed a crime like blasphemy or apostasy or murder. Does he enjoy complete and absolute immunity or are there any checks on his immunity. What is the status of VCDR under the light of *Shari'ah* and are the measures provided by the VCDR enough in the eyes of *Shari'ah*.

CHAPTER No. 3

INTERNATIONAL LEGISLATION ON DIPLOMATIC IMMUNITIES AND PRIVILEGES IN *SHARI'AH'S* PERSPECTIVE

Chapter No. 3: International Legislation on Diplomatic Immunities and Privileges in *Shari'ah*'s Perspective

In order to ensure smooth and uninterrupted functioning of a diplomatic mission, a diplomat has been granted certain immunities and privileges. These immunities and privileges have survived through the ages and are now observed as laws by the international community.

A diplomatic mission is a result of mutual agreement of the states to engage in a diplomatic relation.⁹⁹ The sending state must ensure the consent of the receiving state regarding the head of the mission.¹⁰⁰ Once states are engaged in a diplomatic mission, they must follow the obligations imposed as per diplomatic laws. The immunities enjoyed by diplomats have been the most problematic issues in modern diplomatic law.¹⁰¹ In this chapter we shall discuss the theories on which these immunities are based upon. We shall also explain the classification of the diplomatic staff; the immunities granted by the Vienna Convention on Diplomatic Relations and analyze them in the light of Islamic principles.

3.1 Diplomatic Immunity in Law

A diplomat is regarded as the eyes and ears of a government in other states and his main function is to execute the policies of his country and to safeguard its interests and

⁹⁹ Article 2 of VCDR.

¹⁰⁰ Article 4 of VCDR.

¹⁰¹ Rene Vark, *Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes*, Juridica International VIII/2003, 110, Available at: http://www.juridicainternational.eu/public/pdf/ji_2003_1_110.pdf (Accessed: 10-06-2011).

nationals in the receiving state. It is also a duty of the diplomats to keep his government informed with the major developments in the rest of the world.¹⁰²

International law grants certain immunities and privileges to diplomats which are not enjoyed by the other citizens. The reason for granting them these exemptions is due to the nature of work they have to carry out. The rules of international law which deal with the establishment and maintenance of diplomatic relations are now codified in the Vienna Convention of Diplomatic Relations (1961).¹⁰³

Black's Law Dictionary defines diplomatic immunity as,

"The general exemptions of diplomatic ministers from the operation of local law, the exception being that a minister who is plotting against the security of the host nation may be arrested and sent out of the country."¹⁰⁴

Another definition of diplomatic immunity is,

"Immunity from suit and legal process which is accorded by law to an envoy..."¹⁰⁵

The definitions very clearly explain the concept of immunity in the law. In law, the concept of diplomatic immunity is regarded as customary international law. Diplomatic protection is based on a fiction "the injury to an individual is treated as if it constituted an injury to the individual's national state, thereby entitling the national state to espouse the

¹⁰² Supra note 16, 85.

¹⁰³ The Convention shall be discussed later on.

¹⁰⁴ Supra note 7, 753.

¹⁰⁵ John B. Sanders, *Words and Phrases Legally Defined*, 2nd ed., vol. 3 I-N (London: Butterworths, 1969), 7.

claim".¹⁰⁶ This legal fiction has been clearly stated and acknowledged by the International Law Commission (ILC) in the commentary to the Draft Articles on Diplomatic Protection, and it was also raised as a point of discussion by states prior to second reading.¹⁰⁷ This legal fiction means that if a diplomat is harmed then it is not the diplomat as an individual that is hurt but the state to which that diplomat belongs has suffered the harm, and therefore it is the state that shall seek remedy against that harm. It is not the individual (diplomat) but the state who will decide how and to what extent protection is to be exercised.¹⁰⁸

The immunities granted to the diplomats are based on customary diplomatic law, which had been universally accepted and practiced. With the growing interaction of states with each other, a need was felt to grant the envoys some protection; 'otherwise no international political system could exist'. The oldest detail regarding grant of immunity to a diplomat can be traced way back to 2,000 years ago in Greek city-states. Initially, these practices were observed as customs and then they transformed in to rights. This protection then became a most discussed legal question in the International Law. The result of all this was the transformation of these customary rules in a codified form known as Vienna Convention on Diplomatic Relations (hereinafter VCDR), which entails all the rules and procedures regarding diplomacy and diplomatic practices, immunities

¹⁰⁶ See official Records of the GA, 61st session, Supp. 10 (A/61/10), Ch IV, Commentary to the draft Arts on diplomatic protection adopted on second reading (2006), Commentary to draft Art. 1: '[o]bviously it is a fiction', at 25, as cited in Annemarieke Vermeer-Kunzli, *As if: The legal Fiction in Diplomatic Protection*, EJIL (2007), Vol. 18 No. 1, p. 38. (Available at: <http://www.ejil.org/pdfs/18/1/220.pdf>, Accessed: 10-04-2011). See also, *Draft Articles on Diplomatic Protection with Commentaries 2006*, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf, Accessed: 10-04-2011.

¹⁰⁷ Annemarieke Vermeer-Kunzli, *As if: The Legal Fiction in Diplomatic Protection*, EJIL (2007), Vol. 18 No. 1, 38. (Available at: <http://www.ejil.org/pdfs/18/1/220.pdf>, Accessed: 10-04-2011).

¹⁰⁸ *Ibid.*, 67.

and protections accorded to the diplomats and their staff, and repercussions of their violations or breach.

3.2 International and National Legislation on Diplomatic Immunities and Privileges

Diplomatic immunities and privileges have a long history of legislation. Initially, it was observed as a custom of international law and later on it was codified by the states unanimously. Efforts were being made to codify the diplomatic practices throughout the ages; like English Diplomatic Privileges Act, 1708, the Anglo-Portuguese Treaty of 1809 and the treaty between the British Empire and the Ottoman Empire in 17th century.

3.2.2 Havana Convention on Diplomatic Officers, 1928

The legislation regarded as the stepping stone for the VCDR is the Convention on Diplomatic Officers, 1928, in Havana. This convention was primarily between the American states but it paved the way for the much refined form of legislation in this regard i.e. the VCDR.

This convention deals with the diplomats, their mode of appointment, their functions, immunities to which they are entitled and the mode of termination of their services in great detail.

Section IV of the convention specifically deals with the immunities and prerogatives of the diplomatic officers. It consists of 11 articles. It exempted the diplomats from all personal and land taxes, custom duties, civil and criminal jurisdiction of the receiving

state and no official was allowed to enter the mission premises except with the permission of the diplomatic officer.

All of the above mentioned exemptions and immunities are codified in the VCDR.

3.2.3 A brief history and introduction of VCDR

On April 18, 1961, the VCDR was signed and it came into force on April 24, 1964, in accordance with article 51 of VCDR.¹⁰⁹ It has 60 signatories and 190 parties.¹¹⁰ Pakistan signed and ratified it on March 29, 1962,¹¹¹ and enacted it on September 12th, 1972, through the Diplomatic and Consular Privileges Act, 1972.¹¹²

VCDR is a non self-executing treaty that has 53 articles which deal with the definition of diplomat and its classification, their functions and behavior, 13 of the articles address the issue of diplomatic immunity. In the preamble of the Convention acknowledges the theory of functional necessity. The Convention also explains the purpose of this immunity and privileges as to promote international peace and harmony. It also defines the scope of the immunities by mentioning that it is not for the benefit of a person but for the effective function of the mission in representing a state.¹¹³

3.2.4 Codification of VCDR in Pakistan

Every piece of legislation in Pakistan is guided by the Constitution of Pakistan, 1973. It lays down the basis for any legislation in article 227 i.e. no law shall be enacted which is

¹⁰⁹ Vienna Convention on Diplomatic Relations, of April 18th, 1961, UNTS, Vol. 500, Available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-3.en.pdf>, (Accessed: 17-04-2011)

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² The Diplomatic and Consular Privileges Act, 1972. Act No. IX of 1972.

¹¹³ Preamble of VCDR, 1961.

repugnant to injunctions of Islam as laid down in *Qu'ran* and *Sunnah*. The same article also says that all existing laws shall be brought in conformity with the injunctions of Islam.

The Diplomatic and Consular Privileges Act, 1972 gives effect to the applicable treaties on diplomatic and consular immunities. Through this legislation the provisions of VCDR and VCCR were given effect subject to the other provisions of the said act.

The section 3 of the said act imposes a certain restriction on the immunities and privileges of any diplomat or a consular post on the basis of reciprocity. Section 4 of the said act also clarifies a vital point that if there is any question regarding the fact that whether a person is entitled to any immunity or privilege or not then a certificate from the Federal Government stating the fact relating to that question shall be the conclusive evidence of that fact.

Even though Pakistan has enacted the said conventions but it has not been able to apply those laws effectively. In Iraq's embassy case it may have acted vigilantly and boldly but other than that Pakistan has been on the back foot. For example in Raymond Davis case Pakistan was totally working on the dictations of the US Government.

Also, there does not seem to be any input in the said legislation in the light of the article 227 of the Constitution of Pakistan.

3.3 Immunities Granted by VCDR

VCDR envisages two classes of immunities and privileges; one related to the premises and assets of the mission (related to the property) and the other related to the personal functions of the members of the mission (related to the persons).

3.3.1 Immunities related to the Property

A diplomat requires certain material things in order to carry out his duties. These things involve a residence and other related things. The VCDR has explained the status of each property related to the mission separately.

i- The Inviolability of the Mission Premises

The Article 22 of the VCDR says that the mission premises are inviolable. A receiving state cannot enter it except with the permission of the head of the mission. According to Article 41(3) of the VCDR, the mission premises cannot be used in any way incompatible with the functions of the mission. Furthermore, Article 44 of the VCDR places a responsibility on the receiving state that in case of an armed conflict between the receiving and sending states the mission premises must still be treated as inviolable and its sanctity must not be compromised in any manner. Instead, the receiving state must over ensure that the mission premises are protected and unharmed.

But what if there are serious reservations of a receiving State regarding the activities in the mission premises or a confirm information regarding such activity and the head of the mission does not allow the law enforcing agencies of the receiving State to enter and search the mission premises. Shall it then be considered inviolable or can the receiving

State enter it by force? The answer is in the actions taken by various States in such like situations.

In 1973, a container addressed to Iraqi Embassy in Islamabad was damaged accidentally and a large amount of arms and ammunition was discovered. On this the Pakistani foreign ministry requested the Iraqi Ambassador to allow police officers to search the embassy but he refused. The police forced their way in and found 59 more containers with similar contents. The Iraqi Ambassador was declared *persona non grata* and Pakistan recalled its ambassador in Baghdad.¹¹⁴

Similarly, on 17 April 1984, a peaceful demonstration took place outside the Libyan Embassy in London.¹¹⁵ Shots were fired from the Embassy that resulted in the death of a policewoman, Yvone Fletcher. After the siege ended, the Libyans inside left and the building was searched in the presence of a Saudi Arabian diplomat. In the search, weapons and other significant forensic proof were found.¹¹⁶

In December 2016, the USA seized two Russian diplomatic compounds on the allegation that they were involved in hacking to interfere in the U.S presidential election campaign.

¹¹⁴ Muhammad Munir, *Immunity or Impunity: A Critical Appraisal of the Immunity of Diplomats in International Law and its Status in Sha'ria*, Vol. XXII, No. 35 (Peshwara: Journal of Law and Society, University of Peshawar), 42, Available at: http://www.academia.edu/355212/_Immunity_or_Impunity_A_Critical_Appraisal_of_the_Immunity_of_Diplomats_in_International_Law_and_its_Status_in_Shariah_Journal_of_Law_and_Society_XXII_35_January_2000_pp._39-56 (Accessed: 09-11-2013).

¹¹⁵ 1984: *Libyan Embassy Shots Kill Policewoman*, see at: http://news.bbc.co.uk/onthisday/hi/dates/stories/april/17/newsid_2488000/2488369.stm (Accessed: 20-1-2014).

¹¹⁶ See Foreign Affairs Committee, *Report*, p. xxvi, as cited in Malcolm N. Shaw, *supra* note 11, 527.

Barack Obama, the then president of USA, ordered expulsion of 35 Russians due to this incident.¹¹⁷

So, the mission premises does not have absolute inviolability but are subjected to certain exceptions as mentioned above. The duty is on both the receiving state and the sending State to honour each other's sanctity.

Permanent Missions as per *Shari'ah*

As the concept of permanent diplomatic mission is new, so we cannot find rulings of classical Islamic Jurists in this regard. The permanent diplomatic mission came into existence in the 17th century and was adopted universally. Now the diplomats reside in the receiving states in a permanent diplomatic mission premises unlike before where the diplomats used to stay just to deliver the message and then return. During the time of Muhammad (Peace and blessings of Allah be upon him) and Caliphate there was no concept of permanent diplomatic missions but the basic principles regarding how to deal with a diplomat were very clear and well-practiced. The Muslim Jurists agree upon the principle of granting immunity to a diplomat.¹¹⁸

As far as the immunity of the mission premises is concerned, the present day Islamic International Law experts are of the view that there is no complication in accepting this new concept of permanent missions as they do not violate any Islamic principle.¹¹⁹ The inviolability of the mission premises is considered to stem from diplomat's personal

¹¹⁷ Mark Mazzetti and Michael S. Schmidt, *Two Russian Compounds, Caught Up in History's Echoes*, The New York Times, December 29, 2016, see at: <http://www.nytimes.com/2016/12/29/us/politics/russia-spy-compounds-maryland-long-island.html> (Accessed: 29-12-2016).

¹¹⁸ Supra note 69, 210.

¹¹⁹ See, for example, Dr. Wahbat Al-Zuhaili, supra note 68, 211. Also, Cherif Bassiouni, supra note 71, 609. Also, Muhammad Munir, supra note 114, 48.

immunity.¹²⁰ The personal inviolability of diplomats requires the inviolability of the mission premises; where diplomats live and work.¹²¹

ii- Furnishings and other Property on the Mission Premises

Article 22 (3) of VCDR provides that the furnishings and other property on the mission premises shall also be inviolable and immune to search, requisition, attachment or execution. This also includes the mode of transportation of the mission.

But as mentioned above, the immunity to search is conditional. Under specific circumstances this immunity can be waived of and the furnishings and other property of the mission premises can be searched by the receiving state.

According to Islamic Law, there is no restriction in regarding any protection to such property of the premises as they belong to the diplomat. Hence, the immunity extends to these things as well.

iii- The Archives and Documents

Article 24 of VCDR provides immunity to the archives and documents of the mission. This protection has been accorded to maintain and acknowledge the confidentiality of the diplomatic work. The underlying principle is that the mission must have an ‘unimpeded communication’ with the sending state by all appropriate means of communication, like couriers and messages in code etc.¹²²

Archives and documents have not been defined in the VCDR but VCCR gives the definition of the term ‘consular archives’ in Article 1(1) k. It says that consular archives

¹²⁰ Supra note 69, 212.

¹²¹ Supra note 114, 48.

¹²² Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed., (New York-London: Routledge), 126.

include 'all the papers, documents, correspondence, books, films, tapes and register of the consular post together with the ciphers and codes, the card indexes and any article of furniture intended for their protection or safekeeping'. So, it can be deduced that the term 'archives' means the same in VCDR as it means in VCCR.

The immunity provided to the archives and the documents is with reference to the immunity of official acts. As the official acts are the result of instructions and guidelines from the sending State hence it is necessary to accord protection to those instruments which convey or carry those instructions and guidelines.

From *Shari'ah* point of view, as a diplomat is granted immunity for his official acts then extending that immunity to the archives and documents of a diplomatic mission doesn't seem repugnant to any Islamic principle. In addition, none of the Islamic State has made any reservation in this regard in the VCDR.

iv- Official Correspondence and Diplomatic Bag

Article 27 of VCDR provides for the inviolability of the official correspondence and the diplomatic bag. It further provides that the diplomatic bag shall only contain 'diplomatic documents or articles intended for official use'.

The manner in which a diplomatic bag can be transported or sent is also mentioned in the said article. But what exactly shall constitute a diplomatic bag is not mentioned in the VCDR.

The diplomatic bag cannot be opened or detained but what if there is a suspicion against the package? What shall be the course of action in case where this privilege is abused for

smuggling weapons or drugs etc.? As happened in the case of Iraqi Embassy's container in Pakistan, this immunity might be under question.

Saudi Arabia has recorded its reservation in this regard to the VCDR in the following manner;

“If the authorities of the Kingdom of Saudi Arabia suspect that the diplomatic pouch or any parcel therein contains matter which may not be sent through the diplomatic pouch, such authorities may request the opening of the parcel in their presence and in the presence of the representative appointed by the diplomatic mission concerned. If such request is rejected, the pouch or parcel shall be returned back.”¹²³

Similarly, Qatar also made reservations on diplomatic bag and its inviolability. It said;

“I. On article 27, para. 3:

The Government of the State of Qatar reserves its right to open a diplomatic bag in the following two situations:

1. The abuse, observed in *flagrante delicto*, of the diplomatic bag for unlawful purposes incompatible with the aims of the relevant rule of immunity, by putting therein items other than the diplomatic documents and articles for official use mentioned in para. 4 of the said article, in violation of the obligations prescribed by the Government and by international law and custom.

¹²³ Saudi Arabia, *Reservations: I*, available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-3.en.pdf> (accessed: 17-04-2011)

In such a case both the Foreign Ministry and the Mission concerned will be notified. The bag will not be opened except with the approval of the Foreign Ministry.

The contraband articles will be seized in the presence of a representative of the Ministry and the Mission.

2. The existence of strong indications or suspicions that the said violation has been perpetrated.

In such a case the bag will not be opened except with the approval of the Foreign Ministry and in the presence of a member of the Mission concerned.

If permission to open the bag is denied it will be returned to its place of origin.”¹²⁴

The reservations made to the inviolability of the diplomatic bag by Saudi Arabia and Qatar show that there are exceptions to the inviolability of diplomatic bag. This exception is based upon the principle of State sovereignty and State security. But even then the States are inclined to regard sanctity to the diplomatic norms and not to open the bag or parcel without the permission of the sending State. If the permission shall not be granted then the bag or parcel is sent back instead of opening or otherwise handling it or taking any other measure in this regard.

There is no expressed provision in Islamic Law in this regard. So, it shall be decided on the basis of prevailing customs of international law along with Islamic principles of international law. As can be seen from the above reservations, it can be said that granting immunity to diplomatic bag or parcel is purely a matter for a State to decide. In

¹²⁴ *Qatar*, supra note 123.

diplomatic relations the doctrine of reciprocity¹²⁵ is usually followed by the countries so, if a State does or does not regard immunity to the bag or parcel then the other State may respond likewise.

But if a State has bound herself by entering in to the VCDR without any objection to this provision then such a State must accord immunity to the diplomatic bag or parcel, as is provided therein.

v- Tax Exemptions

Article 23 of VCDR says that the mission premises shall be exempt from all taxes. But this exemption is only applicable on the purchase of the property and does not apply to taxes payable by persons contracting with the mission.

Article 36 (1) of VCDR further adds that the entry of the articles for the official use of the mission and articles for the personal use of a diplomatic agent or his family members shall be exempt from customs duties, tax and related charges of the receiving State.

This exemption is also at the disposal of the States. This exemption was also granted by the classical scholars and the messengers were exempted from the tax levied at their respective era in the State. The scholars clearly exempted them from the custom duty (known as *Ushur*).¹²⁶

As per Islamic international law, this tax exemption is based on the principle of reciprocity.¹²⁷

¹²⁵ We shall discuss this in detail later on.

¹²⁶ Abu Yusaf, *Kitab Al-Khiraj*, p. 188, *Al-Mughni*, v. 8, p. 519, as cited in Wahbat Al-Zuhaili, 214.

¹²⁷ Supra note 69, 214.

vi- Personal Baggage of a Diplomatic Agent

Article 36 (2) of VCDR states that the personal baggage of a diplomatic agent shall be exempt from inspection, and can only be inspected in case of any suspicion or presumption that the baggage does not contain articles mentioned in Article 36 (1) or any prohibited article(s). The inspection shall be conducted in the presence of the diplomatic agent or his authorized representative.

These are the immunities, privileges and exemptions accorded to the properties related to the mission or a diplomat. The provisions of VCDR are very clear and contain all the customary practices of diplomatic law.

3.3.2 Immunities Related to the Person

A diplomatic mission consists of different classes of persons. In order to understand the privileges and immunities granted to each class, let us first know the classification of diplomatic staff.

Classification of Diplomatic Staff

The classification of diplomatic staff, as per VCDR, is defined in the Article 1 of the Convention. A diplomatic mission consists of:

- a- Diplomatic Agent: He is the head of the mission or a member of the diplomatic staff of the mission. (Article 1 (e))
- b- Administrative and technical staff: Employed in the administrative and technical service of the mission. (Article 1 (f))
- c- Service staff: Members of the staff of the mission in the domestic service of the mission. (Article 1 (g))

d- Private servant: A person who is in the domestic service of a member of the mission and who is not an employee of the sending State. (Article 1 (h))

A diplomat is an official of the sending State's Ministry of Foreign Affairs who is charged with the duty of representing the sending State. For a diplomat to enjoy the status of diplomat there are two conditions i.e. one is that the sending State must empower him with the responsibilities to represent them as their diplomat, and the second condition is that the receiving State must acknowledge it and accept to treat the appointed person as a diplomat according to the rules of international diplomatic law. When these two conditions are satisfied then a person is regarded as a diplomat.¹²⁸

The non-diplomatic staff i.e. administrative and technical staff, service staff and private servants, has been separately mentioned in the VCDR so that a distinction could be made between diplomatic and non-diplomatic staff. This helps in ascertaining their status and to describe their functions as well. It not only concerns immunity but also other functions like, a member of administrative and technical staff can replace the head of the mission in exceptional circumstances and even then can deal with his administrative affairs. The non-diplomatic staff may be employed from the local population of the receiving State without any permission from the receiving State.¹²⁹

i- Personal Inviolability of a Diplomatic Agent

Article 1 (e) of the VCDR gives us the definition of a diplomatic agent as "the head of the mission or a member of the diplomatic staff of the mission". Further, Article 1 (a) of the VCDR defines the head of the mission as "the person charged by the sending State with

¹²⁸ Ludwik Dembinski, *The Modern Law of Diplomacy; External Missions of States and International Organisations*, (Leiden: Martinus Nijhoff Publishers, 1988), 121.

¹²⁹ Ibid., 124.

the duty of acting in that capacity". It is the head of the mission who performs all the duties entrusted upon the mission by the sending State. He is the face of the mission and is responsible to represent the sending State, protect its interests in the receiving State, negotiate with the Government of the receiving State and promote friendly relations between the sending and the receiving State.¹³⁰

In order to carry out and perform the duties with which a diplomat is entrusted, there is a need for certain privileges and immunities. A diplomat must perform his functions without any duress or undue influence or other sort of external or internal pressures and blackmailing. The very preamble of the VCDR defines the purpose of all the immunities granted to a diplomat; it states that,

"the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States."

It is very clear from the above statement that the sole purpose and reason of the privileges and immunities granted to a diplomatic agent is the nature and sensitivity of the functions which he is to carry out.

Classes of Heads of Mission

The VCDR divides the heads of mission into three classes¹³¹:

- a) Ambassadors or nuncios accredited to Heads, and other heads of mission of equivalent ranks.
- b) Envoys, ministers and internuncios accredited to Heads of State.
- c) Charges d'affaires accredited to Ministers for Foreign Affairs.

¹³⁰ Article 3 (1) of the VCDR.

¹³¹ Article 14 (1) of the VCDR.

Article 14 (2) of the VCDR further adds that there shall be no differentiation between heads of mission by reason of their class. It means that they all shall be treated as diplomatic agents and shall be entitled to the same privileges and immunities.

Inviolability

Inviolability means 'too important to be ignored or treated with disrespect' or 'secure from violation and profanation'.¹³² A diplomat is regarded as personally inviolable since the beginning of the diplomatic relations between the States on earth. It is historically and logically at the roots of all other rights.¹³³ According to Article 29 of the VCDR the person of a diplomatic agent shall be inviolable. He shall not be arrested or detained in any manner. It also imposes duty on the receiving State that a diplomat shall be respected and shall be protected against any attack on his person, freedom or dignity.

If we look at some important incidents in this regard then the ground breaking case of diplomatic staff in Iran is the best example. The case can be analyzed to see the approach of the international community regarding this doctrine and its application.

The United States Diplomatic and Consular Staff in Tehran Case¹³⁴

This case is considered as a landmark case with regard to the immunities granted to the diplomatic and consular staffs, and the mission premises. We shall only look at the case in detail.

¹³² See at: <http://www.merriam-webster.com/dictionary/inviolable> (Accessed: 20-10-2011)

¹³³ Supra note 114, 43.

¹³⁴ United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3, available at: <http://www.icj-cij.org/docket/files/64/6291.pdf> (accessed: 18-10-2011).

Brief Facts:

In 1979, United States Embassy in Tehran (the capital city of Iran) was surrounded and seized by the radical Iranian students. The reason for this aggression was the US policies regarding Iran and its soft corner for the then Shah of Iran, Shah Reza Pahlavi.

Shah Reza Pahlavi ruled Iran from 1941 to 1979 with a brief period of exile in 1953 due to his crisis with the then Prime Minister Mohammad Mossadegh. The reason of the crisis was his policies regarding oil and its prices and possible Soviet Union's influence in Iran. This was of great concern for the United States. The intelligence services of US and Britain aided the Iranian military to overthrow the Prime Minister in a coup. After his return to the power, the Shah established very close relations with the United States and the United States aided the Shah through weapons and technical knowledge through which the Shah modernized Iran. The Shah ruled Iran as a dictator and therefore was opposed by the Marxist Tudeh Party and by fundamentalist Shia Islamic leaders. They considered his policies against the interests of the country and responsible for the corruption of the society.

During 1978, the hatred and unrest against the Shah had aggravated to a large level and was becoming violent in nature challenging his authority to rule the country, later known as the Iranian Revolution or Islamic Revolution. On January 16, 1979, the Shah fled into exile on the pretext of treatment of cancer and ended up in United States. On his departure, Ayatollah Rohullah Khomeni returned to Iran from his exile in France to take over Iran. Khomeni was a very prominent Shia Muslim clergy and was backed by the Shias of Iran, who form the majority in Iran. The revolution included many anti-American sentiments and the asylum granted to Shah by the US acted as a catalyst in

aggravating these sentiments. Due to this act of US, Khomeni called for anti-American street demonstrations. On November 4, 1979, one such demonstration by the Iranian students ended up in front of the US Embassy. The students then surmounted the walls of the Embassy and took 63 Americans as hostages. Three more Americans were taken as hostages in the Iranian Foreign Ministry, making the total number of hostages 66. Within three weeks few of the hostages were set free making the number 53. A hostage fell severely ill so they have to let go of him as well reducing the number to 52. The hostages were regularly shown on the media. The students were not part of the government or military but their openly stated loyalty to Khomeni caused the international community to worry.

The obvious US response to the situation was halting oil exports from Iran, expulsion of Iranians from the US and seizure of Iranian government assets and investments. The then US President Jimmy Carter launched an operation to rescue the hostages, this operation was known as “Operation Eagle Claw”. This mission resulted in an ultimate failure with death of 8 US military personnel.

After the death of the Shah in 1980, a major event took place when Saddam Hussain, the then President of Iraq, attacked Iran. Due to these events Iran entered into dialogues with US, with Algeria as the mediator. The dialogues between both the countries ended in a deal that released the hostages and the 8 billion dollars of frozen assets of Iran.¹³⁵

¹³⁵ Iran-US Hostage Crisis (1979-1981), see at: http://www.historyguy.com/iran-us_hostage_crisis.html#.VP_EQfmUfQH, (Accessed: 13-03-2015).

The Proceedings before the International Court of Justice

During this entire episode, US approached the International Court of Justice (I.C.J). The Court comprised of President Sir Humphrey Waldeck; Vice President Elias; Judges Foster, Gross, Lachs, Morozov, Nagendra Singh, Ruda, Mosler, Tarazi, Oda, Agu, El-Erian, Sette-Camara, Baxter; Registrar Aquarone. The United States of America was represented by the Honourable Robert B. Owen, Legal Adviser, Department of State (as Agent), H.E. Mrs. Geri Joseph, Ambassador of the United States to the Netherlands (as Deputy Agent), Mr. Stephen M. Schwobel, Deputy Legal Adviser, Department of State (as Deputy Agent and Counsel), Mr. Thomas J. Dunnigan, Counsellor, Embassy of United States of America (as Deputy Agent). They were assisted by Mr. David H. Small, Assistant Legal Adviser, Department of State, Mr. Ted L. Stein, Attorney Adviser, Department of State, Mr. Hugh V. Simon, Jr., Second Secretary, Embassy of the United States of America, as advisers. The Islamic Republic of Iran was not represented by anyone as they abstained themselves from appearing before the Court.

On 29 November, 1979, the Legal Advisor of the Department of State of the United States of America presented to the Registrar of the I.C.J an Application for instituting proceedings against Islamic Republic of Iran in respect of a dispute regarding the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals. The Court on 15 December 1979 passed an order on the request of US as provisional measures that the Embassy should immediately be given back and the hostages released.

The I.C.J also communicated the application to the Government of Iran, as per their rules. By an order passed by the President of the Court dated 24 December 1979, 15 January

1980 was fixed as the time limit for the US to file the Memorial, and 18 February 1980 as the time limit for Iran to file the Counter-Memorial. The US filed its Memorial within the time limit and it was duly communicated to Iran but no Counter-Memorial was filed by Iran or any response came. As per rules of I.C.J, the case was ready for hearing on 19 February 1980. 18 March 1980 was fixed for oral proceedings. On 18, 19 and 20 March, public hearings were held in which US represented its arguments, at the end of which the US requested the Court to adjudge and declare that Iran has violated its international legal obligations, must ensure the release of the American hostages, afford the diplomatic and consular staff the immunity to which they were entitled, provide them safe passage to leave Iran and submit the persons responsible for this crime before competent Iranian authorities or extradite them to the US and pay damages.

Iran did not participate in the proceedings nor appointed any representative but the Court, however, took into consideration Iran's two letters which were addressed to the Court by its Minister for Foreign Affairs on 9 December 1979 and 16 March 1980. In these two letters Iran maintained the stance that the Court could not and should not take cognizance of the matter. The letters furthermore explained the grievances of Iran against US that how they were involved in their internal affairs and how US exploited them. The Court considered these two letters as Iran's stance and response to the instituted suit.

As Iran did not participate in the proceedings, Article 53 of the Statute of the International Court of Justice was brought in to operation according to which the Court was to satisfy itself that it has jurisdiction to take up the case, and that the allegations leveled were based on facts and not mere allegations. For this purpose, members of the Court asked questions from the Agent of the US during the course of the oral

proceedings. As the facts of the case involved matters of public knowledge and were given worldwide coverage by print and electronic media, the US presented before the Court all the relevant evidence along with its Memorial and other documents. The US also presented the Iranian and United States officials' statements made on either media or radio or press conferences before the Court. On examination of the available material before the Court, it was satisfied that the allegations were founded on concrete facts.

The Court, then deciding about its jurisdiction to proceed with the case took into account four instruments put forward by US i.e. Optional Protocols to the Vienna Conventions of 1961 (VCDR) and 1963 (VCCR), 1955 Treaty of Amity, Economic Relations, and Consular Rights between the US and Iran, and 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Person including Diplomatic Agents. It found that the first three provide foundations for the invocation of the Courts jurisdiction in the matter at hand, the fourth one was regarded irrelevant in this regard.

Findings of the Court

In its findings the Court pointed out that the attack by the militants on the mission premises could only be attributed to the Iranian Government only if it was established that the attack was on their command or the militants were acting on their behalf. The Court, although held Iranian Government accountable for not fulfilling its obligations in protecting the mission premises. Iran, in the Court's opinion, violated Articles 22 (2), 24, 25, 26, 27 and 29 of the VCDR, and Articles 5 and 36 of the VCCR, and Article II (4) of the 1955 Treaty.

The Court also took into consideration the two letters and decided that even if the allegations in the letters are considered to be true, it did not constitute defence to the allegations. In such circumstances, the diplomatic relations may be broken off or declaring persona non grata members of diplomatic staff could be exercised as per diplomatic law.

The Court was of the opinion that the continuous breach of its international legal obligations, Iran is obliged to make compensation for the injury caused to the US.

As regarding the operation carried out by the US to aid and evacuate its people, the Court showed its concerns and considered it disrespect for the judicial process in international relations. It was of the opinion that the legality of operation can have no effect on the evaluation of Iran's conduct; therefore, the Court's findings are not affected by the operation.

The Court decided,

- 1) That Iran has violated and is still violating the international legal obligations owed by it to the US. The Court decided this by Thirteen votes to Two.
- 2) That these violations engage Iran's responsibility. This was decided by Thirteen votes to Two.
- 3) That the Government of Iran must immediately release the hostages and place the premises of the Embassy in the hands of the protecting powers. This was unanimously decided.

- 4) That no member of the US diplomatic and consular staff be retained in Iran for any sort of judicial proceeding or to give witness in any such proceedings. This was decided unanimously.
- 5) That Iran is under an obligation to make reparation for the injury caused to the US. This was decided by Twelve votes to Three.
- 6) That if the parties fail to agree on the form and amount of such reparation, the Court shall decide it. This was decided by Fourteen votes to One.

Judge Morozov, in his dissenting note/opinion against para 2, 5 and 6, rightly pointed out to the fact that the US during the judicial proceedings resorted to other means and actions against Iran like, freezing of valuable assets etc. which made the US loose the right of getting reparation from Iran.¹³⁶

Analysis of the Case and its Proceedings

The reasons mentioned by Iran for attacking the diplomatic mission were merely their internal matters. Even if Iran had any such claims against USA then it should have gone to the ICJ just like USA. The legal and *Shari* aspects of this entire episode has been discussed in great detail by Cherif Bassiouni.¹³⁷ In his commentary he concluded that Iran not only violated the international laws but the *Shari'ah* as well. He opined that law and *Shari'ah* both grant complete immunity to the diplomats and Iran was bound by the law (VCDR, as being its signatory) and *Shari'ah* as being an Islamic state.¹³⁸

¹³⁶ Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice (not an official document), *Case Concerning United States Diplomatic and Consular Staff in Tehran, Judgment of 24 May 1980*, 1980, available at: <http://www.icj-cij.org/docket/files/64/6293.pdf> (accessed: 18-10-2011).

¹³⁷ For a detailed introduction of Cherif Bassiouni's academics and records see: <http://mcherifbassiouni.com/biography/>.

¹³⁸ Supra note 72, 631.

Although, Iran did violate the law and *Shari'ah* but when we look at the approach of the ICJ we can see that it was in a sort of urgency to decide the matter and acted biasedly. The ICJ is competent to entertain a dispute only if the States concerned accept its jurisdiction in any of the following ways: (i) by entering into a special agreement to submit the dispute to the Court; (ii) by virtue of a jurisdictional clause; or (iii) through the reciprocal effect of declarations made by them under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration. A number of these declarations, which must be deposited with the United Nations Secretary-General, contain reservations excluding certain categories of dispute.¹³⁹ In this case the matter was solely put before the Court by USA and Iran wrote two letters to the ICJ mentioning that it 'could not and should not take cognizance of the matter'. But the Court considered those letters as Iran's response to the instituted suit and proceeded with the hearing and held Iran accountable for its actions. This, in a way, is against the established universal principles of the justice that "no one should be condemned unheard" and also violated its own mandate i.e. how the ICJ works and takes up cases.

ii- Inviolability of the Family Members of a Diplomat

The Article 37 of the VCDR deals with the inviolability of the family members of a diplomat. It states that the family members of a diplomat enjoy the immunities provided in Articles 29 to 36. These immunities and privileges include personal inviolability, inviolability of residence, immunity against criminal and civil jurisdiction etc. However, there is an exception mentioned in the same article that if they are the nationals of the

¹³⁹ *How the Court works*, at: <http://www.icj-cij.org/court/index.php?p1=1&p2=6> (accessed: 13-03-2015)

receiving state then they can only enjoy the immunities of Article 29 to 35. They are not immune from the civil and criminal jurisdiction of the receiving state.

Since the inception of the permanent diplomatic mission it became necessary that the family of a diplomat should accompany him. It also became necessary that the family of a diplomat should also enjoy immunity so that the diplomat should perform his duties without any duress. But his family should also respect and observe the laws and traditions of the receiving state and if a family fails to do so or ignores then the immunity might not be extended to them by the receiving state.

When we look at the practices of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) and the *Khulafa* R.A then it can be seen that the immunity was extended to the whole of the diplomatic mission. So, such a provision is not against the *Shari'ah* and is acceptable.

iii- Other Members of the Mission

Other members of the diplomatic mission constitute a huge part of the mission. So, it was necessary to devise some rules regarding them. They have been granted limited privilege and immunity under Article 37 of the VCDR.

The administrative and technical staff enjoys the immunities mentioned in Articles 29 to 35 (as per Article 37 (2). The members of the service staff only enjoy immunity for their official acts and from taxes and duties (Article 37 (3)).

The private servants of the members of the diplomatic mission enjoy immunities and privileges as admitted and extended by the receiving state, if they are not citizens or permanent residents of the receiving state. Otherwise, they only enjoy exemption from

tax and duty. The VCDR also puts a restriction on the receiving state by stating that the state should exercise its jurisdiction in such a way that it does not interfere the performance of the functions of the mission (Article 37(4)).

Here a question can be raised with respect to the misuse of this vague term i.e. diplomatic staff. The very famous incident of Raymond Davis at Lahore, Pakistan is an example of such misuse.

Raymond Davis Case

Raymond Davis was a United States national who killed two Pakistanis in Lahore on January 27, 2011, allegedly in self-defence. Davis was charged with murder by the Pakistani police and was arrested. He faced trial in a criminal court in Lahore, Pakistan.

The incident sparked anti-American sentiments in Pakistan and became an issue of public interest that was constantly being discussed and debated in political circles and in the media.

Initially it was claimed that Davis was a US consular employee but then came a media report that claimed that he was a CIA agent who was on assignment at the time of the double murder. The US then actively sought the release of Raymond Davis on the pretext that he has diplomatic immunity.

As the legal principles regarding diplomatic and consular immunities and privileges are legally well established, consular officers are not accorded absolute immunity from a host country's criminal jurisdiction and are immune from local jurisdiction only in cases directly relating to consular functions. They may be tried for certain crimes by a local court.

Even though the law is very clear on the subject of diplomatic and consular immunity, the publicly known facts about Raymond Davis' alleged diplomatic status remained unclear. Mere proclamation by the US government without authentication by the Pakistani government was not sufficient for the Pakistani courts to admit the plea of diplomatic immunity, particularly in view of the initial conduct of the US spokesperson regarding his identity and status.

In the absence of a diplomatic certificate issued by the foreign ministry of Pakistan, the court could have looked doubtfully at the contention of US authorities that Raymond Davis had diplomatic status.¹⁴⁰

But due to weak state policy and international pressure Pakistan was unable to press this issue at any international forum. It could have taken the matter to the ICJ but it was unable to do so. Resultantly, the legal heirs of the two deceased agreed on *diyat* and the court let him go as they had no other choice. The question that arises here is that what if instead of Pakistan it was US whose official committed the same crime in the same manner?

In addition to what happened back then, Raymond Davis has recently written a book on his stay in Pakistan titled "The Contractor". He has clearly mentioned in his book that he was a private security/military contractor in Pakistan and not a diplomat.¹⁴¹ This has left a great question mark on the event and how it was handled. It can be treated as the worst abuse of diplomatic immunity in the present history.

¹⁴⁰ Dr. Tariq Hassan, *Diplomatic Immunity for Criminal Cases*, Express Tribune dated: 07-03-2011.

¹⁴¹ Raymond Davis with Storms Reback, *The Contractor*, First E-Book Ed. June 2017 (BenBella Books Inc., Dallas, TX), 9.

These are the main immunities and privileges that have been granted by the VCDR to the diplomats, their families and different categories of diplomatic staff.

3.4 Restrictions and Checks by the VCDR on the Immunities

The VCDR not only prescribed the immunities and privileges for the diplomats but it has also put certain restrictions on these immunities.

The very first and basic restriction on the immunity is that the diplomatic mission (including diplomat, his family and staff) shall observe the local laws of the receiving country.¹⁴² A diplomat is considered as a representative of his State and his each action is regarded as that carried out by the State or upon her instructions. So, if a diplomat disregards the laws of the host State then it will sever the very purpose for which he was designated i.e. peaceful and friendly relations.

Immunity from the jurisdiction does not mean that a diplomat is above the municipal law but it means that the laws are unenforceable in case of a diplomat. He still remains bound by the laws of a receiving State and violation of any law shall be regarded as a violation but he cannot be prosecuted.¹⁴³

Even then if a person disregards the laws of a host State then VCDR provides with the following measures that can be taken against the diplomat;

3.4.1 Persona Non Grata

Article 9 of the VCDR allows a receiving State to not accept a diplomat before his appointment or to expel a diplomat after his appointment on the basis of an action which

¹⁴² Article 41 of VCDR.

¹⁴³ Supra note 122, 128.

is not acceptable to the receiving State. A receiving State can declare a diplomat or his family or any staff thereof persona non grata and the sending State shall either take such person back or terminate his services with the mission.

If the sending State refuses to declare such a person as persona non grata then the receiving State can refuse to recognize such a person as a diplomat hence he may be prosecuted.¹⁴⁴

Pakistan, very recently, declared the ambassador of Bangladesh Ms. Moshomi Rehman as persona non grata on the pretext of her involvement in anti-State activities and asked her to leave the country within 72 hours. A few days before her being declared persona non grata by Pakistan, Bangladesh declared the Pakistan's Ambassador Ms. Farina Ashiq as persona non grata on similar allegations.¹⁴⁵

The host country may employ this at any time and there is no requirement under the international law to justify doing so but the most common reason of using this measure is espionage, involvement in a conspiracy against a State, use of violence, implication in a threat, interfering in the internal affairs of the receiving State, persistent or serious abuse of immunity and privileges, and gross misconduct by the diplomat etc.¹⁴⁶

¹⁴⁴ Maria Moutzouris, *Sending and Receiving: Immunity Sought by Diplomats Committing Serious Crimes*, LL.M Thesis submitted to Rhodes University, South Africa, 108.

¹⁴⁵ *Pakistan asked the Bangladesh Ambassador to leave the country*, Daily K2 (Gilgit-Baltistan) Urdu dated: 07-01-2016.

¹⁴⁶ Supra note 144, 108-109. Also, *United States: Department of State Guidance for Law Enforcement Officers with regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel*, International Legal Materials, Vol. 27, No. 6 (November 1988), pp. 1617-1636, published by: American Society of International Law, available at: <http://www.jstor.org/stable/20693274>, 1633.

3.4.2 Waiver of Immunity

Another step which can be taken is under Article 32 of VCDR i.e. waiver of immunity. This power is at the discretion of the sending State. The waiver must be express and irrevocable. Normally, the receiving State requests for the waiver when a diplomat or his family or staff commits any misconduct. When the immunity has been waived by a sending state then it must be informed to the receiving state.

Although such a situation where the sending State has waived the immunity is rare to be found yet there are examples of waiver. For example, in 1985, London police arrested a man in possession of two kilograms of heroin that he obtained from a house in London. The police went to the house and searched the premises and found more heroin. The occupant claimed immunity as a third secretary of the Zambian mission. When confirmation was made of the man's identity, they stopped their search and withdrew. The Zambian mission protested and the Foreign Office issued an apology. The police had strong suspicions that the drugs had arrived through a diplomatic pouch, so the Foreign Office approached the mission and demanded the waiver of immunity of the third secretary. The head of the mission, displeased, consulted with President Kaunda, who swiftly waived immunity and the third secretary was arrested and prosecuted. In a letter Kaunda conveyed that diplomatic immunity was never intended to prevent investigation of serious crimes.¹⁴⁷

¹⁴⁷ Grant V. McLanahan, *Diplomatic Immunity: Principles, Practices, Problems*, (London: Hurt & Company, 1989), 156-7, available at: <http://books.google.com.pk/books?id=oQhlua4VHrcC&pg=PR16&lpg=PR16&dq=lectures+on+diplomatic+immunity&source=bl&ots=Fgir-mBc92&sig=aXdrsLCwv11Kp1A-4P5N7y7umeU&hl=en&sa=X&ei=ZPD8Ur7OA6SO7QbTk4HYBA&ved=0CG8Q6AEwCA#v=onepage&q=lectures%20on%20diplomatic%20immunity&f=false> (Accessed: 13-02-2014)

When a State waives the immunity then the subject becomes vulnerable to any legal action and the municipal laws of the receiving State. He cannot claim immunity when he is being prosecuted because he does not own the immunity.¹⁴⁸ The right to waive immunity rests with the State and not with the head of the mission as the immunity is conferred in the interest of the State and not the individual.¹⁴⁹

3.4.3 Jurisdiction of the Sending State

Article 31(4) of the VCDR provides another deterrent in the shape of the jurisdiction of the sending State. It says that the immunity provided to any of the member of the diplomatic mission does not oust the jurisdiction of the sending State. He may be tried for any act or violation that he commits in a receiving State by the sending State.

This provision ensures that diplomats cannot avoid the legal action for a crime committed by them and it also helps the victims to pursue the diplomats in their sending States. This provision is usually used in civil matters.¹⁵⁰

¹⁴⁸ See *Public Prosecutor v. Orhan Olmez*, 87 ILR, 12, as cited in Mehmet Yavuz, *Scope of Diplomatic Family in Vienna Convention on Diplomatic Relations*, *Law & Justice Review*, Vol. IV, Issue 1, June 2013, 171. Also, *United States: Department of State Guidance for Law Enforcement Officers with regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel*, *International Legal Materials*, Vol. 27, No. 6 (November 1988), 1617-1636, published by: American Society of International Law, available at: <http://www.jstor.org/stable/20693274>, 1633.

¹⁴⁹ *Supra* note 122, 128. Also, *United States: Department of State Guidance for Law Enforcement Officers with regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel*, *International Legal Materials*, Vol. 27, No. 6 (November 1988), pp. 1617-1636, published by: American Society of International Law, available at: <http://www.jstor.org/stable/20693274>, 1623. (Accessed: 28-07-2016)

¹⁵⁰ *Supra* note 144, 113-114.

3.4.4 Reciprocity

This is the most effective and widely used deterrent force in the diplomatic relations. The basis of diplomatic relations or any other kind of relation between States is mainly driven by reciprocal approach.

Examples in this regard are abundant, like one mentioned above i.e. the declaration of persona non grata of the ambassador of Pakistan by Bangladesh and then in response the same was done by Pakistan. Similarly, same approach has been practiced by India and Pakistan.

In May 1987, Chaplin, the second-ranking diplomat in Iran, was beaten and arrested by Iranian Revolutionary guards on vague charges. This incident was followed by the arrest of Gassemi, an Iranian consulate in Manchester, for charges of shoplifting, reckless driving and assaulting an officer. When used negatively, as it was in this instance, reciprocity has the effect of tit-for-tat.

Reciprocity has been regarded as the most effective sanction in the diplomatic law. This was shown in *Salm v. Frazier*¹⁵¹ where the court stated that reciprocity guarantees the respect and independence of representatives. States usually observe the laws of immunity mostly because of the fear of retaliation. It is, therefore, in a State's own interest to respect diplomatic immunity in order to safeguard the protection and respect of its diplomats.

¹⁵¹ *Salm v. Frazier* court of Appeals Rouen, 1933, translated in 28 A.J.I.L. (1934) 382, as cited in supra note 144, 116.

3.4.5 Diplomatic Relations during War

According to the contemporary international law experts, when two states declare a state of war against each other or starts a war against each other the diplomatic relations automatically stands abrogated. But as per *Shari'ah* the relations remain intact unless and until there is a reason to believe that continuing such relations shall harm the state and its interests.

According to few international law experts, the relations stand abrogated only when either the diplomat has been declared persona non grata and expelled from the receiving state or the sending state has recalled his diplomat from the receiving state.¹⁵²

3.4.6 Settlements

The Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes, provides for the settlement of disputes arising out of the interpretation of the Vienna Convention. Disputes are to be heard by the ICJ. While this is a valid attempt to provide a forum where states can bring claims arising out of breaches of the Vienna Convention, it does not provide settlement options for individuals who are injured as a result of diplomatic misconduct. Moreover, the ICJ typically only hears cases involving severe breaches of the Vienna Convention.¹⁵³

There are three main theories regarding diplomatic immunity which have been recognized widely by jurists at different times. We shall look at the three in great detail and then will analyze the above prevailing situation in the light of those theories. The

¹⁵² Supra note 69, 215.

¹⁵³ Veronica L. Maginnis, *Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations*, 28 Brook. J. Int'l L. 989, 6, available at: http://jurisafrica.org/docs/articles/Privileges_and_Immunities_of_International_Organizations.pdf (Accessed: 18-10-2011).

only purpose to explain these theories in the end is to let the reader create his own thinking first instead of guiding his thinking on these three paths. In this way the effectiveness of these theories can easily be judged and analyzed as well.

Diplomatic immunity has been misused and abused by the diplomats quite often. They are normally found involved in violation of traffic rules, drug trafficking, shop lifting, kidnaping, rape and even murder. A part from this, powerful states also force weaker states to waive the immunity of a diplomat and then prosecute him. This is also a sort of misuse of the diplomatic law.

3.5 Theories of Diplomatic Immunity

The three theories quoted for the justification of the diplomatic immunity are as follows:

1- Personal Representation

This theory is regarded as the earliest and oldest theory with respect to the doctrine of diplomatic immunity. The theory was prevalent during the era when there used to be temporary diplomatic missions and gained widespread recognition when diplomacy was dynastically oriented.¹⁵⁴

According to this theory, a diplomat is regarded as the representative of a sovereign state, and that as the representative he is entitled to the same privileges as the sovereign.¹⁵⁵

¹⁵⁴ C. E. Wilson, *Diplomatic Privileges and Immunities*, (The University of Arizona Press, 1967), 2, as cited in Maria Moutzouris, *supra* note 144, 19.

¹⁵⁵ Joshua D. Groff, *A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right*, 14 Temp. Int'l & Comp. L. J., p. 215-216 (2000), as cited in Veronica L. Maginnis, *supra* note 153, 3.

Under this theory a diplomat is viewed as an alter ego of his ruler.¹⁵⁶ It was considered that as immunity is an expression of sovereignty and a sovereign is inviolable, therefore his representative should also be inviolable.¹⁵⁷

However, in the present world the concept of sovereignty has changed. Mitchell S. Ross, while analyzing this theory, says that now the people and their elected officials are considered as the sovereigns, as the dynastical regimes are no more. Also, it is not logical that why the diplomats should be immune from jurisdiction for their private acts. Another criticism on this theory is that if a diplomat is accorded the status of sovereign then it places the diplomat above the law of the receiving state,¹⁵⁸ which is the violation of the principle that all sovereigns are equal.¹⁵⁹

This theory is in present time doubtful¹⁶⁰ and also fails a modern application.¹⁶¹

2- Extraterritoriality

According to the theory of extraterritoriality the diplomat in person and the property of a diplomat are to be treated as if they exist on the territory of the sending state.¹⁶² This

¹⁵⁶ *Bergman v. De Sieyes*, 71 F. Supp. 334, 341, as cited in Robert A. Wilson, *Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations*, 7 Loy. L.A. Int'l & Comp. L. Rev. 113 (1984), 114, available at: <http://digitalcommons.lmu.edu/ilr/vol7/iss1/5> (Accessed: 18-10-2011)

¹⁵⁷ Supra note 114, 53.

¹⁵⁸ Mitchel S. Ross, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities*, American University Journal of International Law & Policy, Vol. 4:173, 177-178, available at: <http://www.auilr.org/pdf/4/4-1-6.pdf> (Accessed: 18-10-2011).

¹⁵⁹ Stephen L. Wright, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, (1987) 5 Boston University International Law Journal 177, 197, as cited in Maria Moutzouris, supra note 144, 22.

¹⁶⁰ Supra note 122, 124.

¹⁶¹ Veronica L. Maginnis, supra note 153, 4.

¹⁶² Supra note 147, 30.

As a result of vagueness and impracticability according to the modern day situation of diplomatic relations and legal regime, this theory is almost wiped out.

3- Functional Necessity

The very preamble of the VCDR states that,

“Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”

It very clearly sets out the reason behind this entire mechanism of immunities and privileges i.e. ensure the efficient performance of the functions of diplomatic missions.

This is regarded as the “functional theory”.

It is the most widely accepted current justification of the diplomatic immunity. It provides that the diplomat is immune from the civil and criminal jurisdiction of the receiving state because these can be used to impede his effective functioning. This theory justifies the concept of diplomatic immunity for the purpose of official functions and does not afford protection to the diplomat as a person.¹⁶⁹

In *Parkinson v. Potter*¹⁷⁰, the court observed that an extension of the exemption from the jurisdiction of the courts was essentials to the duties that an ambassador has to perform.

The primary advantage of this functional necessity is that it is adaptable and it restricts immunity to the functions of the diplomat rather than giving him absolute immunity.¹⁷¹

¹⁶⁹ Mitchell S. Ross, *supra* note 158, 179.

¹⁷⁰ *Parkinson v. Potter* [1885] 16 QBD 152.

¹⁷¹ Maria Moutzouris, *supra* note 144, 26.

There is also criticism on this theory as well. Like, it fails to define the functions of a diplomat which leads to incoherent and politically motivated interpretations of the term effective function, just like extraterritoriality. Another criticism is that diplomats require immunity to function effectively because they often indulge in injurious or illegal activities. But even then this theory is regarded as more sound and realistic. For instance, the personal representation and extraterritoriality theories extend absolute immunity to the individual diplomat without any concern to the activities he is to undertake within the diplomatic mission. The functional necessity theory, on the other hand, moves the importance from the individual and focuses on the functions of the diplomat. This is a realistic effort to extend only the immunity essential to perform the diplomatic mission.¹⁷²

The diplomats should not commit criminal acts or act in a manner unbefitting of their status. The diplomats should act in good faith for the protection of the receiving State's security and honouring its laws and sovereignty. Mitchel S. Ross very rightly pointed out that diplomatic immunity originated to protect the process of diplomatic relations between states therefore the current focus of the immunity on the individual is unrealistic. The concept of providing immunity to a diplomat means that he must break laws of the receiving state in order to fulfill his obligations and functions. Therefore, she is of the view that the current proposition of granting immunity to the individual is inconsistent with the theoretical basis that accords protection only to the diplomatic process.¹⁷³

¹⁷² Robert A. Wilson, *Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations*, 7 Loy. L.A. Int'l & Comp. L. Rev. 113 (1984), 118, available at: <http://digitalcommons.lmu.edu/ilr/vol7/iss1/5> (Accessed: 18-10-2011)

¹⁷³ Mitchell S. Ross, *supra* note 158, 179-180.

When we look at the three theories and then take the way diplomatic relations have been practiced, we can easily say that functional necessity theory is the most appropriate theory that can define the exact extent of the immunity. The only thing which this theory is lacking is the exact definition of the functions of the diplomat which can be incorporated in it very easily. The VCDR itself has laid down the corner stone in this regard by stating in its preamble that 'the maintenance of international peace and security, and the promotion of friendly relations among nations' are the purpose and principle of the Charter of the United Nations. Thus, the core function of diplomat is to promote peace, security and friendly relations among nations.

Islamic jurists have very clearly and boldly defined the concept of immunity accorded to diplomats. Immunity does not mean that a person has a license to do whatever he wants and wishes but he has to obey certain limits. If he violates those limits then he must pay the price for that violation. The basic purpose of immunities, as per *Shari'ah*, is to allow the diplomat to work freely without violating the receiving state's laws. That is why the Islamic jurists are of the view that if a diplomat commits certain violations then he must be held accountable. Similar is provided in the VCDR to the extent of civil liability that a diplomat can be prosecuted by the receiving state. Other measures like, declaring persona non grata and waiver of immunity are also provided for heinous crimes but the second one has seldom been exercised.

CHAPTER No. 4:

**MUSLIM JURISTS AND CONTEMPORARY MUSLIM
SCHOLARS ON DIPLOMATIC IMMUNITY**

Chapter No. 4: Muslim Jurists and Contemporary Muslim Scholars on Diplomatic Immunity

Shari'ah looks at things from a totally different and broader perspective than law. The difference is mainly due to the sources. *Shari'ah* is the divine law prescribed by the Creator for the created, whereas law is made by the humans and therefore, it is bound to have some discrepancies and short comings. For example, we can see that there are loop holes in the VCDR which are used by some States to avoid the liabilities and responsibilities. As VCDR is a convention and it lacks proper mechanism of implementation and sanctions so, States obey and follow it as per their wishes. Such is not the case with *Shari'ah* as it provides proper mechanism of implementation and sanctions.

Although not much work has been done in this specific field but based on different *Shari'* provisions and practices of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) and Caliphs of Islamic State jurists have derived principles of diplomatic immunity and relations. The immunities granted to the diplomats can be divided in to three main categories¹⁷⁴, namely:

- 1- Personal Immunity
- 2- Immunity from Courts
- 3- Immunity from Taxes

¹⁷⁴ Supra note 69, 212.

1- Personal Immunity

A diplomat in person, his property and official things all are immune and cannot be abused or encroached. They are protected under the head of *aman* and this *aman* also entails that the life of the diplomat, his property, his family, his staff, official things and official correspondence cannot be encroached or harmed. If a diplomat is found involved in espionage even then his immunity cannot be revoked because jurists are of the view that immunity of such a person can be withdrawn who is designated for such purpose i.e. espionage, else it can never be withdrawn. It can be construed that when the States engage in a permanent diplomatic relation then both the States have equal opportunity to get benefits out of that relation on equal basis.

Dr. Al-Zuhaili bases his opinion on the Islamic legal maxim i.e. for avoiding a bigger harm a lesser harm can be accepted or sustained and a ruling of an issue is based on a necessity. He is of the opinion that the benefit which an Islamic State can derive out of such relations is bigger so such minor harm can be and should be overlooked.¹⁷⁵

Another leading author and expert in Islamic international law Cherif Bassiuoni is of the view that the diplomats, their staff and accompanying persons enjoy protection and immunity as per *Shari'ah*. They, according to him, are entitled to immunity from suits, freedom from arrest and confinement, and proper care and treatment. He bases his opinion on the verses of Qur'an¹⁷⁶, Sunnah¹⁷⁷ and practices of Heads of Islamic State

¹⁷⁵ Sura note 69, 212-213.

¹⁷⁶ Al-Qur'an 27:23-44.

¹⁷⁷ The incident of the envoys of Musaylimah al-Kazzab, and also the incident of Usman ibn Affan R.A during the treaty of Hudaibiyyah.

(Caliphs). He further contemplates that Islamic law permits a head of a state to enter into treaties binding upon the Islamic state.¹⁷⁸

He says that a diplomat is a beneficiary of *aman* and it is legally binding privilege that compels the state to safeguard the beneficiary until his departure from the territory. State can rescind *aman* and expel the beneficiary but cannot violate it. According to him, as a person who violates the terms of *aman* can be prosecuted but a diplomat cannot be prosecuted in the like manner as he is also entitled to other legal protections.¹⁷⁹

He also makes a mention of an exception to this doctrine of immunity that there are few scholars who are of the view that the diplomats do not have absolute immunity and they can be prosecuted for *hudood* crimes. To this he replies by saying that there is no mentioning of any such exception in Qur'an or Sunnah.¹⁸⁰

But there is a narration in Sunan Abi Daud that Abdullah ibn Masood R.A later on finding the same messengers which were sent by Musaylimah Al-Kazzab to the Holy Prophet Muhammad (Peace and blessings of Allah be upon him), he R.A asked them to repent and when one of them refused he got him executed.

Narrated Abdullah ibn Masood R.A: Harithah ibn Mudarrib said that he came to Abdullah ibn Masud R.A and said (to him): There is no enmity between me and any of the Arabs. I passed a masjid of Banu Hanifah. They (the people) believed in Musaylimah. Abdullah (ibn Masood) R.A sent for them. They were brought, and he asked them to repent, except Ibn an-Nawwahah. He said to him: I heard the Messenger of Allah (Peace and blessings of Allah be upon him) 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 ibn Ka'b (to kill him). He beheaded him in the market. Then (Abdullah ibn Masood R.A)

¹⁷⁸ *Pacta sunt servanda.*

¹⁷⁹ Cherif Bassiouni, *supra* note 73, 610.

¹⁸⁰ *Ibid.*

said: *Anyone who wants to see Ibn an-Nawwahah slain in the market (he may see him).* (Classed: Sahih)¹⁸¹

From the above, it can be said that when a person is a diplomat he enjoys immunity but once the title no more remains with him then he becomes subject to the punishment for his crimes which he committed during his service as a diplomat.

2- Immunity from the Courts

There is a difference between Islamic international law and contemporary international law regarding the immunity of a diplomat from the jurisdiction of the courts. It is because the Islamic jurists hold the diplomats accountable for their civil or criminal acts because according to them once a person seeks protection (*aman*) and starts living in the Islamic state he becomes bound by the laws of the state.¹⁸² The purpose of punishment in *Sharia'h* is to keep the chaotic situations away from the society and maintain peace and harmony. So, when a person lives in a Muslim state he is bound to avoid any mischievous act or to create any chaotic situation. Further, a criminal person is neither fit to be a diplomat of any state or to carry out any diplomatic service in a state nor he should be entitled to any sort of immunity or protection. Imam Abu Hanifah R.A in this regard has a soft approach towards diplomats/person seeking *aman* in this regard and accorded immunity to them in matters of rights of Allah (*Haqoqullah*) e.g. theft, adultery etc.¹⁸³

Dr. Al-Zuhaili is of the opinion that keeping in mind the prevailing international laws, a person who seeks protection must also be exempted from punishments which are not mentioned in Qur'an or Sunnah, such as *ta'zir* because *ta'zir* punishments are a matter

¹⁸¹ *Sunan Abi Daud*, supra note 81, Hadith no. 2762, 240-241.

¹⁸² *Kitab Al-Khiraj*, p. 189, *Sharh Al-Siyar Al-Kabir* 1:206, *Fath Al-Qadeer* 4:155, as cited in Wahbat Al-Zuhaili, supra note 69, 213.

¹⁸³ Supra note 69, 213.

which is decided by a state. He further adds that there is no harm in trying a person in a Muslim state because providing justice is one of the basic ingredients on which courts are based upon.¹⁸⁴

The prevailing law is that if a diplomat is to be tried by the receiving state in its court then it contacts the sending state and requests for the waiver of the immunity of that particular diplomat. There is another option available to the states i.e. declaring the diplomat *persona non grata* and asking the sending state to call him back. In case of heinous crimes a diplomat can be sent back by force and if there is a threat to the sovereignty, safety and welfare of the public at large and existence of a state the diplomat can also be arrested.¹⁸⁵

Prof. Cherif Bassiouni also agrees to the same and is of the view that a diplomat enjoys complete immunity with regard to the civil and criminal jurisdiction of the receiving state.¹⁸⁶

Dr. Hamidullah writes that if the envoy or his company commits a crime in the receiving state and becomes a criminal of the state even then he may not be treated otherwise than as an envoy.¹⁸⁷ In his opinion, a diplomat has immunity from the criminal jurisdiction of a state.

¹⁸⁴ Ibid.

¹⁸⁵ Hamid Sultan, p.174, Hafiz Ghanim, p. 170, as cited in Wahbat Al-Zuhaili, *supra* note 69, 213-214. Also, *United States: Department of State Guidance for Law Enforcement Officers with regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel*, International Legal Materials, Vol. 27, No. 6 (November 1988), pp. 1617-1636, published by: American Society of International Law, available at: <http://www.jstor.org/stable/20693274>, 1631. (Accessed: 22-07-2014).

¹⁸⁶ *Supra* note 73, 610.

¹⁸⁷ Dr. M. Hamidullah, *The Muslim Conduct of State*, Sheikh Muhammad Ashraf, 1977, 291.

Prof. Dr. Muhammad Munir (Professor of Law at Department of Law, International Islamic University, Islamabad), regards it as a ‘logical consequence’ of personal inviolability. He says that through this immunity a diplomat cannot be forced by a receiving state through a court to do or not to do anything on the behest of a receiving state.¹⁸⁸ But he also raises a question that whether absolute immunity in criminal matters is in conformity with *Shari'ah*? He then replies in negative and says that immunity is not absolute and it is subject to certain restrictions. He quoted the verse from Qur'an in this regard,

“...*life for life, eye for an eye, nose for nose...*”¹⁸⁹

He regards committing a crime as ‘outside the functions of an envoy’.¹⁹⁰ He has very rightly pointed it out as ‘outside the functions of an envoy’ and thus not covered by immunity. The basic purpose of diplomatic immunity is to enable a diplomat to perform his functions without any duress or coercion and committing a crime does not come under any of the head of his functions.

The VCDR provides for complete immunity from criminal jurisdiction but makes a diplomat accountable for certain civil liabilities i.e. (i) in case of a real action to private immovable property, (ii) an action relating to succession, and (iii) an action relating to any professional or commercial activities. The families of diplomats also enjoy the same status but the other categories of diplomatic staff do not enjoy the immunity from civil jurisdiction but only with regard to the official acts.

¹⁸⁸ Supra note 114, 43.

¹⁸⁹ Al-Qur'an 5:45.

¹⁹⁰ Supra note 114, 49.

3- Immunity from Taxes

The Islamic jurists had exempted the diplomats from the taxes which were payable during their time.¹⁹¹ Dr. Al-Zuhaili says that the basis of tax exemption is reciprocity i.e. both the sending and receiving state shall accord this exemption to the respective diplomats and diplomatic missions.¹⁹²

He is of the view that there is no issue in regarding tax exemption to the diplomats on the basis of reciprocity. He further mentions that it was the doctrine of reciprocity that Muslims imposed certain taxes on non-Muslims.¹⁹³

Tax collection is a prerogative of a state and it has the authority to exempt any person or class of person from this liability. So, if as a goodwill gesture a state exempts diplomats and diplomatic mission from tax then there seems no problem in it.

Vienna Convention has explained the categories of diplomat, his family and his staff, immunities and privileges enjoyed by each category in great detail. It has also explained the measures which can be taken against any violation committed by a diplomat or his family or staff. So, it cannot be said that diplomats enjoy an absolute immunity but are restricted to certain limits and can also be checked by the receiving state.

Pakistan is a signatory of the VCDR and has enacted it through an enactment and made it a part of its law. Pakistan is an Islamic state and as per its constitution no law can be made or implemented which is in violation of Qur'an and Sunnah.¹⁹⁴ This law does not seem to violate any principle of *Shari'ah* but it does lack any input of Islamic states.

¹⁹¹ Supra note 69, 214.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Article 227, the Constitution of Pakistan, 1973.

Saudi Arab and Sudan have made reservations with regard to diplomatic bag; likewise, Pakistan should also have seriously looked in to the minute details and repercussions of the convention and adopted it as per its own security and interests. The case of Raymond Davis has left a big question mark on the legal minds and legal framework of the state and their far sightedness.

CHAPTER No. 5

DIPLOMATIC IMMUNITY AND ITS ABUSES

Chapter No. 5: Diplomatic Immunity and its Abuses

Wherever there is immunity there exists its abuse. States have always preferred their own interests over the interests of other states and in doing so they use different methods to dent each other. The most used method in this regard is the diplomatic means. One state in order to pursue its interests in another state against a third state uses the diplomatic means. It involves spying or even bribing a state's high ups. Besides this, the diplomats consider themselves above the law of the receiving state and hence involve in different crimes ranging from parking tickets, traffic rules violation to smuggling and murder.

5.1 Cases of Abuse of Diplomatic Immunity

Cases of abuse of diplomatic immunity can easily be found throughout the history. The primary abuses can be divided into three categories:

- i- The commission of violent/heinous crimes by diplomats, their family or staff;
- ii- The illegal usage of the diplomatic bag;
- iii- The promotion of state terrorism through the involvement of the embassies.¹⁹⁵.

When we look at the incidents during the life of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) we can find the examples of abuse of diplomatic immunity. For example, the delegation from Banu Amir, lead by Amir Bin Tufail, misbehaved with the Holy Prophet Muhammad (Peace and blessings of Allah be upon

¹⁹⁵ Farahmand "Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses" (1989-1990) 16 *Journal of Legislation* 97, as cited in Maria Moutzouris, *supra* note 144, 67.

him) by threatening to attack Medinah and destroy it.¹⁹⁶ He knew that the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) would not harm a messenger so he abused his status of being a messenger and threatened Him (Peace and blessings of Allah be upon him).

Another incident can be quoted as an abuse of the immunity is during the diplomatic mission of Musaylimah al-Kazzab¹⁹⁷, when the two messengers confessed their act of apostasy in front of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) due to the knowledge that they are messengers and they shall not be harmed. This also amounts to the abuse of the diplomatic immunity.

The above two incidents contain the commission of heinous crimes as per *Shari'ah* i.e. apostasy and disrespecting the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) (blasphemy). These both crimes carry severe punishments i.e. capital punishments, in normal situations. But as the two were envoys therefore, they were not punished.

Examples from the recent times, the most shocking method used to commit a crime in 1967 was by the Burmese Ambassador in Sri Lanka, Mr. Sao Boonwa. He believed that his wife had an affair with another man. He murdered his wife and burnt her body in the backyard of the diplomatic mission premises in full view of the media, people and police. The ambassador, enjoying diplomatic immunity, did not allow anyone to enter the

¹⁹⁶ Supra note 77.

¹⁹⁷ Supra note 81.

premises claiming it to be the Burmese territory. Later on, he was removed by the Burmese government.¹⁹⁸

Another event of misuse is the incident of Libyan Embassy in UK where a Constable Yvone Fletcher was killed due to gunfire from within the Libyan Embassy.¹⁹⁹ The person responsible for her death was not punishment on the pretext that he had diplomatic immunity.

The most quoted incident of the abuse of diplomatic bags occurred in July 1984, when Umaru Dikko, a former minister of the deposed Shangeri Government of Nigeria, wanted by the new Nigerian government on charges of embezzlement of government funds, was abducted. He was kidnapped outside his home in London and after being heavily drugged was placed in a crate. Two large crates arrived at Stansted airport to be loaded on to a Nigerian Airways aircraft. The crates were handled by a member of the Nigerian Government service, who held a diplomatic passport but was not a member of the mission in Britain and did not have any diplomatic status in the country. He made no protest when he was asked to open the crates. One of the crates contained the unconscious Dikko and another man who had in his possession drugs and syringes. The other crate contained two other men. Both were conscious. A total of 27 people, including the three persons other than Dikko who were found in the crates, were arrested. The main reason for the crates being opened without objection was that there were no clear visible markings indicating it was a diplomatic bag. The Foreign Secretary made it clear that even if the crates had borne markings, the concern of protecting life was more

¹⁹⁸ Matt Williams, *Dominique Strauss-Kahn: Diplomatic Immunity's Greatest Hits*, The Guardian, March 28, 2012, see at: <http://www.theguardian.com/world/blog/2012/mar/28/dominique-strauss-kahn-diplomatic-immunity-scandal> (Accessed: 05-06-2017).

¹⁹⁹ Supra note 115.

important than immunity. In that situation, the use of scanning or dogs would have assisted in the discovery.²⁰⁰

The incident of the Ambassador of Papua New Guinea with regard to diplomats' drunk and negligent driving in the US is another example of violent crime. Ambassador Kiatro Abisinito was driving his car whilst intoxicated and crashed into the rear of a parked car in which two people were sitting. The ambassador was travelling at such a speed that his car hit two empty cars on the opposite side of the street, jumped a sidewalk, hit another car waiting at an intersection and bounced back across the street where it smashed into a small brick wall. The police charged the ambassador with failing to pay attention to driving, which could lead to fines of up to \$100 000. The police and the State Department agreed that owing to his status, he could not be prosecuted.²⁰¹

Another nerve racking instance of misuse of diplomatic immunity is when in early 2005, Virginia police closed in on a suspected child predator, a man in his 40s who cops say drove four hours to meet a 13 year old girl he had met on the Internet, promising to teach her about sex. It turned out the girl was really a cop, and officers arrested the man at a shopping mall.

But then it was the police who got an unpleasant surprise. Their suspect, Salem Al-Mazrooei, was a diplomat from the United Arab Emirates and therefore covered by

²⁰⁰ Maria Moutzouris, *supra* note 144, 83-84.

²⁰¹ *Ibid.*, 91-92.

“diplomatic immunity.” The cops had to let him go. Days later, Al-Mazrooei left the country, never having spent a night in jail.²⁰²

Another incident quoted in the Reader’s Digest is that when Congress took a look at diplomatic immunity in the 1980s, a New York police detective testified about tracking down a suspect in a series of rapes. Although the suspect had been identified by two victims, the police had to let him go after 45 minutes because he was the son of a diplomat from Ghana. As he left, the former detective told The New York Times, “he snickered and said, ‘I told you I had diplomatic immunity.’ He was looking at the women, too, and laughing.” Twenty years later, it sounds like that attitude hasn’t changed.²⁰³

The incident of Raymond Davis is also an example of the abuse of the diplomatic immunity. He, in broad daylight, mercilessly killed two citizens and then claimed diplomatic immunity. The issue gathered much attention and much discussion was done on his status. It was also rumoured on the Pakistani media that Raymond Davis was a spy or an FBI agent on some mission here in Pakistan to finance some militant groups. But in his book about his stay at Pakistan, he clearly stated that he was a private security/military contractor in Pakistan and not a diplomat.

When we look at the quantum of abuse of diplomatic immunity then it is not only increasing in number but also ferocity. Diplomats have been found deliberately neglecting and abusing the laws of the receiving state without any official reason. Not

²⁰² Reader’s Digest, *The Untouchables: Is Diplomatic Immunity Going Too Far?*, available at: <http://www.rd.com/money/diplomatic-immunity-going-too-far/> (Accessed: 13-06-2011).

²⁰³ Ibid.

only that, now they make a fun out of the law enforcing agencies of the receiving state, especially when a diplomat is from a more powerful state than the receiving state.

When we look at the theories regarding diplomatic immunity we can see that those theories were presented according to the prevalent conditions of the diplomatic relations. Based on this, the functional theory does suit the current modus operandi of the diplomatic relations. It, however, needs certain improvements to fully incorporate the functional theory in to the diplomatic law.

The types of abuse of diplomatic immunity are quite alarming and they need to be addressed real soon. If they are not addressed soon then there might be a severe reaction from the affected people, as their number is growing day by day. In the present scenario, the affected are not only the people but now-a-days states are also among the aggrieved persons.

CHAPTER No. 6

CONCLUSION AND RECOMMENDATIONS

Chapter No. 6: Conclusion and Recommendations

6.1 Conclusion

Diplomatic immunity is one of the oldest concepts of international law. It has been practiced by all the states and without any discontinuation. In 1961, all those customary practices were brought together in one piece of legislation in the form of VCDR. It has described all the basics of the diplomatic law which prevailed through out the human history. It defined the categories and then defined the immunity according to those categories. Now, the VCDR is regarded as the constitution of the diplomatic relations by all the countries of the world.

The present day doctrine of diplomatic immunity is influenced by the three theories i.e. extraterritoriality, personal representation and functional necessity. The theories of extraterritoriality and personal representation were discarded by the international law experts and the prevailing theory on the basis of which the VCDR was legislated is the theory of functional necessity.

The VCDR limited the immunity enjoyed by a diplomat and made him accountable for certain civil matters. It also divided the diplomatic mission and ascertained the level of immunity enjoyed by each category. But it failed to address the criminal liability of a diplomat, his family and staff effectively. Hence a diplomatic mission can go free even after committing a heinous crime like, murder, rape, smuggling etc. There is a dire need to look in to this matter and come up with a healthy solution to avoid this misuse without disturbing the diplomats from executing their jobs effectively.

Being member states of the United Nations, the Muslim states are also signatories of the said convention. But the thing which was not taken care of while drafting and finalizing the said convention or any other convention for that matter, there is no input from the Muslim states. The sources of *Shari'ah* are absolutely different and their strength undeniable, Muslims are bound to follow *Shari'ah* and denounce anything which is against it. There are certain matters for which there can be no immunity or exemption as per Islamic law e.g. blasphemy, apostasy etc.

Due to this reason there is always a confusion and debate that whether being a signatory of any convention the Muslim states are bound to adopt and follow the convention *stricto sensu*. Take the example of Universal Declaration of Human Rights; there are various articles in it which are directly in contradiction with the established laws and principles of *Shari'ah*. Similarly, the VCDR does not have any input from the Muslim states therefore there are certain ambiguities regarding the doctrine of diplomatic immunity as enunciated by the VCDR.

Some Islamic law experts do argue that the Muslim states are bound to follow the treaties they enter in to²⁰⁴ but they forget to mention that *Shari'ah* also laid down the principles upon which the Muslim states are to follow the treaties. For example, the person to whom the *aman* (protection/immunity) is to be granted shall not be harmful for the Muslims, if there is a threat from the person to whom *aman* had been granted then the Muslims may revoke the treaty but cannot harm the person and shall make sure that the person reaches

²⁰⁴ See for example, M. Cherif Bassiouni, *supra* note 72, 614.

a safe place, a treaty stands revoked if the other party violates any of the conditions laid down in the treaty etc.²⁰⁵

It is written in the VCDR that a diplomat should promote friendly relations between the states, that the mission premises must not be used against the receiving state and that the diplomat shall respect the laws of the receiving state.²⁰⁶ Then how murdering a citizen of a receiving state or terror financing or disregarding traffic laws is aiding all these purposes. There are certain crimes that if the Muslim states go by the *Shari'ah* then such a person shall face prosecution and consequently punishment.

M. Cherif Bassiouni, who is in favour of the complete immunity of a diplomat from civil and criminal jurisdiction, writes in his famous work regarding the United States Diplomatic and Consular Staff in Tehran case that Islamic jurists are of the view that in case of hudood crimes the diplomat may be arrested and detained, and consequently prosecuted.²⁰⁷ He also acknowledges the doctrine of reprisal which was practiced by the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) during the treaty of Hudaybiyah when the news came that Usman R.A has been martyred by the Quraish. He (Peace and blessings of Allah be upon him) detained the envoy of the Quraish till the return of Usman R.A.²⁰⁸

In addition to this, there are main concerns which are not addressed by the VCDR or by the local legislation carried out by Pakistan regarding diplomatic immunity. First of that

²⁰⁵ Dr. Wahbat Al-Zuhaili, *supra* note 68, 234-236, 259-261.

²⁰⁶ *United States: Department of State Guidance for Law Enforcement Officers with regard to Personal Rights and Immunities of Foreign Diplomatic and Consular Personnel*, International Legal Materials, Vol. 27, No. 6 (November 1988), pp. 1617-1636, published by: American Society of International Law, available at: <http://www.jstor.org/stable/20693274>, 1621. (Accessed: 27-08-2016)

²⁰⁷ M. Cherif Bassiouni, *supra* note 73, 616.

²⁰⁸ *Ibid.*

issue is that what if a diplomat from a Muslim state commits an act of apostasy or blasphemy. These crimes are such that there is no exemption from its punishment. So, in such a case which country shall prosecute and if the receiving Muslim state is to prosecute then what will be the manner of initiating such prosecution. A waiver will be required from the sending state or his act itself shall be considered as a revocation of his status of immunity and hence prosecution.

In order to solve the above problem, the incident of Abdullah ibn Masood R.A (mentioned above) should be kept in mind where he executed an ex-envoy for a crime which he committed and thereupon confessed in front of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him).

Similarly, if a diplomat of a non-Muslim state commits an act of blasphemy in a Muslim country then can he be prosecuted or he shall be sent back to the sending state only declaring him as persona non grata. If he is sent back to his state then he will not be prosecuted there and one of the basic purposes of *Shari'ah* (*Maqasid Al-Shari'ah*) i.e. safeguarding the Religion and sanctity of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) shall remain unfulfilled. It shall also have adverse effects on the relationship of the two states as the Muslims are greatly attached with the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) and it shall ignite a wave of hatred among the Muslims against that specific individual and state. The only way to stop it from happening is to bind the diplomat from doing such an act or punish him. As Allama ibn-e-Taimiyah writes in his land mark book on this issue that the right to pardon a person committing blasphemy was with the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) which he (Peace and blessings of Allah be upon

him) exercised in his (Peace and blessings of Allah be upon him) lifetime. The *Sahaba* R.A (Companions of the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) on seeing a person hurting the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) with his words used to get ready to punish him but the Holy Prophet Muhammad (Peace and blessings of Allah be upon him) used to order or stop them R.A according to the situation. This right of pardon is now not with the Muslims and the person committing blasphemy shall be punished with death.²⁰⁹

Then there is the issue of pardon in murder cases. This right is solely of the heirs of the deceased and state cannot interfere in that right according to *Shari'ah*. Then can state grant immunity in a crime in which it has no authority to deal with as per *Shari'ah*.

The entire purpose of United Nations and all these conventions is to make this world a better place to live, make the lives of the humans better and make this world peaceful. On the same pretext, there is this person who goes out and violates the law of a sovereign state or goes out and kills a man or rapes a woman or spreads drug or involves himself in human trafficking or terror financing and when he gets caught shows a booklet or a card or a piece of paper and goes clean. The maximum one can do is declare him *persona non grata* or expel him or ask for a waiver of immunity which will not be granted; instead the diplomat of the state wronged against might get the same treatment in the name of reciprocity. So, if a state does not want to get its diplomat in any sort of trouble then it should either close its eyes or remain silent. Is by doing this the United Nation dreams to achieve peace and harmony, friendly relations and good life?

²⁰⁹ Allama ibn-e-Taimiyah, *As-Sarim Al-Maslool Alaa Shatimir-Rasool* (Peace and blessings of Allah be upon him), trans. Prof. Ghulam Ahmed Hariri, (Lahore: Maktabah Quddosiyah, 2011), 312-316.

There are optional protocols attached with the VCDR which may help someone get any settlement. But those protocols also deal with the state level issues and are time consuming. The humans, in whose name these conventions and organizations are working, gets nothing but a bullet in return.

A state can get a decision in its favour if it is a powerful state. The conduct of ICJ in the Tehran Case is in violation of basic norms of rule of law and justice. How can a court condemn someone unheard? Is the doctrine of *audi alteram partem* just to be mentioned in the books and judgments and not be practiced by the courts?

It is also argued that the immunity is granted for a greater good and one or two incidents should not be a reason for limiting the immunity. If we look at the famous incident of Raymond Davis, it was a single event yet it jolted not only entire Pakistan but the US as well. Mr. Obama, the President of US, had to come forward and defend his man. These events and acts of diplomats leave a deep impact on the minds of the citizens of the aggrieved state which resultantly effect the relations of the state.

The British House of Commons Foreign Affairs Committee while commenting on the abuse of diplomatic immunity said,

“It can hardly need saying that terrorism or other criminal activities can never be justified by reference to these functions...When diplomats act in fact as terrorists they are not diplomats at all and thus lose the benefit of those immunities that diplomats are entitled to.”²¹⁰

²¹⁰ British House of Commons Foreign Affairs Committee report, In: The American Journal of International Law, 1985, 79.

Prof. Muhammad Munir also writes in his article “Immunity or Impunity” that the VCDR and VCCR need to be amended in order to cater for the human rights and remedy for the private citizens.²¹¹

In short, it can be concluded that the immunity is not for personal benefit of an individual but for a collective good and efficient functioning. No doubt diplomatic immunity is an important feature of international law but the VCDR needs to be amended and as the Muslim states are huge in number and are party to the said convention, their legal system must also be recognized and respected. Not only to the extent of VCDR but to all the other conventions made or shall be made.

6.2 Recommendations

In the light of the above, following recommendations are suggested which shall be helpful in further refining and clarifying the very important yet mishandled concept of diplomatic immunity.

Generally, the diplomatic relations are based on reciprocity. A state is not bound to enter in to a diplomatic relation with the other state. If it does enter in to a diplomatic relation with another state then it means that there is an element of respect and harmony among them. Therefore, it becomes an obligation on the diplomatic mission to further strengthen the ties by adhering to the laws and customs of the receiving state and be a true ambassador of his state. Therefore, it is a duty of the sending state to make sure that the persons who are made a part of the diplomatic mission are of good character and law abiding. Similarly, the receiving state should provide a conducting environment for the

²¹¹ Prof. M. Munir, *supra* note 114, 54.

diplomats to perform their functions effectively. It is because a peaceful world is in favour of all the states and it is the responsibility of every state to contribute to it. The laws are made by the states and it is the states that should abide by them so that their fruitful results can be enjoyed collectively and universally.

Being member states of the United Nations, the Muslim countries must give their input as per *Shari'ah* in every convention. In the VCDR there needs to be certain changes with respect to the Muslim countries, like including the provision regarding prosecution in cases of hudood offences and how to go about *qisas*(in murder cases) and *diyat*(blood money) in case of private Muslims.

The Muslim scholars are also required to work on this specific area as there are many new issues which need to be looked at as per Islamic law and jurisprudence. For example, initially there was no concept of permanent diplomatic missions, there was no concept of a huge supporting staff for the mission.

Diplomats from non-Muslim states are often found violating the cultural laws of Islam, like a female diplomat may wear an inappropriate dress or shaking of hands with opposite gender etc. There shall also be an amendment which shall bind every diplomat to observe and follow the basic cultural laws of Islam e.g. avoiding indecency, respecting the rules of veil, avoid drinking publically etc.

The functional necessity theory must be further elaborated and functions of a diplomat which are to be carried out by him should be mentioned in the VCDR. Killing or espionage or drug trafficking or terror financing etc. can never be regarded as functions of a diplomat and hence should not be covered under functional necessity theory.

It shall also be clarified in the VCDR that whether the immunity is only during the tenure of his office or even after his retirement the diplomat enjoys the immunity. Here again the incident of Abullah ibn-e-Masood R.A is of great importance.

There shall be a special international tribunal for the diplomats, which shall have the jurisdiction over the civil and criminal matters involving diplomats, their families and staff only. Although, the establishment of a Permanent International Diplomatic Criminal Court with mandatory jurisdiction over diplomats accused of committing crimes with its own penal system has been a debated subject since years.²¹²

There shall be an amendment in the VCDR to add a list of the crimes that shall not be covered by the immunity.²¹³ This list shall again give due weightage to the Islamic criminal law as well. Once a diplomat or his family member or staff commits any of the mentioned crime the special international tribunal shall have the jurisdiction to prosecute. It will help in removing the fear of use of duress or coercion by the receiving state and will make prosecution of the accused diplomat fair.

Another bone of contention is the diplomatic bag. Its dimensions and weight should be specified. The recent incident in Pakistan in which it was said that some embassies were involved in secretly listening to the conversations of secret offices is an alarming situation. Therefore, if some machinery or anything huge is to be imported for the mission's functions then it shall be approved before hand by the receiving state.

The US has given its law enforcing officers enough authority to intervene in a situation where a diplomat is involved if that incident is directly related to public safety. Similarly,

²¹² Mitchel S. Ross, *supra* note 158, 195.

²¹³ Maria Moutzouris, *supra* note 144, 163.

they have authorized the officers to issue traffic tickets and to stop any intoxicated individual from driving.²¹⁴ Such restrictions do not hinder the effective functioning of a diplomat or disrespect the immunity enjoyed by him. Certain restrictions on such lines can also be issued either at state level or it can be incorporated in the VCDR itself.

The purpose of VCDR is to promote the diplomatic relations between states and channelize them properly. Therefore, it shall be amended to keep it up to date with the present day scenario. This will help in stopping the disastrous abuse and misuse of diplomatic immunity by the diplomats, their families and staff.

At the end, the diplomatic immunity is neither absolute nor it shall be absolute because no one should be above the law.

²¹⁴ Supra note 206, 1618.

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Annexure “A”

Vienna Convention on Diplomatic Relations, 1961

(Done at Vienna on 18 April 1961. Entered into force on 24 April 1964.

United Nations, *Treaty Series*, vol. 500, p. 95.

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The States Parties to the present Convention,

Recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents,

Having in mind the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Believing that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 1

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

- (a) The "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;
- (b) The "members of the mission" are the head of the mission and the members of the staff of the mission;
- (c) The "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;
- (d) The "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;
- (e) A "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;
- (f) The "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;
- (g) The "members of the service staff" are the members of the staff of the mission in the domestic service of the mission;

- (h) A "private servant" is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;
- (i) The "premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

Article 2

The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

Article 3

1. 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.

2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Article 4

1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément*.

Article 5

1. The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.
2. If the sending State accredits a head of mission to one or more other States it may establish a diplomatic mission headed by a chargé d'affaires ad interim in each State where the head of mission has not his permanent seat.
3. A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization.

Article 6

Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.

Article 7

Subject to the provisions of articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

Article 8

1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.

2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.
3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 9

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

Article 10

1. The Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, shall be notified of:
 - (a) The appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;
 - (b) The arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;

(c) The arrival and final departure of private servants in the employ of persons referred to in subparagraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;

(d) The engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.

2. Where possible, prior notification of arrival and final departure shall also be given.

Article 11

1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.
2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

Article 12

The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Article 13

1. The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner.

2. The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.

Article 14

1. Heads of mission are divided into three classes, namely:

- (a) That of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;
- (b) That of envoys, ministers and internuncios accredited to Heads of State;
- (c) That of chargés d'affaires accredited to Ministers for Foreign Affairs.

2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Article 15

The class to which the heads of their missions are to be assigned shall be agreed between States.

Article 16

- 1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with article 13.
- 2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.
- 3. This article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

Article 17

The precedence of the members of the diplomatic staff of the mission shall be notified by the head of the mission to the Ministry for Foreign Affairs or such other ministry as may be agreed.

Article 18

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

Article 19

1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions a chargé d'affaires ad interim shall act provisionally as head of the mission. The name of the chargé d'affaires ad interim shall be notified, either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the sending State to the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

2. In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission.

Article 20

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission, and on his means of transport.

Article 21

1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.
2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 23

1. 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 mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Article 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

Article 25

The receiving State shall accord full facilities for the performance of the functions of the mission.

Article 26

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
3. The diplomatic bag shall not be opened or detained.
4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.
7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Article 28

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

Article 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of article 31, his property, shall likewise enjoy inviolability.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State.

He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

- (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

Article 33

1. Subject to the provisions of paragraph 3 of this article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:

(a) That they are not nationals of or permanently resident in the receiving State; and

(b) That they are covered by the social security provisions which may be in force in the sending State or a third State.

3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Article 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(c) Estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of article 39;

(d) Dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;

- (e) Charges levied for specific services rendered;
- (f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 23.

Article 35

The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

- (a) Articles for the official use of the mission;
- (b) Articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

Article 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36.
2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in article 36, paragraph 1, in respect of articles imported at the time of first installation.
3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 33.
4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 38

1. Except insofar as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict.

However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

Article 40

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.
2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the passage of members of the administrative and technical or service staff of a mission, and of members of their families, through their territories.
3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been

granted a passport visa if such visa was necessary, and diplomatic bags in transit, the same inviolability and protection as the receiving State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to force majeure.

Article 41

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed.

3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

Article 42

A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.

Article 43

The function of a diplomatic agent comes to an end, *inter alia*:

- (a) On notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;
- (b) On notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission.

Article 44

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 45

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

- (a) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
- (b) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;
- (c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

Article 46

A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

Article 47

1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.
2. However, discrimination shall not be regarded as taking place:
 - (a) Where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;
 - (b) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 48

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention, as follows: until 31 October 1961 at the Federal Ministry for Foreign Affairs of Austria and subsequently, until 31 March 1962, at the United Nations Headquarters in New York.

Article 49

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 50

The present Convention shall remain open for accession by any State belonging to any of the four categories mentioned in article 48. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 51

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 52

The Secretary-General of the United Nations shall inform all States belonging to any of the four categories mentioned in article 48:

- (a) Of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with articles 48, 49 and 50;
- (b) Of the date on which the present Convention will enter into force, in accordance with article 51.

Article 53

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States belonging to any of the four categories mentioned in article 48.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna this eighteenth day of April one thousand nine hundred and sixty-one.

Annexure "B"

The Diplomatic and Consular Privileges Act, 1972.

NATIONAL ASSEMBLY OF PAKISTAN

Islamabad, the 12th September, 1972

ACT NO IX OF 1972

An Act to give effect in Pakistan to the Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963.

WHEREAS Pakistan has acceded to the Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963;

AND WHEREAS it is necessary to give effect in Pakistan to the said Vienna Conventions;

It is hereby enacted as follows:-

1. Short title, extent and commencement. - (1) This may be called the Diplomatic and Consular Privileges Act, 1972.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

2. Provisions of Conventions to have force of law.-

(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, the provisions of the Vienna Convention on Diplomatic Relations, 1961, set out in the First Schedule and the Vienna Convention on Consular Relations, 1963, set

out in the Second Schedule shall, subject to the other provisions of this Act, have the force of law in Pakistan.

(2) For the purposes of Article 32 of the Convention set out in the First Schedule, a waiver by the head of the mission of any State or any person for the time being performing his functions shall be deemed to be a waiver by that State.

(3) For the purposes of Article 45 of the Convention set out in the Second Schedule and of that Article as applied by Article 58 of that Convention, a waiver shall be deemed to have been expressed by a state if it has been expressed by the head of the diplomatic mission of that State or by any person for the time being performing his functions or, if there is no such mission, by the head of the consular post concerned.

(4) Articles 35, 36 and 40 of the convention set out in the First Schedule, and Articles 50, 51, 52, 54, 62 and 67 of the Convention set out in the Second Schedule, shall be construed as granting any privilege or immunity which they require to be granted.

3. Restriction of Privileges and immunities.- If it appears to the Federal Government that the privileges and immunities, accorded to the mission or a consular post of Pakistan in the territory of any State, or to persons connected with that mission or consular post, are less than those conferred by this Act on the mission or a Consular post of that State or on persons connected with that mission or consular post, the Federal Government may, by notification in the official Gazette, withdraw such of the privileges and immunities so conferred from the mission of that State or, as the case may be from all or any of the consular posts of that State, or, as from such persons connected there with as it may deem fit.

4. Certificate of Federal Government. - If any question arises whether or not any person is entitled to any privilege or immunity under this Act, a certificate issued by or under the authority of the Federal Government stating any fact relating to that question shall be conclusive evidence of that fact.

5. Power to amend schedules.- The Federal Government may, by notification in the official Gazette, amend either of the Schedules in conformity with any amendment duly made in the provisions of the Convention set out therein.

6. Repeal. - The Diplomatic and Consular Privileges Ordinance, 1972 (XV of 1972), is hereby repealed.

THE FIRST SCHEDULE

[See section 2 (1)]

ARTICLE 1

For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

- (a) the "head of the Mission" is the person charged by the sending State with the duty of acting in that capacity;
- (b) the "members of the mission" are the head of the mission and the members of the staff of the mission;
- (c) the "members of the staff of the mission" and the members of the diplomatic staff of the administrative and technical staff and of the service staff of the mission;
- (d) the "member of the diplomatic staff" are the members of the mission having diplomatic rank;
- (e) a "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;
- (f) the "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;
- (g) the "members of the service staff" are the members of the staff of the mission in the domestic service of the mission;

- (h) a “private servant” is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;
- (i) the “premises of the mission” are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

ARTICLE 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

ARTICLE 23

1. 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 mission, whether owned or leased, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

ARTICLE 24

The archives and documents of the mission shall be inviolable at any time and wherever they may be.

ARTICLE 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the government and the other missions and consulates of the sending state wherever situated, the mission and employ all appropriate means, including diplomatic couriers and messages in code or cypher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.
2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
3. The diplomatic bag shall not be opened or detained.
4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.
5. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of constituting the diplomatic bag, shall be protected by the receiving State in the performance of his function. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State or the mission any designate diplomatic couriers ad hoc. In such cases the provision of paragraph 5 of this Article shall also apply, except that the

immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

ARTICLE 28

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

ARTICLES 29

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

ARTICLE 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.
2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property shall likewise enjoy inviolability.

ARTICLE 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

- (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
- (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a),(b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

ARTICLE 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.
2. The waiver must always be express.
3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim, directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

ARTICLE 33

1. Subject to the provisions of paragraph 3 of this Article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.
2. The exemption provided for in paragraph 1 of this Article shall also apply to private servants who are in the sole employ of a diplomatic agent, on condition:
 - (a) that they are not nationals of or permanently resident in the receiving State; and
 - (b) that they are covered by the social security provisions which may be enforce in the sending State or a third State.

3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

5. The provisions of this Article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

ARTICLE 34

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(c) estate, succession or inheritance duties levied by the receiving State, subject to the provisions of paragraph 4 of Article 39;

(d) dues and taxes on private income having source in the receiving State and Capital taxes on investments made in commercial undertakings in the receiving State;

- (e) charges levied for specific service rendered;
- (f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

ARTICLE 35

The receiving State shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

ARTICLES 36

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all Customs-duties, taxes and related charges other than charges for storage, cartage and similar services, on:
 - (a) articles for the official use of the mission;
 - (b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.
2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorized representative.

ARTICLE 37

1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State enjoy the privileges and immunities specified in Articles 29 to 36.
2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of the Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36 paragraph 1, in respect of articles imported at the time of first installation.
3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.
4. Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

ARTICLE 38

1. Except in so far as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity for jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions.
2. Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

ARTICLE 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other Ministry as may be agreed.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable time in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.
4. In the event of the death of a member of the mission, not a national of or permanently resident in the receiving State or of a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

ARTICLE 40

1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return.
2. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

3. In circumstances similar to those specified in paragraph 1 of this Article, third State shall not hinder the passage of members of the administrative and technical or services staff of a mission, and of members of their families, through their territories.
4. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cypher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers who have been granted a passport visa if such visa was necessary and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.
5. The obligations of third States under paragraphs 1,2, and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third States is due to force majeure.

THE SECOND SCHEDULE

[See section 2 (1)]

ARTICLE 1

DEFINITIONS

1. For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:
 - (a) "consular post" means any consulate-general, consulate, vice-consulate or consular agency;
 - (b) 'consular district' means the area assigned to a consular post for the exercise of consular functions;
 - (c) "head of consular post" means the person charged with the duty of acting in that capacity;
 - (d) "consular officer" means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;
 - (e) "consular employee" means any person employed in the administrative or technical service of a consular post;
 - (f) "member of the service staff" means any person employed in the domestic service of a consular post;
 - (g) "member of the consular post" means consular officers, consular employees and members of the service staff;

(h) members of the consular staff" means consular officers, other than the head of the consular post, consular employees and members of the service staff;

(i) "member of the private staff" means a person who is employed exclusively in the private service of a member of the consular post;

(j) "consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post;

(k) "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the cyphers and codes, the card-indexes and any article of furniture intended for their protection or safe keeping.

2. Consular officers are of two categories, namely career consular officers and honorary consular officers. The provisions of Chapter II of the present Convention apply to consular posts headed by career consular officers; the provisions of Chapter III govern consular posts headed by honorary consular officers.

3. The particular status of members of the consular posts who are nationals or permanent residents of the receiving States is governed by Article 71 of the present Convention.

ARTICLE 5

CONSULAR FUNCTIONS

Consular functions consist in:-

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

- (b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
- (c) as curtaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting State, reporting thereon to the Government of the sending State and giving information to persons interested;
- (d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
- (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
- (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving state;
- (h) safeguarding, within the limits imposed by the laws, and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

- (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
- (j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements in any other manner compatible with the laws and regulations of the receiving State;
- (k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending States, in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;
- (l) extending assistance to vessels and aircraft mentioned in subparagraph (k) of this Article, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ships papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incident which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorised by the laws and regulations of the sending State;
- (m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no

objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

ARTICLE 15

TEMPORARY EXERCISE OF THE FUNCTIONS OF THE HEAD OF A CONSULAR POST

1. If the head of a consular post is unable to carry out his functions or the position of head of consular post is vacant, and acting head of post may act provisionally as head of the consular post.
2. The full name of the acting head of post shall be notified either by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, or if he is unable to do so, by a competent authority of the sending State, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry. As a general rule, this notification shall be given in advance. The receiving State may make the admission as acting head of post of a person who is neither a diplomatic agent nor a consular officer of the sending State in the receiving State conditional on its consent.
3. The competent authorities of the receiving State shall afford assistance and protection to the acting head of post. While he is in charge of the post, the provisions of the present Convention shall apply to him on the same basis as to the head of the consular post concerned. The receiving State shall not, however, be obliged to grant to an acting head of post any facility, privilege or immunity which the head of the consular post enjoys only subject to conditions not fulfilled by the acting head of post.

4. When, in the circumstances referred to in paragraph 1 of the Article, a member of the diplomatic staff of the diplomatic mission of the sending State in the receiving State is designated by the sending State as an acting head of post, he shall, if the receiving State does not object thereto, continue to enjoy diplomatic privileges and immunities.

ARTICLE 17

PERFORMANCE OF DIPLOMATIC ACTS BY CONSULAR OFFICERS

1. In a State where the sending State has no diplomatic mission and is not represented by a diplomatic mission of a third State, a consular officer may, with the consent of the receiving State, and without affecting his consular status, be authorised to perform diplomatic acts, the performance of such acts by a consular officer shall not confer upon him any right to claim diplomatic privileges and immunities.

2. A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any inter-Governmental organisation. When so acting, he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements, however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.

**CHAPTER II.- Facilities, privileges and Immunities Relating to Consular Posts,
Career Consular Officer and other Officer and other Members of a Consular Post.**

**SECTION 1. - FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO
A CONSULAR POST.**

ARTICLE 31

INVIOLABILITY OF THE CONSULAR PREMISES

1. Consular premises shall be inviolable to the extent provided in this Article.
2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.
3. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions and prompt adequate and effective compensation shall be paid to the sending State.

ARTICLE 32

EXEMPTION FROM TAXATION OF CONSULAR PREMISES

1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional, or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in paragraph i of this Article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the person acting on its behalf.

ARTICLE 33

INVIOLABILITY OF THE CONSULAR ARCHIVES AND DOCUMENTS

The consular archives and documents shall be inviolable at all times and wherever they may be.

ARTICLE 35

FREEDOM OF COMMUNICATION

1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communication with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular, couriers, diplomatic or consular bag and messages in code or cypher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.
3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article; they may request that the bag be opened in their presence by an authorised representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.
4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents of articles intended exclusively for official use.
5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State he shall be neither a national of the receiving State, nor unless he is a national of the sending State, a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State, its diplomatic missions and its consular posts may designate consular couriers ad hoc. In such cases the provisions of paragraph 5 of this Article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorised post of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

ARTICLE 39

CONSULAR FEES AND CHARGES

1. The consular post may levy in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.
2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this Article, and the receipts for such fees and charges, shall be exempt from all dues and taxes in the receiving State.

SECTION II - FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST.

ARTICLE 41

PERSONAL INVIOABILITY OF CONSULAR OFFICER

1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

2. Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

ARTICLE 43

IMMUNITY FROM JURISDICTION

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

2. The provision of paragraph 1 of this Article shall not, however, apply in respect of a Civil action either:-

- (a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or
- (b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

ARTICLE 44

LIABILITY TO GIVE EVIDENCE

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this Article, decline to

give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.

2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.

3. Member of a consular post is under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending state.

ARTICLE 45

WAIVER OF PRIVILEGES AND IMMUNITIES

1. The sending State may waive, with regard to a member of the consular post any of the privileges and immunities provided for in Articles 41, 43 and 44.

2. The waiver shall in all cases be express, except as provided in paragraph 3 of this Article, and shall be communicated to the receiving state in writing.

3. The initiation of proceedings by a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of

execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

ARTICLE 48

SOCIAL SECURITY EXEMPTION

1. Subject to the provisions of paragraph 3 of this Article, members of the consular post with respect to services rendered by them for the sending State and members of their families forming part of their households, shall be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this Article shall apply also to members of the private staff who are in the sole employ of members of the consular post, on condition:-

(a) that they are not nationals of or permanently resident in the receiving State; and
(b) that they are covered by the social security provisions which are in force in the sending State or a third State.

3. Members of the consular post who employ persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State.

ARTICLE 49

EXEMPTION FROM TAXATION

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except.

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues or taxes on private immovable property situated in the territory of the receiving State, subject to the provisions of Articles 32;

(c) estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject to the provisions of paragraph (b) of Article 51;

(d) dues and taxes on private income, including capital gains, having its source in the receiving State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duties, subject to the provisions of Article 32.

2. Members of the service staff shall be exempt from dues and taxes on the wages which they receive for their services.

3. Members of the consular post who employ persons whose wages or salaries are not exempt from income tax in the receiving State shall observe the obligations which the

laws and regulations of that State impose upon employers concerning the levying of income tax.

ARTICLE 50

EXEMPTION FROM CUSTOMS DUTIES AND INSPECTION

1. The receiving state shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all Customs-duties, taxes, and related charges other than charges for storage, cartage and similar services, on:-

(a) articles for the official use of consular post;

(b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilization by the persons concerned.

2. Consular employees shall enjoy the privileges and exemptions specified in paragraph 1 of this Article in respect of articles imported at the time of first installation.

3. Personal baggage accompanying consular officers and members of their families forming part of their households shall be exempt from inspection. It may be inspected only if there is serious reason to believe that it contains articles other than those referred to in sub-paragraph (b) of paragraph 1 of this Article, or articles the import or export of which is prohibited by the laws and regulations of the receiving State or which are subject to its quarantine laws and regulations. Such inspection shall be carried out in the presence of the consular officer or member of his family concerned.

ARTICLE 51

ESTATE OF A MEMBER OF THE CONSULAR POST OR OF A MEMBER OF HIS FAMILY

In the event of the death of a member of the consular post or of a member of his family forming part of his household, the receiving State:-

- (a) shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the receiving State the export of which was prohibited at the time of his death;
- (b) shall not levy national, regional or municipal estate, succession or inheritance duties, and duties on transfers, on movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consular post or as a member of the family of a member of the consular post.

ARTICLE 52

EXEMPTION FROM PERSONAL SERVICES AND CONTRIBUTIONS

The receiving State Shall exempt members of the consular post and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

ARTICLE 53

BEGINNING AND END OF CONSULAR PRIVILEGES AND IMMUNITIES

1. Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or if already in its territory from the moment when he enters on his duties with the consular post.
2. Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this Article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.
3. When the functions of a member of the consular post have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so whichever is the sooner, but shall subsist until that time, even in case of armed conflict. In the case of the persons referred to in paragraph 2 of this Article, their privileges and immunities shall come to an end when they cease to belong to the household or to be in the service of a member of the consular post provided, however, that if such persons intend leaving the receiving State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.

5. In the event of the death of a member of the consular post, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving State or until the expiry of a reasonable period enabling them to do so, whichever is the sooner.

ARTICLE 54

OBLIGATIONS OF THIRD STATES

1. If a consular officer passes through or is in the territory of a third State, which has granted him a visa, if visa was necessary, while proceeding to take up or return to his post or when returning to the sending State, the third state shall accord to him all immunities provided for by the other Articles of the present Convention as may be required to ensure his transit or return. The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer of travelling separately to join him or to return to the sending State.

2. In circumstances similar to those specified in paragraph 1 of this Article, third State shall not hinder the transit through their territory of other members of the consular post or of members of their families forming part of their households.

3. Third State shall accord to official correspondence and to other official communications in transit, including messages in code or cypher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.

4. The obligations of third States under paragraphs 1,2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to force majeure.

ARTICLE 55

RESPECT FOR THE LAWS AND REGULATIONS OF THE RECEIVING STATE

1. The consular premises shall not be used in any manner incompatible with the exercise of consular functions.

2. The provisions of paragraph 2 of this Article shall not exclude the possibility of offices of other institutions or agencies being installed in part of the building in which the consular premises are situated, provided that the premises assigned to them are separate from those used by the consular post. In that event, the said offices shall not, for the purposes of the present Convention, be considered to form part of the consular premises.

ARTICLE 57

SPECIAL PROVISIONS CONCERNING PRIVATE GAINFUL OCCUPATION

1. Privileges and immunities provided in this Chapter shall not be accorded:
 - (a) to consular employees or to members of the services staff who carry on any private gainful occupation in the receiving State;
 - (b) to members of the family of a person referred to in sub-paragraph (a) of this paragraph or to members of his private staff;
 - (c) to members of the family of a member of a consular post who themselves carry on any private gainful occupation in the receiving State.

CHAPTER-III - Regime relating to Honorary Consular Officers and Consular Posts headed by such officers.

ARTICLE 58

GENERAL PROVISIONS RELATING TO FACILITIES, PRIVILEGES AND IMMUNITIES

1. Articles 35 and, paragraph 3 of Article 54 and paragraphs 2 and 3 of Article 55 shall apply to consular posts headed by an honorary consular officer. In addition, the facilities, privileges and immunities of such consular posts shall be governed by Articles 60, 61 and 62.

2. Article 43, paragraph 3 of Article 44, Articles 45 and 53 shall apply to honorary consular officers. In addition, the facilities, privileges and immunities of such consular officers shall be governed by Articles 66 and 67.

3. Privileges and immunities provided in the present Convention shall not be accorded to members of the family of an honorary consular officer or of a consular employee employed at a consular post headed by an honorary consular officer.

ARTICLE 60

EXEMPTION FROM TAXATION OF CONSULAR PREMISES

1. Consular premises of a consular post headed by an honorary consular officer of which the sending State is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the laws and regulations of the receiving State, they are payable by the person who contracted with the sending State.

ARTICLE 61

INVIOLABILITY OF CONSULAR ARCHIVES AND DOCUMENTS

The consular archives and documents of a consular post headed by an honorary consular officer shall be inviolable at all times and wherever they may be, provided that they are kept separate from other papers and documents and, in particular, from the private

correspondence of the head of a consular post and of any person working with him, and from the materials, books or documents relating to their profession or trade.

ARTICLE 62

EXEMPTION FROM CUSTOMS DUTIES

The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all Customs-duties, taxes, and related charges other than charges for storage, cartage and similar services on the following articles, provided that they are for the official use of a consular post headed by an honorary consular officers coat-of-arms, flages, signboards, seals and stamps, books, official printed matter, office furniture, office equipment and similar articles supplied by or at the instance of the sending State to the consular post.

ARTICLE 66

EXEMPTION FROM TAXATION

An honorary consular officer shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending State in respect of the exercise of consular functions.

ARTICLE 67

EXEMPTION FROM PERSONAL SERVICES AND CONTRIBUTIONS

The receiving State shall exempt honorary consular officers from all personal services and from all public services of any kind whatsoever and from military obligations such as those connected with requisitioning military contributions and billeting.

CHAPTER IV- General Provisions

ARTICLE 70

EXERCISE OF CONSULAR FUNCTIONS BY DIPLOMATIC MISSIONS

1. The provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission.
2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry of Foreign Affairs of the receiving State or to the authority designated by that Ministry.
3. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 of this Article shall continue to be governed by the rules of international law concerning diplomatic relations.

ARTICLE 71

NATIONALS OR PERMANENT RESIDENTS OF THE RECEIVING STATE

1. Except in so far as additional facilities, privileges and immunities may be granted by the receiving State, consular officers who are nationals of or permanently resident in the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in

respect of official acts performed in the exercise of their functions, and the privilege provided in paragraph 3 of Article 44.

2. Other members of the consular post who are nationals of or permanently resident in the receiving state and members of their families, as well as members of the families of consular officers referred to in paragraph 1 of this Article, shall enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State. Those members of the family members of the consular post and those members of the private staff who are themselves nationals of or permanently resident in the receiving State shall likewise enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State.

Annexure "C"

Havana Convention on Diplomatic Officers, 1928

The Governments of the Republics represented at the Sixth International Conference of American States, held in the city of Habana, Republic of Cuba, the year 1928, being aware that one of the most important matters in the field of international relations is that pertaining to the rights and duties of diplomatic officers, which should be regulated in accordance with the conditions of economic, political and international life of nations;

Realizing the desirability that such regulation be effected pursuant to the new trends on the matter;

Recognizing that diplomatic officers do not in any case represent the person of the chief of State but only their Government and that they must be accredited to a recognized Government, and acknowledging the fact that diplomatic officers represent their respective States and should not claim immunities which are not essential to the discharge of their official duties, and acknowledging also that it would seem desirable that either the officer himself or the State represented by him renounce diplomatic immunity whenever touching upon a civil action entirely alien to the fulfillment of his mission;

There being no possibility, nevertheless, at the present moment, of agreeing to general stipulations which although forming a well-defined trend in international relations sometimes conflict with the established practices of various States in a contrary sense;

Therefore and until a more complete regulation of the rights and duties of diplomatic officers can be formulated;

Have decided to conclude a Convention incorporating the principles generally accepted by all nations, and have designated the following Plenipotentiaries:

[Here follow the names of the plenipotentiaries.]

Who, after having deposited their full powers, found to be in good and due form, have agreed on the following provisions:

ARTICLE 1. – General provision

States have the right of being represented before each other through diplomatic officers.

SECTION I

Chiefs of mission

ARTICLE 2. Diplomatic officers are classed as ordinary and extraordinary. Those who permanently represent the Government of one State before that of another are ordinary. Those entrusted with a special mission or those who are accredited to represent the Government in international conferences and congresses or other international bodies are extraordinary.

ARTICLE 3. Except as concerns precedence and etiquette, diplomatic officers, whatever their category, have the same rights, prerogatives and immunities. Etiquette depends upon diplomatic usages in general as well as upon the laws and regulations of the country to which the officers are accredited.

ARTICLE 4. In addition to the functions indicated in their credentials, ordinary officers possess the attributes which the laws and decrees of the respective countries may confer upon them. They should exercise their attributes without coming into conflict with the laws of the country to which are accredited.

ARTICLE 5. Every State may entrust its representation before one or more governments to a single diplomatic officer. Several States may entrust their representation before another to a single diplomatic officer.

ARTICLE 6. Diplomatic officers, duly authorized by their governments, may, with the consent of the local government, and upon the request of a State not represented by an ordinary officer before the latter Government, undertake the temporary or accidental protection of the interests of the said State.

ARTICLE 7. States are free in the selection of their diplomatic officers, but they may not invest with such functions the nationals of a State in which the mission must function, without its consent.

ARTICLE 8. No State may accredit its diplomatic officers to other States without previous agreement with the latter. States may decline to receive an officer from another or, having already accepted him, may request his recall, without being obliged to state the reasons for such a decision.

ARTICLE 9. Extraordinary diplomatic officers enjoy the same prerogatives and immunities as ordinary ones.

SECTION

II

Personnel of missions

ARTICLE 10. Each mission shall have the personnel determined by its Government.

ARTICLE 11. When diplomatic officers are absent from the place where they exercise their functions or find it impossible to discharge them, they shall be substituted for temporarily by persons designated for that purpose by their Government.

SECTION

III

Duties of diplomatic officers

ARTICLE 12. Foreign diplomatic officers may not participate in the domestic or foreign politics of the State in which they exercise their functions.

ARTICLE 13. Diplomatic officers shall, in their official communications, address themselves to the Minister of Foreign Relations or Secretary of State of the country to which they are accredited. Communications to other authorities shall also be made through the said Minister or Secretary.

SECTION

IV

Immunities and prerogatives of diplomatic officers

ARTICLE 14. Diplomatic officers shall be inviolate as to their persons, their residence, private or official, and their property. This inviolability covers:

- a) All classes of diplomatic officers;
- b) The entire official personnel of the diplomatic mission;
- c) The members of the respective families living under the same roof;
- d) The papers, archives and correspondence of the mission.

ARTICLE 15. States should extend to diplomatic officers every facility for the exercise of their functions and especially to the end that they may freely communicate with their governments.

ARTICLE 16. No judicial or administrative functionary or official of the State to which the diplomatic officer is accredited may enter the domicile of the latter, or of the mission, without his consent.

ARTICLE 17. Diplomatic officers are obliged to deliver to the competent local authority that requests it any person accused or condemned for ordinary crimes, who may have taken refuge in the mission.

ARTICLE 18. Diplomatic officers shall be exempt in the State to which they are accredited:

1. From all personal taxes, either national or local;
2. From all land taxes on the building of the mission, when it belongs to the respective government;
3. From customs duties on articles intended for the official use of the mission, or for the personal use of the diplomatic officer or of his family.

ARTICLE 19. Diplomatic officers are exempt from all civil or criminal jurisdiction of the State to which they are accredited; they may not, except in the case when duly authorized by their government, waive immunity, be prosecuted or tried unless it be by the courts of their own country.

ARTICLE 20. The immunity from jurisdiction survives the tenure of office of diplomatic officers in so far as regards actions pertaining thereto; it may not, however, be invoked in respect to other actions except while discharging their diplomatic functions.

ARTICLE 21. Persons enjoying immunity from jurisdiction may refuse to appear as witnesses before the territorial courts.

ARTICLE 22. Diplomatic officers enter upon the enjoyment of their immunity from the moment they pass the frontier of the State where they are going to serve and make known their position.

The immunities shall continue during the period that the mission may be suspended, and, even after it shall be terminated, for the time necessary for the officer to be able to withdraw with the mission.

ARTICLE 23. Persons belonging to the mission shall also enjoy the same immunities and prerogatives in the States which they cross to arrive at their post or to return to their own country, or in a State where they may casually be during the exercise of their functions and to whose Government they have made known their position.

ARTICLE 24. In case of death of the diplomatic officer, his family shall continue to enjoy the immunities for a reasonable term, until they may leave the State.

SECTION

V

Termination of the Diplomatic Mission

ARTICLE 25. The mission of the diplomatic officer ends:

1. By the official notification of the officer's Government to the other Government that the officer has terminated his functions;
2. By the expiration of the period fixed for the completion of the mission;
3. By the solution of the matter, if the mission had been created for a particular question;
4. By the delivery of passports to the officer by the Government to which he is accredited;
5. By the request for his passports made by the diplomatic officer to the Government to which he is accredited.

In the above mentioned cases, a reasonable period shall be given the diplomatic officer, the official personnel of the mission, and their respective families, to quit the territory of the State; and it shall be the duty of the government to which the officer was accredited to see that during this time none of them is molested nor injured in his person or property. Neither the death or resignation of the head of the State nor the change of government or political regime of either of the two countries shall terminate the mission of the diplomatic officers.

ARTICLE 26. The present Convention does not affect obligations previously undertaken by the contracting parties through international agreements.

ARTICLE 27. After being signed, the present Convention shall be submitted to the ratification of the signatory States. The Government of Cuba is charged with transmitting authentic certified copies to the Governments for the aforementioned purpose of

ratification. The instrument of ratification shall be deposited in the archives of the Pan American Union in Washington, the Union to notify the signatory governments of said deposit. Such notification shall be considered as an exchange of ratifications. This Convention shall remain open to the adherence of the non-signatory States.

In witness whereof, the afore-named Plenipotentiaries sign the present Convention in Spanish, English, French and Portuguese, in the city of Habana, the 20th day of February, 1928.