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Islamic Diplomatic Law and International Diplomatic Law: A Quest for Compatibility

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ABSTRACT

Most literatures on international law have been observed to neglect or give scanty attention to the contribution of Islamic law towards the development of modern international law, particularly the principles relating to the diplomatic immunity and privileges. It has often been maintained, especially by some Western commentators that there is no modicum of materiality between Islamic *siyar* and the rules of conventional international law; as such, Islamic law has nothing to offer the international legal system. The current spades of global terrorism which are allegedly perpetrated in the name of Islam against diplomatic institutions have further widened this perceived incongruity between the two legal regimes. This study therefore critiques and also evaluates the exactitude of the contention that the sources of the two legal regimes are incompatible. This study equally examines the compatibility in the diplomatic principles between Islamic diplomatic law and international diplomatic law. It also contends that the attacks on diplomats and diplomatic facilities are antithetical to the classical principles of *jihaad* and Islamic diplomatic law. It further argues that the need to harmonise the two legal systems and have a thorough cross-cultural understanding amongst nations generally with a view to enhancing unfettered diplomatic cooperation should be of paramount priority.

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TABLE OF CONTENTS

Pages

TABLE OF CASES

- Empson v. Smith (1996) 1 Q.B. p. 426
- Empson v. Smith (1996) 1 Q.B. p. 426
- Factory at Chorzow (Germ. V. Pol.), 1928 P.C.I.J. Reports, (ser. A), No. 17 (Sept. 13), p. 29
- Ghulam v. United States Agency for International Development (USAID) Mission, Islamabad (1986) 19 SCMR (SC) 907 (Pak.)
- Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275
- Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112
- Maritime Delimitation in the area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993, Pp. 211-279
- Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United
- Mosul Boundary case PCIJ Reports, (ser. B), No. 12 (1925), p.32
- Nauru v Australia (jurisdiction) I.C.J. Reports 1992 240
- North Sea Continental Shelf cases, ICJ Reports, 1969, pp. 3, 49–50. See also Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment I.C.J. Reports 1982, p. 18
- North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3
- Nottenbohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955, p. 4
- Parkinson v. Potter (1885) 16 Q.B.D. p. 152
- Qureshi v. Union of Soviet Socialist Republic PLD (1981) SC 377
- Re: Islamisation of Laws Public Notice No. 3 of 1983 PLD (1985) Federal Shariat Court 344
- Reparation for Injuries Suffered in the Service of United Nations, Advisory Opinion: I.C.J. Reports 1949, p. 174
- Reservation to the Convention on the Prevention and the Punishment of the Crime of Genocide, Advisory Opinion I.C.J. Reports 1951, p. 15
- S. S. Lotus (France v. Turkey) 1927 PCIJ (ser. A) No. 10, p. 4

- S. S. Wimbledon (Great Britain, France, Italy and Japan v. Germany), 1923 PCIJ (ser. A) No. 1, p. 15
- Saudi Arabia v. Arabian American Oil Company (ARAMCO) (1963) 27 I.L.R. p. 117
- Sher Zaman v. The State (1977) P.Cr.L.J. (Lahore), p. 686
- States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14
- The Government of the State of Eritrea v. The Government of the Republic of Yemen 119 ILR, p. 417.
- The King v. Goerchy (1765) 96 Eng. Rep. 315
- The Schooner "Exchange" v. M'Faddon (1812)11 US (7 Cranch) p. 116
- United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3
- United States v. Hand Moore, Digest, Vol. VI, p. 62
- Wilson v. Blanco (1889) 4 N. Y. S p. 714

TABLE OF TREATIES AND STATUTES

Treaties:

- Arab Convention on the Suppression of Terrorism, 1998
- Charter of the United Nations, 1945
- Convention of the Immunities and Privileges of the Organization of Islamic Conference, 1976
- Convention of the Organization of Islamic Conference on Combating International Terrorism, 1999
- Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Internationally Protected Persons, 1973
- Convention on the Suppression of Financing of Terrorism, 1999
- Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance, 1971
- European Convention on the Suppression of Terrorism, 1977
- Geneva Convention for the Prevention and Punishment of Terrorism, 1937
- International Convention for the Suppression of Acts of Nuclear Terrorism, 2005
- International Convention for the Suppression of Terrorist Bombings, 1997
- Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971
- New York Convention Against the Taking of Hostages, 1979
- OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, 1971
- Organisation of African Unity Convention on the Prevention and Combating of Terrorism, 1999
- Permanent Neutrality and Operation of Panama Canal Treaty, 1978

- South Asian Association for Regional Cooperation's Regional Convention on the Suppression of Terrorism, 1987
- The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970
- Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963
- Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran, 1955
- Vienna Convention on Consular Relations, 1963
- Vienna Convention on Diplomatic Relations, 1961
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986
- Vienna Convention on the Law of Treaties, 1969

Statutes:

- Charter of the United Nations , 1945
- Diplomatic and Consular Privileges Act, 1972 (Pakistan)
- Diplomatic Privileges Act of 1708 (United Kingdom)
- Diplomatic Privileges Act, 1964 (United Kingdom)
- Pakistan Code of Criminal Procedure, 1898
- Pakistan Penal Code, Act XLV of 1860
- Statute of International Court of Justice, 1945

ABBREVIATIONS

AJISS -- -- --	The American Journal of Islamic Social Sciences
AJSS -- -- --	Asian Journal of Social Sciences
Am. J. Comp. L --	American Journal of Comparative Law
Am. J. Int'l. L. --	American Journal of International Law
Am. U. J. Int'l. L. & Pol'y	American University Journal of International Law and Policy
Anglo-Am. L. Rev. --	Anglo-American Law Review
ASILP -- -- --	American Society of International Law Proceedings
B. U. Int'l L. J. --	Boston University International Law Journal
Brit. Y. B. Int'l L. --	British Yearbook of International Law
Brook J. Int'l L --	Brook Journal of International Law
Cal. L. Rev. -- --	California Law Review
Cardozo L. Rev --	Cardozo Law Review
Colum. L. Rev. --	Columbia Law Review
Conn. L. Rev. -- --	Connecticut Law Review
Denv. J. Int'l. L. and Pol'y	Denver Journal of International Law and Policy
HICJ -- -- --	Harvard International Club Journal
HJIL -- -- --	Houston Journal of International Law,
I.L.C. -- --	International Law Commission
I.C.J -- --	nternational Court of Justcie
ICLQ -- -- --	International & Comparative Law Quarterly
ILR -- --	International Law Report
ILS -- -- --	Islamic Law and Society
Indian J Int'l L --	Indian Journal International Law
Int'l & Comp L. Q --	International and Comparative Law Quarterly
Islamabad LR-- --	Islamabad Law Review
JCSL -- -- --	Journal of Conflict and Security Law
JIL -- -- --	Journal of Islamic Law
LIM -- -- --	Legal Information Management
Man. L. J. -- --	Manitoba Law Journal
O.I.C -- -- --	Organisation of Islamic Cooperation
S.I.C.J -- --	Statutes of International Court of Justice
TILJ -- -- --	Texas International Law Journal
Tul. L. Rev -- --	Tulane Law Review
UN --	United Nations
Uni. St TLJ -- --	University of St. Thomas Law Journal
Vand. J. Transnat'l L--	Vanderbilt Journal of Transnational Law
VJIL -- -- --	Virginia Journal of International Law
Wash. & Lee L. Rev --	Washington and Lee Law Review
Y.B. Int'l L. Comm'n --	Yearbook of International Law Commission

CHAPTER ONE

INTRODUCTION

1.1 General Background

The perennial nature of the concept of according respect and giving protection to the persons of envoys of other communities and nations is attested to by history of ancient times. It has, however, been speculated that the practice of protecting the envoys from attacks and personal injuries has been in existence from time immemorial.[1] Various studies into the history of ancient civilisations whether in Asia, Middle East, Ancient Near East, Africa, Europe or North America have always revealed the high degree of inviolability attached to the personality of foreign messengers.[2] The concept of immunities and inviolability of diplomatic envoys is recognised by various religious beliefs; sanctioned by customs; and fortified by reciprocity.[3] Historically, most religions have underscored the essence of the inviolability of envoys to the extent that attack on the persons of ambassadors was condemned as an impious act.[4] With this, therefore, no particular civilisation, nation or community can possibly claim to be the sole originator of this universally acknowledged concept.

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[1] See JC Barker, *The Protection of Diplomatic Personnel,* (Ashgate Publishing Limited, England 2006), p.29 while referring to the work of Harold Nicolson that it is not beyond probability that the communities of the cave-dwelling anthropoid apes would have by diplomatic means resolved amongst one another a day's battle. Nicolson, *Diplomacy* (2nd edn., Oxford University Press, Oxford 1969), p. 6

[2] LS Frey and ML Frey, *The History of Diplomatic Immunity,* (Ohio State University Press, Columbus, Ohio 1999), p. 3

[3] Ibid., p. 4

[4] Ibid., p.12

The need to give respect and protection to foreign representatives of other sovereigns constituted the bedrock of the law of nations of ancient times just as it does in today's international law. Meaningful negotiations between sovereign polities have been made possible by the instrumentality of diplomatic protection, the essence of which need not be overstressed.

Hardly can any nation or community survive isolating itself from others, particularly in this era where globalisation is fast becoming, if not already become, the new world order. The significant role of the diplomatic personnel, at a period like this, cannot be undermined.[5] This is so because the task of developing, formulating and implementing states' foreign policies heavily rest on the shoulders of the diplomatic personnel. In the same vein also, detailed analysis of contemporary issues emanating from different parts of the world are often carried out by the diplomats being one of its essential responsibilities.[6] The sensitive nature of the office of a diplomat and the enormous task attached to the office require that adequate protection be put in place for the person of the diplomat, his family and also the diplomatic mission. The amount of protection given to diplomatic agents stems from the great importance past civilisations attach to the need for nations to remain in

[5] See Article 3 of the 1961 Vienna Convention on Diplomatic Relations (hereinafter referred to as 'VCDR'). This Convention came into force on 24 April, 1964 and was done in Vienna, Austria. The choice of Vienna as the venue of the Convention was informed by the fact that it played host to the very first international Conference on the status of diplomatic agents in 1815. See LS Frey and ML Frey, op cit., *p.480;* See United Nations, Treaty Series, vol. 500, p. 95 available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf [accessed 12 October, 2008]. See also Article 5 of the 1963 Vienna Convention on Consular Relations (hereinafter referred to as 'VCCR'). This Convention was also done at Vienna and came into force on 19 March, 1967; see United Nations, Treaty Series, vol. 596, p. 261 available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf [accessed 12 October, 2008]

[6] JC Barker, op cit., (2006) p.16

constant communication and unimpaired interrelations. And for this to be, it is only imperative that the diplomatic establishment must not be left unprotected.

Respect is accorded to the inviolability of envoys even by warring nations. This, at least enables them to maintain contacts with their enemies. The need for communication between sovereign entities also underscores the importance of giving proper protection to the envoys. This has today, taken the form of permanent diplomatic and consular establishments in virtually all capital cities. This sacrosanct position of diplomatic envoys has been succinctly described by the International Court of Justice (hereinafter referred to as 'ICJ') thus:

> There is no fundamental requisite for the conduct of diplomatic relations between states . . . than the inviolability of diplomatic envoys and embassies, so that throughout history, nations of all creeds and cultures have observed reciprocal obligations for that purpose…[7]

In the same way, the inviolability and immunities of diplomatic envoys have long been recognised and freely observed under Islamic law. This was demonstrated, for instance, by Prophet Muhammad (pbuh)[8] during the

[7] *US Diplomatic and Consular Staff in Tehran* (1980) ICJ Rep. 3 at 42 para 91

[8]This abbreviation (pbuh) that means 'Peace be upon him' is the translation of the Arabic eulogy used after the name of Prophet Muhamad

famous *Treaty of Hudaybiyyah (628 AD)*,[9] when one Abu Raafi'i, a Quraysh, representing the Makkans at a meeting indicated his intention to revert to Islam. There and then, Prophet Muhammad (pbuh) told him thus:

> I do not break a covenant or imprison envoys [you are an ambassador], but return, and if you feel the same as you do just now, come back.[10]

With this, Prophet Muhammad (pbuh) not only recognised the sanctity of the ambassadorial post of the envoy not to be detained, but that host countries should not take advantage of envoys residing in their territory for their own benefit.

There is no record of any past civilisation or nation where the desecration of the inviolability of the envoy was institutionalised or to say the least, tolerated. This must not, however, be understood to mean that foreign agents in the early period were freer from attacks than today. Far from it!

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[9] It is also known as *'Sulh al-Hudaybiyyah'*. It is the treaty that was signed between the state of Madina as *represented* by Prophet Muhammad on the one hand and the Quraysh tribe of Makkah as represented by Suhayl bin 'Amr on the other hand. The treaty was signed in March, 628 CE at a place called *al-Hudaybiyyah* which was on the edge of the sacred territory of Makkah. See, WM Watt, *Muhammad at Medina,* (Oxford University Press, Karachi, Pakistan 1981), Pp. 46-52; see also, Sh. Safiur-Rahman Al-Mubarakfuri, 'Al-Hudaibiyah Treaty', http://www.islaam.com/Article.aspx?id=461 (accessed 3 December 2008) The treaty of *Hudaybiyyah* is usually considered as a *locus classicus* when talking about diplomacy in Islamic law because, in the words of Bassiouni, 'its negotiating history demonstrate the sanctity of emissaries, that a violation of an amassador's immunity is a *casus belli,* and that no ambassador may be detained or harmed. See, MC Bassiouni, 'Protection of Diplomats Under Islamic Law' (1980), 74, No.3, AJIL, p.611

[10]Partial Translation of Sunan Abu-Dawud, Book 14, Jihad (Kitab al-Jihad), Hadith Number 2752 http://www.muslimaccess.com/sunnah/hadeeth/abudawud/014.html [accessed 12 September, 2011]. See also M Hamidullah, *Muslim Conduct of State,* (Sh. Muhammad Ashraf Publishers, Lahore, Pakistan 1961), p. 148

Considering the peculiarity of the concept of diplomatic inviolability to nearly all known civilisations, one may therefore want to ask: why are diplomatic missions and personnel still subjects of terrorist attacks? Many reasons have been canvassed for what appears to be responsible for these violent attacks. For instance, a one time British diplomat who was also a victim of an attempted kidnap attributed the reason for these gruesome attacks to 'the special status of the diplomatic agent'.[11] Also, violence against diplomatic agents, according to Barker, could be politically motivated by those protesting against the policies of either the sending State or the receiving State.[12] These terrorist attacks range from the minor to the meanest, such as kidnapping[13] and killing[14] of diplomatic personnel and seizure of embassies.[15]

It would not be a stretch to say that a healthy diplomatic mission along with threat-free diplomatic personnel will, in no small way, contribute towards the guarantee of enduring international diplomatic relations. Crimes, such as

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[11] G. Jackson, *Concorde Diplomacy: The Ambassador's Role in the World Today,* (Hamish Hamilton, 1981), Pp.92-3

[12] JC Barker, op cit., (2006), p.15

[13] On the 22nd of September, 2008, Mr. Abdul Khaliq Farahi, the Afghanistan ambassador designate to Pakistan was kidnapped by gunmen who also killed his driver. See http://www.thenews.com.pk/daily_details.asp?id=137541 [accessed on the 29/03/2009]. Less than two months thereafter, on the 13th of November, 2008, another diplomat, Heshmotollah Attarzadeh Niyaki (Commercial Attaché to the Iranian Peshawar Consulate, Pakistan) was again abducted by gunmen after killing the policeman assigned to guard him. See also http://www.alertnet.org/thenews/newsdesk/SP376391 [accessed on 29/03/2009]

[14] The dual terrorist bomb attacks on the United State Embassies both in Kenya and Tanzania on 7 August, 1998 where over 220 lives were lost and about 4,000 others wounded is recorded to be the most devastating attack to be unleashed on the diplomatic missions. See JC Barker, op cit., p. xi. On the 4th of June, 2006 a Russian diplomat (Vitaly Vitalyevich Titov) was shot dead in Baghdad while other four diplomatic employees were abducted. See http://www.foxnews.com/story/0,2933,198054,00.html [accessed on 29/03/2009]. In August, 2008 there was an attempt on the life of the Head of the United States Consulate in North western Pakistan, Lynne Tracy http://www.foxnews.com/wires/2008Aug26/0,4670,Pakistan,00.html [accessed on 29/03/2009]

[15] The 1979 seizure and detention of the United States Diplomatic staff in Tehran.

murder, kidnap and arson against diplomatic agents and diplomatic facilities constitute a serious threat to international peace and security. Recognising the danger embedded in the terrorist attacks on diplomats and diplomatic missions, a good number of multilateral conventions were initiated and drafted, prominent among which are: the 1971 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance[16] and the 1973 Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Internationally Protected Persons.[17] It is rather disturbing that in spite of the current positive developments made by most States in criminalizing terrorist acts in their domestic laws and regulations,[18] terrorist activities particularly against diplomats and diplomatic missions can still not be said to have abated. Can the reason for these attacks on diplomats and diplomatic missions be attributable to inadequacies in the Conventions or absence of international cooperation? Or should we just throw our hands in the air and conclude that the 'terrorists, whether they argued for the reinstatement of old laws and customs or for the destruction of the existing system to pave the way for a newer, more utopian order, no longer heeded the old taboos.'[19] Either of these questions will have to be looked into with a view to proffering answers to them; bearing in mind the fact that terrorist

[16] This Convention was signed in February 2, 1971 and came into force in 1973 See http://treaties.un.org/doc/db/Terrorism/Conv16-english.pdf
[17] The Convention was signed in December 14, 1973 and came into force in 1977 See http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf
[18] United Nations Security Council Letter dated 17 August 2011 from the Chair of the Security Council Committee establish pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the Secretary-General, (UN Doc. S/2011/463), para. 12
[19] LS Frey and ML Frey, op cit., (1999), p.508

outbursts are mostly precipitated, as observed, by disruptive conditions, rapid economic change, and political instability[20]

What has now attracted a major concern amongst the Islamic law scholars is the rate at which Islam has now been stigmatised with terrorism, most especially, after the September 11, 2001 incidence.[21] It could however, be argued that the misinterpretation and misapplication of the rules of *jihaad* by few Muslim groups that are often, non-state actors seem to justify the position of those who impute terrorism to Islam. In the same vein, it could also be further argued that the gross misperception of the entire concepts of *jihaad* in relation to Islamic international law[22] by some non-Muslims remains a major problem. This problem was rightly depicted by Esposito when he gives an example of an American Senate leader who confessed that 'I know a lot about many things but nothing about Islam and the Muslim world – and neither do most of my colleagues.'[23] Another issue of great concern which falls under the search light is the rampancy of the acts of terrorism directed at diplomats and diplomatic missions, most especially within the Muslim States which are often carried out by individual or group of individuals in the name of Islam.[24]

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[20] Ibid Pp. 507-508

[21] K Dalacoura, 'Violence, September 11 and the Interpretations of Islam', (2002), 16, International Relations, p.269

[22] The meaning of Islamic international law is given at Pp. 4-43 of this dissertation.

[23] JL Esposito, *Unholy War: Terror in the Name of Islam,* (Oxford University Press, Inc., New York 2002), p.120

[24] Ibid p.151 If one carefully follows records of terrorist attacks in recent times, one may be favourably inclined towards Esposito's submission that: "In recent years, radical groups have combined nationalism, ethnicity, or tribalism with religion and used violence and terrorism to achieve their goals: Serbs in Bosnia, Hindu Nationalist in India, Tamil and Sinhalese in Sri Lanka, Jewish fundamentalist in Israel, Christian extremists in the United States. However the

Diplomatic inviolability and immunities, being an age-long concept of international law, have received academic contributions from both the classical writers as well as the modern writers.[25] For instance, Hugo Grotius (1583-1645) who is believed to be the father of international law says in his famous treatise, *De Jure Belli ac Pacis*[26] regarding the rationale behind the diplomatic immunity enjoyed by an ambassador that:

> . . . it is natural to suppose, that nations have agreed, in the case of ambassadors, to dispense with that obedience, which every one, by general custom, owes to the laws of that foreign country, in which, at any time, he resides. The character which they sustain, is not that of ordinary individual, but they represent the Majesty of the Sovereigns, by whom they are sent, whose power is limited to no local jurisdiction.[27]

Mattingly also writes while analysing the work of Bernard du Rosier (1404-1475) on the immunity and personal inviolability of diplomatic envoys that:

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most widespread examples of religious terrorism have occurred in the Muslim world." Also see DA Shawartz, 'International Terrorism and Islamic Law' (1991), 29, Colum. J. Transnat'l L., p.630. "International terrorism is a global challenge. Most significantly, a substantial number of terrorist acts are perpetrated by or upon Muslims, or within Islamic lands." It must however, be pointed out that this does not and cannot justify the imputation of terrorism to Islam.

[25] E Young, 'The Development of the Law of Diplomatic Relations', (1964), 40, Brit. Y. B. Int'l L., p.147 In acknowledging numerous treatises that had been produced on diplomatic relations, this article refers to such names as Pierre Ayrault, Gentili, Jean Hotman and Grotius alongside their remarkable works that were produced between the sixteenth and early seventeenth centuries. Whereas, Shaybani's treatise on the Islamic law of nations, which includes diplomatic relations, was produced about 800 years before the works of these writers. See, MA Boisard, 'On the Probable Influence of Islam on Western Public and International Law', (1980), 11, No.4, Int. J. Middle East Stud., Pp.447-448

[26] H Grotius, *De Jure Belli ac Pacis, Published 1625,* (Classics of International Series, Ed. Scott, 1925)

[27] Ibid, Section 4

> Ambassadors are immune for the period of their embassies, in their persons and in their property, both from actions in courts of law and from all other forms of interference. Among all peoples, in all kingdoms and lands, they are guaranteed complete freedom in access, transit and egress, and perfect safety from any hindrance or violence.[28]

In the same vein, Shaybani, the father of Islamic international law, says in his *magnum opus, 'Kitab al-Siyar al-Saghir,*[29] regarding the need to treat a foreign envoy with respect once he carried with him a letter of credence in the following words:

> If a Harbi is found in the Territory of Islam and claims to be an emissary and produces a letter from his King to this effect, he will be provided security if the letter is confirmed to be really from the King. He will be secure till he delivers the message and returns [to his territory].[30]

It has however, been observed that most of these contributions, particularly by western scholars, surrounding the development of this ancient but fundamental branch of international law give much credence to the influence

[28] G Mattingly, *Renaissance Diplomacy,* (Jonathan Cape, London 1955), p. 45
[29] MA Ghazi Trans., *Kitab al-Siyar al-Shaybani – The Shorter Book on Muslim International Law* (Adam Publishers and Distributors, New Delhi 2004)
[30] Ibid, p. 63

of the Greek and Roman civilizations without giving a deserving attention to the contribution of the Islamic civilization.[31] Although, diplomatic mission in the early part of Islam was not permanent as we have it today. It was temporary because emissaries at that time were usually despatched to foreign lands to give notice of alternative options before the commencement of hostilities and to resolve post-war problems.[32] But by the twelfth century, Islam had already put in place permanent representation in the form of the modern day consulates. While prior to the twelfth century, legation in a permanent form was unknown to the West.[33] The idea of sending emissary abroad with all the power to represent the State in the form of modern diplomacy started in Italy (the Republic of Venice) in the late fifteenth century.[34]

It has been observed that some writers, especially in the field of international law, do not see any congruity between the classical concept of Islamic international law and modern norms of international law.[35] Consequently, they give scant recognition to the legal position of diplomatic relations under

[31] MA Boisard, op cit., (1980), p.430 esp. p.446
[32] S Mahmassani, 'The Principles of International Law in The Light of Islamic Doctrine', in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p.264-265
[33] Ibid., 265; See, MA Boisard, op cit., (1980), p.442
[34] See, T Hampton, 'The Diplomatic Moment: Representing Negotiation in Early Modern Europe', (2006), 67:1, MLQ, Pp. 82-83
[35] See CA Ford, 'Siyar-ization and Its Discontents: Intenationla Law and Islam's Constitutional Crisis', (1995) 30 TILJ p.500. See also M Berger, 'Islamic Views on International Law' in P Meerts (ed), *Culture and International Law* (Hague Academic Coalition, The Hague 2008) p.107; DA Westbrook, 'Islamic International Law and Public International Law: Separate Expressions of World Order', (1992-1993) 33 VJIL p.883 and AI Bouzenita, 'The *Siyar* – An Islamic Law of Nations?', (2007) 35 AJSS, p. 44

Islamic law. They have also given the so-called dichotomisation of the world into *dar al-Islaam*[36] (abode of peace) and *dar al-harb*[37] (abode of war) a fundamental justification against a permanent peaceful diplomatic relations between the Muslim world and the rest of the world.

1.2 Research Question

The main research question has to do with the compatibility between Islamic diplomatic law and international diplomatic law which further leads to the following inquiries: i) To what extent is Islamic diplomatic law, especially with the *Treaty of Hudaybiyyah 628 AD* which is regarded as a model of Islamic diplomatic law,[38] compatible with international diplomatic law? ii) How do Muslim States conduct diplomatic relations with non-Muslim states and also amongst themselves? iii) How do Muslim States treat the violation of diplomatic law particularly by non-state actors in the name of *jihaad*?

1.2.1 Whether and To What Extent Is Islamic Diplomatic Law Compatible with International Diplomatic Law?

This question requires comparing a set of main principles of Islamic diplomatic law with the principles of international diplomatic law such as the

[36] This literally means the abode or house of Islam and technically it refers to a domain where power lies with the Muslims, the rules of Islam implemented and Islamic rituals performed without any inhibition. See Sheikh Wahbeh al-Zuhili, 'Islam and International Law', (2005), 87, No. 858, Int'l Review of the Red Cross, p. 278

[37] This literally means the abode or house of war. But technically it refers to the relationship between an Islamic state and neighbouring non-Muslim states with which it has not signed a peace treaty or pact. See *The Encyclopaedia of Islam*, New Edition, (Brill, Leiden), Vol. 2, p. 126

[38] See PS Smith, 'Of War and Peace: The Hudaibiya Model of Islamic Diplomacy' (2006) 18 Fla. J Int'l. L. 167

immunities and inviolability of diplomatic agents; concept of treaties (*mu'aahadaat*) as it relates to the principle of *pacta sunt servanda*; the concept of *aman* (safe conduct); the legal principle of reciprocity. This question, in a sense, is a comparison of substantive principles of diplomatic law in the two legal systems: Islamic law and international law. It is argued that the foundational principles in Islamic diplomatic law and international diplomatic law are compatible. However, if there are incompatibilities, a detailed procedures on how to resolve the differences between the two legal systems leading to harmonised interpretation and application are laid down in chapter 3. For instance, the principle of *maslahah* which is generally translated to mean 'public welfare' or 'public interest' could be resorted to as a reconciliatory concept in a situation where the principles of Islamic diplomatic law and international diplomatic law appear to be incompatible. In Islamic jurisprudence, recourse can be made to the principle of *maslahah*, that is by making rules based on the general interests of the Muslim community where there are no applicable provisions in the primary sources of Islamic law – the Qur'an and the Sunnah.[39] It must be borne in mind that while applying the principle of *maslahah*, it must not run contrary to the fundamental objectives of the Shari'ah (*maqaasid al-Shari'ah*).

[39] See NA Shah, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan,* (Routledge, Aningdon, 2011), p. 16

Meanwhile, Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties[40] (hereinafter referred to as 'VCLT'), empowers the judges of the International Court of Justice or International Tribunal to give consideration to relevant external sources while interpreting international norms. This, in the words of Tzevelekos, 'should always be done following the so-called "principles of harmonization," according to which, when a plurality of norms affects the same subjects the interpretation should always attempt to achieve conciliation.'[41] International law also allows interpretive declarations and reservations to be entered at the time of signature and accession, subject to the compatibility with the object and purpose test of a given treaty.[42] A reservation will be presumed to have been entered once a statement purports to exclude or modify the legal effect of a treaty in its application to the State.[43]

Before we get to the comparative study of the substantive principles, it is important to clarify some definitional issues and mention how both legal systems evolved over centuries and what are their main sources. This will require the evolutionary study of Islamic diplomatic law and international

[40] This Convention was done at Vienna on 23 May, 1969 and was entered into force on 27 January, 1980. See the United Nations, Treaty Series, vol. 1155, p. 331 also available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed [20 January, 2009]

[41] VP Tzevelekos, 'The Use Article 31 (3) (a) of the VCLT In the Case Law of the ECtHR An Effective Anti-Fragmentation Tool or Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration', (2010) 31 Michigan Journal of International Law, p. 631

[42] See Article 19 of the 1969 Vienna Convention on the Law of Treaties. The convention was entered into force on 27 January 1980 and it is contained in the United Nations, Treaty Series, vol. 1155, p. 331 See http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed on 23/08/2011]

[43] Article 2 (1) (d) of the 1969 Vienna Convention on the Law of Treaties

diplomatic law and their legal sources. Diplomatic immunity is an age-long practice that has been generally attested to among various civilisations by scholars of history and international law.[44] Right from the early days of Islam, the inviolability and immunities of diplomatic envoys have been recognised and freely observed. For instance the prophetic statement that '. . . if it were not the tradition that envoys could not be killed, I would have severed your heads,'[45] which later forms the *locus classicus* in Islamic diplomatic law is very instructive. This explains why the notion of diplomatic immunity occupies an important position in Islamic *siyar*, translated as Islamic international law. Islamic diplomatic law forms part of Islamic *siyar*.

It is generally viewed that diplomatic law is considerably sourced from the customary rules of international law.[46] However, the importance of international treaty and general principles of law as sources of international diplomatic law cannot be over-emphasised. For example, treaty has always remained functional to diplomatic law when a state agrees to accept the personnel or representative of the other State. Likewise, Islamic diplomatic law, which also forms an integral part of Islamic *siyar,* are all inseparable components of Islamic law since they share the same sources with it.[47] The divine sources are the Qur'an and the Sunnah followed by the mechanisms of

[44]See JC Barker, op cit., (2006), p. 26; Nicolson, op cit., (1969), p. 6
[45] Ibn Hisham, *As-Seeratu-n-Nabawiyyah*, (Darul Gadd al-Jadeed, Al-Monsurah), p. 192
[46] See R Higgins, *Problems and Process: International Law and How We Use it,* (OUP, Oxford 1994), Pp. 86-87; MJL Hardy, *Modern Diplomatic Law*, (Manchester University Press, Manchester 1968), p. 5
[47] See AI Bouzenita, 'The Siyar – An Islamic Law of Nations?' (2007) 35 AJSS, p. 174; S Mahmassani, op cit., p. 235; S Khatab and GD Bouma, *Democracy in Islam* (Routledge, London 2007), p. 174

ijtihaad, which are given as follows: *ijmaa*', *qiyaas*, *maslahah*, *istihsaan* and '*urf,* otherwise known as the methods and principles of Islamic law.

The sources of the two legal systems are viewed and generally examined together with a view to finding areas of compatibility by taking into account various opinions canvassed by scholars of Islamic law and international law. The possible areas of tension between the two legal systems are also discussed in a way to bring about reconciliation by harmonising the differences. Detail explanation of this is contained in chapter 3 of the study.

1.2.2 Muslim States Practice

The second inquiry will focus on the practice of some Muslim States[48] with the view to confirming the extent of their compliance with the principles of Islamic diplomatic law and international diplomatic law in their relationship

[48] It should be known that there is a difference between 'Islamic States' and 'Muslim States'. Islamic State is believed to be a country that adheres and applies fully the principles of Islamic law. While the Muslim State, on the other hand, refers to country that has a majority Muslim population. Therefore, in this study, Muslim States will mean States that are predominantly Muslim majority, which also includes States that specifically declare themselves as 'Islamic Republics' and those States that declare Islam, in their Constitutions, as the States religion. See MA Baderin, *International Human Rights and Islamic Law,* (OUP, Oxford 2003), p. 8; M Berger, op cit., (2008), Pp. 109-110; and H Moinuddin, *The Charter of the Islamic Conference and the Legal Framework of Economic Co-operation amongst its Member States: A Study of the Charter, the General Agreement for Economic, Technical, and Commercial Co-operation and the Agreement for Promotion, Protection, and Guarantee of Investments Among Member States of the OIC* (Claredon Press, Oxford 1987) p. 11. It must be noted, however, that the meaning of 'Muslim States' does not necessarily cover all the 57 States that are members of the Organisation of Islamic Cooperation (OIC), because there are some member States such as Togo, Uganda, Republic of Benin, Gabon, Mozambique and Suriname that cannot be said to have majority Muslim population. Members of the OIC are: Azerbaijan, Jordan, Afghanistan, Albania, United Arab Emirates, Indonesia, Uzbekistan, Uganda, Iran, Pakistan, Bahrain, Brunei-Darussalam, Bangladesh, Benin, Burkina-Faso, Tajikistan, Turkey, Turkmenistan, Chad, Togo, Tunisia, Algeria, Djibouti, Saudi Arabia, Senegal, Sudan, Syria, Suriname, Sierra-Leone, Somalia, Iraq, Oman, Gabon, Gambia, Guyana, Guinea, Guinea-Bissau, Palestine, Comoros, Kyrgyz, Qatar, Kazakhstan, Cameroon, Cote D'Ivoire, Kuwait, Lebanon, Libya, Maldives, Mali, Malaysia, Egypt, Morocco, Mauritania, Mozambique, Niger, Nigeria and Yemen. See the official website of the OIC http://www.oic-oci.org/member_states.asp [accessed on December 23, 2008].

with the non-Muslim States. This is important because it will form one of the foundational bases for comparison between the application of Islamic diplomatic and international diplomatic law in this study. At least, there is the need to know the extent at which the Muslim States conform with international diplomatic law in their various diplomatic interactions amongst themselves, and with other non-Muslim States.

It should be noted that most of the Muslim States have signed and ratifiedthe two globally recognised diplomatic and consular legal frameworks: the Vienna Convention on Diplomatic Relations (hereinafter referred to as 'VCDR') and Vienna Convention on Consular Relations (hereinafter referred to as 'VCCR'). As such, they are duty bound to carry out their commitments under the terms of the international treaties. The Muslim States that will be considered are the Islamic Republic of Pakistan, the Islamic Republic of Iran and Libya. For example the 2011 killing of the two Pakistanis by Raymond Davis, an American, who was considered by the United States government as having a diplomatic status; the 1979 Iranian invasion of the American Embassy in Tehran; and the 1983 shooting from the Libyan Embassy killing a British woman police officer are practical instances of how some Muslim States respond to their diplomatic responsibilities. This study will critically analyse and examine these three cases using the parameter of the principles of Islamic diplomatic law. The study will also consider whether Muslim States see any incompatibility between Islamic diplomatic law and international diplomatic law. We would need to check whether Muslim States have entered

reservations or interpretive declarations to the relevant international treaties and on what basis. If there are instances of reservations or interpretive declarations, efforts will be made to see whether the Islamic or international legal principles could be interpreted in a particular way to get a harmonised interpretation.

1.2.3 The Attacks of Muslim Armed Groups on Diplomats and Diplomatic Facilities.

While the third inquiry raises a crucial question as Muslim armed groups have attacked and continue to attack diplomatic missions and personnel. The recent killing of a Saudi Arabian diplomat and string of attacks on the United States and other Western diplomatic missions and personnel in Pakistan are typical examples. The assertion made by Kelsay and Johnson that '[not] all Muslims are prepared to reach an accommodation with public international law'[49] is not far away from the truth. This is so because there are some Muslims who strictly stand by the *Shariaʻh* to the extent that they would not accept 'the legitimacy of any non-Islamic legal system'.[50] Kelsay and Johnson further state that they 'include members of some of the radical, fundamental groups in the Muslim world'.[51] They tend to find justification in their interpretation of the concept of *jihaad* as the basis for their attacks. In their rebellion, they take up arms against Muslim State governments as well as foreign nations who support Muslim States in their efforts to suppress these

[49] AE Mayer, 'War and Peace in the Islamic Tradition and International Law' in J Kelsay and JT Johnson, *Just War and Jihad: Historical and Theoretical Perspective on War and Peace in Western and Islamic Traditions* (Green Press, New York 1991), p. 199
[50] Ibid
[51] Ibid

domestic rebellions. These rebellions are generally described as terrorism and extremism. It is important to see the response of the Muslim States to this misinterpretation and misapplication of the principles of *jihaad,* and how the Muslim States eventually treat the violation of international diplomatic law by these Muslim groups, who are mostly non-State actors. It is also important to state that the rebellious acts of these non-State actors may not inform the interpretation of international law or Islamic international law principles since they are not considered as a sovereign entity. However, the practice of non-State actors may provide evidence of how the two legal principles of diplomatic immunity are applied in and by Muslim States.

1.3 Theoretical Approaches to the Study

This study analyses the two legal systems: international diplomatic law and Islamic diplomatic law with a view of ascertaining the presence of any compatibility or tension in their respective principles. In order to further appreciate this analysis, the study acknowledges the different approaches adopted by scholars in arriving at their various conclusions. Three of these different approaches (non-compatibility approach, compatibility approach and reconciliatory approach) will be briefly discussed below:

1.3.1 Non-Compatibility Approach

The question of non-compatibility between Islamic *siyar* and international law has generated controversy among writers of international law. The exponents

of the exclusivist theoretical view argue that modern international law along with its principles do not and cannot accommodate any rules or principles of Islamic international law due to the absence of any grounds of congruency between the two legal regimes. Berger was very blunt in his view regarding the non-compatibility between the two legal systems, and he maintains that 'Islamic international law may be of great historical interest and Islamic source of inspiration for Islamic militants, but it has no relevance whatsoever for contemporary international law'.[52] Also in summarising the argument on the cognitive differences between Islamic international law and public international law, Westbrook came to the conclusion that 'Islamic law has no authoritative place for institutions, particularly nations, and institutional authority is basic to public international law. . . Islamic law takes meaning from certain narratives, and those narratives are inapposite to public international law.'[53] To make his statement very clear, he sums it up by stating that 'Islamic international law, in the sense used by the scholars surveyed here, cannot speak to international environment composed of institutions, and so cannot address the business of public international law.'[54]

The attempt of those who perceive Islamic *siyar* as being compatible in its sources-doctrine with the modern international law has been strongly criticised by Ford as attempts to 'merely whitewash genuine discrepancies

[52] M Berger, op cit., (2008), p. 107
[53] DA Westbrook, op cit., (1992-1993), p. 883
[54] Ibid

between international norms and the principle grounding the *siyar*'.[55] He further itemised areas which he sees as gronunds of non-compatibility in the following words: 'The *siyar* cannot be said to be genuinely compatible with modern international jurisprudence with respect to treaty principles, customary law, general principles of law, precedent, or even the teaching of eminent publicists.'[56] The question of whether the sources of Islamic *siyar* are incompatible with the sources-doctrine of international law, as mentioned above, is carefully considered in Chapter 3 of this study where it is argued that there are some elements of compatibility between them even though they appear incompatibility in their respective origin.

1.3.2 Compatibility Approach.

This approach is expounded by considerable number of Muslim scholars.[57] The approach emerges from the argument on how the sources of the two legal systems are perceived and how some fundamental principles of Islamic law are applied, such as the concept of *jihaad*; the concept of dividing the world into *dar al-Islaam* (abode of peace), *dar al-harb* (abode of war) and *dar as-sulh* (abode of treaty); and the law of treaties. The proponents of this approach contend that the basic principles of Islamic *siyar* are not only identical with the modern principles entrenched in international law, but that

[55] Christopher A. Ford, 'Siyar-ization and Its Discontents: International Law and Islam's Constitutional Crisis', (1995), 30, Texas Int'l Law Journal, p. 500
[56] Ibid
[57] S Mahmassani, op cit., (1968);J Rehman, *Islamic States Practices, International Law and The Threat From Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order,* (Hart Publishing, Oregon, 2005); and HM Zawati, *Is Jihad A Just War? War, Peace and Human Rights Under Islamic and Public International Law*, (The Edwin Mellen Press, Wales 2001)

they 'may even be said to be part of that doctrine or philosophy' that constitute international law.[58] They also contend that there are elements of similarities in the sources of Islamic international law and the sources of public international law as stated in Article 38(1) of the Statute of the International Court of Justice (hereinafter referred to as 'SICJ'). For instance, in the analogical deduction made by Zawati, while comparing the similarities in the two legal systems, he says that:

> The texts of international covenants may be compared to the texts of the *Holy Qur'an* and the true Prophetic *hadiths*. In many respect, the international agreements are equivalent to the treaties made by the Prophet Muhammad, the rightly-guided Caliphs (*al-Khulafa' al-Rashidun*) and later Muslim rulers. Moreover, the opinions of Western scholars often parallel the legal opinions and works issued by Muslim jurists.[59]

This study considers the compatibility approach, not to contrive a ground of absolute similarity in the sources of these two legal systems or to forge recognition and relevance for Islamic law within the contemporary international legal order. But rather, to find grounds of commonality within the doctrinal sources of diplomatic law of Islam and international diplomatic law with a view to realising for the benefit of humanity the universal principles set out in the UN Charter.

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[58] S Mahmassani, op cit., (1968), p.205
[59] HM Zawati, op cit., (2001), p. 6

1.3.3 Reconciliatory Approach

The third approach is in a way connected with the compatibility approach in the sense that where absolute compatibility is not achievable then, a reconciliatory bridge that is capable of linking the two legal systems will have to be resorted to.[60] This, in a nutshell, also explains, in addition to the compatibility approach, the approach this study may adopt.

There are many Muslim scholars and also non-Muslim writers who suggest the adoption of the reconciliatory approach. Amongst them are Shihata,[61] Khadduri,[62] Baderin,[63] Shah,[64] Badr,[65] Weeramantry[66] to mention but a few. For example, Khadduri sees the active involvement of Muslim States in the activities of the United Nations and its agents and international conferences as a demonstration that 'the *dar al-Islam* [abode of Islam] has at least reconciled itself to a peaceful co-existence with *dar al-harb* [abode of war]'.[67] It may also be correct to suggest that the participation of Muslim States in these international gathering may be as a result of embracing the third division of the world into *dar as-sulh* (abode of treaty). At least, it has long been established, in the words of Shihata, that once 'fighting ceased to be

[60] See NA Shah, *Women, The Koran and International Human Rights Law* (Martinus Nijhoff Publishers, Leiden/Boston 2006), Pp. 8-13
[61] I Shihata, 'Islamic Law and the World Community', (1962) 4 Harvard Int'l C J, p. 107
[62] M Khadduri, 'Islam and Modern Law of Nations', (1956) 50 AJIL, Pp. 370-371
[63] MA Baderin, 'The Evolution of Islamic Law of Nations and Modern International Order: Universal Peace through Mutuality and Cooperation', (2000) AJISS, p. 59
[64] NA Shah, op cit., (2006), Pp. 8-13
[65] GM Badr, 'A Survey of Islamic International Law', (1982) 76 Am. Soc'y Int'l L. Proc., p. 58
[66] CG Weeramantry, *Islamic Jurisprudence: An International Perspective,* (Macmillan, Basingstoke 1988), p. 166
[67] M Khadduri, op cit., (1956), Pp. 370-371

normal state of affairs between the two *Dars* [the two worlds], a third division [*dar as-sulh*] was formed to contain the territories which had treaty relations with Dar al Islam'.[68] Of course, international treaty plays a very important role in nations actively participating within the international community.

Also, it has been observed by Weeramantry that there is an urgent need for negotiation between 'non-Islamic' and 'Islamic' countries on a lot of matters including 'war and peace' which will facilitate a common understanding and co-operation. He cited the case of *US Diplomatic and Consular Staff in Tehran* where the American government kept referring to well-accepted principles of diplomatic immunity all from the Western law perspective, without making any reference to Islamic law which is equally 'rich in principles relating to the treatment of foreign embassies and personnel'.[69] His conclusion, however, epitomises the essence of the reconciliatory approach thus:

> Had such authority been cited by the USA, it would have had a three-fold effect: its persuasive value would have been immensely greater; it would have shown an appreciation and understanding of Islamic culture; and it would have induced a greater readiness on the Iranian side to negotiate from a base of common understanding.[70]

[68] I Shihata, op cit., (1962), p. 107
[69] CG Weeramantry, op cit., (1988), p. 166
[70] Ibid

In addition, Badr also contends that there are specific principles of Islamic *siyar* that 'lend themselves to consolidating and expanding the scope of contemporary international law.'[71] He mentions the sanctity of agreements and the rule of reciprocal treatment as the principles of Islamic *siyar* which also encompass the whole body of international law.[72]

After all, if international law of today is to remain truly international, there is a need for a 'greater participation by the other legal systems in the formulation and development' of its general principles. This becomes necessary because, as Baderin asserts, Muslim countries have 'an important role to play in the modern international order through an evolutionary interpretation and injection of the paradigmatic ideals of Islam into the pragmatic policies of the modern international order'.[73]

1.4 Significance of the Compatibility Approach

Methodological differences make the study of compatibility particularly important. Moreover, as one intends to adhere to the compatibility approach while analysing legal questions in this study, it may also become necessary to apply the reconciliatory approach to resolve legal tension if need be. However, it is important to first consider whether Islamic law is comparable with the contemporary international law. Just as domestic law has been found

[71] GM Badr, op cit., (1982) p. 58
[72] Ibid, p. 59
[73] MA Baderin, op cit., (2000), p. 59

to be comparable with international law,[74] it is also possible to have a comparative analysis between Islamic law and international law. It should be remembered that States that have adopted Islamic law as their legal system such as Saudi Arabia, Islamic Republic of Pakistan and Islamic Republic of Iran considered it as their domestic law as well. Islamic law, though, seen as a religious law due to the Qur'an and *Sunnah* which are basic divine texts of the Muslims being its primary sources.[75] The fact remains that Islamic law governs the activities between God and man on the one hand, and the dealings between man and man on the other hand.[76] This presupposes that it covers both religious and secular aspects of the law. Within the secular domain of the law, comes Islamic international law which regulates the conducts of the Muslim States with the international community.[77] Comparative study has been considered necessary for the purposes of (1) analytical jurisprudence that is the comprehension of the conceptions and principles of the two legal systems that is being compared; (2) historical jurisprudence that is the understanding of the purpose of development of the two legal systems under consideration; and (3) ethical jurisprudence that is having a better analysis of the practical merits and demerits of the two legal systems.[78] Aside from the purposes mentioned above, in the words of Salmond, 'the comparative study of law would be merely futile'.[79]

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[74] See A Cassese, *International Law,* (2nd edn, OUP, Oxford, 2005), p. 213
[75] NA Shah, *Self-Defense in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq,* (Palgrave Macmillan, New York 2008), p. 6
[76] Ibid
[77] Ibid
[78] J Salmond, (Glanville L. Williams ed.) *Jurisprudence* (10th edn., 1947), Pp. 7-8 cited in BA Garner (ed.), *Black's Law Dictionary,* (Thomson West, USA 2004), p. 300
[79] Ibid

This study tends to make use of the analytical and historical jurisprudential purposes in its comparative approach with the aim of deducing any compatibility between Islamic diplomatic law and international diplomatic law which aims at achieving the following objectives. First, to see whether Islamic law accord the same inviolability and immunities to diplomatic envoys as international diplomatic law. Also, to examine whether non-state actors' actions against diplomatic missions can be successfully prosecuted in Muslim states? Second, if both legal systems are compatible, could Islamic diplomatic law complement international diplomatic law? And third, if on the other hand, both systems of law are incompatible, can there be ways of reconciling both legal systems? In addition, to see the application of international diplomatic law in Muslim States in a fashion that is compatible with Islamic law.

1.5 Aims and Objectives of the Study

In an era where the world is fast coming together under the canopy of globalisation, it will be necessary to bring the Islamic legal system under the scrutiny of international legal mechanisms for the purpose of having a cross-fertilisation of the two legal systems. Most especially in a period when Islamic law, particularly Islamic *siyar* with its components for instance, Islamic human rights law, Islamic environmental law, law of armed conflict in Islam, is being critically evaluated vis-à-vis modern international law. This also happens to be a period when the legal atmosphere in most of the Muslim countries does not fully reflect the standard sets down by Islamic law. However, regardless of

the short fall in the practices of these Muslim States, this does not diminish the importance of Islamic law principles as presented in the conclusion of a Seminar on Human Rights in Islam thus: 'Regrettably enough, contemporary Islamic practices cannot be said to conform in many aspects with the true principles of Islam. Further, it is wrong to abuse Islam by seeking to justify certain political systems in the face of obvious contradictions between those systems and Islamic law.'[80]

The aim of this study may therefore be suggestive of the title of the entire research: 'Islamic Diplomatic Law and International Diplomatic Law: A Quest for Compatibility.' That is, looking at the areas of compatibility and possibly, tension between Islamic diplomatic law and international diplomatic law. Where the principles are compatible, then they complement each other. But in case of conflict in their principles, we may then have to resort to available Islamic juristic principles as well as the principles of international law, with a view to bringing about reconciliation between the two legal systems. Therefore, the objectives and aims of this study are: i) To facilitate a better understanding of the relationship between international diplomatic law and Islamic diplomatic law; and ii) To ultimately maximise diplomatic protection by clarifying and developing Islamic diplomatic law which may eventually, complement international diplomatic law.[81]

[80] International Commission of Jurists, Human Rights in Islam: Report of a Seminar held in Kuwait in December, 1980 (1982), p. 7

[81] This falls in line with the view expressed by Weeramantry regarding the famous case of *US Diplomatic and Consular Staff in Tehran* that if the US had cited the diplomatic principles as enshrined in the Islamic law in addition with the international law principles, 'it would have

It is hoped, however, that these aims and objectives will find a common ground within the doctrinal sources of Islamic diplomatic law and international diplomatic law.[82]

1.6 Methodology and Terminology

This study is mainly based on the qualitative research method. It compares the fundamental sources of Islamic law, they are the Qur'an and the *Sunnah*, with the sources of international diplomatic law – international conventions, international customs and general principles of law. The study also considers the notion of *ijtihaad* which is utilised to devise the methods by which Islamic law could be further advanced. These methods are known as the concepts of *ijma'a* and *qiyaas.* These sources and legal methods of Islamic law are guided by principles such as local customs (*'urf*), public interest (*maslahah*) and juristic preference (*istihsaan*). It is obvious from the nature of the aims stated above that substantial part of this study particularly the theoretical aspect of it will involve documentary analysis based on a black letter approach. In other words, the research methodology will be based on a traditional legal analysis, relying on information that already exists in some form, such as books, journal articles, case reports, legislations, statements and resolutions by the United Nations, the work of other international inter-governmental bodies and historical records. There will also be the need to engage in on-the-spot first

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induced a greater readiness on the Iranian side to negotiate from a base of common understanding'. CG Weeramantry, op cit., (1988), p. 166

[82]See Article 1(4) of the Charter of the United Nations, 1945 (San Francisco) available at http://www.un.org/en/documents/charter/chapter1.shtml [accessed 06 October, 2008]

hand analysis of the current laws and practices in some Muslim States where, for example, Islamic law is in force which, in a sense, could constitute case studies. This will afford me an opportunity of knowing how Islamic diplomatic law relates with and accommodates diplomatic personnel from non-Muslim countries, and how the non-Muslim countries have, in turn, reciprocated by hosting the Muslim diplomatic personnel in their respective countries.

The study also recognises the difficulty in the vocabulary used in some chapters particularly for those who are not familiar with the Arabic terminologies. I have carefully set out their meanings in a brief glossary. Also, in this study, the word *'siyar*[83] has been used as a rough equivalent of Islamic international law. Literally, the term *'siyar'* means 'a particular manner of conduct as recorded in the biography of an exemplary person',[84] and it could also, when used in a singular form (*seerah*), refer to any biography but generally, it is used in reference to the biography of Prophet Muhammad (pbuh). In discussing Islamic international law, it is generally used by jurists to mean the conduct of State relationship with other communities and nations. The usage of the term *siyar* was first popularised in the second century of Islam by the Hanafi jurists particularly, Muhammad ibn Hasan As-Shaybani (d. 804) although, the actual meaning of the word *siyar* was not given by Shaybani.[85] As-Sarakhsi (490/1096) who wrote commentary on Shaybani's Siyar gave a clear definition of *siyar* as describing 'the conduct of

[83]Also referred to as *'As-Siyar'* when used as a definite noun
[84] JL Esposito (ed), *The Oxford Dictionary of Islam,* (OUP, 2003), p. 297
[85] Ibid; S Mahmassani, op cit., (1968), p. 235; M Khadduri (tr), op cit., (1966), p. 40

the believers in their relations with the unbelievers of enemy territory as well as with the people with whom the believers had made treaties, who may have been temporarily (musta'mins) or permanently (Dhimmis) in Islamic lands; with apostates, who were the worst of the unbelievers, since they abjured after they accepted [Islam]; and with rebels (baghis). . .'[86] Various issues touching on Islamic international law are mostly discussed by jurists under *siyar*. The two terms, *'siyar'* and 'Islamic international law' are therefore used interchangeably in this study. It is worth mentioning that the term Islamic diplomatic law which is used throughout this study, forms part of the *siyar.*

1.7 Outline of Chapters

This study is divided into 7 chapters and an introduction. Chapter 1 touches on the general background of the research; the various research questions that need to be addressed; and the methodology adopted in carrying out this research. Chapter 2 considers the scope and historical origin of diplomatic law which covers the definitional problems. While digging into the antiquity and universality of diplomatic practice, a probe into the impact and contribution of the Islamic civilisation to the growth and development of diplomatic law is also taken into account.

Chapter 3 dwells on the sources of diplomatic law both under the conventional international law and Islamic jurisprudence in a comparative

[86]M Khadduri, (tr), op cit., (1966), p. 40, quoting Shams al-Din Muhammad Ibn Ahmad Ibn Sahl al Sarakhsi, *Kitab al-Mabsut* (Cairo, 1960), p. 2

fashion with a view to answering the question of materiality between the two legal regimes. That is, to what extent can the argument of some writers who hold on to the view that there is no element of materiality between Islamic *siyar* and the rules of modern international law be sustainable? The exactitude of this argument of materiality or otherwise is critically evaluated and examined by considering the proper meaning and implication of the provisions of Article 38 of the Statute of the International Court of Justice.

Chapter 4 contains a macroscopic overview of diplomatic immunities and privileges by expatiating on the three classical theories – representative character, exterritoriality and functional necessity - which represent the juridical rationale for diplomatic immunity. Also contained in this chapter is a quest into which amongst these primary legal theories forms a basis for diplomatic immunity under Islamic law. The chapter also discusses events leading to the codification of diplomatic relations and the various kind of diplomatic inviolability and immunities spelt out in the VCDR and the VCCR. This chapter also delves into the important position Islamic law confers on the personality of the diplomatic envoy from the Qur'an, *Sunnah* (Prophetic tradition) and historical points of view. This chapter also examines in much detail, the relevance of the *Treaty of Hudaybiyyah* (628 AD) to modern diplomatic law by considering issues bothering on its compatibility with the provisions of the VCDR, VCCR and the Vienna Convention on the Law of Treaties (hereinafter referred to as VCLT); the concept of *pacta sunt servanda*

as it relates to treaties; the concept of reciprocity; exchange of envoys; and *aman* - safe conduct.

Since the essence of diplomatic privileges and immunities goes beyond the individual interest but to protect and guarantee unhampered channel of communications between States, it therefore behoves the diplomatic and consular personnel to observe and respect the laws of the receiving States. Chapter 5 of this study therefore focuses on the diplomatic practices of some Muslim States such as Pakistan, Iran and Libya. The double murder committed by Raymond Davis, an American, in Lahore, Pakistan, whom the United States claimed had diplomatic immunity will be evaluated in the light of the Pakistan diplomatic and consular law and the eventual intervention of the Islamic criminal law as operated in Pakistan. In Iran, the *Case Concerning United States Diplomatic and Consular Staff in Tehran* where some group of militant students invaded and held members of the United States diplomatic staff as hostages will be critically evaluated using the parameter of Islamic diplomatic law. While the Libyan case has to do with the shooting that came out from the Libyan Embassy in London, killing a woman police officer, Constable Yvonne Fletcher. Would the case be treated differently under Islamic diplomatic law? This question will also be answered in this chapter.

Chapter 6 examines the vulnerability of the diplomatic mission and personnel especially in this era when terrorism has become not only institutionalised but also internationalised. In doing this, the chapter highlights the doctrine of

jihaad under the Islamic law in contradistinction with the acts of terrorism; and further considers whether the act of terrorism perpetrated against diplomatic missions and personnel is justified under the principles of the Islamic *jihaad*. The chapter then concludes with how the acts of terrorism are treated in Muslim countries under the Islamic law.

Chapter 7 concludes the study with recapitulations of general observations, evaluations and recommendation.

CHAPTER TWO

HISTORICAL OVERVIEW OF THE UNIVERSALITY OF DIPLOMATIC PRACTICE

2.1 Introduction

The world at large appears to have adopted a uniform kind of diplomatic practice which could be described as universal, particularly with respect to the exchange of diplomatic missions and personnel and the various types of diplomatic immunities attached to them. The amount of immunities given to diplomatic agents stems from the great importance ancient civilisations attached to the need for nations to remain in constant communication and unimpaired interrelations. When we talk of communication between societies, an embassy plays a different and vital role in this regard. It is quite different from the communication one gets from commercial exchanges; religious pilgrims; educational pursuit; transfer of slaves; and communication provoked by soldiers during war.[1] This is so because of the peaceful role the embassies play even during wartime to enhance communication between nations.[2]

This chapter will first consider various meanings surrounding the word 'diplomacy' and 'diplomatic law' and then emphasise its relevance to international law. Then, the historical analysis of diplomatic practice in

[1]D Quataert, *The Ottoman Empire 1700-1922,* (2nd edn, Cambridge University Press, Cambridge 2005), Pp. 85-86
[2] Ibid., p. 86

different civilizations, such as the Greek, Roman, Indian, Chinese, African and Islamic civilizations, will be discussed with a view to establishing the universality of diplomatic practice. This chapter will also discuss the contribution of Islamic law to the development of the concept of international diplomatic law by examining the interactions between the Islamic and Western civilizations. By so doing, it will then become easier to determine whether there is compatibility between Islamic diplomatic law and international diplomatic law.

2.2 Defining Diplomacy and Diplomatic Law

It has, however, been observed that the word 'diplomacy' along with its derivatives, such as 'diplomatist' and 'diplomatic envoys', only gained currency following the institutionalisation of permanent legation in the late eighteenth century.[3] Contrary to this observation, Jonsson and Hall[4] perceive diplomacy beyond the modern day structure of state system. According to them, diplomacy is a 'perennial international institution that expresses a human condition that precedes and transcends the experience of living in the sovereign territorial states of the past few hundred years.'[5] To them, diplomacy is a phenomenon that is timeless in its existence.

Diplomacy, by its concept and practice, is a field of study that cannot be said to reside exclusively in or relate only to a particular discipline. It outstrips the

[3] R Jennings and R Watts, (eds.), *Oppenheim's International Law*, (9th edn., Addison Wesley Longman Inc., New York 1996) p.1054
[4] C Jonsson and M Hall, *Essence of Diplomacy*, (Palgrave Macmillan, Hampshire 2005), p.3
[5] P Sharp, 'For Diplomacy: Representation and the Study of International Relations', (1999) 1 International Studies Review, p.51

verges of any particular discipline as it is interdisciplinary in relevance and scope.[6] In spite of its general relevance to various fields of knowledge, it however remains 'a neglected field of academy study.'[7] Nevertheless, there have been commendable attempts by many writers towards giving a lucid meaning to the term 'diplomacy'. Satow, for example, in his *magnum opus*, *A Guide to Diplomatic Practice,* has compendiously defined diplomacy as 'the application of intelligence and tact to the conduct of official relations between the governments of independent states, extending sometimes also to their relations with vassal states.'[8]

The Oxford English Dictionary has equally defined diplomacy as the 'management of international relations by negotiation; the method by which these relations are adjusted and managed by ambassadors and envoys; the business or art of the diplomatist.'[9] It is pertinent to mention that Nicolson's liberal realist perception of diplomacy, though firmly rooted in the Graeco-Roman ancient political theory, is not in substance, different from the previous definition given by the Oxford Dictionary.[10] Nicolson also makes clear his lack of conviction in the indivisibility of foreign policy and diplomacy when expounding by way of distinction, 'the curative methods of diplomacy' and the 'surgical necessities of foreign policy'[11] in the following words:

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[6] W Bolewski, *Diplomacy and International Law in Globalized Relation*, (Springer, Berlin Heidelberg 2007) p.2
[7] Ibid
[8] E Satow, *A Guide to Diplomatic Practice*, (Longman, Green and Co. London 1932), p.1
[9] See *The Oxford Engish Dictionary*, Vol. 3, (Claredon Press, Oxford 1933), Pp. 385-386
[10] D Drinkwater, *Sir Harold Nicolson and International Relations: The Practitioner as Theorist*, (Oxford University Press, Oxford 2005), p. 89.
[11] Ibid. P.90

> Diplomacy . . . is not an end but a means; not a purpose but a method. It seeks, by the use of reason, conciliation and the exchange of interests, to prevent major conflicts arising between sovereign states. It is the agency through which foreign policy seeks to attain its purposes by agreement rather than by war. Thus when agreement becomes impossible diplomacy, which is the instrument of peace, becomes inoperative; and foreign policy, the final sanction of which is war, alone becomes operative.[12]

Meanwhile, Nicolson's distinction between foreign policy and diplomacy has not gone unquestioned. Kissinger, in particularly, has challenged it for being inadequate because, according to him, the effectiveness of diplomacy cannot be divorced from the domestic structure of the states, which invariably, includes international order.[13] In acknowledging the fusion that exists between diplomacy and foreign policy, Burton also argues that the use of diplomacy will be maximized when it includes the entire process of managing relations with other states and international institutions.[14] The all-involving nature of diplomacy brings a considerable amount of exactitude to the statement of Lord Strang, a former British diplomat who is reported to have said that: 'In a world where war is everybody's tragedy and everybody's

[12] H Nicolson, *The Congress of Vienna: A Study in Allied Unity, 1812-1822*, (Constable, London 1946) Pp. 164-165
[13] H Kissinger, 'The Congress of Vienna: A Reappraisal' (1956) 8 World Politics, p. 264
[14] JW Burton, *Systems, States, Diplomacy and Rules*, (The University Press, Cambridge 1968), p.199

nightmare, diplomacy is everybody's business.'[15] The fact is that diplomacy can no longer be restrictively seen in its traditional sense as a mere conduct of foreign affairs of sovereign nations. It has indeed outlived that era. Diplomacy has now become much relevant and related to foreign policy and to the process of foreign policymaking.[16]

It is important to state that likening diplomacy to an obscure art concealed in the folds of deceit believing that 'it can exist only in the darkness of mystery'[17] will not arguably, garner any momentum. Accepting this contention amounts to giving credence to the view that the ambassador can be depicted as 'an honest man sent to lie abroad for the good of his country.'[18] The mere fact that the diplomat is saddled with the task of managing and portraying the beautiful image of his country abroad, will not still justify this assertion. This is because the functional essence of diplomatic relations transcends the art of lie-telling or deceit. The main essence of diplomatic intercourse has, from time immemorial been, and still remains an amiable apparatus through which nations ensure and maintain regular contacts.[19] One cannot but agree with the view that contemporary diplomacy now finds comfort in adapting to new

[15] This statement is quoted from W Bolewiski, *op cit*., (2007), p.2
[16] See PC Habib, 'The Practice of Modern Diplomacy', (1979) 9 Cal. W. Int'l L. J., p. 485
[17] This assertion is attributed to the eighteenth century French writer, Le Trosne. See AS Eban, *The New Diplomacy: International Affairs in the Modern Age*, (Weidenfeld & Nicolson London 1983), Pp. 384-385
[18] This is the observation of Sir Henry Wotton (1568-1639) contained in the album of Christopher Flickmore and quoted from LC Green, 'Trends in the Law Concerning Diplomats', (1981) 19 Canadian Yearbook of International Law, p. 132
[19] M Griffiths and T O'Callaghan, *International Relations: The Key Concepts*, (Routledge, London 2002), p. 79

prevailing conditions.[20] This view cannot be far from the truth, more so as it has now become apparent that the 21st century diplomacy is not just an amicable process of inter-state relations, but an all-purposed modus of communication among the international community.[21]

Diplomatic law, on the other hand, becomes necessary to enhance a smooth conduct of official relations and negotiations between independent polities including other subjects of international law. It therefore becomes imperative that there is in place a set of rules to govern the business of international diplomacy. This, in other words, accentuates the essence of diplomatic law whose primary aim is not only to facilitate international diplomacy between the sending State[22] and the receiving State[23] but also to govern the relationship between representative organs of major players in the international diplomatic business.[24]

Diplomatic law can also, by extension, if considered from a wider perspective, refer to the norms of international law regulating all other international law subjects such as international organisations, in addition to diplomatic institutions.[25] It has been observed however, that these international law norms regulating diplomatic and consular interactions for ages were basically

[20] R Langhorne, 'Current Development in Diplomacy: Who are the Diplomats Now?', (1997) 8 Diplomacy and Statecraft, p.23
[21] W Bolewski, *op. cit.*, (2007), p.2
[22] That is the home State of the head of a diplomatic mission
[23] That is the State which receives the diplomatic mission and personnel
[24] See R Higgins, 'The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience', (1985) 79 AJIL, No. 3, p. 641
[25] L Dembinski, *Modern Law of Diplomacy: External Missions of States and International Organizations*,(Springer-Verlag, New York LLC 1988), p.1

customary[26] before they were later codified and embodied in the two Vienna Conventions: the 1961 VCDR and the 1963 VCCR.

It is important to mention that the general scope of this study will be confined within the context of diplomatic law as it relates to diplomatic missions and their personnel.

2.3 Diplomatic Law in Antiquity

The pre-historic nature of the concept of diplomatic immunity and inviolability has been abundantly stressed in various distinguished scholarly publications.[27] However, a cursory glimpse into the pages of history regarding this very important concept of international law will immensely benefit the purpose of this chapter. It is of benefit to mention that the intention here is to place diplomatic immunity in historical perspective with a view to making a comparative elucidation and examination of its practice amongst the various ancient civilizations of which includes that of Islam.

The fact that diplomacy by its nature is primordial and also universal in its practice regarding the immunities and inviolability of its personnel is remarkably attested to by the preamble to the VCDR which commences thus: 'recalling that people of all nations from ancient times have recognised the status of diplomatic agents. . .' In further confirming the age-long historical

[26] Ibid. P.4
[27] Some of these publications include DJ Hill, *A History of Diplomacy in the International Development of Europe*, Vol. I (Longmans, Green & Co., London 1905); H Nicolson, *The Evolution of Diplomatic Method*, (Constable & Co. Ltd., London 1954); G Mattingly, op cit., (1955); and Frey and Frey, op cit., (1999)

relevance of diplomatic institution along with its attendant privileges and immunities, no truer remark can be made of it other than that it has enduringly 'withstood the test of centuries'[28] in the words of the ICJ.

It has been copiously argued by legal scholars that the law of diplomatic immunity, in its prehistoric contexts, owed its existence and relevance to religious belief systems rather than to any legal obligations in the name of treaties. The special privileges and immunities enjoyed by emissaries in the ancient period were not as a result of strict adherence to any law in the form of the present day international law.[29] The nexus between the sanctified position of the envoys and religious beliefs in ancient Greek, for example, is discernable from the declaration made by Alexander when he stated that no one shall perform the functions of an embassy 'unless he had first washed his hands in water poured over them by heralds, and had made a libation to Zeus from goblets wreathed with garlands.'[30] This obvious influence of religion in the early practice of diplomatic immunity is present virtually in all the known civilisations of the past. It has however, been submitted that the influence of religion on this age-long concept of international law cannot claim to be

[28] *US Diplomatic and Consular Staff in Tehran*, (1980) ICJ Rep. 3, p. 19

[29] See LS Frey and ML Frey, *op. cit.,* (1999), p. 16 while commenting on the importance of religious belief in the imposition of sanction against acts of discretion of the inviolability of diplomatic envoys, he maintains that "[h]arming a herald violated divine law, for all power and all authority emanated from the gods. Sanctions would inevitably follow." See also L Oppenheim, *International Law: A Treatise*, (3rd edn, The Lawbook Exchange Limited New Jersey 2005) p. 769; B Sen, *A Diplomat's Handbook of International Law and Practice*, (Martins Nijhoff Publishers, London 1988) ; E Young, 'The Development of the Law of Diplomatic Relations', (1964) 40 Brit. Y. B. Int'l L., p. 142; and JC Barker, op cit., (2006), p.29

[30] See Gentilis, *De Legationibus Libris Tres.* Vol. II, p. 58

dominant.[31] But then, it remains a historical fact that early diplomatic practice relied, to a greater extent, on the sanctity of religion to safeguard and protect the personality of the envoys.[32]

Various civilizations of the past confirm the universality of early practice of diplomatic intercourse and diplomatic inviolability, albeit in varying degrees. A glance into the pages of history reveals the presence of historical evidence pointing towards the availability of rudiments of diplomatic activities and the sanctity of diplomatic personality which are traceable to ancient civilisations of the Greeks, Romans, Islam, Chinese, Africans and Indians to mention but a few.[33] It has, however, been observed that dwellers of medieval societies evolved their own methods of declaring wars, resolving conflicts and negotiating commercial transactions amongst themselves. These very important activities inevitably required the services of intercommunity messengers whose freedom of movement, personal immunities and safety had to be guaranteed if they were to discharge their tasks effectively.[34] An insight into the extent to which the concept of diplomatic immunity has left its impression on the pages of early history will be better appreciated by considering, with substantial amount of precision, some of these civilisations.

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[31] JC Barker op cit., (2006), p.33

[32] JC Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?*, (Aldershot, Dartmouth 1996), p. 34

[33] See JC Barker, *op cit.*, (2006), p.29; M Ogdon, *Juridical Bases of Diplomatic Immunity*, (John Byrne & Co., Washington D.C. 1936) pp.10-14; and SV Viswanatha, *International Law in Ancient India*, (Green & Co., Longmans 1925)

[34] R Numelin, *The Beginnings of Diplomacy: A Sociological Study of Intertribal and International Relations*, (Oxford University Press, London 1950), p.131. The outcome of the anthropological studies of the primitive societies carried out by Dr. Ragnar Numelin revealed that emissaries were known to enjoy high degree of generosity and hospitality from their host which even went as far as including 'sexual privileges'. See also G McClanahan, *Diplomatic Immunity: Principles, Practices, Problems*, (St. Martin's Press, New York 1989), p.19

2.3.1. Diplomatic Practice in the Greek Civilization

The classical age of the Greek States was overwhelmed by intra-states wars which necessitated the formation of loose and temporary alliances with a view to fortifying themselves against their adversaries.[35] The services of envoys were required to facilitate the endorsement of these alliances and also broker peace if need be. Not only were these emissaries granted immunity to enable them safely discharge this highly exacting task, they were equally placed under the divine protection of Zeus.[36] Desecration of the sanctity of any of these emissaries was considered to be synonymous to perpetrating a heinous sin against the gods.[37]

The diplomatic system of the ancient Greeks, though considered to be parochial and rudimentary in scope and application,[38] has often been considered as a source of reference when talking about the history of diplomatic immunity.[39] Just as in most of the ancient civilizations, ambassadorial position in ancient Greece was strictly *ad hoc* in character.

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[35] K Hamilton and R Langhorne, *The Practice of Diplomacy: Its Evolution, Theory and Administration*, (Routledge, London & New York 1995)

[36] According to the Greek mythology, Zeus is the principal god of the Greek pantheon, ruler of the heavens and Mount Olympus and the father of other gods and mortal heroes. See W Burkert, *Greek Religion*, (Harvard University Press, 1985), p.125

[37] See G McClanahan, *Diplomatic Immunity: Principles, Practices, Problems*, (St. Martin's Press, New York 1989), p. 21

[38] Raymond Cohen makes this submission while drawing a line of distinction between the diplomatic system of the Amarna Period which he considered to be more sophisticated and that of the ancient Greek which according to him was 'both rudimentary and parochial' resulting from its ineffective method of public oratory, lack of organisation and resident embassies followed by dearth of documentary records. See R Cohen, 'Reflections on the New Global Diplomacy: Statecraft 2500 BC to 2000 AD' in J Melissen, *Innovation in Diplomatic Practice*, (Palgrave Macmillan, New York 1999), p.10

[39] See E Young, op. cit., (1964), p. 142

However, much emphasis was placed on the oratory skills in addition to wisdom and respectability of those to be appointed to discharge this highly honoured task as they were not professional diplomats. And this explains why the ambassadorial assignments in early Greece were usually carried out by professional orators or actors. The diplomacy of the Greeks has been observed to be characterised by two distinct types of diplomatic representatives – heralds and ambassadors.[40] The heralds were, in most cases, individually sent to deliver messages that were uncomplicated while on the other hand, the ambassadors who were usually larger in numbers had the task of advocating and negotiating on behalf of their states in the courts of other sovereigns.

While acknowledging the unparalleled depth of the mechanism of the Greeks international and diplomatic intercourse in the fifth century, having evolved concepts touching on the declaration of wars, initiation of peace, exchange of diplomatic personnel and many more, one still finds the idea behind the Greeks' diplomacy elusive. Perhaps, this points to why it appears difficult to find reason to believe that ambassadors in the ancient Greek states had the privilege of absolute immunity and inviolability.[41] Ambassadors in the then Greek states did not only suffer physical assault in the hands of the receiving states, but also endured enormous physical harm and even death, resulting

[40] See DJ Mosley, *Envoys and Diplomacy in Ancient Greece*, (Franz Steiner Verlag GMBH, Wiesbaden 1973), p. 81. Also see K Hamilton and R Langhorne, *op cit*., (1995), p. 9 where it is further observed that the Greeks diplomacy identified three kinds of representatives namely: *angelos* or *presbys* otherwise known as messenger and elder in charge of brief and specific missions; *keryx* otherwise known as heralds conferred with special rights of personal safety; and *proxenos* which can be said to be analogous to a consul.
[41] DJ Mosley, op cit., (1973), p. 83

from the unexpected interception by a third State. An apparent example can be seen in the delegation of Corinthian, Spartan and Tegeate envoys that were killed in Athens. These envoys were on a mission to Persia to solicit the support of the King against Athens. Meanwhile, they stopped on their way through Thrace to persuade Sitalces to revoke his alliance with Athens. Unknown to them, there were two Athenian envoys who were also visiting Sitalces who had also succeeded in persuading Sadocus, the son of Sitacles, to get these Peloponnesians arrested and had them subsequently executed in Athens.[42]

In addition to the foregoing inadequacy, Nicolson was able to identify three reasons to justify his conclusion that the Greeks 'made a mess of their diplomacy'[43] notwithstanding its acclaimed excellent concepts in the following words:

> In the first place, they were afflicted with what Herodian has called 'that ancient malady of the Greeks, the love of discord'. Their jealousy was so poisonous that it stung and paralysed their instinct for self-preservation. In the second place the Greeks were not by temperament good diplomatists, but bad diplomatists. Being an amazingly clever people, they ascribed a wrong value to ingenuity and stratagem, thereby destroying the basis of all sound negotiation, which is confidence. They

[42] Ibid
[43] H Nicolson, op cit., (1954), p. 10

were moreover tactless and garrulous; they lacked all sense of occasion; and they were woefully indiscreet.... In the third place they failed, in their external as in their internal affairs, to establish a correct distribution of responsibility between the Legislature and the executive.... It was this final fault that brought them to ruin.[44]

2.3.2. Diplomatic Practice in the Roman Civilization

The diplomatic practice in ancient Rome, though ad hoc in nature, was in the same way as the Greeks, firmly embedded in their religious beliefs. The Romans practice of diplomatic immunity was not only sourced from its belief system, but also had a strong affinity to its 'custom of respect for the sacred character of envoys during the early republican era.'[45] All issues relating to or emanating from the external relations of the ancient Rome were handled by a body referred to as the College of Fetials[46] relying on the instrumentality of its fetial law. It has also been observed that the making and application of this law was again deeply-rooted in the Roman religion.[47] Adherence to external obligations in the form of treaties was perceived as fulfilment of oaths made to the Roman gods such as Jupiter. Perhaps, this might have accounted for

[44] Ibid.
[45] G McClanahan, *op cit.*, (1989), p. 22
[46] The College of Fetials, made up of priests, was established by Numa Pompilius, (753 – 673 BC) the King of Rome and according to Frank is "a semi religious, semi political board which from time immemorial supervised the rites peculiar to the swearing of treaties and declaration of war, and which formed, as it were, a court of first instance in questions of international disputes as the proper treatment of envoys and the execution of extradition." In addition, the Fetials also carried out ambassadorial functions. See T Frank, 'The Import of the Fetial Institution', (1912) 7 Classical Philology, p.335
[47] JC Barker, *op cit.*, (2006), p.30

the credence given to the College of Fetials as a very important point of reference when talking about diplomatic activity in early Rome by writers like Hill[48] and Frank.[49] Aside from the fetials, there were the *nuntii* or *oratores* (another names) for ambassadors, usually appointed by the Senate from amongst the Knights. Upon appointment, they were given credentials and specific instructions which also define the extent of their authorities.[50]

The Romans respect for the inviolability of the person of the foreign ambassador was also extended to his property throughout the duration of his diplomatic mission. There is no evidence however, that this privilege covered the official correspondence of the envoy which in most cases, were subjected to tremendous sifting.[51] Where any member of a foreign mission violated the law, such an envoy would be sent back to his country for appropriate punishment.[52] The Roman State took serious exception to any act of maltreatment against the foreign envoy to the extent that any of its citizens found to have breached this *hospitium*[53] would be made to face the

[48]DJ Hill, *op cit,* (1905), p. 8

[49] T Frank, op cit., (1912), Pp. 335 and 342. Hamilton and Langhorne have also observed that the College of Fetials was the only permanent body evolved in ancient Rome with some international relations responsibilities. See K Hamilton and R Langhorne, op cit., (1995), p. 14 It must however, be mentioned that Nicolson finds it difficult to attribute much importance to the fetials institution. To him, the College performed no function different from the Treaty Department in the United Kingdom which can best be called an archive for treaty documents. See H Nicolson, *op cit*., (1954), p. 18

[50] H Nicolson, *op cit*., (1954), p. 17

[51] Ibid., p. 18

[52] Ibid

[53] This simply means hospitality. As practiced in both Greece and Rome, it was of a twofold nature. It would be *hospitium privatum* when established between individuals and *hospitium publicum* when established between two states. These two types of hospitality (private and public) have, however, been found to be prominently common amongst all the nations of Italy having existed at a very early period amongst them. See W Smith, *Dictionary of Greek and Roman Antiquities*, 3rd edn., (1890), Pp. 619-621

consequence of noxal surrender.[54] This is another form of extradition practiced by the early Romans whereby a person who desecrated the sanctity of the *hospitium* bestowed on the foreign envoy was surrendered to the aggrieved nation for necessary punishment.[55] Instances of such extradition have been amply cited by Bederman[56] while discussing the 'Reception and Protection of Diplomats and Embassies.' There are however, reported instances where the Roman authority failed to adhere to its proclaimed principle of diplomatic inviolability. One of such failures was when the Roman Senate rejected the demands made by the *fetials* calling for the extradition of Fabius Ambustus to the Gauls for waging war against his host, the Gauls who received him as ambassador.[57] Bederman however, does not see reason not to applaud the diplomatic conduct of the Romans which according to him has generally complied with established norms in spite of this ugly incident which he himself considered to be an aberration.[58]

The increase in the dominant strength of the Roman Empire has been observed to be a factor responsible for the contempt with which the Romans treated foreign embassies.[59] A visiting emissary, for example, must have sought with approval from the Roman General, permission to send envoys.

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[54] JW Rich, *Declaring War in the Roman Empire in the Period of Transmarine Expansion*, (Collection Latomus No. 149, 1976), p. 109
[55] Ibid
[56] DJ Bederman, *International Law in Antiquity*, (Cambridge University Press, Cambridge 2004), p. 115. He has made reference to the extraditions of Postumius Albinus to the Samnites in 321 BCE; Fabius Apronius to the Apolloniates circa 266 BCE; and Lucius Municius Myrtilus and Lucius Manlius to the Carthaginians in 188 BCE for offending against the embassies of these foreign entities.
[57] C Philipson, *The International Law and Custom of Ancient Greece and Rome*, Vol. 1 (Macmillan & Co., London 1911), p. 341-342
[58] DJ Bederman, *op cit*., (2004), p. 118
[59] H Nicolson, op cit., (1954), Pp. 18 and 19

Upon arrival, these envoys will have to wait at the outskirts of Rome and then announce their presence to the *quaestor urbanus,* who will not give their permission to have them admitted to the Graecostasis[60] until thorough identification and verification have been made on their credentials.[61] Where such credentials were assessed to be defective or inadequate, the emissaries would not only be denied audience but will be required to, without any delay, vacate the territory of the Romans.[62] But where their credentials were found to be in order, they will be required to wait at this point until an audience is arranged for them with the Senate. Not until then will they be allowed to address the Senate at the Curia. At the end of the address, they will be conducted back to the Graecostasis and thereafter returned to the Curia to get the senatorial reply.[63]

It can therefore be rightly submitted that perhaps, the diplomatic intercourse of the Roman Empire with other foreign emissaries whose missions mostly revolved around rendering tribute and reaffirming unwavering loyalty to the Roman hegemony was a reflection of the imperialistic nature of the Roman Empire.[64] Such a relationship, in the words of Cohen, can best be described as one between 'suzerain and vassal'[65] rather than between two equal sovereigns as it ought to be. No wonder, Nicolson unhesitatingly attributed

[60] This is a place in the Roman forum where the ambassadors of foreign states were privileged to stand for the purpose of attending and listening to debates. See W Smith, op cit., p. 577
[61] See DJ Bederman, op cit., (2004), p. 105
[62] Ibid
[63] H Nicolson, op cit., (1954), P. 19
[64] R Cohen, op cit., in J Melissen, *Innovation in Diplomatic Practice*, (Palgrave Macmillan, New York 1999), p. 11
[65] Ibid

the inability of the Romans to appreciate diplomatic niceties and failure to bequeath useful lessons that could aid good negotiations to their being 'too dictatorial' and 'too masterful'.[66]

2.3.3. Diplomatic Practice in the Indian Civilization

In ancient India, emissaries sent on foreign assignments were of three different categories: *Nisrishtartha* – this was an ambassador endowed with full authority to negotiate on behalf of the sending state; *Parimitartha* – an ambassador that must not, on any condition, deviate from his instructions; and *Sasanahara-duta* – though an ambassador, but literally means a messenger whose main task was to deliver a message without the authority to negotiate.[67] Like in many other civilizations of ancient times, the exchange of diplomatic envoys in the ancient states of India was of temporary nature just as the protection of foreign emissaries was firmly sanctioned by the Indian ancient religion. It is evidenced from the *Ramayana*[68] that the *duta* being a mere messenger charged with the duty of delivering the message of his master, must not be subjected to any punishment even when found to have acted in a provocative manner.[69] Similarly, a king who kills an ambassador, according to the *Mahabharata*[70], will end up in hell fire along

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[66] H Nicolson, op cit., (1954), Pp. 22-23

[67] AS Altekar, *State and Government in Ancient India*, (Motilal Banasidass, 2002), Pp. 300 - 301

[68] This is one of the two prominent epic poems of India. It was composed about 300 BC by Valmiki in Sanskrit and it remains an important part of the Hindu canon. See W Buck and BA van Nooten *Ramayana*, (University of California Press, Los Angeles 2000), p. xiii

[69] AS Altekar, op cit, (2002), p. 301

[70] This is the greater of the two famous epic poems of India. It symbolises the Indian cultural heritage. Considered in its Sankrit original text, it is arguably the largest epic ever composed. See W Buck and BA van Nooten, *Mahabharata*, (University of California Press Los Angeles 2000), p. xiii

with his ministers.[71] It must, however, be mentioned that the degree of immunity and protection the Indians gave to envoys was not without limitation thereby undermining the amount of inviolability an envoy was privileged to enjoy in ancient India.[72] A foreign envoy, for instance, found to have committed a crime, flagitious in nature, would not be protected by reason of immunity as he could still be mutilated; but then he must not be put to death.[73] That a representative of a foreign mission must not, for fear of death, be dissuaded from accomplishing their mission occupied a fundamental position in the ancient Indian foreign relations which states that 'Messengers are the mouth-pieces of kings...hence messengers who, in the face of weapons raised against them, have to express as exactly as they are entrusted...do not...deserve death.'[74]

There are historical evidence confirming the existence of diplomatic intercourse, not only between the ancient Indian states, but also between the Mauryan Empire of India and some of the Hellenistic Kingdoms that emerged consequent upon the break-up of Alexander's Empire[75]. For instance, history has it that during the period of Emperor Ashoka, *dutas* were sent to far States like Syria, Egypt, Macedon, Epirus and Cyrene.[76] It has also been recorded

[71] AS Altekar, op cit., (2002), p. 301
[72] L Rocher, 'The Ambassador in Ancient India', (1958) 7 The Indian Yearbook of International Affairs, Pp. 344
[73] HL Chatterjee, 'International Law and Inter-States Relations in India', (1958) Calcutta, p. 66
[74] GVG Kirshnamurty, *Modern Diplomacy: Dialectics and Dimensions*, (Sasar Publications, New Delhi, 1980), p. 49
[75] See Ibid., p. 48; B Sen, op cit, (1988), p. 4; G McClanahan, op cit, (1989), p. 23, KA Nilakantha Sastri, 'International Law and Relations in Ancient India', (1952) 1 India Yearbook of International Affairs.
[76] See B Sen, op cit., (1988), p. 4

that Indian embassies on missions of good will were sent to China with request of some commercial concessions.[77] With this, it therefore becomes difficult to agree with the submission made by Bederman that 'there is simply no historical evidence to suggest that there was any substantial diplomatic contact between Indian and Chinese cultures, nor between these great Asian international systems and those of the Near East and Mediterranean.'[78] This submission however, forms the basis of him excluding India from prominent civilisations that have contributed towards the development of international law. It is to be noted that the distance of India has, to some extent, accounted for the irregularity in its diplomatic contacts with other civilizations.[79] Also identifiable in the Indian diplomatic tradition was the undaunted will of the Indian envoy to carry out espionage activities in the host state on behalf of his country. While overtly orchestrating the claims of his State in the court of the host State, he would, at the same time, clandestinely be assessing the strengths and weaknesses of the host State even if it meant resorting to means that can, at best, be described as bizarre.[80]

2.3.4. Diplomatic Practice in the Chinese Civilization

[77] AS Altekar, op cit, (2002), p. 300
[78] DJ Bederman, op cit., (2004), p.4
[79] R Cohen, op cit., in J Melissen, *Innovation in Diplomatic Practice*, (Palgrave Macmillan, New York 1999) p.10
[80] See G McClanahan, op cit, (1989), p. 24. Some of these envoys would go as far as secretly engaging the services of prostitutes, dancing girls, umbrella bearers, astrologers thereby having access to the king within the court with a view to extract useful information. See also GK Mookerjee, *Diplomacy: Theory and History*, Vol. 1, (Trimurti Publications, New Delhi 1973), p. 8

The diplomatic tradition of the Chinese can be rightly depicted, just like that of Greece, as imperialistic and parochial in nature resulting from its 'rigidly hierarchical and ethnocentric attitude' as observed by Cohen.[81] The ancient Chinese empire so much believed in the superiority of its culture to the extent that it failed to acknowledge the existence of other civilized nations.[82] Since to the Chinese, China was the sole world State as it was the centre of humanity,[83] all other non-Chinese were therefore, regarded as barbarians that could only be interacted with as unequal vassals.[84] It would therefore be unexpected that such a nation will relate diplomatically with other nations on equal terms. The failure of the Chinese to see other nations as equals have been attributed to their tremendous population; the overwhelming quality of their civilization; and the remoteness of their geographical location.[85] The response of the Chinese Emperor to Lord Macartney's attempt (acting on behalf of King George III of the United Kingdom) to establish diplomatic ties with China was an indication of the nature of the Chinese diplomatic practice. It states thus:

> As to the request made in your memorial, O King, to send one of your nationals to stay at the celestial court to take care of your country's trade with China, this is not in harmony with

[81] See Cohen, R., op cit, in J Melissen, *Innovation in Diplomatic Practice*, (Palgrave Macmillan, New York 1999), p. 11
[82] G McClanahan, op cit, (1989), p. 24
[83] See AB Bozeman, *Politics and Culture in International History*, (Princeton University Press, New Jersey 1960), p. 133
[84] See R Cohen, op cit., in J Melissen, *Innovation in Diplomatic Practice*, (Palgrave Macmillan, New York 1999), p. 11
[85] G McClanahan, op cit., (1989), p. 24

> the state system of our dynasty and will definitely not be permitted. Traditionally people of the European nations who wished to render some service at the celestial court have been permitted to come to the capital. But after their arrival they are obliged to wear Chinese court costumes, are placed in a certain residence and are never allowed to their own countries.[86]

Of equal relevance in appreciating the parochial nature of Chinese diplomacy is the majestic letter of the Emperor of China to King George III of Great Britain which reads thus:

> Swaying the wide world, I have but one aim in view, namely, to maintain a perfect governance and to fulfil the duties of the state. Strange and costly objects do not interest me. I . . . have no use for your country's manufactures. . . . It behoves you, Oh King, to respect my sentiments and to display even greater devotion and loyalty in the future, so that by perpetual submission to our throne, you may secure peace and security for your country hereafter. . . . Our Celestial Empire possesses all things in prolific abundance and lacks no product within our borders. There was, therefore, no need to import the manufactures

[86] This is a quotation from FS Northedge, *The International Political System*, (Faber and Faber, London 1976), p. 40

> of outside barbarians for our produce. . . . I do not forget the lonely remoteness of your island, cut off from the world by intervening wastes of sea, nor do I overlook your excusable ignorance of the usages of our Celestial Empire. . . . Tremblingly obey and show no negligence.[87]

In spite of these seeming limitations to the traditional Chinese diplomacy, the Chinese empire was able to develop a scheme which aptly and amply reflects its claim to universal superiority.[88] This scheme which has been described as being tributary in nature, defined the kind of relationship the Chinese empire was willing to have with his neighbours and even far-off States.[89] The tribute embassy will be accompanied to the capital by the Chinese officials upon arrival at the Chinese border. The envoy will not have the privilege of an audience with the Emperor until he had been thoroughly taught the protocol relating to appearance at court which most importantly, must include the *Kotow*[90]. A proper assimilation and successful exhibition of these rituals by the

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[87] See ED Thomas, *Chinese Political Thought*, (Prentice-Hall, New York 1927), p. 289

[88] See M Rossabi, *China Among Equals: The Middle Kingdom and Its Neighbours, 10th-14th Centuries*, (University of California Press, Los Angeles 1983), p. 2

[89] These tributary states (Korea, Burma, Annam and Siam) having adopted the Chinese institutions, also greatly benefitted from the Chinese culture and protection. In return for these benefit, they were obliged to send on regular occasions tributary missions to register their appreciations and gratitude to the Chinese Emperor. See AF Wright, *The Study of Chinese Civilization,* Vol. 21, No. 2, (University of Pennsylvania Press, 1960), p. 236

[90] This has generally been defined as a former Chinese custom of knocking the forehead on the ground as a symbol of respect or submission. Attesting to its significance in the Chinese diplomatic relations, it was reported that the Japanese military general, Toyotomi Hideyoshi knelt 5 times on the ground and knocked his head 3 times on the ground at the Chinese court direction to evince his allegiance to the Chinese Ming Dynasty for vassal homage. See http://encyclopedia.thefreedictionary.com/Kotow [Accessed: on the 21/08/2009]. The traditional importance of this ritual can be distilled from the succinct content of the Court Letter of 14 August 1793 instructing Cheng-jui of what etiquette was expected of Macartney and his envoys in the presence of the Emperor thus: ". . . ought casually in the course of conversation to inform him tactfully that as regards the various vassal states, when they

tribute envoys in the presence of the Emperor was regarded as a tacit acceptance of his superiority, while at the same time acknowledging the inferiority of their status as envoys of a vassal state.[91] With this, the envoys enjoyed a further privilege of moving closer to the Emperor on his throne for a majestic conversation. The embassies and their ruler were usually, in return for their tributes, bestowed with valuable gifts by the Emperor and at the end of which they were given within three to five days to transact with the Chinese merchants and then vacate the Middle Kingdom.[92] Rossabi has given a graphical description of the tributary system of the Chinese Empire in the following words:

> The tribute system enabled China to devise its own world order. . . . Equality with China was ruled out. The court could not conceive of international relations. It could not accept other states or tribes as equals. Foreign rulers and their envoys were treated as subordinates or inferiors. It refused entry into China to those who reject its system of foreign relations. The Chinese emperor was not just a *primus inter*

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come to the celestial Empire to bring tribute and have an audience, not only do all their envoys perform the ceremony of the three kneeling and the nine knockings of the head, but even the princes who come in person to Court also perform this ceremony". For full text see JL Cranmer-Byng, 'An Embassy to China Being the Journal Kept by Lord Macartney during his Embassy to the Emperor Chi'en-lung 1793-1794', (2000) Folio Society, UK, p. 145 It has also been observed based on Macartney's speculation that perhaps, his refusal to perform the Kotow rituals might have contributed to the reasons behind the refusal of the Chinese Emperor to grant any of his requests. See PJN Tuck, *An Embassy to China: Lord Macartney's Journal, 1793-1794*, (Routledge, 2000) p. 32

[91] M Rossabi, op cit, (1983), p. 2

[92] Ibid

pares. He was a Son of Heaven, the indisputable leader of the people of East Asia, if not the world.[93]

2.3.5. Diplomatic Practice in African Civilisation

In the traditional African communities, the people largely recognised and observed the principles of diplomatic interactions among themselves and with other non-African communities. The Egyptian-Hattite relations which occurred about 1350 B.C. could serve as one of the classical examples depicting the diplomatic activities of the people of ancient Egypt. It has been recorded as narrated by McClanahan that an Egyptian queen, a royal wife of Tutankhamen, sent a letter to the Hattite monarch explaining the fact that she had no husband and sons. She therefore, requested that if Hittite king would allow one of his sons to marry her, that son had the chance of becoming the Pharaoh of Egypt.[94] The king, of course, gave his permission to her proposal after sending envoys to verify the veracity of her story in Egypt. The Hittite prince that was to marry the Egyptian was attacked and killed in Syrian on his way to Egypt.[95] According to Wilson '[t]he Hittite army marched into Syria, captured the murderers, and led them to the Hittite capital to be tried and condemned in accordance with international law.'[96] This incidence, at least, confirmed the existence of diplomatic understanding along with some diplomatic privileges between the Hittite kingdom and ancient Egypt.

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[93] Ibid p. 4
[94] GV McClanahan, *Diplomatic Immunity: Principles, Practices, Problems,* (C. Hurst & Co. Ltd., London, 1989), p. 20
[95] Ibid
[96] JA Wilson, *The Burden of Egypt: An Interpretation of Ancient Egyptian Culture,* (University of Chicago Press, Chicago, 1951), p. 235

In the West African region, for example, different communities were in the habit of receiving and sending diplomatic missions from each other.[97] It is a fact known to history that earliest African diplomatic envoys were known to enjoy diplomatic immunity in order to give a measure of protection to their persons and personal belongings throughout the duration of their official assignments.[98] That is, the practice required that they could not be harassed, maltreated or even killed, which traditionally conformed with the African principle of hospitality that was usually and readily extended to visitors from near and far.[99] It was the custom, for instance, amongst different communities in the West African region, particularly at the beginning and end of diplomatic negotiations, to break and serve kolanuts to their visitors as a way of expressing their hospitality.[100] In the account given by Polk regarding the diplomatic intercourse of Nuban[101] people, a primitive tribe in Africa, with their hostile neighbours, he says that:

> The ambassador was often a captive or former slave who knew the language, the customs, and perhaps some of the members of another tribe. That helped, but he could not rely upon these things for protection. Rather, he was protected by ritual status symbolized

[97] RS Smith, *Warfare and Diplomacy in Pre-Colonial West Africa,* 2nd Edition, (The University of Wisconsin Press, Wisconsin, 1989), p. 7
[98] PJ Schraeder, *African Politics and Society: A Mosaic in Transformation* (Thomson/Wadsworth, 2004), 39
[99] RJ Njoroge, *Education for Renaissance in Africa,* (Trafford on Demand Pub., 2004), p. 122
[100] Ibid.
[101] The Nuban people were known to inhabit the Nuba mountains of South Kordofan state, in Sudan. The Nubans are multiple distinct people who speak different languages.

> by a special spear. Carrying it, he could go inviolate into villages to negotiate with his counterparts. When agreements were reached, the chiefs of the path sanctioned them with religious or magical rites and threatened truce violators with curses thought to produce leprosy.[102]

Diplomatic envoys were generally referred to as 'messengers,' 'heralds' or 'linguists,' depending on the tasks assigned to them. They were often chosen from among those that were close to the monarchs from among the slaves and captives, and occasionally, from members of the royal household. There was an instance where the Congolese embassy that was sent to Rome in 1514 had a royal prince as one of its emissaries.[103] In the old Oyo Empire,[104]for instance, the Alaafin of Oyo[105] usually have at his disposal, those known as the *Ilari*,[106] also referred to as 'half heads,' attesting to the custom of having to shave half of their heads and applying magical substance into it. The senior males within the *Ilaris*, according to Smith,

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[102] WR Polk, *Neighbors and Strangers: The Fundamentals of Foreign Affairs*, (University of Chicago Press, Chicago, 1997), p. 238

[103] The prince's name was Prince Dom Henrique. See EM Ma Khenzu, *A Modern History of Monetary and Financial Systems of Congo, 1885-1995,* (Edwin Mellen Press, 2006), p. 26.

[104] The Oyo Empire which was established in the 14th Century, used to be what is today Western and some part of the Northern Nigeria. It was one of the largest kingdoms in the West African region..

[105]The Alaafin of Oyo, meaning the king, was the head of the Oyo Empire and supreme overlord of the people. See GT Stride & C Ifeka, *People and Empire of West Africa: West Africa in History, 1000-1800,* (Africana Pub. Corp., 1971), p. 298

[106] The word 'Ilari' means the parting of the hair in a peculiar way. The term 'Ilari' has been adopted by Yoruba kings in describing the royal messengers (male and female), who upon their appointment, must shave have their heads completely shaved with small incisions made on the occiput (for the male) and on the left arm. See S Johnson, *The History of the Yorubas From the Earliest Times to the Beginning of the British Protectorate,* (C.S.S. Bookshop, Lagos, 1921), p. 61

'acted as a bodyguard to the Alafin and also as his messengers to the outside world.'[107] While the junior ones within the *Ilaris* were charged with the menial and administrative duties in the palace.[108] Usually, in ancient Africa, which was almost universal, the diplomatic envoys carried a form of credentials such as a staff, spear, wand, a cane, baton, a whistle or a sword as official symbolic emblems.[109] Particularly famous among these credentials were the staffs carried by the Ashanti and Dahomey ambassadors which were generally adorned with gold or silver leaf.[110]

Diplomatic missions in ancient Africa, just like in other ancient civilisations, were temporarily despatched for different purposes.[111] That is not to say that the idea of harbouring resident envoys from abroad was completely alien to African diplomatic practice. There are, of course, copious instances of rulers that had resident representatives in outside communities for the collection of tributes or war spoils. For instance, in the early sixteenth century, the Askia Muhammad, the ruler of Songhay Empire, was reported to have stationed 'some of his courtiers perpetually residing at Kano'[112] for the purpose of collecting tribute that was due to him from that Kingdom. Similarly, the account given by Argyle suggests that the Alaafin of Oyo had his

[107] See RS Smith, op cit., p.12 See also S Johnson, op cit., p. 62
[108] F Adegbulu, 'Pre-Colonial West African Diplomacy: It's Nature and Impact, (2011) 4:18 *The Journal of International Social Research,* p. 175
[109] WR Polk, op cit., p. 238;
[110] See RS Smith, op cit., p. 12. See also K Yankah, *Speaking for the Chief: Okyeame and the Politics of Akan Royal Oratory,* (Indiana University Press, 1995), p. 31
[111] I Roberts (ed.), *Satow's Diplomatic Practice,* (OUP, Oxford, 2009), p. 187
[112] JFA Ajayi & F Crowder, *History of West Africa,* Vol. 1 (Columbia University Press, 1971), Pp. 214-215. It is, however, doubtful if the Hausaland of Kano was, in fact, conquered by the Songhay Empire.

ambassadors stationed in Dahomey, in the latter part of the eighteenth century, for the purpose of collecting tribute that was due to the Alaafin of Oyo, and possibly collect his share of the proceeds from any Dahomean military successes.[113]

African people were conversant with the principles of diplomatic immunity since they understood the sacred nature of the duties which the diplomatic envoys have to discharge. Therefore, it was considered sacrilegious and, in fact, a taboo to maltreat or kill an emissary, in as much as he does not act as a spy.[114] It is generally common among all peoples, in all kingdoms and lands, that when diplomatic envoys had credentials which proclaimed their official status as the representatives of any rulers or sovereigns, then, 'they are guaranteed complete freedom in access, transit and egress, and perfect safety from any hindrance or violence.'[115] That is, they must be adequately protected. According to Ajisafe while describing the Yoruba native custom regarding diplomatic immunity that the '[e]mbassy between two hostile tribes, countries, or governments is permissible in native law and the ambassador's safety is assured; but he must not act as a spy or in a hostile way. . .'[116] It must be said, however, that there may be instances where diplomatic

[113] WJ Argyle, *The Fon of Dahomey: The History and Ethnography of the Old Kingdom,* (Clarendon Press, 1966), p. 25
[114] OO Okege, *Contemporary SocialProblems and Historical Outline of Nigeria: A Nigerian Legacy Approach,* (Dare Standard Press, 1992), p. 32
[115] G Mattingly, *Renaissance Diplomacy,* (Jonathan Cape, London 1955), p. 45
[116] AK Ajisafe, *The Law and Custom of the Yoruba People,* (G. Ruledge & Sons, Limited, 1924)

immunity was circumscribed.[117] Such cases can only be described as exceptional to the general rule of diplomatic practice.

2.3.6. Diplomatic Practice in the Islamic Civilisation

Diplomatic interaction, being a universal bequest of antiquity was practiced in Islam right from the periods of Prophet Muhammad (pbuh) (570-632); the first four Caliphs (632-661); the Umayyad dynasty (661-750); the Abbasid Empire (750-833); down to the Ottoman Empire (1260-1800). This section will be looking at various examples from the foregoing periods with a view to ascertaining the extent of the practice of diplomatic immunity in the Islamic legal system.

2.3.6.1 The Islamic Connotation of 'Safara'

To start with, the Arabic terms *'saafir'* or *'rasul'* are often used by commentators of Islamic law when referring to diplomatic agent or envoy. The word *'saafir'* which means ambassador is a derivative of the verb *'safara'* with the original meaning of 'conciliation or peaceful settlement.'[118] *'Rasul'* on the other hand, is a word derived from the verb *'arsala'* which means 'to send or dispatch.' In practice, the usage of the term *'saafir'* has generally been reserved for diplomatic agent unlike *'rasul'* which is understood to have a religious connotation.[119]

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[117] RS Smith, op cit., p. 13

[118] Y Istanbuli, *Diplomacy and Diplomatic Practice in the Early Islamic Era*, (Oxford University Press, Oxford 2001), p. 124

[119] See M Khadduri, *War and Peace in the Law of Islam*, (John Hopkins Press, Baltimore 1955), p. 241. See also S Mahmassani, op cit., in Hague Academy of International Law, (1968), *Recueil Des Cours: Volume 117 (1966/I), (*Martinus Nijhoff Publishers), p. 265.

The Arabs, prior to the advent of Islam were not unfamiliar with diplomacy and diplomatic relations whose scope and practice became elaborate and widened with the emergence of the Islamic civilization.[120] Record has it that Umar ibn Khattab was once the Quraishite[121] ambassador to other Arab tribes prior to the emergence of Islam while the foreign affairs of Makkah was then left in the hands of Banu 'Uday.[122] The mission led by Abdul-Muttalib (the grandfather of Prophet Muhammad) consisting of his sons and some of the leaders of Makkah to have a direct talk with Abrahah who was bent on destroying the Ka'bah[123] was also considered as a diplomatic conversation - *'safaarah'* - according to some historians.[124]

2.3.6.2 Islamic Diplomatic Law

It must be mentioned that diplomatic practice in the early days of Islam, just as it was the practice in other ancient civilizations,[125] was not carried out on a

[120] S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968, p. 264

[121] The Quraysh was the tribe of Prophet Muhammad. This tribe has its genealogy traceable to Adnan who was a descendant of Isma'il, the son of Ibrahim. The nobility of the Quraysh coupled with their distinguished virtues of oratory, civility and gallantry were unanimously acknowledged by other tribes of Arabia. The Quraysh was, sometime in the early sixth century, entrusted with the management and control of the sanctuary in Makkah (the Kaabah). See SA Ali Nadwi, *Muhammad Rasulullah, (The Life of Prophet Muhammad)*, (Islamic Research and Publications, Lucknow 1979), p. 66. For further details on the genealogy of the Quraysh and other Arab tribes. See Ibn Hisham, *As-Seeratu-n-Nabawiyyah*, (Darul Gadd al-Jadeed, Al-Monsurah)

[122] See Al-Sayyid al-Jamili, *Manaaqib Ameer al-Mu'mineen 'Umar ibn al-Khattab*, (Dar al-Kitab al-'Arabi, Beirut, 1985), p. 21

[123] MH Haykal, *The Life of Muhammad*, (North American Trust Publications, 1976) Pp. 40-41

[124] Y Istanbuli, op cit., (2001), p. 124

[125] See M Rossabi, op cit., (1983), p. 2 where foreign embassies were only allowed to stay within the Chinese Empire within three to five days.

permanent basis.[126] It was however obvious that no receiving State was willing to take the risk of accommodating an envoy for a period longer than necessary so as not to compromise their state security. Abu-Bakr, the immediate successor of Prophet Muhammad (pbuh), was explicit in his instruction to Yazid ibn Abu Sufyan regarding foreign envoys that ". . . and make their period of stay (residence) at your camps short, so that they quit while they are still ignorant. Let them not look about, so that they may not see your weakness and know your disposition."[127]

The practice of diplomacy in the early days of Islam was not only utilised as a necessary post-war tool to pave the way for peace but also resorted to in times of peace. An appropriate instance can be seen in the treaties signed by the Islamic *ummah* (community) as represented by Prophet Muhammad and the Madinites, the Jews and the Christians and the famous *Treaty of Hudaybiyyah (628 AD)* between the Islamic *ummah* and the Makkans.[128] These treaties are considered to have been signed not as result of any looming war or as a consequence of any hostility. If one also considers the overwhelming peaceful intercourse that existed between the early Islamic community of the Umayyad period and the Byzantium Empire, in spite of the seeming irreconcilable nature of the hostility between these two great nations, one would challenge Khadduri's view that Islam cannot be said to have adopted diplomacy 'essentially for peaceful purposes as long as the

[126] M Hamidullah, *Muslim Conduct of State,* (Sh. Muhammad Ashraf Publishers, Lahore-Pakistan 1961), p. 144
[127] Quoted in Y Istanbuli, op cit., (2001), p. 127 from Arjoun, Sadeq Ibrahim, *Khalid Ibn al-Walid* (Al-Dar Alsaudiah, 1981), p. 244
[128] J Esposito, op cit., (2003), p. 69

state of war was regarded as the normal relation between Islam and other nations.'[129] In fact, it cannot be truer that this belligerent attitude between these two avowed enemies was never allowed to constitute an impervious obstacle to harmonious relations.[130] No wonder Abdul Malik bin Marwan (684-705 AD), the fifth Umayyad Caliph, could sign an agreement to pay a weekly tribute to the Byzantium Emperor.[131] It has also been reported that the Islamic State under the reign of the Umayyads executed a diplomatic treaty with Cyprus after it had been conquered by Muawiyyah as the then governor of Syria, allowing the Cypriots to exhibit dual loyalty to both the Romans and the Muslims. The people of Cyprus, by the said treaty, shall be under an obligation to pay an annual tribute to the Islamic state while, at the same time, they will not abate their commitment to remit taxes to Byzantium. They will also, in addition, be exonerated from partaking in any warfare with the Muslims against the Byzantines, provided that they must not fail to warn the Islamic State of any impending hostility by the Romans.[132] These instances among others, give credence to why one may find it arguably unacceptable to assume that an unrelenting state of war or bellicosity was the most essential hallmark of the relation Islam had with other nations. One cannot, therefore, but agree with the submission of Zawati that 'based on the doctrine of *jihaad*, in which "peace is the rule, war is the exception," diplomacy has played a distinctive role in the peaceful missionary work of Islam.'[133]

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[129] M Khadduri, op cit., (1955), Pp. 239-240
[130] See AA Vasliev, 'Byzantine and Islam', in NH Baynes and HLB Moss (eds.) *Byzantium: An Introduction to East Roman Civilization,* (Claredon Press, Oxford 1953), p. 311
[131] Y Istanbuli, op cit., (2001), p. 98
[132]Ibid, p. 99
[133] HM Zawati, op cit., (2001), p. 75

Some writers are of the view that the theory of diplomatic relation was embraced by Islam as 'a temporary necessity'[134] considering the 'Islamic concept' of dividing the world into two – *dar al-Islam* (abode of peace) and *dar al-harb* (abode of war).[135] With the application of the third division of the world into *dar as-sulh* (abode of treaty)[136] the Muslim States and the non-Muslim States were able to interact among themselves peacefully and friendly while observing the terms of the treaties. The history of Islam is replete with factual instances accentuating the importance of the concept of diplomatic relation to the political life of Islam right from its inception. In fact, the spirit of diplomatic practice has for long formed and still forms up till today, the basis of interaction between the Muslim States and other nations. For a comprehensive understanding of the diplomatic practice in Islamic law, this chapter will carefully examine the various stages of the Islamic history commencing with the period of Prophet Muhammad (pbuh).

2.3.6.3. Diplomatic Practice at the Time of Prophet Muhammad (570-632 AD)

Aside from the first set of envoys sent by Prophet Muhammad (pbuh) to Negus, the Emperor of Abyssinia,[137] many more Muslim envoys and ambassadors were sent, particularly during and after the signing of the famous *Treaty of Hudaybiyyah* (628 AD), to other Arab tribes. In a bid to

[134] K Hamilton and R Langhorne, op cit., (1995), p. 20
[135] The concepts of *dar al-Islam* and *dar al-harb* are discussed in Chapter 6 of this study.
[136] The concept of *dar al-sulh* is discussed in Chapter 6 of this study.
[137] HM Zawati, op cit., (2001), p. 75

convince the Makkans about the good intention of Prophet Muhammad (pbuh) and the Muslims to enter Makkah only for the purpose of performing the *'Umrah* (the lesser pilgrimage) and to return immediately afterwards, Prophet Muhammad first despatched Khirash ibn Umayah and thereafter, 'Uthman ibn 'Affan[138] to the Quraysh even though Khirash suffered imminent attack at the hands of the Qurayshites and it was also rumoured that they had killed 'Uthman.[139] There is the need to stress the fact that the conclusion and execution of the *Treaty of Hudaybiyyah* was made possible as a result of the diplomatic acumen tremendously displayed by Prophet Muhammad (pbuh) as opposed to the confrontational attitude of the Makkans. With this epoch-making event came the despatch of Muslim envoys to various Kingdoms consisting of Arabs and non-Arabs. For instance, Haatib ibn Abi Balta'a was sent to Muqawqas, the Governor of Alexandria; Abdullaah ibn Hudhaafa al-Sahmi was sent to the King of Persia; Dahiyyah ibn Khalifah al-Kalbi to Heraclius, the Emperor of Byzantine; 'Amr ibn Umayya al-Damri was sent to the Negus (As'hamah Ibn al-Abjar), the Abyssinian Emperor; 'Amr ibn al-'As to the Kings of Oman; Salit ibn 'Amr to the Kings of Yamama; al-'Ala' ibn al-Hadrami was sent to the King of al-Bahrain; Shuja' ibn Wahb al-Asadi was sent to the Ghassanid King; while al-Muhaajir ibn Abi Umayya al-Makhzumi was despatched to the Himyarite King; and Mu'aadh ibn Jabal to the Kings in Yemen.[140]

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[138] He later became the third Caliph of the Islamic State after the demise of Prophet Muhammad.
[139] See SA Ali Nadwi, op cit., (1979), Pp. 262-264
[140] See Safiur-Rahman Al-Mubarakpuri, *Ar-Raheequl-Makthtum*, (Beirut), Pp. 350-361; HM Zawati, op cit., (2001), p. 77; MH Haykal, op cit., (1976), Pp.374-377

Eloquence, being one of the highly cherished qualities a diplomatic agent must possess, Prophet Muhammad (pbuh) was not oblivious of this fact while selecting the bearer of his message in the courts of the then world powers. The envoys were men endowed with the power of language particularly conversant with the languages and political atmosphere of their hosts. Perhaps, this explains why the two eminent authors of *'Tabaqaat'*[141] and *'Khasaa'is al-Kubra'*[142] described these envoys as men who have received the miraculous gift of languages owing to their ability to speak the languages of the countries they were deputed. These envoys were despatched with the requisite credentials which were in the form of letters with which they were sent, specifically addressed to individual potentates. A typical example of these letters was the one addressed to Heraclius, the King of Rome which reads thus:

> In the name of Allah, the Beneficent, the Merciful. This letter is from Muhammad, the slave and Messenger of God, to Heraclius, the great King of Rome. Blessed are those who follow the guidance. After this, verily I call you to Islam. Embrace Islam that you may find peace, and God will give you a double reward. If you reject, then on you shall rest the sin of your subjects and

[141] Ibn S'ad*, Kaatib al-Waaqidi Muhammad*, *Tabaqaat*, Vol. II, p. 23
[142] As-Suyuti, Jalaalud-Deen Muhammad Ibn Ahmad, *Khasaa'is al-Kubra*, Vol. II, p.11

followers. O People of the Book,[143] come to that which is common between us and you; that we will serve non but Allah, nor associate aught with Him, nor take others for lords besides God. But if you turn away, then say: Bear witness that we are Muslims.[144]

Needless to mention that a glance through the contents of these letters which also served as what is now known as letters of credence, portrays the genteel and cultivated manners of Prophet Muhammad (pbuh). Interestingly, these emissaries were warmly received and their messages favourably responded to by the potentates of the respective States to whom they were sent except Chosroes, the king of Persia who out of irrepressible rage, tore the Prophet's letter into shreds.[145]

It has also been documented that Sa'd ibn Abi-Waqqas was the first envoy to be sent to China by Prophet Muhammad (pbuh). This fact is attested to by the Chinese Muslims' reverence of a tomb in Canton, which up till present days bears the name of Sa'd ibn Abi Waqqas.[146] Also, attesting to the existence of diplomatic interaction between the then Islamic world and China as far back as the mid-eight century are evidence from the Chinese records referring to amir al-mu'minin (a title for the head of the Islamic State) as

[143]It is *'Ahlul-Kitaab'* in the original Arabic text. This term is often used in the Quran as another name for the Christians and the Jews
[144] See SA Ali Nadwi, op cit., (1979), Pp. 274-275
[145] S Al-Mubarakpuri, op cit., p. 354
[146] PK Hitti, *History of the Arabs: From the Earliest Time to the Present*, (Macmillan & Co. Ltd., London 1961), p. 344

`*hanmi-mo-mo-ni;* abu-al-`Abbas (the first Caliph of the Abbasid dynasty) as *'A-bo-lo-ba';* and Haarun (the famous caliph of the Abbasid dynasty) as *'A-lun'*.[147] The intercourse between the Muslims and the Chinese can again be inferred from the instruction of Prophet Muhammad (pbuh) to the Muslims charging them not to relent in their quest for knowledge even if it means travelling as far as China.[148]

Not only were emissaries and ambassadors despatched to foreign lands in the early days of Islam as outlined above, records also show that Prophet Muhammad (pbuh) had a designated place in his mosque known as *ustuwanaat al-wufuud* – pillars of embassies – where he received foreign delegations and embassies.[149] He was not discourteous to foreign visiting envoys in spite of the horrendous treatment meted out to his emissaries. A typical incidence that came to mind was the killing of Al-Harith ibn 'Umair Al-Azdi, an envoy of Prophet Muhammad (pbuh), by Shurahbil ibn 'Amr Al-Ghassani, who was then the Governor of Al-Balqa'. This envoy was intercepted on his way to the ruler of Busra to whom he was sent to deliver a letter by Shurahbil who had him tied up and beheaded.[150]

The historic and bloodless conquest of Makkah by the Muslims was followed by an unimaginable wave of deputations from neighbouring Arab States

[147] Ibid
[148] The hadith of Prophet Muhammad (pbuh) that says 'Seek knowledge in China if necessary' is quoted in PM Holt et al (eds.), *The Cambridge History of Islam* Vol. 2B, (CUP, Cambridge, 1970), p. 741
[149] HM Zawati, op cit., (2001), p. 77
[150] S Al-Mubarakpuri, op cit., p. 387

coming to signify their submission to the rule of the Islamic State. No wonder, the period is often referred to as *Sanat al-Wufud* – the year of deputation – by writers of Islamic history.[151] Among the tribes and States whose emissaries the Prophet received were the Banu Tamim; Banu Zubayd; Banu Hanifah; Himyar; Kinda; Banu 'Aamir; and Banu Tayy.[152] These envoys, in addition to being warmly received, were also presented with gifts and comfortably accommodated. It was also the practice in the early days of Islam for visiting envoys to be instructed on what protocols to observe when meeting with Prophet Muhammad (pbuh).[153]

The immunity and personal inviolability of foreign envoys is uncompromisingly upheld by Islam as exemplified by Prophet Muhammad's reaction to the two envoys of Musaylimah Ibn Habeeb. These two envoys by the names Ibn An-Nawaahah and Ibn Uthal, were sent by Musaylimah to deliver a letter to Prophet Muhammad (pbuh) which read thus:

> From Musaylimah, the apostle of God, to Muhammad, the Apostle of God. Peace be unto you. I, then, inform you that I have been associated with you in this mission, and that we have half of the territory, and

[151] See Ibn Hisham, op cit., Vol. IV, p. 158
[152] Ibid. Pp. 158-182
[153] Y Istanbuli, op cit., (2001), p. 148

> Quraysh has the other half, but Quraysh is an aggressive community[154]

When these envoys went ahead to stress and confirm their believe in the acclaimed prophethood of Musaylimah, the Prophet (pbuh) gave the following response which was to become the substratum upon which the Islamic concept of diplomatic immunity and inviolability is built: 'By God, if it were not the tradition that envoys could not be killed, I would have severed your heads.' [155] This response gives a vivid picture of the level of respect that was accorded to envoys in the early period of the Islamic civilization that under no circumstances must an envoy be killed, punished or maltreated. An envoy will, however, be declared *persona non grata* rather than being killed or maltreated if found guilty of espionage against the Islamic State or found to have committed any of the prohibited acts.[156] With this classical pronouncement of the Prophet, it therefore, becomes imperative to question the veracity of Khadduri's submission that whilst the envoys are still on the Muslims soil and there arose hostility, 'they (envoys) were either insulted or imprisoned or even killed.'[157]

2.3.6.4 Diplomatic Practice: The First Four Caliphs (632-661 AD)

[154] Ibn Hisham, op cit., Vol. IV, p. 192
[155] Ibid
[156] See Abu Yusuf, Ya'qub ibn Ibraahim al-Ansari, *Kitaab al-Kharaaj*, Cairo, A.H. 1352, Pp. 188-189 and HM Zawati, op cit., (2001), p. 77
[157] M Khadduri, op cit., (1955), p. 244. A similar unsubstantiated conclusion was made by Hamilton and Langhorne while talking about the fate of foreign ambassadors within the Islamic domain that: "If unsuccessful, a cool dismissal followed; and if war broke out before the ambassadors had left, they might be held captive or even executed." See K Hamilton and R Langhorne, op cit., (1995), p. 21

Just like in the time of Prophet Muhammad, the era of his foremost successors, generally referred to as the rightly guided caliphs, also recorded some diplomatic relations with foreign States. In strict adherence to the teachings of Prophet Muhammad (pbuh), Abu-Bakr, the first Caliph was reported to have instructed, as part of his farewell speech, Yazid Ibn Abu Sufyan when the later was leading an expedition to Syria in the following words 'in case envoys of the adversary come to you, treat them with hospitality.'[158] This era witnessed tremendous exchange of envoys between the Muslims and non-Muslim states. For instance, apart from Sa'd ibn Abi Waqqas (595-664 AD) that was sent to China by Prophet Muhammad (pbuh), the year 651 AD also recorded the despatch of the Muslim mission headed by Sa'd ibn Abi Waqqas to the Chinese Emperor, Gaozong of Tang under the overall leadership of Uthman Ibn 'Affan (579-656 AD), the third Caliph.[159] It has been further reported that the eight century witnessed more than thirty missions from the Muslim state sent to the Chinese Empire.[160]

2.3.6.5 Diplomatic Practice: The Umayyad and Abbasid Periods (661-750 AD)

The diplomatic intercourse of the then Islamic empire with neighbouring Kingdoms according to Zawati, has attained the height of 'sophistication' during the period of the Umayyad and most especially, the era of the Abbasid

[158] Arjoun, Sadiq Ibrahim, 'Khalid Ibn al-Walid', Al-Dar Alsaudiah, 1981, p. 244
[159] JN Lipman, *Familiar Strangers: A History of Muslims in Northwest China* (University of Washington Press, 1997), Pp. 25 and 29
[160]This has been recorded by the Chinese historian, Feng Chia Sheng, see M Nasser-Eddin, *Arab Chinese Relations*, (Arab Institute for Research and Publishing, Beirut) p. 15

dynasty.[161] The large amount of peace treaties conclusively negotiated with other Kingdoms, at that time attested to the diplomatic successes achieved by these Muslim states.[162] Muawiyah Ibn Abi Sufyan (602-680 AD), an Umayyad Caliph, was known for his preference for diplomatic methods which has been observed to be a reason behind the longevity of his reign.[163] Hitti, in his *Makers of Arab History,* refers to the Caliph's statement which signifies the level of his penchant for diplomacy thus: 'I apply not my lash where my tongue suffices, nor my sword where my lip is enough, and if there be one hair binding me to my fellow men, I let it not break. If they pull, I loosen, and if they loosen, I pull.'[164] These periods also witnessed quite a number of Muslims sent on diplomatic missions to the courts of various potentates for reasons ranging from political, commercial to social purposes. And in some other occasions, just for the purpose of exchanging friendly gifts.[165]

The period of the Abbasid has particularly been acknowledged to have expanded, in no small magnitude, the ambit of the international connections the Islamic State had with other nations, especially, in the area of commerce.[166] The Abbasid sovereigns created the office known as *Nizam-ul-Hadratain* which was in charge of employing 'special envoy to transact confidential business with neighbouring potentates.'[167] No wonder the foreign

[161] HM Zawati, op cit., (2001), p. 78
[162] Ibid
[163] Y Istanbuli, op cit., (2001), p. 87
[164] PK Hitti, *Makers of the Arab History*, (St. Martins Press, New York 1968), p. 43
[165] SA El-Wady Romahi, *Studies in International Law and Diplomatic Practice*, (Data Labo Inc., Tokyo 1981), p. 302
[166] B Sen, op cit., (1988), p. 5
[167] SA 'Ali, *A Short History of the Saracens,* (Taylor & Francis, 2004), p. 622

relations of the Abbasid Caliphate have been identified and greatly applauded for being a monumental factor upon which rest the enormous power, glory and progress recorded by the caliphate.[168] It is most likely correct that the emergence of *siyar*, as a new area of jurisprudence in Islamic law at that point in time must have been prompted by this outstanding advancement in the Muslims foreign relations. Historians have identified Harun Ar-Rashid (reigned 786-809 AD) as one of the most outstanding and powerful Caliphs of the Abbasid dynasty. Under his reign the four famous schools of Islamic jurisprudence[169] were established and he was the one who requested Abu Yusuf (d. 798 AD)[170] to author his *magnum-opus, Kitab Al-Kharaj*, which up till today, remains a valuable reference when considering issues touching on foreign relations under the Islamic law.[171]

Of great significance was the mutual friendly relations established between the two great powers of that period as represented by Harun al-Rashid in the East and Charlemagne in the West. The Islamic empire under the leadership of Harun al-Rashid and the Franks had strong and cordial diplomatic

[168] PK Hitti, op cit., (1968), p. 297

[169] The four schools of Islamic jurisprudence generally belong to the Sunni schools of law. They are; a) The Hanafi School founded by Abu Hanifah Nu'man Ibn Thaabit (circa 699-767) with followership in Iraq, Syria, Central Asia and India; b)The Maliki School founded by Maalik Ibn Anas al-Asbaahi (circa 710-796) with followership in North Africa, West of Egypt,Sudan, Sub-Saharan West Africa and Moorish Spain; c) The Shafi'i School founded by Muhammad Ibn Idris al-Shaafi'i (circa 767-820) with considerable followership Southern Arabia, Egypt, East Africa, Southern Asia and part of Central Asia; and d) The Hanbali School founded by Ahmad Ibn Hanbal (circa 780-855) with followership in Saudi Arabia and Saudi sponsored institutions abroad. For further details see MH Kamali, *Shari'ah Law: An Introduction*, (Oneworld Publications, Oxford 2008), Pp. 70-86; B Lewis and BE Churchill, *Islam: The Religion and the People,* (Wharton School Publishing, New Jersey 2009), p. 30-31

[170] His full name is Yaaqub Ibn Ibraahim al-Ansari. He was one of the prominent students of Abu Hanifah, the founder of the Hanafi School. He held the position of a judge in Baghdad prior to his elevation to the high position of a Chief Justice (*qaadi al-qudaat*) under Harun al-Rashid who requested him to write the book 'Kitaab al-Kharaj'. See J Esposito, op cit., (2003)

[171] Y Istanbuli, op cit., (2001), p. 87

relations.[172] This friendly relations between the Frankish Emperor and Caliph Harun, the essence of which is although, tainted with suspicion,[173] will always be remembered for the warmly reception given to the Franks emissaries and the lavish gifts they returned with. Hitti has, while describing the immensity of the gifts presented to the Frankish embassies by al-Rashid, referred to the following statements attributed to a Frankish author that 'the envoys of the great king of the West returned home with rich gifts from "the king of Persia, Aaron", which included fabrics, aromatics and an elephant.'[174] According to the accounts given by Vasiliev on the nature of the hospitality lavished on the Muslim embassies despatched to Constantinople, he says that '[it] was minutely elaborate, and the ambassadors were welcomed with all sorts of brilliant court ceremonies, diplomatic courtesies, and the astute display of military strength.'[175] In the same way the Byzantine diplomatic envoys were impressively received in Baghdad by the Muslim Caliph with full paraphernalia of Oriental magnificence.[176] Also there are records of ambassadors been

[172] Ibid., p. 101

[173] The pursuit of self-interest has been observed as the main reason or factor that brought these two imperial powers together. Charlemagne has been depicted as one who saw in Caliph Harun al-Rashid an ally against his rivals, the Byzantium while Harun, on the other hand, is portrayed as a person who saw in Charlemagne an ally against his bitter opponents, the Umayyads of Spain. See PK Hitti, op cit., (1968), p. 298

[174]Ibid. Hitti and some other writers have expressed much surprise over the utter silence of Muslim historians regarding this exchange of embassies and gifts between the Islamic Empire and the Frankish monarch. It can as well be observed, however, that this utter silence by the Muslim writers may not be unrelated to the doubts surrounding the historicity of the entire event. See N Daniel, *The Arabs and the Medieval Europe*, (Longman Group Limited, London 1979), p. 50

[175] AA Vasiliev, 'Byzantium and Islam', in NH Baynes and H Moss (eds.), *Byzantium: An Introduction to East Roman Civilization,* (Clarendon Press, Oxford 1953), p. 312

[176] Ibid

received from the Chinese Emperor and from India along with plentiful gifts for the Caliph, and they also received reciprocal treatments in return.[177]

2.3.6.6 Diplomatic Practice: The Ottoman Era (1260-1800 AD)

The Ottoman Empire came into historical limelight in about 1260 and steadily, it kept expanding towards the West and the East crushing the strength of the Byzantine, Serb, Bulgarian Kingdoms, the Anatolians and even, the Mamluk Sultanate stationed in Egypt was not spared.[178] In 1500, the Ottoman Empire was arguably, one of the most powerful nations in the world. The Ottoman armies made an attempt in 1529 and 1683 to overrun Habsburg Vienna. At that time, the strength and power of the once invincible Ottoman Empire began to dwindle to the extent that the Ottoman State started to lose their military superiority over to the West. The two wars against the Russians and the Austrians which the Ottomans failed to win that resulted in the treaties of Carlowitze in 1699 and Passarowitze in 1718 marked 'the resulting shift in the balance of power between the Ottoman Empire and the West.'[179]

Diplomatic relations of the Ottoman Empire with other nations had always remained cordial although, prior to 1700, it was said to be on an ad hoc basis

[177] SA Ameer Ali, *Short History of the Saracens,* (Macmillan and Co. Ltd., London 1955), Pp. 250-251; PK Hitti, op cit., p. 299
[178] D Quataert, op cit., (2005), p. 1
[179] FM Gocek, *East Encounters West: France and the Ottoman Empire in the Eighteenth Century* (Oxford University Press, New York 1987), p. 4

which almost 'came close to being a form of permanent diplomacy.'[180] Successive Ottoman Sultans that reigned many centuries before Selim III would only send out representatives to other nations if it becomes necessary.[181] From the eighteenth century onwards, the Ottoman diplomacy started drifting towards a more permanent one by stationing residential embassies in major European capitals that once played hosts to its temporary ambassadors. In 1793 for example, the first permanent embassy of the Ottoman Empire was established in London and few years later, more of it were established in Paris, Vienna and Berlin.[182] But the question is why did the Ottoman Empire adopt a temporary diplomacy when its military strength was pre-eminent? Could it be as a result of its inclination towards the principles of Islamic international law that the world is divided into two – *dar al-Islam* (the abode of peace) and *dar al-harb* (the abode of war)? Or is it that the Ottoman Empire was mainly adhering to its own created method of diplomacy? Answers to these questions become necessary in order to appreciate what really influenced the Ottoman kind of diplomatic interactions with other foreign nations.

Historically, the Ottoman Sultans were in the habit of sending diplomatic envoys to friendly foreign nations for the purposes of greeting ascension to the thrones; discussing treaties and ratifying peace agreements; conveying

[180] E Yurdusev, 'Studying Ottoman Diplomacy: A Review of the Sources' in AN Yurdusev (Ed), *Ottoman Diplomacy: Conventional or Unconventional?* (Palgrave Macmillan, Basingstoke, Hampshire 2004), p. 167
[181] B Ari, 'Early Ottoman Diplomacy: Ad Hoc Period' in AN Yurdusev (Ed), *Ottoman Diplomacy: Conventional or Unconventional?* (Palgrave Macmillan, Basingstoke, Hampshire 2004), p. 36
[182] D Quataert, op cit., (2005), p. 80-81

credentials on behalf of the Sultan; frontier demarcations; and continuation of peaceful and friendly relations.[183] The journey of the emissaries to foreign courts for negotiations and other diplomatic contacts is usually very short and upon conclusion of their visits, all diplomatic affairs came to an end.

The Ottomans system of capitulations which is predicated upon each country having its own laws, is very popular, although, not unique to the Ottoman Empire alone. The Chinese for instance were known to have something similar to the Ottoman concept of capitulations. Once the Ottomans received foreign ambassadors, they are unilaterally granted capitulations throughout the period of their stay even though it is non-reciprocal. The grant of capitulation is synonymous with the modern day concept of diplomatic privileges and immunities. Immediately the capitulatory favour is granted to a diplomatic envoy, the envoy is henceforth deemed to be under the laws of his king or republic.[184] Foreign emissaries were considered as guests within the Ottoman domain, and as such, provision of free food, travel accommodations and also daily allowance were all guaranteed.[185] Anybody with capitulatory status within the Ottoman Empire enjoyed full exemption from Ottoman taxes and custom duties.[186]

It has, however, been contended that the Ottomans embraced and adopted a negative attitude toward diplomacy as a result of their faithfulness to "Islamic

[183] B Ari, op cit., in AN Yurdusev (Ed), *Ottoman Diplomacy: Conventional or Unconventional?* (Palgrave Macmillan, Basingstoke, Hampshire 2004) p. 48
[184] D Quataert, op cit., (2005), p. 79
[185] FM Gocek, op cit., (1987), p. 20
[186] D Quataert, op cit., (2005), p. 79

precepts" which dictates that permanent diplomatic missions should not be sent to the European capitals.[187] There is an assumption that there cannot be a smooth diplomatic intercourse and exchange of diplomatic personnel by way of reciprocity between the Muslims and non-Muslims.[188] This contention properly fits with the account of Naff when he says that the Ottoman Empire in their relations with Europe were under the guiding principle of 'the inadmissibility of equality between *Dar al-Islam* (the abode of Islam) and *Dar al-Harb* (the abode of war, i.e. the Christian West).'[189] Meanwhile, most of the European States kept sending resident ambassadors to Istanbul as far back as the sixteenth century even though the Ottoman Empire did not deem it appropriate to reciprocate, but instead, embraced a unilateral diplomacy with respect to its European neighbours.[190]

There are four theoretical arguments behind the origin and nature of the system adopted by the Ottoman Empire. The first argument is that the Ottoman Empire is a direct or indirect continuation of and derivation from the

[187] See T Naff, 'Reform and the Conduct of Ottoman Diplomacy in the Reign of Selim III 1789-1807' (1963) 83, Journal of the American Oriental Studies, p. 296 where he says: 'Ottoman thinking in diplomacy, as in all matters of government, derived from the Muslim concept of the state, which was rooted in the Shari'a (Holy Law); traditionally, the Shari'a provided for all the exigencies of life and government, thus making the Muslim state, in theory, self-sufficient. In this sense, the Ottoman Empire was pre-eminently a Shari'a state.' See also MS Anderson, *The Rise of Modern Diplomacy 1450-1919,* (Longman, London 1993), Pp. 9 and 71

[188] AN Yurdusev, 'The Ottoman Attitude toward Diplomacy' in AN Yurdusev (Ed), *Ottoman Diplomacy: Conventional or Unconventional?* (Palgrave Macmillan, Basingstoke, Hampshire 2004), p. 6

[189] T Naff, 'Ottoman Diplomatic Relations with Europe in the Eighteenth Century: Patterns and Trends', in T Naff and R Owen (eds), *Studies in Eighteenth Century Islamic History* (Southern Illinois University Press, Carbondale and Edwardsville 1977), 93, 97

[190] Ibid.

Byzantine Empire.[191] The second argument is that the origin and character of the Ottoman Empire could be traced to the movements of migrating Turkish tribes.[192] As such, the Ottoman Empire falls within the Turkic tradition. The third was the ghazi state theory. That is the Ottoman State was *ghazi* based in that it was predicated upon the Islamic precept and the concept of *jihaad*.[193] While the fourth argument sees the Ottoman Empire as exemplifying nomadic empires emanating from tribal institutions.[194] Many scholars have, however, widely argued in support of the ghazi thesis that the Ottoman Empire was an Islamic empire.[195] Taken that the Ottoman territories were seen as the land of Islam; its army as the soldiers of Islam; and taken that the Ottoman Empire would not hesitate to go to war in case they are attacked or Islam is being threatened;[196] and the entire Empire claimed to be governed under the Islamic law. But can it be said to be truly and strictly an Islamic empire in all its ramifications?

It is doubtful to say that the Ottoman Empire in its governmental and administrative activities strictly complied with Islamic law. After all, the Ottomans were known for their adherence to the Turkish local customs and

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[191] HA Gibbons, *The Foundation of the Ottoman Empire: A History of the Osmanlis, 1300–1403* (Oxford University Press, Oxford 1916)

[192]MF Köprülü, *The Origins of the Ottoman Empire*, trans. and ed. Gary Leiser (State University of New York Press, Albany 1992)

[193] P Wittek, *The Rise of the Ottoman Empire* (Royal Asiatic Society, London 1938)

[194] RP Lindner, *Nomads and Ottomans in Medieval Anatolia* (Indiana University Press, Bloomington 1983)

[195]See N Itzkowitz, *Ottoman Empire and Islamic Tradition* (University of Chicago Press, Chicago 1972), 6, 11 See also H Inalcik, 'The Rise of the Ottoman Empire', in M. A. Cook (ed.), *A History of the Ottoman Empire to 1730* (Cambridge University Press, Cambridge 1976), 31

[196] AN Yurdusev, op cit., in AN Yurdusev (Ed), *Ottoman Diplomacy: Conventional or Unconventional?* (Palgrave Macmillan, Basingstoke, Hampshire 2004, p. 14

tradition, one of which is the right to make laws for the running of State affairs which the Ottoman sultans always resorted to by issuing the *qanun-nameas,* otherwise known as 'books of law'.[197] At best, it is safer to suggest that there was an amalgamation of Islamic law and the Turkish tradition in the administration of the Ottoman Empire.[198] For instance, during the reign of Mehmed II in 1454, he granted Capitulations otherwise known as *ahdname*[199] to the Venetians with the understanding that the decision was in accordance with the existing custom referring to the former capitulatory agreements that existed between the Byzantine Empire and the Venetians.[200]

The theoretical notion of perpetual war existing between the Muslim and the non-Muslim States may be difficult to justify. Especially so, when one considers the context and implication of *Qur'an 8 v 61*[201] which urges the Muslims to make peace in as much as the non-Muslims are inclined towards peace. Moreover, whether *jihaad* implies a state of regular or perpetual war

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[197] H Inalcik, op cit., in M. A. Cook (ed.), *A History of the Ottoman Empire to 1730* (Cambridge University Press, Cambridge 1976), p. 47-48

[198] Bulent Ari analysed that the Ottoman state did observe basic Islamic principles in many respect, but they also do not hesitate to combine these practices with the Turkish traditions and in many occasion 'followed a practical path without adhering strictly to religious law.' B Ari, op cit., in AN Yurdusev (Ed), *Ottoman Diplomacy: Conventional or Unconventional?* (Palgrave Macmillan, Basingstoke, Hampshire 2004), Pp. 43-44

[199] It is similar to *aman* which means safe conduct and freedom for foreign envoys to live within the territories of the Ottoman Empire not under the Ottomans laws, but under the laws of their own countries.

[200] See N Sousa, *The Capitulatory Regime of Turkey: Its History, Origin, and Nature* (Johns Hopkins Press, Baltimore, MD 1933), 16. Article XVI of the Agreement read as follows: 'that his lordship of Venice may, if he desires, send to Constantinople a governor (consul), with his suit, according to existing custom, which governor (consul) shall have the privilege of ruling over, governing, and administering justice to the Venetians of every class and condition.'

[201] Qur'an 8 verse 61 says: 'And if they (the enemy) incline to peace, then incline to it [also] and rely upon Allah. Indeed, it is He who is the Hearing, the Knowing.' The English translation of the Qur'an in *The Qur'an: English Meaning and Notes by Saheeh International* (Al-Muntada Al-Islami Trust, Jeddah, 2012) will be adopted throughout this dissertation.

against the non-Muslims remains contestable.[202] Furthermore, is the additional concept of *dar as-sulh* (abode of treaty), where the Muslims and the non-Muslims live in peace while observing the terms of the treaties. It takes away the duality or dichotomization of the entire world into the perpetual *dar al-Islaam* (the abode of peace) and *dar al-harb* (the abode of war) once the *dar as-sulh* (peaceful co-existence based on treaty) is resorted to. In addition, the reason for the argument that Islam prescribes an impenetrable duality in terms of *dar al-Islaam* and *dar al-harb*, as expressed by Yurdusev, 'is indeed the analogy between the medieval Christian conceptualization of *Christendom* versus *non-Christendom* and that of Islam.'[203]

While the diplomatic practice that was established during the Ottoman Empire can be said to be mostly shaped by the principles of Islamic international law, at the same time, it may be equally correct to suggest that the Ottomans devised their own method of diplomacy. In other words, the Ottoman Empire appeared to be structured based on the Islamic law tenents blended with the Turkish tradition.

2.4 Historical Survey of the Contribution of Islamic Law to the Development of International Diplomatic Law.

[202] The notion of jihad and when it can be resorted to against the non-Muslims is well discussed in HM Zawati, op cit., (2001), Pp. 36-39 See also AHA Abu Sulayman, *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (International Institute of Islamic Thought, Herndon 1987)

[203] AN Yurdusev, op cit., in AN Yurdusev (Ed), *Ottoman Diplomacy: Conventional or Unconventional?* (Palgrave Macmillan, Basingstoke, Hampshire 2004), p. 15

Many writers of international jurisprudence have always seen modern international law as a legal system that is deeply rooted in Western culture even when it has been overwhelmingly admitted that it has its roots firmly entrenched in and traceable to various ancient civilizations of the world.[204] This explains why the system of diplomatic immunities and privileges, being an integral aspect of international law, has also been perceived as 'essentially Euro-centric based.'[205] Perhaps, the demand of some commentators against 'the continued European and Christian underpinnings and influences on modern international law,' to use the words of Baderin,[206] justifies the need for further research into the contributions already made and most likely to be made by Islamic law towards the development of modern international law. Of course, it will be argued that some of the principles of Islamic *siyar* contributed into forming what is now known as the principles of international law. It is not a case of expression of mere optimism that the evidence to prove the possibility of Islamic law influences 'may yet be uncovered,'[207] when there are ample historical evidence pointing towards a significant contribution made by Islam jurisprudence. This contribution has received little or no mention by most Western literatures probably due to what Boisard has

[204] MA Baderin, (ed.) *International Law and Islamic Law*, (Ashgate Publishing Limited, Hampshire 2008) p. xv. See also M Shaw, *International Law*, (5th edn, Cambridge University Press, Cambridge 2003), p. 13 and JL Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edn. Claredon Press, Oxford 1963), p. 1

[205] JC Barker, op cit., p. 57

[206] MA Baderin, 'Religion and International Law: An Analytical Survey of the Relationship' in D Armstrong, *Routledge Handbook of International Law* (Routledge, Oxon 2009), p. 167

[207] See AE Mayer, 'War and Peace in the Islamic Tradition and International Law' in J Kelsay and JT Johnson, (eds.), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, (Greenwood Press, Westport CT 1991), p. 199

described as 'psychological prejudice'.[208] The ICJ has equally attested to the contribution of Islam when it says:

> But the principle of the inviolability of the persons of diplomatic agent and the premises of diplomatic missions is one of the very foundations of long-established regime, to the evolution of which the traditions of Islam made a substantial contribution.[209]

The historical accounts regarding the genesis and development of modern international law along with its principles have always been fashioned around Western civilization. Oppehheim, for instance, just like many other Western scholars of international law, was unequivocal in his submission that international law 'is a product of modern Christian civilisation.'[210] This conclusion has been met with serious criticism by some commentators who would rather argue that modern international law owes its growth and development to the 'coexistence of plural civilizations' with each of these civilizations proudly attached to its culture and normative value system which

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[208] MA Boisard, (1980), p. 430. A clearer picture of this alleged psychological prejudice exhibited against Islam is objectively and well depicted by Watt in the *Cambridge History of Islam* thus: ". . . some occidental readers are still not completely free of the prejudices inherited from their medieval ancestors. In the bitterness of the Crusades and the other wars against the Saracens, they came to regard the Muslims, and in particular Muhammad, as the incarnation of all that is evil, and the continuing effect of the propaganda of that period has not yet been completely removed from occidental thinking about Islam." MW Watt, 'Muhammad' in PM Holt et al., (eds.), *Cambridge History of Islam*, (Cambridge University Press, Cambridge 1970), p. 30

[209] *US Diplomatic and Consular Staff in Tehran* (1980) ICJ Rep.at para. 86, p. 40

[210] L Oppenheim, *International Law: A Treatise* (Vol 1, 3rd edn, The Lawbrook Exchange Ltd., Clark, New Jersey 2005), p. 48. See also MN Shaw, *International Law* (6th edn CUP, Cambridge 2008), p. 13

were considered to be of universal applicability.[211] While it is not the intention here to dwell on how all the various civilizations have contributed to the making of the modern international law, this section intends to scrutinise the most probable influence of the Islamic civilization on the contemporary international law principles of which the concept of diplomatic immunity is one.

It has been rightly argued that the contemporaneous existence of the Islamic civilization alongside the Western civilization coupled with the inevitable interactions between the two civilizations, point towards the possibility of influence.[212] That the Islamic civilization had a legal influence on the West particularly at the time of its emergence from the Middle Ages can be gleaned from: the juristic writings of early Muslim jurists mostly, during the Abbasid Caliphate; the protracted contacts between Europe and Islam both in war and peace, most especially before and after the recapture of Spain and Sicily by the Crusaders; the peaceful interaction between the Christian and Islamic civilisations brought about through commercial transaction; and the military confrontation which though, appeared unending between the West and the East.

In addition to the general acceptability, particularly amongst Western publicists, that the development of the principles of modern international law

[211] O Yasuaki, 'When Was the Law of International Society Born? An Inquiry of the History of International Law from An Intercivilisational Perspective', (2000), 2, Journal of the History of International Law, p. 7
[212] MA Boisard, op cit., (1980), p. 430

was initiated by the West, it has equally gained tremendous currency that the creation of modern international law principles revolves around the likes of Francisco De Vitoria (1480-1546), Suarez (1548-1617), Alberico Gentili (1552-1608), Hugo Grotius (1583-1645) and Emerich de Vattel (1714-1767) who are referred to as the founders of international law.[213] The most prominent amongst these names was of course, Grotius, writer of the famous book, *De Jure Belli ac Pacis* which came out in 1625. He was, on the strength of this book, singled out and styled by some Western historians of international law as "the father of international law."[214] Western commentaries touching on the origin of international law have often been noticed to concentrate heavily on the periods of the Greek civilization, the Roman era, and then swiftly conclude with the modern times. This historical account is always nicely manipulated in such a way that it thus appears as if the intervening period of about ten centuries between the Roman era and the period of modernity was of no significant momentum to the making of modern international law.[215] It is perhaps, for this reason that the conclusion of Oppenheim that there was no form of intermediary link between the Roman period and modern times has not been allowed to go unchallenged.[216] The assertion of Oppenheim that there was 'neither room nor need for an International Law'[217] during the Middle Ages underscores the essence of an in-depth scrutiny into the

[213] See MN Shaw, op cit., (2008), Pp. 22-24
[214]The prevalent assertion that Grotius is the father of modern international law has been strongly challenged by some other scholars such as Scott, who are of the fervent view that the renowned Spanish scholar, Francisco De Vitoria, is more deserving of that amiable position than Hugo Grotius. See JB Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations*, (The Lawbook Exchange Limited, New Jersey 2000)
[215] M Hamidullah, op cit., (1961), p. 62
[216] Ibid
[217] See L Oppenheim, op cit., (2005), Pp. 56 and 58

jurisprudential contribution of early Muslim scholars to the development of what now became modern international law. To justify his submission that there arose no need for a law of nations at that period, he maintains that the Roman Empire 'hardly knew of any independent civilised states outside the border of their Empire'[218] as it almost absorbed the whole civilised ancient world. This submission cannot be seen or held to be congruent with the historical facts which point to the existence of the Islamic civilization in the medieval period and its interaction with other civilised nations of that epoch including the Byzantium Empire. If one of the core purports of international law is to regulate how independent States relate and deal with each other; and if history strongly supports the co-existence of the Islamic civilization in the Middle-Ages alongside other civilizations, it is only logical to conclude that the need for an international law cannot be more expedient. According to Oppenheim in his further account, the need for an international law only became paramount sometime between the fifteenth and sixteenth centuries when Europe became 'divided up into a great number of independent states.'[219] It may therefore become necessary to ask at this stage that: what makes the period witnessing the fragmentation of Europe more deserving of the law of nations than the medieval period? This may appear to be a clandestine attempt not to give any credence to, or acknowledge the contribution of the Islamic civilisation to the making of modern international law thereby strengthening the highly contestable assertion that modern international law is the product of the Christian European civilization.

[218] Ibid
[219] Ibid

Hugo Grotius became, though arguably, 'the father of modern international law' for writing the *De Jure Belli ac Pacis* in the seventeenth century to satisfy the urgent need of the newly found 'multitude of independent States established and crowded on the comparatively small continent of Europe'[220] with a view to salvaging them from plunging into what Oppenheim has described as 'international lawlessness'.[221] It is worth mentioning the famous Muslim jurist, Muhammad Ibn Hassan as-Shaybani (750–805 AD) who authored at the end of the eight century the world earliest treatise on international law. The book is entitled '*Kitab as-Siyar al Kabir'* the original text of which, according to Khadduri, appears to have been lost but fortuitously preserved in the elaborate commentary of Sarakhsi (d. 490/1096) otherwise known as the '*Sharh Kitab as-Siyar al-Kabir'*.[222] It was the admiration for this remarkable work that led Joseph Hammer von Purgstall after reviewing same, to designate this classic author as 'the Hugo Grotius of the Muslims.'[223]

It however, remained unclear if, prior to the writing of Grotius' famous treatise, there were traces of any standard legal work on international law imputable either to the Greeks or Romans that could have served as a source of influence or reference for Grotius. What remains evidently apparent is that that as at the time Grotius was putting together his *De Jure Belli ac Pacis,* there was already in existence, and had been for more than 800 years, the

[220] L Oppenheim, op cit., (2005), p. 63
[221] Ibid.
[222] M Khadduri, (tr.) *The Islamic Law of Nations: Shaybani's Siyar*, (The John Hopkins Press, Baltimore 1966), p. 38
[223] Ibid., p. 56. See also *Jahrbucher der Literatur,* (Wien, 1827), Vol. 40, p. 48

work of Shaybani which Weeramantry rightly refers to as 'the world's earliest treatise on international law.'[224] Taking into account the perceived quest of Grotius to unify mankind under a universal rule, a quest which would have undoubtedly propelled him into an elaborate research of the diverse cultural bequests of various civilizations, one will admit the fact that Grotius, with his high level of erudition, could not have ignored valuable jurisprudential materials emanating from the world of Islam, a civilization which for almost ten centuries, unflinchingly, engaged the world of Christendom in both peaceful and belligerent interactions.[225] Doubt as to whether or not Grotius was ever aware of the existence of the Muslim *siyar* might as well be put to rest by the amazement that surrounded Grotius' discovery that the legal concept of *postliminium* has a place in the Islamic international law.[226] Weeramantry, in his analysis of the possible impact of the Islamic civilization upon Grotius' *De Jure Belli ac Pacis,* has carefully outlined one of these possibilities in the following words:

> Grotius finalised his *De Jure Belli ac Pacis* in France, where he had fled after his escape from imprisonment in the fortress of Louvestein. In France he worked on his book in the chateau of Henri de Meme, where another friend, de Thou, 'gave him facilities to borrow books from the superb library formed by his father' (*Encyclopaedia Britanica,* 1947 edn, vol. 10, p.908).

[224] CG Weeramantry, op cit., (1988), p.130
[225] Ibid., p. 151
[226] See M Hamidullah, op cit., (1961), note 3 p. 66

> A 'superb library' in France in the early 1600s could not have been without a stock of Arabic books and other materials on Islamic civilisation. Moreover, if Grotius had no Arabic himself it is highly unlikely that he could not have found a translator in France.[227]

It has been strongly argued that Grotius' legacy to modern international law cannot be said to be free from the indirect influence of the several juristic endeavours of early Muslim scholars belonging to the glorious era of the Islamic civilization.[228] This argument is based on Grotius' acknowledgement of having been greatly influenced by one of his Spaniard predecessors, de Vitoria who himself was indebted to the prominent Spanish writers of international law that came before him such as King Alfonso X of Castle. It must however be noted that King Alfonso's *Las Siete Partidas* of 1263 unequivocally, proclaims the significant influence Islamic law had on international law.[229] It has also been observed that the fact that most of the prominent and earliest European scholars of international law like Vitoria, Ayala, Suarez and Gentili were known to have come from those parts of Spain and Italy that had strong influence of the Islamic legal system gives more weight and credence to the possibility of Islamic law influence on the

[227] CG Weeramantry, op cit., (1988), p. 152
[228] MA Boisard, op cit., (1980), p. 441
[229] Attention has been drawn to the relevant portion of King Alfonso's *Las Siete Partidas* which acknowledges the influence of Islamic law by Nys while reviewing the *Siete Partidas* thus: "In the second *Partida* some chapters are given to military organisation and to war. As regards war, much is borrowed from the Etymologiae of St. Isidore of Seville . . . and *in many respects the influence of Musulman law is very apparent*." See Nys, 1964, Introduction, p. 62

development of modern law of nations.[230] The analytical summation of Weeramantry on the implied influence of Islam on Grotius' famous work is of particular interest:

> We must note also that Grotius was preceded not merely by one Spanish theologian who wrote on the laws of war, but many, such as Suarez and Ayala and others going all the way back to King Alfonso and beyond. All those writers wrote against the background of a dominant Islamic culture and could not have been unaware of or uninfluenced by it. For example, Suarez was born in Granada in 1548, barely half a century from the time when it was the last stronghold of the Moorish kings in Spain. Suarez' *De Legibus* appeared in 1612 and there is reason to believe that Grotius read it with interest and was influenced by its seminal ideas.[231]

The predominant power of the Muslim civilization spanning between the seventh and sixteenth centuries in the Mediterranean region presupposes a strong possibility that the West must have in one way or the other borrowed and learnt from the Islamic practice of international relations. The important role played by Spain and Sicily in the introduction of the Islamic civilization to

[230] CG Weeramantry, op cit., (1988), p. 158 Hamidullah, in his account, has given a vivid description of these famous writers thus: 'they were all the product of the renaissance provoked by the impact of Islam on Christendom.' See M Hamidullah, op cit., (1961), p. 66.
[231] CG Weeramantry, op cit., (1988), p. 157

Europe cannot be discarded if one is really keen about unravelling the reason why the initiative of permanent legation was taken by the commercial towns of Italy. Not only did Spain and Sicily serve as vital points of contact between Islam and Europe, they also became a point from where the Islamic intellectual and social influence spread across the entire Iberian Peninsula.[232] In recognition of Islamic law concept of freedom of the seas, the Islamic government in Spain allowed for the installation of foreign commercial agents thereby evolving for the first time, the European consulates right in the heart of the Islamic State.[233] The eventual perfection of this system in the form of permanent legation in Italy following the Italian Renaissance of the fourteenth and fifteenth centuries cannot, as such, be attributable to mere chance.[234] After all, it is a fact known to history that not only did the Norman conquest of 1061-1089 abruptly terminates the Islamic governance in Spain and Sicily, but also brought about what Boisard has described as 'the phenomenon of two superimposed civilisations'[235] through which the cultural treasure of the Islamic civilization along with its knowledge and techniques passed on to the West.[236]

[232] See M Lombard, *The Golden Age of Islam*, (Markus Weiner Publishers, Princeton 2004) p. 87; MA Boisard, op cit., (1980), p. 435
[233] See MA Bosard, op cit., (1980), p. 432
[234] Ibid p. 442
[235] Ibid p. 436
[236] Ibid p. 435

2.5 Conclusion

This chapter has drawn our attention to how diplomatic practice generally with particular reference to the inviolability and immunity of diplomatic envoys appear to be historically universal among different civilizations of the world. This is evidenced from their long history of diplomatic relations. Moreover, the inter-civilizational contacts which gave each civilization the opportunity to borrow from each other, which in today diplomatic relations, have the potential of building a cross-cultural understanding amongst States which contribute immensely towards the development of international diplomatic law.

CHAPTER THREE

SOURCES OF ISLAMIC AND INTERNATIONAL DIPLOMATIC LAWS: BETWEEN TENSION AND COMPATIBILITY.

3.1. *Introduction*

The question of compatibility between the principles of Islamic *siyar* and modern international law has exacerbated a cornucopia of controversies amongst scholars of Islamic jurisprudence and international law. Exponents of the exclusivist theoretical view have always maintained that modern international law along with its principles do not and cannot accommodate any rules or principles of the Islamic international law due to the absence of any compatibility between the two legal regimes. Ford, for example, made it categorically clear without mincing words that '[t]he *siyar* cannot be said to be genuinely compatible with modern international jurisprudence with respect to treaty principles, customary law, general principles of law, precedent or even the teachings of eminent publicists.'[1] He further argues that any attempts towards finding compatibility in the two jurisprudential systems will be tantamount to 'merely whitewash[ing] genuine discrepancies between international norms and the principles grounding the *siyar*.'[2] Bouzenita equally concludes that the fact that Islamic international law and modern international law originated from different historic and cultural developments

[1] See CA Ford, op cit., (1995), p.500 See also M Berger, op cit., in P Meerts (ed), *Culture and International Law* (Hague Academic Coalition, The Hague 2008) p.107 and DA Westbrook, op cit., (1992-1993), p.883

[2] CA Ford, op cit., (1995), p. 500

with distinct sources, concepts and objectives, will ultimately make the two legal systems incompatible.[3] Muslim publicists,[4] including some non-Muslim commentators,[5] on the other hand, have continually canvassed arguments in favour of a harmonious blend between the principles of Islamic international law and modern international law by expounding on all areas of compatibility between the two legal systems. Mahmassani, for instance, was very clear in his pursuit of this exposition that he states that 'a sufficient explanation of the basic principles of the international law of Islam is necessary in order to bring out their similarity with modern principles, and to demonstrate that such universal principles, being based on the unity of mankind, are part and parcel of the tradition of Islam.'[6]

Based on the foregoing arguments, this chapter will formulate the following issues for discussion. To start with, the chapter is divided into five sections. After these introductory comments, in the first section, I seek to discuss the two primary sources of Islamic *siyar* (the Qur'an and the *Sunnah*) to be followed by *ijtihaad* which is the manifestation of the rational sources of Islamic *siyar* in the second section. I also seek to examine how legal obligations can be extracted from these sources for the purpose of establishing Islamic *siyar.* In the third section, I seek to analyse the sources

[3] AI Bouzenita, op cit., (2007), p. 44
[4] See S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p.205 See also I Shihata, 'Islamic Law and The World Community', (1962) 4 Harvard Int'l C J p. 101; HM Zawati, op cit., (2001) p. 6; and GM Badr,op cit., (1982), Pp. 58-59
[5]CG Weeramantry,op cit., (1988) p. 166
[6] S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p.205

of international diplomatic law relying on Article 38 of the SICJ. In the fourth section, I seek to consider a theoretical comparative overview of the sources of both legal systems and draw a conclusion on whether there is compatibility in their respective sources. And finally, in the fifth section, I seek to sum up the compatibility in the outcome of the sources of Islamic *siyar* and international law.

3.2. ***Sources of Islamic Diplomatic Law***

Islamic diplomatic law, being an integral part of Islamic *siyar,* shares the same sources with it. Moreover, Islamic *siyar* has always been an inseparable component of Islamic law*,* since it shares the same sources.[7] Khadduri has correctly stated this position thus: '[t]he *siyar*, if taken to mean the Islamic law of nations, is but a chapter in the Islamic *corpus juris*, binding upon all who believed in Islam as well as upon those who sought to protect their interest in accordance with Islamic justice.'[8] Before going into the different sources of Islamic law, it is important to first understand the terms *'Shari'ah'* and *'Fiqh'* within the context of Islamic law and the definitional connotation of sources in Islamic law.

[7] See SS Ali, 'The Twain Doth Meet! A Preliminary Exploration of the Theory and Practice of as-Siyar and International law in the Contemporary World' in J Rehman and SC Breau (eds.), *Religion, Human Right and International Law* (Martinus Nijhoff Publishers, The Netherlands, 2007), p. 90; AI Bouzenita, op cit., (2007), p. 24 See also S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p. 235; S Khatab and GD Bouma, *Democracy in Islam* (Routledge, London 2007) p. 174; FA Hassan, op cit p.72; M Khadduri, *War and Peace in the Law of Islam* (The Lawbook Exchange Limited, New Jersey 2006) p. 47; and SS Ali and J Rehman, 'The Concept of Jihad in Islamic International Law', (2005)10 (3) JCSL p. 324

[8] M Khadduri, op cit., (1966), p. 6 See also *Qureshi v. U. S. S. R.* PLD (1981) SC p. 377

3.2.1 Islamic Law: Distinction between Shari'ah and Fiqh (Jurisprudence)

The usage of the words *Shari'ah* and *Fiqh* as synonyms of Islamic law has generated some confusion in both the theoretical and practical understanding of Islamic law.[9] Meanwhile, they are of different technical meanings which though, complement each other for a pragmatic perception of Islamic legal system. The word *'Shari'ah'* literally means 'a path to a watering place' or a 'clear path to be followed' and it emanates from the verb '*shara'a'* meaning 'to introduce', 'to enact' or 'to prescribe'.[10] In its general usage, it connotes commands, prohibitions and principles meant to regulate the conducts of humanity as contained in the Qur'an and Prophet Muhammad's example (his *Sunnah*) which are binding on all believers.[11] This term is also traceable to Qur'an 45:18 which says: 'Then we put you, [O Muhammad], on an ordained way concerning the matter [of religion] [*shari'atin minal-amr*]: so follow it and do not follow the inclinations of those who do not know.' In the literal sense, *fiqh* simply means intelligence or knowledge while technically it covers the whole of Islamic jurisprudence.[12] *Fiqh* can thus, be defined as 'knowledge of the practical rules of the *Shariah* which are deducible from the Qur'an and *Sunnah* by direct contact with them.[13] It is the science of the *Shari'ah.*

[9]M Baderin, 'Understanding Islamic Law in Theory and Practice' (2009) 9 Legal Information Management, p. 186
[10] See MH Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications, Oxford 2008) p. 14
[11] See Ibid; JL Esposito, op cit., (2003) Pp. 287-288; and C Glasse and H Smith, *The New Encyclopedia of Islam* (AltaMira Press, 2001) p. 419
[12] See H Abd Al-Ati, *The Family Structure in Islam,*(ATP, Indianapolis, 1977), p. 13
[13]See MH Kamali, op cit., (2003), p. 41

Baderin has carefully classified the usage of *Shari'ah* in relation to Islamic law into three different contexts. Firstly, there is the usage of *shari'ah* in the generic religious context, meaning the Muslims' way of life generally.[14] In other words, *shari'ah* is perceived as covering strictly legal and non-legal matters. Secondly, *shari'ah* could also be applied in a general legal context.[15] That is *shari'ah* is considered as a distinct legal system 'with its own sources, methods, principles and procedures' completely different from all other legal systems. The fear associated with this context, according to Baderin, is that the whole of the Islamic legal system might be considered to be 'completely divine and thereby . . . (mis)represent[s] the whole system as inflexible and unchangeable.'[16]

Thirdly, *shari'ah* can be seen from a specific context distinct from *fiqh* (jurisprudence).[17] While analysing this context, Baderin distinguishes the usage of *Sharia'h* restrictively to mean 'only the divine sources of Islamic law, namely the *Qur'an* and *Sunnah* of the Prophet Muhammad'[18] from *fiqh* which represents the 'human jurisprudential aspect of Islamic law'.[19] It therefore means that *Shari'ah*, in a strict sense, will constantly remain immutable. But the *fiqh*, on the other hand, which is 'a human product, the intellectual systematic endeavour to interpret and apply the principles of *shari'ah*'[20] will always maintain its variability subject to time and circumstances, particularly

[14] M Baderin, op cit., (2009), p. 186-187
[15] Ibid., p. 187
[16] Ibid
[17] Ibid., Pp. 186-187
[18] Ibid., p. 187
[19] Ibid
[20] H Abd Al-Ati,op cit., (1977), p. 14

with respect to *mu'aamalaat* (inter-human relations).[21] This distinction becomes particularly important as Abd Al-Ati concludes that '[m]uch of this confusion can probably be avoided if the analytical distinction between *shari'ah* and *fiqh* is borne in mind and if it is realized that Islamic law is held by Muslims to encompass two basic elements: the divine which is unequivocally commanded by God or His Messenger and is designated as *shari'ah* in the strict sense of the word; and the human, which is based upon and aimed at interpretation and/ or application of *shari'ah* and is designated as *fiqh* or applied *shari'ah.*'[22] Without this distinction, Islamic law will be erroneously depicted as a completely divine legal system.

3.2.2 Definitional Connotation of 'Sources' in Islamic Law

The terms *'daleel'* and *'asl'* have often been used, though interchangeably, by scholars of Islamic jurisprudence as synonyms of the word 'source'. The word *daleel* (pl. *adillah*) literally means 'proof, indication or evidence'.[23] It will however be ascribed a technical meaning when it serves as an indication of a source from where a rule of *Shari'ah* is deducible, hence the usage of the phraseology, '*adillat al-Shar'iyyah*[24] (sources of Islamic law). The term '*asl'* (pl. *usuul*) on the other hand, ordinarily means "something from which another thing originates."[25] Nyazee's meaning of the term *asl* is in accord with Hamidullah's understanding of *usuul* being a synonym of the words 'roots'

[21] M Baderin, op cit., (2009), p. 187
[22] H Abd Al-Ati, op cit., (1977), Pp. 14-15
[23] MH Kamali, *Principles of Islamic Jurisprudence* (The Islamic Texts Society, Cambridge 1991) p.9
[24] Ibid.
[25] IAK Nyazee, *Islamic Jurisprudence* (Adam Publishers and Distributors, New Delhi 2006) p.33

and 'sources'.[26] In appreciation of the common usage of the two terms (*'daleel'* and *'asl'*), Kamali was quite explicit in his explanation that "*Dalil* in this sense is synonymous with *asl*, hence the sources of *Shari'ah* are known both as *adillah* and *usul."*[27]

Traditionally, the rules - *ahkaam* (sing. *hukmu*) of Islamic law are said to be derived from four different sources namely: the Qur'an, *Sunnah* (prophetic tradition), *ijmaa'* (consensus of legal opinion) and *qiyaas* (analogical deduction).[28] The practices of the Islamic rulers and caliphs, which include their official instructions to their commanders and statesmen, have also been added as a supplementary source of Islamic international law.[29] But following the pattern of discussion in the foregoing section, there appears to be three basic elements constituting the Islamic legal system. They are sources, methods and principles. The sources are the Qur'an and the *Sunnah* of Prophet Muhammad (pbuh) which are basically divine and immutable. The *ijmaa'* and *qiyaas* constitute the methods of Islamic law while the principles are made up of *istihsaan* (juristic preference), *maslahah-mursalah* (jurisprudential interest), *saddudh-dharii'ah* (blocking lawful means to an unlawful end), *istishaabul-haal* (presumption of continuity of a rule), *'urf*

[26] M Hamidullah, op cit., (1961) p. 18
[27] MH Kamali, (1991), op cit., p.10. See also IAK Nyazee, op.cit, (2006), p. 144
[28] NA Shah, *Women, The Koran and International Human Rights Law* (Martinus Nijhoff Publishers, Leiden/Boston 2006) p. 70
[29] See MC Bassiouni, 'Protection of Diplomats under Islamic Law, (1980) 74 American Journal of International Law, p. 609; J Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilisation' in the New World Order* (Hart Publishing, Oxford, 2005), p. 11

(custom)[30] and many more which have been formulated into legal maxims.[31] Aside from the Qur'an and *Sunnah* which have been identified as forming the divine sources (*adillah*) of Islamic law, all the other sources aforementioned are manifestations of the human jurisprudential elements of Islamic law, otherwise known as *ijtihaad*.[32] Meanwhile, the acceptability of these additional methods and principles of Islamic law has provoked considerable contention amongst the various *madhaahib* (plural of *madhhab*) – schools of Islamic jurisprudence.[33] The sources, methods and principles of Islamic law will now be considered in *seriatim.*

3.2.3 The Qur'an:

The Qur'an is unanimously considered by the Muslims as a book containing the words of Allah which was revealed to Prophet Muhammad (pbuh) through angel Gabriel, not as a whole, but in piecemeal, spanning through a period of

[30] IAK Nyazee, op cit (2006), p. 144. See also M Baderin, op cit., (2009), p 189

[31] MH Kamali, 'Qawa'id al-Fiqh: The Legal Maxims of Islamic Law', (1998) 3 Muslim Law Journal, p.

[32] This is a juristic tool resorted to by jurists through intellectual exertion with a view to expanding the law by having recourse to the primary sources of the Shari'ah so as to provide solutions to new legal problems. See A Khan, 'The Reopening of the Islamic Code: The Second Era of Ijtihad', (2003) 1 Uni. St. TLJ, p. 345

[33] The Sunni and the Shi'a schools constituted the two major divisions within the legal schools of Islam about three decades after the demise of Prophet Muhammad. The Sunni school which forms the majority is further divided into four major *madhaahib* namely: Hanafi School founded by Abu Hanifah Nu'maan ibn Thaabit (d. 767) with followers in Turkey, Syria, Lebanon, Jordan, India, Pakistan, Afghanistan, Iraq and Libya; Maaliki School founded by Maalik ibn Anas al-Asbahi (d. 795) with followers North Africa, West Africa and Kuwait; Shaafi'i School founded by Muhammad ibn Idris as-Shaafi'i (d. 820) Southern Egypt, Southern Arabia, East Africa, Indonesia and Malaysia; and Hanbali School founded by Ahmad ibn Hanbal (d. 855) with followers in Saudi Arabia and Qatar. The Shi'a School is sub-divided into three surviving schools of law thus: Ithnaa Ashariyyah School otherwise known as the 'Twelvers'; Zaydi School; and Ismaa'ili School also referred as *'Sab'iyyah'* otherwise known as the Seveners. See MH Kamali, (2008) op cit Pp. 70-87; WB Hallaq, *Origins and Evolution of Islamic Law* (CUP, Cambridge 2005) Pp. 150-177; M Baderin, op cit., (2009), p. 189; and NA Shah, op cit., p. 69

about twenty-three years.[34] It remains the most authoritative source (*daleel*) of Islamic law owing to the concordant view of Muslim scholar-jurists on the incontrovertibility of its divinity and form.[35] It must be noted however, that the Qur'an being rated the most reliable source of *shari'ah* does not necessarily make it a legal instrument, *stricto sensu,* since, the legal verses (*aayaatul-ahkam*) contained therein only constitute a small proportion of the more than 6000 verses of the Qur'an.[36] The verses of the Qur'an dealing with legal matters (such as crimes, public, private and international law) fall within the range of between 350 and 600 verses most of which were revealed as answers to both empirical questions and anticipatory situations.[37] The absence of unanimity amongst the Muslim juris-consults (*fuqahaa'*) on the numbers of legal enactments in the Qur'an is not unconnected with the differences in individual scholar's understanding of and interpretation ascribed to a particular provision of the Qur'an. A learned scholar, for instance, can deduce a rule of law from a parable or historical contents of the Qur'an and hence, considers it as one of the *ayaatul-ahkaam* which may not be acceptable to another scholar.[38] It has also been observed that some Western commentators, particularly adherents of the legal positivist theory, remain averse to the assertion that the legal-specific verses of the Qur'an are up to

[34] M Hamidullah, op cit., (1961), p. 19
[35] S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p. 229 The scholars however, maintain divergent views regarding the interpretation ascribed to some verses of the Qur'an which precipitated the emergence of the branch of knowledge known as *'ilmut-tafseer al-Qur'an'* – science of exegesis of the Qur'an.
[36] See MH Kamali, (2008), op cit p. 19
[37] Ibid See also IAK Nyazee, op.cit, (2006), p. 161;and M Baderin, op cit., (2009), p. 187
[38] See MH Kamali, (2008), op cit., p. 20 where he refers to the observation of As-Shawkaani in *Irshaadul-Fuhuul,* at p. 250

or more than 350 verses. Coulson, for instance, in his estimation of the legal-specific verses of the Qur'an, concludes that 'no more than approximately eighty verses deal with legal topics in the strict sense of the term.'[39] To them, no legal ruling can possibly be deduced from a Qur'anic text or stipulation ingrained in morality.[40] The degree of primacy consentaneously accorded the Qur'an as a source of Islamic law by the generality of the Muslim jurists and Muslim States is a confirmation that every other sources of Islamic law owe their legal cogency to it.[41]

The texts of the Qur'an with respect to their meanings are classified into definitive (*qat'ii*) and speculative (*zanni*) stipulations. A few number of the Qur'anic texts fall within the definitive category.[42] While those classified as speculative on the other hand, which are of course, overwhelming in number, consist of stipulations whose texts are in need of interpretation due to their susceptibility to multiple meanings. To derive rules from the provisions of the Qur'an therefore, it is required that one turns first to the Qur'an itself for a

[39] See NJ Coulson, *A History of Islamic Law* (Edinburgh University Press, Edinburgh 1964) p. 12

[40] See M Baderin, op cit., (2009), p. 187

[41] Ibid; ME Badar, 'Islamic Law (*Shari'a*) and the Jurisdiction of the International Criminal Court', (2011) 24 Leiden Journal of International Law, p. 415; HH Hassan, *An Introduction to the Study of Islamic Law*, (Adam Publishers and Distributors, New Delhi, 2005), p. 143; Article 1 of the Saudi Arabian Constitution (adopted by Royal Decree of King Fahd on March 1992); Article 2(6)(a) of the 1979 Constitution of the Islamic Republic of Iran and paragraph 5 of the preamble to the 1973 Constitution of the Islamic Republic of Pakistan

[42] An example of the qat'ii texts can be found in Qur'an 4:12 which states that: 'And for you is half in what your wives leave if they have no child . . .' This provision of the Qur'an is quite explicit as to the half share of the husband in the estate of his wife who dies without any child. The share of one-half assigned to the husband is considered to be a definitive text (qat'ii) which cannot be subjected to any interpretation or jurisprudential reasoning (*Ijtihaad*).

clearer interpretation; then the explanation of Prophet Muhammad (pbuh); and lastly the interpretation of the companions of the Prophet.[43]

Considering the position of Prophet Muhammad (pbuh) as the person to whom the Qur'an was revealed, the task of proffering supplementary elaboration and explicit interpretation to make for proper application of the Qur'anic stipulations formed an integral part of his missions.[44] Some of the Qur'anic stipulations on constitutional matters and international relations, for instance, are usually in the form of general principles the details of which are left within the complementary and elaborative domain of the Prophetic *Sunnah*. An example can be found in Qur'an 60:8-9 which contains the general principle upon which the inter-relation between Muslims and non-Muslims is premised thus:

> Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes – from being righteous toward them and acting justly toward them. Indeed Allah loves those who act justly. Allah only forbids you from those who fight you because of religion and expel you from your homes and aid in your expulsion – [forbids] that you make allies of them. And whoever makes allies of them, then it is those who are the wrongdoers.

[43] Their close intimacy to the Prophet coupled with their exceptional knowledge of the Qur'an along with circumstances surrounding the revelation of its verses account for their unique position within the sphere of Islamic jurisprudence.
[44] A Khan, 'The Reopening of the Islamic Code: The Second Era of Ijtihad', (2003) 1 Uni. St. TLJ, p.351

This additional part of Prophet Muhammad's mission as reflected in his deeds, utterances and tacit approvals which culminated in what is known as his *Sunnah* became the second cardinal source of Islamic *siyar*.

3.2.4 The Sunnah:

This is the second fundamental source of Islamic law which is also classified as a divine source of law just like the Qur'an. The *sunnah*, being an embodiment of the life and traditions of Prophet Muhammad (pbuh), it encompasses his sayings (*qawl*), his deeds (*fi'l*), or his tacit approvals (*taqrir*). The validity of the *Sunnah* as one of the sources of Islamic law is derived from the Qur'an. One of such validating verses of the Qur'an reads thus: 'O you who have believed, obey Allah and obey the Messanger . . . And if you disagree over anything, refer it to Allah and the Messenger . . .'[45] The argument that the Prophet never intended his *sunnah* to be binding when he warned his companions against writing down his *sunnah* in the following words: 'Do not write what I say. Whoever has written anything from me other than the Qur'an, let him wipe it out' has been faulted by the majority of Muslim scholars on the authority of another oft-cited tradition said to have been reported by 'Abdullah bin 'Amr who was in the habit of writing down every utterances of Prophet Muhammad (pbuh) until he was warned against it. He reportedly went back to the Prophet (pbuh) to ask whether he should resume writing down his sayings to which the Prophet (pbuh) replied: 'Write .

[45] Qur'an 4:59. Also see Qur'an 59:7

. . I say nothing but the truth.'[46] This tradition, according to the majority opinion, lifted the prohibition initially placed on the recording of the prophetic *sunnah* since the said prohibition, in the first place, was meant to repel the possibility of confusing the recording of the words of Allah with that of the Prophet (pbuh).[47]

The 'book and a candle' similitude advanced by Weeramantry while stressing the complementary role of the *sunnah* to the Qur'an as a cardinal tool of the Islamic legal mechanism that: 'The life and work of the Prophet provided the candle by the light of which the book is to be read. The book without the candle or the candle without the book would not achieve its purpose'[48] is instructively revealing. Even though the Qur'an has been rated to transcend the *sunnah* in hierarchy, it has, however, been observed that substantial number of rules having direct relevance to Islamic international law are established by the prophetic *sunnah*.[49] The *Treaty of Hudaybiyyah* (628 AD) is a typical example of such prophetic *sunnah* which up till today remains an irresistible reference point when discussing the concept of diplomatic relations and immunities and the validity of international treaties under Islamic *siyar*.

The *sunnah* has, however, not enjoyed unassailable accuracy and authenticity as does the Qur'an which may also account for why it cannot be placed on equal hierarchical pedestal with the Qur'an despite its status of divinity. The

[46] This tradition is cited in DW Brown, *Rethinking Tradition in Modern Islamic Thought* (CUP, Cambridge 1996) p. 91
[47] Ibid.
[48] CG Weeramantry, op cit ., (1988), p.35
[49] M Hamidullah, op cit., (1961), p. 21

internal political discordance which threatened, if not totally debilitated the Muslims' fraternity shortly after the demise of Prophet Muhammad has been identified as a major channel through which fabrications crept into some traditions that were ascribed to Prophet Muhammad (pbuh).[50] If the *sunnah* must retain its relevance as a source of Islamic law, the authenticity of its texts must not be compromised. Consequently, sometime between the second and third centuries of Islam, Muslim jurists came up with ways of ascertaining the genuineness of *hadith* which later became another sphere of knowledge otherwise known as the science of *hadith* (*'ilm-al-hadith*). The outcome of this authenticating technique was what gave birth to the famous and widely acknowledged six Sunni collections of authentic traditions namely: Sahih al-Bukhaari,[51] Sahih Muslim,[52] Sunan Abu Daawud,[53] Sunan at-Trimidhi,[54] Sunan an-Nasaa'i[55] and Sunan Ibn Maajah.[56] It must also be mentioned that out of these six collections, the first two are ranked to be most reliable.

The fact that the prophetic *sunnah* serves as a source of legal obligations for Islamic *siyar* can be seen in the treaties, especially the *Treaty of Hudaybiyyah*

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[50] AB Atwan, *The Secret History of Al-Qaeda* (University of California Press, California 2006) p. 68

[51] This collection was compiled by Abu 'Abdullah Muhammad bin Isma'il al-Bukaari (810-870 AD).

[52] This is the collection of Abul Husayn Muslim ibn al-Hajjaj Qushayri al-Nishapuri (821-875 AD).

[53] This is the collection of Abu Daawud Sulayman ibn Ash'ath al-Azadi al-Sijistani (817-888 AD).

[54] This is the collection of Abu Isa Muhammad ibn Isa ibn Sawrah ibn Shaddaad at-Trimidhi (824-892)

[55] This is the collection of Ahmad ibn Shu'ayb ibn Ali ibn Sinan Abu 'Abdur-Rahman an-Nasaa'i (829-915)

[56] This is the collection of Abu 'Abdullah Muhammad ibn Yazeed ibn Maajah (824-887)

628 AD, signed by Prophet Muhammad (pbuh); the various missions he despatched to different kings and emperors; his verbal and written codes of conduct in warfare; and his exchange and respectful treatment of diplomatic envoys. The question as to whether a particular tradition is legal or non-legal or ascertaining the meaning of a text from the Qur'an or *Sunnah,* particularly when such stipulation is evidently speculative, falls within the preserve of legal reasoning (*ijtihaad)* which is discussed below.

3.2.5 Ijtihaad: A Manifestation of Methods and Principles of Islamic Law

With the demise of Prophet Muhammad (pbuh) came an abrupt finality to the continuous flow of legal guidance from the Qur'an and extension of legal principles and rules. This was preceded by the expansion of the territorial stretch of the Islamic faith which needed to contend with increasing novel matters. The fact that the law must necessarily evolve to reflect the inevitable changes in times and conditions of the society is not only rightly depicted in the Islamic legal maxim that 'the fatwa changes with changing times' (*taghayyur al-fatwaa bi taghayyir al-azmaan*),[57]but has also captured the attention of the eleventh century Muslim scholar, al-Sam'aani who gave a remark that '... *Fiqh* is an ongoing science continuing with the passage of centuries and changing with the change of circumstances and conditions of

[57] WB Hallaq, *Authority, Continuity and Change in Islamic Law* (CUP, Cambridge 2004) p. 166

men, without end or interruption.'[58] All these necessitated the need for a functional *ijtihaad.*

Ijtihaad which literally means 'the expending of maximum effort in the performance of an act,'[59] be it physical or mental has been variously defined by scholars of Islamic law. According to Al-Alwani, *ijtihaad* in its general context denotes the expenditure of mental and intellectual effort.[60] For such intellectual effort to be referred to as *ijtihaad* in a strict legal sense, it should, in the words of Ramadan, be a 'personal effort undertaken by the jurist in order to understand the source and deduce the rules or, in the absence of a clear textual guidance, formulate independent judgments.'[61] What is, however, clear from these definitions is that *ijtihaad* is a process of human intellectual reasoning usually resorted to with a view to interpreting and giving meaning to inexplicit stipulations contained in the divine sources of Islamic law – the Qur'an and the *Sunnah* while at the same time relying on these sources.

The juridical position of the concept of *ijtihaad* in Islamic jurisprudence remains unsettled amongst Islamic law writers. To those who perceive the *Shari'ah* as wholly divine, consisting of rules that are strictly immutable and

[58] This quotation is cited in WB Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (Variorum, Aldershot 1994) p. 197
[59] IAK Nyazee, op cit., (2006), p. 263
[60] TJ Al-Alwani, *Issues in Contemporary Islamic Thought* (The International Institute of Islamic Thought, Virginia 2005) p. 68
[61] T Ramadan, *Western Muslims and The Future of Islam* (OUP, Oxford 2004) p.43. See also MK Masud, *Shatibi's Philosophy of Islamic Law* (The Islamic Research Institute, Islamabad 1995) p. 367 and IAK Nyazee, op cit., (2006), p. 263

uncompromisingly monolithic, *ijtihaad* may not be worthy of any significant role within the realm of the Islamic juridical system since it is basically founded upon the mechanism of independent human reasoning.[62] Some scholars would rather see *ijtihaad* not strictly as an independent source of law, but as a juristic tool which gave rise to some legal methods generally referred to as non-divine sources of Islamic law.[63] Other exponents of *ijtihaad* on the other hand, relying strongly on the authority of the famous hadith of Mu'aadh ibn Jabal,[64] see it as the third in the echelon of the sources of Islamic law.[65] This, however, lends credibility to Kamali's remark that all other sources of Islamic law aside from the Qur'an and Sunnah, such as consensus (*ijmaa'*), analogical reasoning (*qiyaas*), public interest (*maslahah*), equity or juristic preference (*istihsaan*) and custom (*'urf*), are all manifestations of *ijtihaad*.[66] These legal methods of Islamic law will be considered briefly.

3.2.6 Ijmaa' (Consensus of Opinion)

[62] This opinion has been attributed to the traditionalists. They challenge the possibility and propriety of human rationality (Ijtihaad) as a valid source of law even when a direct solution to a pending legal question appears not to be forthcoming in the two divine sources of the Shari'ah. See A Khan, op cit., (2003), p. 362

[63] See A Khan, op cit., (2003), p. 363. See also M Baderin, op cit., (2009), p. 188.

[64] Mu'aadh ibn Jabal was one of the companions of Prophet Muhammad whom he deployed to Yemen as a judge. He asked him what will be his source of law when adjudicating on matters brought before him to which, he replied: 'I will judge with what is in the book of God (the Qur'an)'. The Prophet probed further: 'And if you do not find a clue in the book of God?' Mu'aadh replied: 'Then with the Sunnah of the Messenger of God' The Prophet went ahead again to ask: 'And if you do not find a clue in that?' Mu'aadh responded again by saying: 'I will exercise my own reasoning (ijtihaad).' The Prophet was reported to be pleased with and approved of Mu'aadh's response. See A Hasan, (trans) *Sunan Abu Daawud* (1984), Vol. III, Hadith No. 3585, p. 1019

[65] See T Ramadan, op cit., (2004), Pp. 44-45 where he refers to some classical scholars like Imam Al-Ghazali, as-Shaatibi, Ibn al-Qayyim al-Jawziyyah, al-Khallaf and Abu Zahra who equally acknowledged the jurisprudential importance of ijtihaad as a third source of Islamic law.

[66] MH Kamali, op cit., (2008), p. 366

The fact that *ijmaa´* is a product of *ijtihaad* is clearly noticeable from the technical meaning most scholars give to it as 'the agreement of independent scholars of Muhammad's (pbuh) community in a particular period upon a legal decision.'[67] It can be deduced from this definition that *ijmaa´* is simply the plurality of individual juristic opinions of Muslim jurists belonging to a particular age on a specific legal question.

The concept of *ijmaa´* finds it validity both in the Qur'an and the *Sunnah* of Prophet Muhammad (pbuh). One of the often quoted references from the Qur'an is Quran 4:59 which enjoins obedience to God, His Messenger and 'those in authority among you.'[68] And the Prophetic tradition that 'My community shall never agree on an error'[69] remains the most frequently cited authority from the *sunnah* which gives validity to *ijmaa´*. Resort to *ijmaa´* becomes necessary when a new legal question finds no specific solution either in the Qur'an or the *Sunnah*. The fact that a validly constituted *ijmaa´* is founded upon the unanimity of qualified Muslim jurists on a particular rule of law, gives such a rule of law an automatic status which is synonymous in authority to the provision of the Qur'an or the *Sunnah*. It must be noted however, that an *ijmaa´* does not, like the Qur'an and *Sunnah*, enjoy

[67]This definition has been cited by GF Hourani, *Reason and Tradition in Islamic Ethics* (CUP, Cambridge 1985) p. 193 while referring to the work of Muhammad b. Hamza al-Ghaffari, (d. A.D. 1430/31), *Fusul al-bada'i fi usul ash-Shara'i.* Also see IAK Nyazee, op cit p. 183 and MH Kamali, op cit., (2008), p. 169

[68]That part of the Qur'anic verse: *"ulul-amr minkum"* has been interpreted to mean the Muslim jurists by some commentators of the Qur'an. Other authorities from the Qur'an validating the concept of *ijmaa´* are Qur'an 4:115 and Qur'an 4:83

[69] This hadith has been variously reported by Ibn Maajah, Al-Tirmidhi and Abu Daawud.

unqualified authority and observance since it can be possibly set aside, modified or outrightly abrogated by another validly constituted *ijmaa'*.

Although the concept of *ijmaa'* has received an overwhelming approval from the classical Muslim jurists albeit with varying conditions,[70] yet this legal method has been and still being confronted with various theoretical questions touching on the practical feasibility of its universalistic connotation. The possibility and practicability of achieving an actual unanimity amongst the qualified legal scholars (*mujtahidun*) of any given age aside from the generation of the companions immediately preceding the death of Prophet Muhammad remains an unresolved question.[71] Even where the unanimity is assumed to have been achieved, the question of ascertaining convincingly, that no dissenting opinion of at least a qualified jurist has been overlooked also begs for attention.[72] With this, some writers have even gone as far as asking whether *ijmaa'* is not a mere legal fiction devoid of practical feasibility? I must, however, admit that a broader analytical survey of these theoretical questions which have ever been controversial amongst classical Muslim scholars just as they are with modern writers is beyond the purview of this chapter. Nonetheless, mention must be made of some scholars such as Shah

[70] The Shafi'i school of law's acceptance of ijmaa' is limited to obligatory duties alone. The Zahiri and Hanbali schools on the other hand would only approve of *ijmaa'* if it is within the scope of the consensus of the companions of the Prophet alone. But to the Maliki school, ijmaa' is just the consensus of the people of Madinah. While the Hanafis would accept as a valid *ijmaa'* the consensus of the jurists belonging to any age. But according to the Shi'a juridical school, no ijmaa' is valid save the consensus drawn from the Prophet's household (*ahl al-bayt*). See MH Kamali, op cit., (2008) Pp. 182-183; KM Khan, 'Juristic Classification of Islamic Law', (1983-1984) 6 HJIL p. 34; and CG Weeramantry, op cit., (1988), p.40

[71]See FE Vogel, op cit., (2000), p. 48 This generation (era of the companions of the Prophet) has been exempted because of the few and identifiable numbers of the qualified scholars amongst them and more so most of them were resident in Madinah.

[72]Ibid

Wali Allah Dihlawi (d.1762) who are of the view that the proper meaning of *ijmaa'* does not envisage a universal consensus of all the qualified Muslim jurists but rather, it implies the consensus of learned scholars of different towns and localities.[73] If one truly considers the difficulty and the seeming impossibility surrounding the feasibility of the universalistic theory of *ijmaa'* on the one hand, and the significant role of *ijmaa'* in evolving the law to meet the unrelenting demands of our changing world, on the other hand, one may want to agree with Dihlawi's contention.

3.2.7 Qiyaas (Analogical Deduction)

This is another legal method emanating from the concept of *ijtihaad*. *Qiyaas* in its ordinary meaning connotes 'measurement'. But technically it has been defined as the extension of the application of a certain legal rule (*hukm*) prescribed for a given case (*asl*) to a new case (*far'*) on the ground of common effective cause (*'illah*) which is identical in both cases.[74] From this meaning, four essential conditions can be deduced for an effective application of the legal process of *qiyaas*: the original case (*asl*) as stipulated either in the Qur'an or the Sunnah forming the basis for the analogical deduction; a new case (*far'*) to be ruled upon for which there is no definite ruling in either of the two divine sources; commonality of effective cause or *ratio legis* (*'illah*) between the original and new cases; and subject to the fulfilment of the

[73] MH Kamali, op cit., (2008), p. 190
[74] S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p.231

foregoing conditions, the ruling (*hukm*) in the original case shall, by analogy, be extended to the new case.[75]

The need to resort to the legal method of qiyaas will definitely become unnecessary once there are rulings (*ahkaam*) either in the Qur'an, Sunnah or *ijmaa'* capable of proffering solution to the new case at hand. The only identifiable human element in the application of analogical deduction is the task of identifying the commonality of the effective cause or *ratio legis* (*'illah*) between the original and the new cases.[76]

Classical Muslim scholars have devised certain legal principles which usually serve as guides whenever it becomes necessary to apply any of the divine sources and the legal methods discussed above. These legal principles which form part of the juristic tools of *ijtihaad* have also been considered significant while discussing the sources of Islamic jurisprudence. Some of these legal principles have been identified as playing interpretative roles to any of the sources, while the others are of relevance to the legal methods.[77] These legal principles are briefly considered below.

3.2.8 Istihsaan (Juristic Preference)

Juristic preference, generally referred to as *istihsaan* in Islamic law, just like *ijmaa'* and *qiyaas*, is another products of *ijtihaad*. The ordinary meaning of

[75] See M Baderin, op cit., (2009), Pp. 188-189 and MH Kamali, op cit., (2008), p. 200
[76] MH Kamali, op cit., (2008) Pp. 198-199
[77] See M Baderin, op cit., (2009), p. 189

the term *'istihsaan'* being a derivative of the verb *hasan* which means to deem (something) good, makes clearer the rationale behind the concept of *istihsaan* that the core objectives of the *Shari'ah* (*maqaasid al-shari'ah)*[78] must not be compromised at the expense of literal application of the rules of the *Shari'ah*.[79] It must, however, be mentioned that the fact that this legal principle has not been strictly pronounced or defined as a legal concept either by Prophet Muhammad (pbuh) or any of his companions does not deplete its juridical relevance. This is so because, traces of its application have been noticed in some legal pronouncements and instructions made by some of the companions of Prophet Muhammad (pbuh). The letter of instruction written by 'Umar, the second Caliph, to Abu Musa al-Ash'ari, one of his appointed judges that: 'Research similar cases, and when you find similarities that affect the ruling, apply the method of *qiyas.* Using the results of *qiyas*, select the ruling that adheres to the Islamic principles and ensures that your conscience is satisfied that justice has been served'[80] attests to this assertion.

The application of *istihsaan* has given rise to serious theoretical questions which stem from the absence of unanimity amongst the Islamic jurists on the

[78] The primary purposes and objectives which have also been designated as necessities (*daruraat*) that must remain preserved, according to the Muslim jurists are: religion (*ad-din),* life (*an-nafs*), progeny (*an-nasl*), intellect (*al-'aql*) and wealth (*al-maal*). These objectives, according to Imam al-Ghazzali, are meant 'to promote the well-being of all mankind' and that 'whatever ensures the safeguard of these five serves public interest and is desirable.' See MU Chapra, *The Future of Economics: An Islamic Perspective* (The Islamic Foundation Leicester 2000) p. 118 and IAK Nyazee, op cit., (2006), Pp. 199 and 202

[79] MH Kamali, op cit., (2008), p. 54

[80] This quotation has been cited in M Kayadibi, 'Ijtihad by Ra'y: The Main Source of Inspiration Behind Istihsan'*,* The American Journal of Islamic Social Sciences, 24:1 p. 87 with references from Hatib, *Al-Faqih,* 1:200 and Ibn al-Qayyim, *I'lam,* 1:126

legal meaning ascribable to *istihsaan*.[81] Proponents of this legal principle have generally equated it with the notion of equity owing to its preference for simplicity and easement of difficulties that may occur as a result of strict adherence to established precedents in the previous rulings of *qiyaas*. This understanding can be deduced from the simple, but rich definition given by Jassas amongst others that 'istihsan is the departure from a ruling of qiyas in favor of another ruling which is considered preferable.'[82] With the application of *istihsaan*, allowance is given for the adoption of 'a more subtle – but ultimately more plausible – analogy'[83] where the pre-existing ruling is capable of causing hardship. The idea of giving preference to a more plausible and equitable analogy will appear to be in keeping with the spirit of the *Shari'ah* and the clear intention of the law Giver (*Haakim*) as stipulated in the Qur'an thus: 'Allah intends for you ease and does not intend for you hardship.'[84] It therefore becomes clear that it can be argued that based on the application of *istihsaan,* Muslim States can enter into international treaties with non-Muslim States for an indefinite period once the treaties facilitate ease for the Muslim community.

3.2.9 Maslahah (Public Interest)

[81] See J Makdisi, 'Legal Logic and Equity in Islamic Law', (1985) 33, Am. J. Comp. L, p. 73
[82] See M Kayadibi, op cit., p. 75 See also MH Kamali, *Istihsan: Juristic Preference and Its Application to Contemporary Issues*, (Islamic Development Bank, IRTI, Jeddah 1997), p. 24 and Jassas Abu Bakr Ahmad ibn `Ali al-Razi, Al-Fusul fi al-Usul, ed. Ajil Jasim al- Nashmi (Kuwait: Wizarat al-Awqaf wa al-Shu'un al-Islamiyyah, 1988), 4:234
[83] B Weiss, 'Interpretation in Islamic Law: The Theory of Ijtihad', Am. J. Comp. L, 26 (2) p. 202
[84] Qur'an 2:185

When one considers the ever increasing needs of modern times, vis-à-vis the exigency to preserve the fundamental objectives of the *shari'ah* (*maqaasid al-Shari'ah*), the importance of the legal principle of *maslahah* as another instrument of *ijtihaad* will be well appreciated. Being a tool of interpretation rather than a material source of substantive law, its application dictates that when interpreting provisions from the Qur'an and *Sunnah*, the jurist is required to give consideration to how best his interpretation will promote and preserve the public interest or human welfare.[85]

The application of *maslahah*, according to the Muslim jurists could come under any of these three categorisations – indispensables (*daruriyyaat*)[86], needed (*haajiyyaat*)[87] and complementary (*tahsiniyyaat*)[88] depending on the needs of the community. The significance of *maslahah* to the *juris corpus* of Islam as a legal instrument used for the preservation of human welfare and public interest has been rightly summed up by Ibn Ashur in the following words:

> . . . the Shari'ah aims at preserving the order and regulating the conduct of human beings in it by preventing them from inflicting

[85] NJ Delong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad* (OUP, Oxford 2004) p. 101. See also JL Esposito and NJ Delong-Bas, *Women in Muslim Family Law* (2nd edn Syracuse University Press, New York 2001) Pp. 8-9

[86] These are indispensable interests the realisation of which is paramount to the sustainability of the social order of the community. According to the Muslim scholars, it consists of preservation and safeguarding of the five core objectives of the Shari'ah (religion, life, intellect, property and lineage).

[87] These are things needed for the achievement and effective functioning of the community's interest.

[88] This consists of things that lead to the perfection of the community condition and social order

corruption and destruction upon one another. This objective can be achieved only by acquiring what is good and beneficial (*masalih)* and warding off what is evil and harmful *(mafasid)* as far as the meaning of *maslahah* and *mafsadah* can be understood.[89]

The application of *maslahah* has also been identified as capable of forming the juridical basis for signing of international treaties and conventions which are eventually made into domestic legislations with a view to ensuring a peaceful co-existence between the Muslim State and other nations.[90]

3.2.10 'Urf (Prevailing Local Custom)

Custom, technically referred to as *'urf,* is another legal mechanism whose status within the Islamic jurisprudence has become controversial amongst the Muslim jurists. For instance, the failure of the Malikis to give much recognition to custom has been attributed to their strong affiliation to the customs of the people of Madinah, having elevated such customs to the status of the prophetic Sunnah.[91] This perhaps, explains why some commentators conclude that custom has no binding effect in Islamic legal theory.[92] The fact that it is a reflection of human behaviour, according to Libson, stands as a reason why

[89] Muhammad al-Tahir Ibn Ashur, *Ibn Ashur: Treatise on Maqāṣid al-Shari'ah,* (The International Institute of Islamic Thought, Herndon, 2006), p. 116
[90]Ibid., p. 131
[91] G Libson, 'On the Development of Custom as a Source of Law in Islamic Law', (1997) 4 (2) ILS p. 134
[92] See NJ Coulson, op cit., (1964), p. 143

some Muslim jurists particularly of the pre-classical period fail to accord any recognition to it as one of the sources of Islamic law.[93] Contrary to this understanding, Muslim scholars belonging to the post classical era have however acknowledged the relevance of custom in Islamic law.[94]

In spite of these varying amounts of relevance given to custom by the Muslim jurists, it is however, still recognised as a law formulating method provided it does not in any manner, run contrary to the clear texts of the divine sources of Islamic law – the Qur'an and the prophetic tradition.[95] It is also of importance to note that the origin of a particular practice need not necessarily be associated with the periods of Prophet Muhammad (pbuh) or his companions to be validly pronounced as a custom under the Islamic jurisprudence. It suffices that such practice conforms to the fundamental principles of Islam.[96] The protection and inviolability of diplomatic personnel is an age-long practice among different nations of the world and it has equally gained a huge recognition and acceptance under Islamic international law. Prophet Muhammad (pbuh) made it categorically clear when confirming the inviolability of the two emissaries sent to him by Musaylamah (*al-kadhdhab*) in his statement that: '. . . if it were not the tradition that envoys could not be killed, I would have severed your heads.'[97]

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[93] G Libson, op cit., (1997), p. 135
[94] NA Shah, op cit., (2006), Pp. 74-75 See also NJ Coulson, 'Muslim Custom and Case-Law' (1959) 6 Die Welt des Islams, p. 14
[95] See I Abdal-Haqq, 'Islamic Law: An Overview of its Origin and Elements' (1996) 1 JIL Pp. 34-35
[96] Ibid p. 35
[97] Ibn Hisham, *As-Seeratu-n-Nabawiyyah*, Vol. IV, (Darul al-Gadd al-Jadeed, Al-Monsurah), p. 192

3.2.11. Consistent Practices of the Caliphs and Islamic Rulers

The practice of the caliphs, particularly those that are often referred to as the rightly guided caliphs,[98] in their international dealings with other communities is so important that it cannot be ignored while discussing the sources of Islamic *siyar*. Aside from the conventional sources of Islamic law which have been discussed above, the instructions issued by the Caliphs for the guidance of their governors and military leaders and decisions which were made in the form of principles and rules incorporated in treaties with non-Muslims also represent legal authority in Islamic international law.[99] The treaty which 'Umar ibn Khattab, the second caliph in Islam, signed with the Patriarch of Jerusalem in 638 AD, is one of the numerous examples of such treaties.[100]

The practice of other Islamic rulers may also be considered a legal authority in Islamic international law provided the 'practice has not been repudiated by the contemporary or later jurisconsults.'[101] There are relevant precedents in the treaties and valuable decisions made by some of the Umayyad and Abbasid caliphs down to other Islamic rulers.[102] For instance, there are series of treaties reportedly concluded between the Abbasid caliphs and the Byzantines for different reasons such as putting a stop to frequent violation of

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[98] The rightly guided caliphs are: Abu Bakr ibn Abi Quhafah (d. 634 D), 'Umar ibn Kattab (d. 644 AD), 'Uthman ibn 'Affan (d. 656 AD) and 'Ali ibn Abi Talib (d. 661 AD). Most writers considered 'Umar ibn 'Abdul-'Azeez (d. 720 AD), an Umayyad caliph, as one of the rightly guided caliphs. See AS Najeebabadi*, The History of Islam,*Vol. 2 (Darussalam International Publications Limited, London, 2001), Pp. 194 and 212

[99] See M Khadduri, op cit. (1966), p. 9; S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p.236

[100] M Khadduri, *War and Peace in the Law of Islam,* (John Hopkins Press, Baltimore, 1955), Pp. 213-214

[101] M Hamidullah, op cit., (1961), p. 23

[102] Ibid

frontiers, settlement of boundaries disputes between the Abbasid and Byzantines governments etc.[103]

In a nutshell, these treaties, decisions and instructions of the caliphs and other Islamic rulers will only become acceptable as legal authority in the Islamic international law provided they are not repugnant or contrary to the Qur'an or the Sunnah or the practice of any the rightly guided caliphs.

3.3. *Sources of International Diplomatic Law*

The pre-historic and universal nature of diplomatic law brings it within the special ambit of customary international law which now makes it an integral branch of contemporary international law particularly with the famous codifications of diplomatic practice in 1961 and 1963.[104] It therefore follows, that a panoramic analysis of the sources of diplomatic law cannot be made in isolation of the sources of international law which are generally accepted to be embodied in the provisions of Article 38 (1) of the SICJ. Perhaps, this explains why most writers on diplomatic law have not deemed it necessary to expound on the sources of diplomatic law, not because it has no sources, but, may be, because its sources are already embedded in the generally acclaimed sources of international law. It is important, at least, to bear in mind that diplomatic relations, just like any other branches of humanities, cannot be left

[103] M Khadduri,op cit., (1955), Pp. 216-218
[104] These are the 1961 VCDR and 1963 VCCR which codified customary diplomatic practice.

unregulated by law if its affairs were to be properly and judiciously managed.[105]

Although, there is an overwhelming consensus amongst writers that diplomatic law is considerably sourced from the customary rules of international law,[106] yet, one can still not lose sight of the invaluable significance of convention to diplomatic law, as the functionality of this body of law is only achievable when a State agrees to accept the personnel or representatives of the other State.[107] It must be borne in mind, however, that while discussing about the sources of diplomatic law, we are, invariably, talking about the sources of international law. This is acknowledged by Hardy while discussing about the sources of diplomatic law that 'we must remember that we are referring to international law, a system of law unique in the discretion which it leaves to its subjects in the choice and applications of given legal rules.'[108]

Although, it has been expressed by Bederman that '[t]he ICJ statute's articulation of sources thus may not be entirely authoritative or relevant today',[109] however, considerable number of international law writers have

[105] See MJL Hardy, *Modern Diplomatic Law*, (Manchester University Press, Manchester 1968) p.4
[106] See R Higgins, *Problems and Process: International Law and How We Use it,* (OUP, Oxford 1994) Pp. 86-87 and MJL Hardy, op cit., p.5
[107] MJL Hardy, op cit., (1968), p.4
[108] Ibid
[109] DJ Bederman, *The Spirit of International Law,* (The University of Georgia Press, Athens & London, 2002), p. 28

adopted the provision of Article 38 (1) of the SICJ as containing 'the most authoritative and complete statement as to the sources of international law.'[110] Similarly, in the words of Meldenson, it also 'authorizes and requires the Court, without much ado, at least to have recourse to the sources specified in paragraph 1'[111] of Article 38 which provides thus:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The sources of international law identified in the provisions of Article 38 above will now be examined below:

3.3.1. International Customary Law

[110] See MN Shaw, op cit., (2008), p. 70 See also I Brownlie, *Principles of Public International Law,* (OUP, Oxford, 2003), p. 5 and MO Hudson, *The Permanent Court of International Justice*, (The Macmillan Company, New York, 1934), Pp. 601 ff

[111] M Mendelson, 'The International Court of Justice and the Sources of International Law' in V Lowe and M Fitzmaurice (eds.), *Fifty Years of the International Court of Justice,* (CUP, Cambridge, 1996), p. 64

Within the international echelon, the source of international diplomatic law is known to have evolved largely from customary rules of international law.[112] Although, more recently, these customary rules have been, in the main, codified into what is now known as the VCDR and the VCCR. With the codification, notwithstanding, the significant of international customary law as a source of international diplomatic law still stands as expressly stated in the fifth paragraph of the preamble to the VCDR that 'affirming that rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention.' However, there remain arguments on the relevance of international customary law as a source of international law. Some commentators do not attach any value to it for reason of it being 'too clumsy and slow-moving'[113] as to accommodate the fast-evolving international law question,[114] while others correctly maintained that because of its universal application, it stands dynamic as a process of law creation.[115]

The ICJ has, in the course of shedding more light on what international customary law is, observed in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*[116] that:

> It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio*

[112] MJL Hardy, op cit., (1968), p. 5
[113] MN Shaw, op cit., (2008), p. 73
[114] W Friedman, *The Changing Structure of International Law* (Columbia University Press, New York 1964) p. 121-3
[115] A D'Amato, *The Concept of Custom in International Law* (1971) p. 12
[116] ICJ Report 1985, p. 13

jusris[117] of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom or in deed in developing them . . . [118]

These two elements have been identified as the objective one of 'a general practice' and a subjective one of 'accepted as law.'[119] The two constituents of customary international law will however, be considered below with a view to understanding to what extent they need to be proved in establishing the existence of the rule of customary law and the controversies surrounding them.

A. ***The Objective Element of 'a General Practice'***

The general requirement of the SICJ, as mentioned earlier, does not demand that all the States or even the majority of them must have necessarily practiced a particular custom for its rules to be regarded as established.[120] According to J. L. Kunz, for the practice to be firmly established as to form international customary law, it must be a continuous and repeated practice without interruption of continuity, albeit, that there are no clear indication in international law as to 'how many times or for how long a time this practice

[117] It is known as opinion *juris sive necessitatis* meaning 'opinion that an act is necessary by rule of law'. The legal phrase was first propounded by a French writer, Francois Geny to identify legal custom from mere social usage. That is for a conduct or practice to attain the status of international customary law, nations must be shown to believe that in deed international law and not moral obligation mandate the practice or conduct. See BA Garner (ed.) *Black's Law Dictionary* (8th edn., Thomson West Publishing Co., USA 2004) p. 1125 and MN Shaw, op cit., (2008), p. 75

[118] ICJ Report 1985, 29

[119] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, I.C.J. Reports 1986, p. 14 at p. 97

[120] AM Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 Vand. J. Transnat'l L., p. 6

must have been repeated.'[121] However, Chodosh maintains that a practice need not be continuous as other distinguished scholars do not ascribe any weight to it.[122] It has been indicated by the Permanent Court of International Justice in the *Case of S. S. Wimbledon*[123] and *The S. S. Lotus*[124] that the rules of international customary law can be inferred from the practice of States even if repeated in less than a dozen.

The view that the principles of customary international law need to be based on 'broad participation' of states for it to create a rule of international law has been strongly opposed by D' Amato who gives precedential value to a single act between two or more States.[125] It has been observed also by Tunkin that the element of repetition may not occur in some cases and yet, the rule of conduct will appear resulting from a singular precedent, even though, such occurrence could be rare.[126] Moreover, not all elements of repetition do result in juridical customary norm of international law. It could, according to Tunkin, merely be a norm of international ethics or a norm of international

[121] JL Kunz, 'Nature of Customary International Law', 47 Am. J. Int'l. L. 666
[122] HE Chodosh, 'Neither Treaty Nor Custom: The Emergence of Declarative International Law, (1991) 26 Tex. Int'l. L. J., p. 100. He cited with approval the statement of Tunkin where he agrees that discontinuity is not a decisive indication of a rule's non-existence. See Tunkin, 'Co-existence and International Law', 95 (3) Recuel Des Cours 5, 12 (1958)
[123] 1923 PCIJ (ser. A) No. 1, at 15, 25 and 28. (Aug. 17)
[124] 1927 PCIJ (ser. A) No. 10, at 4 and 29 (Sept. 7)
[125] A D'Amato, *The Concept of Custom in International Law* (1971), p. 175. It is however, uncertain if Kunz subscribed to a single precedential practice by two or more states as constituting customary rule of law. He asserted that the practice must not only be continuous, but it must be 'repeated without interruption of continuity'. As to whether there has to be a unanimous practice of the customary usage by the states, he argues that what is required is "general" practice. JL Kunz, op cit. p. 666
[126] GI Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law', (1961) 49 Cal. L. Rev., p. 419

courtesy.[127] In international diplomatic law for instance, the exemption of diplomatic baggage from customs inspection including privileges accorded by all states for diplomats in third countries are not international norms but norms of international courtesy.[128] But this does not conclusively settle the requirement. According to Guzman, the duration and consistency of the practice must be ascertained that is to say: 'How long must it have been going on?'[129] Even though, it appears that one inconsistency in the act of a State may not out-rightly take away the issue of consistency in State practice, one still has to determine the amount of the inconsistency for it to be deemed insufficient.[130] In addition, it remains unclear what amounts to 'State practice' for the purpose of establishing customary international law particularly, in a world that is made up of many independent states.[131] These are the million dollar questions that must be answered before establishing what international customary law is.

Although State practice need not be universal for the purpose of establishing international customary law, it is required that majority of States must participate in the practice.[132] To figure out what constitute States practice, one may have to consider the prevailing arguments surrounding it. Actions by States are usually considered as part of State practice. D'Amato believes that

[127] GI Tunkin, op cit., (1961), p. 420
[128] Ibid
[129] AT Guzman, *How International Law Works: A Rational Choice Theory* (OUP, Oxford 2008) p. 185
[130] Ibid
[131] Ibid
[132] AT Guzman, 'Saving Customary International Law' (2005) 30 American Law and Economics Association Annual Meetings, p.35

physical actions, without statements of either diplomats or UN officials, should alone be taken as constituting State practice.[133] But the prevalent view is that statements and claims by States can also form integral part of State practice. Utterances by State which includes treaties, domestic laws, United Nations Resolutions and policy statements all constitute evidence of State practice.[134] In the words of Akehurst, state practice 'covers any act or statement by a state from which view can be inferred about international law' in addition with omissions and silence.[135] The ICJ in the *Case Concerning Rights of Nationals of the United States of America in Morocco*[136] relied on and used diplomatic correspondence to evaluate a claim of State practice. Also International customary could either stem from positive action of the State or manifest itself by abstaining from action. Abstinence from action has been found to be an action in itself as there is no denying the fact that it is capable of establishing customary norm of international law.

B. ***The Subjective Element of 'Accepted as Law'***

When a practice becomes accepted and recognised as juridically binding by the States in addition to it being general, then international customary law can be said to be established. This legal position has been supported by the ICJ when it says that 'for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be

[133] A D'Amato, op.cit., (1971), Pp. 61-64
[134] I Brownlie, *Principles of Public International Law*, (6th edn., Claredon Press, 1990), p. 6
[135] M Akehurst, 'Custom as a Source of International Law' (1974-5a) 47 British Yearbook of International Law, p. 10
[136] I.C.J. Reports 1952, p. 176 at p. 200

accompanied by the *opinio juris sive necessitas*.'[137] Once a State engages in a practice based on legal obligation, then it possesses the psychological element for establishing a norm of international customary law.[138] This very important element of customary international law is known as *opinio juris sive necessitates* which is known for short as *opinio juris.* Brownlie sees it as 'a necessary ingredient'[139] for customary international law since it is the reason why a nation acts in accordance with a behavioural regularity.[140]

It is not enough that the acting state has a sense of legal obligation, but that other States also have an equal belief that indeed, it has an unfettered legal commitment to act.[141] The State will then be bound to act in accordance with such belief 'even if only once, then it is to be inferred that they have tacitly consented to the rule involved.'[142] It will then be taken that a norm of international customary law has been created based on the general agreement amongst States. The challenge of other states to this belief or declaring the acceptance of it *ex gratia* could prevent the creation of a new norm of customary international law.[143]

However, the fact remains that classical international law considers State practice and *opinion juris* as very vital elements of customary international

[137] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment*, I.C.J. Reports 1986, p. 14 at Pp. 98-99
[138] T Hillier, *Sourcebook on Public International Law,* (Cavendish Publishing Limited, London, 1998), p. 75; M Dixon, *Textbook on International Law,* (6th edn., OUP, Oxford, 2007), p. 34
[139] I Brownlie, op cit., (1990), p. 8
[140] M Dixon, op cit., (2007), p. 34
[141] AT Guzman, op cit., (2008), p. 195
[142] MN Shaw, op cit., (2008), p. 75
[143] JL Kunz, op cit., (47, AJIL), p. 664

law.[144] This was the position of diplomatic relations before 1961 when it was mainly customary international law because its rules 'were the product of long-established state practice.'[145] The customary rules are now codified in the VCDR and VCCR. Although, one cannot say that the VCDR and VCCR contain fully all the relevant customary rules regulating diplomatic and consular relations.[146] Nevertheless, the conventions do not out-rightly take away the relevance of customary rules of international law when deciding on diplomatic related matters particularly in cases where the provisions of the VCDR or VCCR seem inadequate.[147] Perhaps, this falls within the observation of the International Court of Justice in the *United State Diplomatic and Consular Staff in Tehran*[148] when it held that 'the obligations of the Iranian Government here in question are not merely contractual . . . but also obligations under general international law.'[149]

3.3.2. International Treaties

The significance of international treaties has become enormous as a source of international law. Treaties are generally believed to be binding amongst States that are parties to them, thereby limiting their effectiveness on general States co-operation as a whole. Treaties are thought to be the 'plainest

[144] H Thirlway, 'The Sources of International Law' in MD Evans (ed.), *International Law,* (OUP, Oxford, 2003), p. 125
[145] I Brownlie, op cit., (1990), p. 341
[146] MJL Hardy, op cit., (1968), p. 6
[147] See paragraph 5 of the Preamble to the 1961 Vienna Convention on Diplomatic Relations which expressly provides that 'the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention'.
[148] ICJ Reports (1980) Pp. 30-43
[149] Ibid. P. 31, para, 62, See also p. 33, para. 69

source of international law'[150]in that it is usually in the form of written agreements expressly and consciously made amongst sovereign States. The essence of a treaty has been clearly spelt out in the following words: '"treaty" means an international agreements concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'[151] The meaning of 'treaty' has been further extended to accommodate treaties concluded between States and international organizations or agreements between international organizations by the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[152] Therefore, the legal capacity to conclude international conventions by the combined effect of the 1969 VCLT and 1986 Vienna Convention of the Law of Treaties between States and International Organizations or between International Organizations resides between the States and other subjects of international law.[153]

The binding effect of a treaty comes with consent. That is, States come together consciously with the intention to be legally bound by the terms of the agreement.[154] A treaty is not a merely gentlemen's agreement which only

[150] MW Janis, 'An Introduction to International Law' (1983-1984) 16 Conn. L. Rev., p. 900
[151] Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties.
[152] Ibid Article 2(a) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations signed in March 21, 1986 also available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf [accessed in August 9, 2010]
[153] GM Danilenko, *Law-Making in the International Community,* (Martinus Nijhoff Publishers, The Netherlands 1993) p.45
[154] See the judgments of the ICJ in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain), Jurisdiction and Admissibility*, Judgment of 1

amounts to a political rather than a juridical commitment.[155] This in effect means that once the consenting States ratify or accept or give accession to the agreement, they are not only expected to discharge the obligations contained in the treaty, a breach of its terms is also impermissible.[156] The exception, of course, will be where the State(s) has entered reservation to any or some of the terms of the convention. With the consent given, it means the States have expressed their good will to be bound by the rules stipulated in the treaty. It is a general rule as stipulated in *North Sea Continental Shelf*[157] that where a State does not give consent to or approve of a treaty, it is exonerated from any judicial commitments to it. It is of importance to stress, however, that where a treaty is a manifestation of customary law rules, then non-party members may be bound by the rules, not because it is treaty, but because it is a reflection of rules of international customary law.[158] But where a State is not desirous of pursuing the contents of a treaty any more, it can invoke the opt-out stipulations or clauses in the treaty.

July 1994, 1994 ICJ Reports, p. 112 and in the case of *Aegean Sea Continental Shelf*, 19 December 1978, 1978 ICJ Reports, p. 3

[155] I Seidl-Hohenveldern, 'Hierarchy of Treaties' in E. W. Veirdag *et al* (eds), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Veirdag* (Martinus Nijhoff Pubishers, The Netherlands 1998) p. 7

[156] It must be noted that in some exceptional cases a state may not be a signatory to a treaty and yet be expected to be bound by it. There is, for instance, a clear-cut category of 'dispositive treaties' creating legal regime that binds a third party. They are considered to be valid *ergo omnes* i.e. effective against the entire world. Treaties that govern international waterways such as the Permanent Neutrality and Operation of the Panama Canal Treaty 1978 and those determining boundaries are of such treaties. See J O'Brien, *International Law,* (Cavendish Publishing Limited, London 2001), p.80 and the *Case concerning Kasikili/Sedudu Island (Botswana/Namibia),* 1999 ICJ Reports, 1045

[157] ICJ Reports 1969 Pp. 3 and 25

[158] MN Shaw op cit., (2008), p. 95

It must, however, be made emphatic that treaty significantly owes its importance and validity to international customary law as it derives it legal competence from it. The *pacta sunt servanda* is a rule which has its origin in customary international law but entrenched within the ambit of international convention that parties must obey their contractual treaty.[159] In some quarters it is believed that international customary law surpasses international treaty in hierarchy because, if not for international customary rule, treaty will ultimately loose it binding force.[160]

Treaties have been known to be either bilateral or multilateral. Bilateral treaties, though, considered less cumbersome as a law making instrument, but the question of efficiency in attaining uniformity and equality of treatment amongst the 193 members of the United Nations when required to make an agreement on a single topic remains a problem.[161] And in most cases, bilateral treaties are found to be in the form of 'contract treaties' such as bilateral investment treaties and extradition treaties which are viewed by some commentators as not competent enough to be a source of international law. Multilateral treaties on the other hand, as the name suggests, involve more than two countries in the agreement making process. Multilateral treaties are often seen as *law-making treaties* which generally, give the authoritative source of international law. Law-making treaties, according to Shaw, 'are intended to have effect *generally*, not restrictively, and they are to

[159] See the third paragraph of the preamble to the 1969 VCLT.
[160] CG Weeramantry, *Universalising International Law* (Martinus Nijhoff Publishers, The Netherlands 2004), p. 239
[161] C Schreuer, 'Sources of International law: Scope and Application', Emirates Lecture Series 28, The Emirates Center for Strategic Studies and Research, Pp. 5-6

be contrasted with those treaties which merely regulate limited issues between a few states.'[162] The new rules created by these *law-making treaties* will necessarily involve the participation of large number of states and thus bind those states who give their consents to it. Although, most of the treaties are usually concluded amongst few States,[163] but then, those that are concluded by overwhelming majority of States end up formulating rules that will eventually become *general* international law.[164] A typical example is the VCDR which has the consent and approval of about 187 member States of the United Nations which, invariably, gives it a universal support.[165]

3.3.3. General Principles of Law

This is one of the sources of international law as embodied in Art. 38 (1) (c) of the SICJ and it is 'the general principles of law recognized by civilized nations.' The provisions of Article 38 (1) (c) which empowers the ICJ to apply 'the general principles of law recognized by civilized nations' was, according to Lauterpacht, drafted in order to prevent the possibility of a *non liquet.*[166] The ICJ cannot give judgments of *non liquet* (finding that an existing law does not cover a particular situation) since Article 38 (1) (c) has now empowered the international bench 'through their principled application of legal reasoning'[167]

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[162] MN Shaw op cit., (2008), p. 95
[163] L Oppenheim, op cit., (2005), p. 22
[164] Ibid
[165] J Brown, 'Diplomatic Immunity: State Practice under Vienna Convention on Diplomatic Relations', (1988) 37, ICLQ, p. 53
[166] H Lauterpacht, 'Some Observation on the Prohibition of "Non Liquet" and the Completeness of the Law', in *Symbolae Verzijl* (Leydon, 1958), Pp. 205-206; H Lauterpacht, *The Foudation of Law in the International Community* (Oxford, 1933), Pp. 66-67
[167] CA Ford, op cit., (1995), p. 525; see also M Akehurst, *The Hierarchy of Sources of International Law,* (1975) 47 Brit. Y. B Int'l L, Pp. 274 and 279

to fill any legal *lacunae*. That is the courts or the tribunals might find themselves in a legal dilemma, not being able to decide some of the cases brought before them for adjudication due to lack of guidance in the treaty and customary laws. It must be pointed out that for the courts or tribunals to apply the general principles of law in a particular case they have to ensure that the said principle similarly exists in every system of civilised law. This assertion has received support from Gutteridge in his remark that:

> If any real meaning is to be given to the words "general" or "universal" and the like, the correct test would seem to be that an international judge before taking over a principle from private law must satisfy himself that it is recognized in substance by all the main systems of law, and that in applying it he will not be doing violence to the fundamental concepts of any of those systems.[168]

The words 'recognised by civilized nations' appear to be settled as all the member States, following the creation of the United Nations, most especially after the decolonisation process has been accomplished, are presumed to bear the mark of civilization.[169] The unsettled phrase is 'general principles of law' which remain susceptible to multifarious meanings amongst international commentators and as such, has provoked diverse definitions.

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[168] HC Gutteridge, *Comparative Law* (2nd ed. CUP, Cambridge 1949), p.65

[169] MC Bassiouni, "A Functional Approach to "General Principles of International Law"", (1989-1990) 11 Mich. J. Int'l L. p. 768; VD Degan, *Sources of International Law* (Martinus Nijhoff Publishers, The Netherlands 1997), p. 67

A considerable amount of legal authorities maintain that general principles of law fall within the categories of subsidiary sources like judicial decisions and writings of publicists. Dixon, for instance makes the following assertion in his analysis of general principles of law that it 'may therefore, be purely *descriptive* of general doctrines or bundles of rights which form part of international law, but they are nothing to do with the law creating sources of international law.'[170] But if one considers Art. 21 (1)(c) of the Statute of the International Criminal Court[171] which further stresses the significance of general principles of law as a source, then one would see the flaw in viewing it as a subsidiary source.[172]

Also a lot of ink has been split on whether general principles should be regarded in terms of rules accepted in domestic law of all civilized States or principles about the nature of international law that are accepted by States. Brownlie has, however, expressed acceptance of Oppenheim's view that '[t]he intention is to authorize the Court to apply the general principles of municipal

[170] See M Dixon, op cit., (2007), p. 41; A Cassese, *International Law,* (2nd edn., OUP, Oxford, 2005), p. 188

[171] Art. 21 (1)(c) of the Statute of International Criminal Court signed into law on July 17, 1998 provides that the Court shall apply: ". . . general principles of law derive by the Court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this statute and with international law and internationally recognised norms and standards." http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94 0A655EB30E16/0/Rome_Statute_English.pdf [accessed in 11/10/2010]

[172] See CW Henderson, *Understanding International Law,* (Wley-Blackwell, West Sussex, 2010), p. 72 It has also been observed by Shaw that most writers admit that general principles of law stands as separate source of international law as reflected in the decisions of the Permanent Court of International Justice and the International Court of Justice. MN Shaw, *op cit.* (2008), p. 99; H Thirlway, op cit., in MD Evans (ed.), *International Law,* (OUP, Oxford, 2003), p. 132

jurisprudence, in particular of private law, in so far as they are applicable to relations of states.'[173] As such, it will be wrong to assume that Article 38 (1)(c) of the SICJ refers to the principles of international law as this interpretation was not contemplated.[174] It has been interpreted, in other instance, to mean the general principles of international law such as the concept of *pacta sunt servanda* – that promise should be kept and the notion that international law is created by the consent of States.[175] It should be noted that far before the establishment of the Permanent Court of International Justice in 1920, the international tribunals had resorted to general principles of law based on both national and international laws.[176] One would rather agree with the conclusion of Malanczuk that 'there is no reason why it should not mean both; the greater the number of meanings which the phrase possesses, the greater the chance of finding something to fill gaps in treaty law and customary law.'[177]

In applying the general principles of law, the ICJ at times, in its judgements and advisory opinions employed the exact phraseology 'general principles of law' while in other cases, it resorted to the usage of some other terms such as 'established principles' and 'general concepts of law.'[178] However, these general principles are mainly common among the main legal systems of the

[173] Cited in I Brownlie, op cit., (1990), p. 8
[174] T Hillier, op cit., (1998), p. 84
[175] AC Arend, *Legal Rules and International Society,* (OUP, Oxford and New York, 1999), p. 52
[176] P Malanczuk, op. cit., (1997), p. 48; FO, Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals,* (Martinus Nijhoff Publishers, Leiden 2008), p. 21
[177] Ibid
[178] FO Raimondo, op cit., (2008), p. 22

international community such as the common-law system, the Islamic legal system and the civilian legal system.[179] The ICJ and tribunals have been found, in several occasions, to have applied these general principles of law in one or more of these three classifications: domestic principles commonly present within major legal systems of the world, principles that are international in origin and principles emanating from natural law.

Firstly, some of these principles are well known within different domestic legal systems of the world and have been applied by judges of the ICJ while sitting as justices in their respective municipal courts. Among these principles are *res judicata*[180] (a case already adjudicated upon cannot be heard again for the second time), *estoppel*[181] (an established practice must not be discontinued) and *nemo judex in causa sua*[182] (one should not be a judge in his own case).

Secondly, the general principles of law that originate from the international domain, prominent among which is the concept of *pacta sunt servanda* (agreements must be observed).[183] So important is this principle that it gives an inexorable support to the law of treaties that international agreement must

[179]RMM Wallace, *International Law,* (4th Ed. Sweet & Maxwell, London 2002), p. 23
[180] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment,* I.C.J. Reports 2007, p. 43 at Pp 50-51, para. 114; *Administrative Tribunal* case ICJ Reports, 1954, p. 53; *Corfu Channel* case, ICJ Reports, 1949, p. 248
[181] The ICJ has confirmed the meaning of *estoppel* in *Cameroon v Nigeria ICJ Reports*, 1998, Pp. 275, 303 thus: 'An estoppels would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues only. It would further be necessary that, by relying on such attitude, Nigeria had changed position to its own or had suffered some prejudice.' See also *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits,* Judgment of 15 June 1962: I.C.J. Reports 1962, p. 6 at Pp. 23, 31 and 32.
[182] See *Mosul Boundary* case PCIJ Rep., ser. B, No. 12 (1925) p.32
[183] See *AMCO v Republic of Indonesia* 89 ILR 366, 495-7

not only be observed, but remains binding among the respective parties. No wonder it occupies a considerable position in the preambles of the 1969 VCLT.[184] So also is the principle of reparation[185] under international law.

And lastly, is the principle of equity and humanity.[186] Equity has been used by the courts for fairness and reasonableness in the dispensation of justice particularly to prevent the injustice that may arise due to the strict adherence to law.[187] It should be noted however, that equity in a strict sense cannot be compared with general principles in that it is a concept according to Wallace that 'reflects values, which may be hard to define.'[188] He further contends that since equity does not contribute to substantive law, it therefore cannot be considered a source of law, 'but it can, nevertheless, affect the way substantial law is administered and applied.'[189]

Therefore, the ICJ may apply any of the general principles of law applicable internationally or within the realm of a particular civilized nation in any case brought before it, once there is a legal *lacunae* left unfilled by international treaty and international customary law. For instance, there are some

[184] The third paragraph of the preamble of the 1969 VCLT provides that: "*Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized".
[185] See *Chorzow Factory* case PCIJ Series A, No. 17, 1928, p. 29 where the Permanent Court of International Justice stresses that 'a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law'.
[186] See *Maritime Delimitation (Norway v Denmark)* (1993) I.C.J. Reports, Pp. 211-279
[187]See *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 49–50. See also *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya), Judgment* I.C.J. Reports 1982, p. 18 at p. 60 and *Delimitation of Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246 at Pp. 313–314 and 325–330
[188] RMM Wallace, op cit., (2002), p. 24
[189] Ibid

principles of law within the realm of Islamic jurisprudence in the judicial systems of many Muslim countries that would qualify as general principles of law that could be applied, if need be, in international dispute by the ICJ.[190]

3.3.4. Judicial Decisions and Scholarly Writings

The ICJ and other international tribunals have the leverage of applying 'judicial decisions . . . as subsidiary means for determination of rules of law' according to the stipulation of Article 38 (1) (d) of the SICJ. However, the proviso which states that it is made 'subject to the provisions of Article 59' would appear to have watered down the overall effect of the concept of *stare decisis.*[191] Article 59 of the SICJ provides that 'the decision of the Court has no binding force except between the parties and in respect of that particular case.' Meaning that the ICJ is not bound to follow its previous decisions; that is to say there is a universal consensus that international law does not accommodate what is known in common law as the rule of *stare decisis.* It should not be a surprise then that Bing Bing Jia came to the conclusion that precedents in the international courts could only serve as "persuasive" to the judges rather than having a "binding authority."[192] It has however, being argued that had the provision of Article 59 not been in place, the precedential

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[190] Examples of the Islamic law principles that could also be applied as general principles of law by the international court is discussed at Pp.158-160 of this dissertation.

[191] It is a short form of the Latin maxim *'stare decisis et non quieta movere'* which means 'to stand by things decided, and not to disturb settled points'. It is used to describe the doctrine of precedent where a court is expected to follow an earlier judicial decision particularly when a similar point arises again in litigation. See BA Garner (ed) *Black's Law Dictionary* (8th edn, Thomson West Publishing Co., USA 2004), p. 1443

[192] Bing Bing Jia 'Judicial Decisions as a Source of International Law and the Defense of Duress in Murder or Other Cases Arising From Armed Conflict', in S Yee and W Tieya (eds.), *International Law in the Post-Cold War World: Essays In Memory of Li Haopei* (Routledge, New York 2001) Pp. 83-95

effect of the principle of *stare decisis* mentioned in Article 38 (1)(d) would have remained in full application.[193]

Nonetheless, the ICJ does consider its previous decisions with the sole aim of seeking guidance in subsequent matters even though they are only expected in the words of Wallace 'to apply the law and not to make the law.'[194] Various judgments and advisory opinions of the international court remain today, a source of reference and provide a remarkable influence on the development of international jurisprudence. It could be said that the judges are, in effect, creating new laws which are obviously innovative and command general acceptability. For instance, the *Genocide Case*[195] where reservations to treaties was considered; the *Reparation for Injuries Case*[196] which reiterates the legal personality of the United Nations and international institutions; *Nottenbohm Case*[197] which establishes a genuine link between individual and claimant State; and *Anglo-Norwegian Fisheries Case*[198] which states the baselines from which the territorial sea may be drawn, all attest to this fact. It will thus, remain uncertain if the decisions of the court could still be regarded as "subsidiary" means of determining the law in the face of these classical decisions. This is because, according to Lauterpacht, 'respect for decisions

[193] M Shahabuddeen, *Precedent in the World Court*, (University of Cambridge, Research Centre for International Law 1996), p. 99
[194] RMM Wallace, op cit., (2002), p. 25
[195] *Reservation to the Convention on the Prevention and the Punishment of the Crime of Genocide, Advisory Opinion* ICJ Rep. 1951 p. 15
[196] *Reparation for Injuries Suffered in the Service of United Nations, Advisory Opinion* ICJ Rep. 1949 p. 174
[197] ICJ Rep. 1955 p. 4
[198] ICJ Rep. 1951 p. 116

given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice.'[199]

Another subsidiary means by which dispute may be settled by the ICJ is the 'teachings of the most highly qualified publicists of various nations.' This also forms part of Article 38 (1) (d) of SICJ. Truely, legal scholars do not create the law; rather, they explain by shedding more light on existing laws through their legal writings which have the potentiality of influencing decision makers in practice.[200] However, it may be difficult to determine who among the scholars would be rated as one of 'the most highly qualified publicists', particularly in a world consisting of many nations with multicultural identities. The determination of this will be subjective and may be, according to Boczek, 'susceptible to bais.'[201]

Over the years, there had been an intense reliance on the scholarly works of publicists the likes of Gentili, Grotius, Pufendorf and Vattel and which, up till today, continues with the prolific international law writers of our century. The theoretical frameworks of legal scholars have greatly impacted most of the decisions of the international tribunals but not that much with the judgments of the ICJ.[202] The reason, perhaps, could be as a result of the increase in 'the

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[199] H Lauterpacht, *The Development of International Law by International Court,* (CUP, Cambridge 1996) p. 14

[200]C Schreuer, 'Sources of International Law: Scope and Application' Emirate Lecture Series 28, The Emirates Center for Strategic Studies and Research, p. 8

[201] BA Boczek, *International Law: A Dictionary*, (Scarecrow Press Inc., Maryland, 2005), p. 33 See also T Hillier, op cit., (1998), p. 94

[202] S Rosenne, *The Law and Practice of the International Court of Justice,* (2nd edn, 1985) p. 614-616

substantive law of international law' in state practice and customary international law which has adversely affected the relevance of legal writers.[203] Nevertheless, one can still not under-estimate the vibrant role played in the development of international law especially in ascertaining and emphasising the important areas where international regulations should be introduced. For instance, while delivering a dissenting opinion in the *Case Concerning United States Diplomatic and Consular Staff in Tehran,*[204] Judge Tarazi cited with approval the lecture delivered by Prof. Ahmed Rechid on *"Islam and jus gentium"* wherein he gave a vivid account of the inviolability of an envoy in Islamic law.

3.4 The Possibility of Compatibility in the Legal Sources of International Diplomatic Law and Islamic Diplomatic Law.

The compatibility or tension theory between the legal sources of Islamic international law – *As-siyar* and conventional international law remains controversial amongst different commentators even though the two legal regimes genuinely crave for an indistinguishable universal justice. Khadduri, for instance, holds the view that the sources of Islamic *siyar* are similar to the sources of international law due to the fact that '[t]he Qur'an represent the authoritative source of law; traditions are equivalent to custom; rules and principles expressed in treaties with non-Muslims fall in the categories of agreement; and the opinion of the caliphs and jurists, based on legal

[203] RMM Wallace, op cit., (2002), p. 28
[204] *ICJ Rep.* (1980), p. 59

deduction and analogy, may be regarded as reason.'[205] While on the other hand, Ford, in his elucidation of the sources of international law and Islamic *siyar* could not find any genuine compatibility between them. According to him, he concludes that '[t]he *siyar* cannot be said to be genuinely compatible with modern international jurisprudence . . .'[206]

There is the need to consider whether there is compatibility in the principles inherent in the sources of international diplomatic law and Islamic diplomatic law. This section will, therefore, be looking at how and to what extent the sources of Islamic law are compatible with the sources of international diplomatic law.

3.4.1. The Analogy of International Treaty

The basic and fundamental principle behind every international treaty is that it must be respected and obeyed. Hence, the traditional Western maxim in conventional international law, *'pacta sunt servanda'* – every pact must be fulfilled. In the same vein, Islamic international law requires that once a Muslim State enters into a treaty arrangement with any other State, be it a Muslim State or a non-Muslim State, it is legally required that all the terms of the treaty must be fulfilled. The basis of its fulfilment, just as *pacta sunt servanda* in conventional international law, is also found in the old Arabic

[205] M Khadduri, 'Islam and the Modern Law of Nations' (1956) 50 AJIL, p. 359 See also HM Zawati, op cit., (2001), p. 6
[206] CA Ford, op cit., (1995), p. 500. See also M Berger, op cit., p. 107; DA Westbrook, op cit., (1992-1993), p. 883; and AI Bouzenita, op cit., (2007), p. 44

adage *'Al-'aqd shari'at al-muta'aqideen'*, meaning that 'the contract is the *Shari'ah* of the parties'.[207]

The obligation to fulfil all contractual agreements when entered into is unequivocal in the Qur'anic provisions. For example, Qur'an 5:1 states that 'O you who have believed, fulfil [all] contracts.' Likewise, Qur'an 16:91 stipulates thus 'And fulfil the covenant of Allah when you have taken it, [O believers], and do not break oaths after their confirmation while you have made Allah, over you, a witness. Indeed, Allah knows what you do.' Even for the non-Muslims, Allah stresses that the term of the treaty must be completed once they have not compromised their position by giving support to an adversary party thus: 'Excepted are those with whom you made a treaty among the polytheists and then they have not been deficient toward you in anything or supported anyone against you; so complete for them their treaty until their term [has ended]. Indeed, Allah loves the righteous [who fear Him].'[208] Allah states further that 'So as long as they are upright toward you, be upright toward them. Indeed, Allah loves the righteous [who fear Him].'[209] The unequivocal statement of Prophet Muhammad (pbuh) to Abu Jandal ibn Suhayl when the latter became a Muslim and sought to defect from the Makkan camp to join the Muslims immediately after the *Treaty of Hudaybiyyah* was that: 'O Abu Jandal have patience and be disciplined; for God will soon provide for you and your other persecuted colleagues a way out

[207] S Habachy, 'Property, Right and Contract in Muslim Law' (1962) 62, Colum. L. Rev. p. 461
[208] Qur'an 9:4
[209] Qur'an 9:7

of your suffering. We have entered with the Quraysh into a treaty of peace and we have exchanged with a solemn pledge that none will cheat the other.'[210] With this statement, Prophet Muhammad (pbuh) understood the importance of fulfilling the terms of a treaty and, as such, stressed the importance and implication of violating a treaty once it has been entered into.

The legal position of treaty under Islamic law has been well articulated in the famous case of *Saudi Arabia v. ARAMCO*[211] where it was carefully stated that:

> Muslim law does not distinguish between a treaty, a contract of public or administrative law and a contract of civil or commercial law. All these types are viewed by Muslim jurists as agreements or pacts which must be observed, since God is a witness to any contract entered into by individuals or collectivities; under Muslim law, any valid contract is obligatory, in accordance with the principles of Islam and the Law of God, as expressed in the Koran: "Be faithful to your pledge to God, when you enter into a pact"

An overwhelming majority of the Muslim jurists are of the view that a Muslim State can validly enter into a binding treaty with a non-Muslim State for an indefinite period of time or for a specified period to be determined by the Islamic leader.[212] The view canvassed by Khadduri that a peace treaty cannot

[210] MH Haykal, *The Life of Muhammad,* (North American Trust Publications), p. 354
[211] (1963) 27 I.L.R. 117
[212] M Munir, op cit., (2003), p. 428

be entered for more than ten years with the non-Muslim[213] has been said to represent the extreme views of al-Shafi'i.[214] There are authoritative views, according to Ibn Rushd (1198 AD), attributed to Abu Hanifah, Malik Ibn Anas and Ibn Hanbal that a peace treaty can be for an indefinite period as long as it serves the interest of the Muslim State.[215] The important thing is that such treaty must subsist for the interest of the Muslims. It is to be noted, however, that a treaty that contains some terms that are repugnant to Islam may still be executed under Islamic international law, although with some reservations and provided it is for the overall interest of the Muslims.[216] The historical basis for this assertion could be found in the *Treaty of Hudaybiyyah 628 AD* which Prophet Muhammad signed with the non-Muslims of Makkah even though some of the terms of the treaty appeared unfavourable to the Muslims. But the *Treaty of Hudaybiyyah* later turned out, as expected by Prophet Muhammad, to be "a manifest victory" (*fathaan mubeenan*).[217] This may probably be the reason why almost all of the Muslim States are parties to the 1961 VCDR and 1963 VCCR which regulate the immunities and activities of

[213]M Khadduri (Tr.), op cit., (1966), Pp. 16-17

[214]MR Zaman, "Islamic Perspectives on Territorial Boundaries and Autonomy" in SH Hashmi (ed.) , *Islamic Political Ethics: Civil Society, Pluralism and Conflict,* (Princeton University Press, New Jersey, 2002), p. 94

[215] See A Sulayman, *Islamic Theory of International Relations,* (International Institute of Islamic Thought, Virginia, 1987), p. 18

[216] See M Munir, op cit., (2003), p. 428

[217] With the conclusion of the Treaty of Hudaybiyyah, Prophet Muhammad was accorded an official recognition by the Makkans as the leader of the Muslim community. Also, the Muslims had the opportunity to preach Islam without any persecution during the pendency of the treaty. See LA Bsoul, 'International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Siyar (Islamic International Law), (PhD Thesis, McGill University, Montreal, 2003), p. 191. Also see S Al-Mubarakpuri, *The Seal Nectar (Ar-Raheequl-Makhtum)*, (Darussalam, Riyadh 2002), Pp. 305-306; M Lecker, 'Glimpses of Muhammad's Medinan Decade' in JE Brockopp (ed.), *The Cambridge Companion to Muhammad,* (CUP, Cambridge 2010), p. 74

the diplomatic and consular personnel which are to the benefit of the generality of the Muslim community (*ummah*).

3.4.2. The Analogy of International Customary Law

International customary rule amongst nations will remain a source of international law provided it evidences a general practice accepted as law. In essence, customary international law must be a general practice and such practice must be legally binding. On the other hand, according to Islamic law, once a customary practice does not derogate from the fundamental tenets of Islam, then it becomes a law formulating method regardless of whether it originates from the era prior to Prophet Muhammad (pbuh) or not. That is why in interpreting contractual obligation, Islamic law gives allowance to the prevailing customary practice at the time and place of the contract.[218]

Most Muslim countries, going by their legal systems, do consider customary practice in their judicial decisions.[219] The rule of reciprocity for instance, which forms the basis of universal international order and which is deeply embedded in international customary law, also occupies an important position in Islamic diplomatic law.[220] It was embraced by Islamic legal system to 'make justice

[218] S Habachy, op cit., (1962), p. 471

[219]See N Saleh, 'The Law Governing Contracts in Arabia', (1989) 38 Int'l & Comp L. Q., Pp. 761 and 773

[220]Qur'an 2:194 '[Battle in] the sacred month is for [aggression committed in] the sacred month, and for [all] violations is legal retribution. So whoever has assaulted you, then assault him in the same way that he has assaulted you. And fear Allah and know that Allah is with those who fear Him.'

reign, establish standards of fairness and impartiality.'[221] The Muslims have, however, been discouraged from reciprocating where the fundamental moral principles will be breached as it is clearly stated in the Qur'an that: 'And if you punish, let your punishment be proportionate to the wrong that has been done to you; but if you show patience that is indeed the best (course) for those who are patience.'[222] A typical example can be drawn from the provision of the Qur'an which states that 'How can there be for the polytheists a treaty in the sight of Allah and with His Messenger, except for those with whom you made a treaty at al-Masjid al-Haram? So as long as they are upright toward you, be upright toward them. Indeed, Allah loves the righteous [who fear Him].'[223] At least every State would want to be treated in the same way they treat others. [224] That is, to reciprocate in the spirit of one good turn deserves another.

Meanwhile, Islam has been known to observe and continuously respect whatever customary norm that has developed within the international arena in as much as it is not in conflict with the basic principles of Islamic law.[225]

3.4.3. The Analogy of General Principles of Law:

The general principles of Islamic law, being one of the major legal systems of the world, are capable of renewing the rules of international law considering

[221] WM Zuhili, 'Islam and International Law', (2005) 87 International Review of the Red Cross, p. 275
[222] Qur'an 16:126
[223]Qur'an 9:7
[224] GM, Badr, op cit., (1982), p. 59
[225] See M Munir, op cit., (2003) 1 (3 & 4) Islamabad LR p. 428

the fact that these are principles of a legal system that have been 'tested within the shelter of more mature and closely integrated legal systems.'[226] The stipulation in Article 38 (1) (c) of the SICJ deliberately empowered the international bench to draw from generally acknowledged and highly refined legal principles belonging to various legal systems of the world when adjudicating. They are particularly expected to utilise and apply these general legal principles as 'a tempting set of rules which these might be encouraged to adopt, as a last resort,'[227] rather than resort to judgments of *non liquet*. The prerequisite for electing persons into the international judiciary, according to Art.9 of the SICJ, is the possession of individual qualifications. It is further required 'that in the body as a whole the representation of the main forms of civilizations and of the principal legal systems of the world should be assured.' The fact that Islamic law was recognised as constituting one of the main forms of civilizations and being one of the major legal systems of the world at the League of Nations in September, 1939 and subsequently at the United Nations Conference in San Francisco in April, 1945 which was eventually adopted as Art.38 of the SICJ, concludes the relevance of its general principles.[228]

Islamic jurisprudence has equally evolved time-honoured principles of law which could be applied by the ICJ, whenever the need arises, to resolve international disputes particularly those involving Muslim countries. Prominent

[226] G Schwartzenberger, *Foreword* to B Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* (CUP, Cambridge 2006), p. xi
[227] Ibid
[228] S Mahmassani, op cit., p. 222

among these general principles is the international law principle of *pacta sunt servanda* which is also a fundamental tenet of Islamic law. The basic principle in Islamic law regarding any treaty, agreement or contract is that once it has been concluded, it must be fulfilled. Also, the legal principle of *istihsaan* – juristic preference which has been likened to the Western concept of equity due to its preference for simplicity and easement of difficulties gives a lucid picture of one among the various principles of law that could be of use to the International Court of Justice. One could therefore, see reason in the international tribunal's decision in *Eritrea v. Yemen* that 'in today's world, it remains true that the fundamental moralistic general principles of the Qur'an and the *Sunnah* may validly be invoked for the consolidation and support of positive international law rules in their progressive towards the goal of achieving justice and promoting the human dignity of mankind.'[229]

Similarly, the juristic method of *maslahah* – public interest is another principle of Islamic law which the Muslim States have applied and still apply as one of the legal justifications for ratifying and signing international treaties with non-Muslim countries.[230] The juristic principle of *maslahah* allows for the existence of a mutual and peaceful relation between Muslim State and a non-Muslim State in as much as there is no prevalence of a physical or ideological warfare between them. This does appear as one of the reasons why most of the Muslim nations are signatories to all the diplomatic related conventions – for instance, the 1961 VCDR, 1963 VCCR, 1969 VCLT and 1973 UN Convention

[229] *Eritrea v. Yemen* 119 ILR, 417.
[230] Muhammad al-Tahir Ibn Ashur, op cit., (2006), p. 131

on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents to mention but view.

The above general principles of Islamic law can, if utilized, according to Kelsay and Johnson, 'prove to be ones that readily harmonize with and accommodate modern international norms'.[231]

3.5 *Conclusion*

In sum, we have analysed the legal sources in the two jurisprudential systems and most importantly, investigated by bringing out the compatibility in the principles surrounding the sources of the two legal regimes. We have also indicated how Islamic *siyar* enjoins the Muslim State to strictly comply with the terms and conditions of any treaty once entered into; how it gives validity to international customs that have evolved amongst different nations; and how it has contributed, through its numerous legal principles, to the general principles of law thereby rescuing the international tribunals and the ICJ from falling into legal oblivion.

We can see that the principles of Islamic international law are readily available to consolidate and expand the scope of contemporary international law. In addition, these Islamic law principles are also there to facilitate the overall protection of diplomatic institution with the hope that this will

[231] J Kelsay and JT Johnson, *Just War and Jihad: Historical and Theoretical Perspectives of War and Peace in Western and Islamic Traditions,* (Greenwood Press, 1991), p. 200

'encourage the development of common ground between the different legal systems of the world to ensure global peaceful and harmonious international relations'[232] in the words of Baderin.

[232] MA Baderin (ed.), *International Law and Islamic Law*, (Ashgate Publishing Limited, 2008), p. xvi

CHAPTER FOUR

A MACROSCOPIC OVERVIEW OF DIPLOMATIC IMMUNITY IN INTERNATIONAL DIPLOMATIC LAW AND ISLAMIC LAW

4.1. *Introduction*

In the early period, just as it used to be the practice in Islam, envoys were assigned tasks abroad and once these tasks have been accomplished, they were to return home immediately.[1] The beginning of the sixteenth century marked the establishment of permanent diplomatic missions, particularly among European nations.[2] It then became imperative that 'suitable immunities and privileges'[3] be found with cogent legal justification. The rationale for the inviolability and jurisdictional immunity accorded foreign representatives along with their diplomatic premises could be traced back to the three popular theoretical justifications of diplomatic immunities – exterritoriality[4], representative character and functional necessity.[5] Extensive scholarly discussions have been recorded on the theoretical justifications of diplomatic immunity. This chapter, therefore, intends to examine these justifications with the view to extracting a common theoretical basis for diplomatic inviolability and immunities in Islamic diplomatic law and international diplomatic law. This chapter will also examine the different forms

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[1] B Sen, *A Diplomat's Handbook of International Law and Practice,* (Martinus Nijhoff Publishers, The Netherlands, 1988), p. 6

[2] F Przetacznik, "The History of the Jurisdictional Immunity of the Diplomatic Agents in English Law", (1978) 7 Anglo-Am. L. Rev., p. 353

[3] MG Fry, et al, *Guide to International Relations and Diplomacy,* (Continuum, London 2002), p. 542

[4] It is traditionally known as 'extraterritoriality' but commonly shortened and referred to as exterritoriality as used above.

[5] GV McClanahan, *Diplomatic Immunity: Principles, Practices, Problem* (St Martins Press, New York, 1989), Pp. 27-28

of diplomatic privileges, immunities and facilities to diplomatic missions and their various personnel as understood under international diplomatic law on the one hand; and consider on the other hand, whether under Islamic diplomatic law the concept of diplomatic immunity exists, particularly as confirmed by the making of the *Treaty of Hudaybiyyah (628 AD)*; and if it does exist, is it compatible with the principles of diplomatic immunity as understood under modern diplomatic law? This chapter will further consider how Islamic *siyar* perceives the relationship between the concept of *Aman* – safe conduct and diplomatic immunity.

4.2. *The Theoretical Justifications Underlying Diplomatic Inviolability and Immunities*

4.2.1 Diplomatic Inviolability and Immunities under International Law

International law has set certain standards, 'whether administrative, legislative or judicial,'[6] which the receiving state will have to put in place before hosting diplomatic personnel of other states. These standards which are made up of international and national laws are known as diplomatic privileges and immunities. What makes a diplomat deserving of these immunities? In answer to this question, scholars of international law have come up with three major theoretical considerations that form the bases for diplomatic privileges and immunities (personal representation, exterritoriality and functional necessity) and each of them will be considered in *seriatim*.

[6] MJL Hardy, op cit., (1968), p. 9

A) Representative Character Theory.

The representative character theory as propounded by the classical writers including Grotius became popular with the establishment of permanent diplomatic missions. That was between the eighteenth and nineteenth centuries.[7] This theory represented a generally accepted position amongst the conflicting schools of law – the natural law school and the positivist law school - that maintained views on the subject. Grotius, while conveying the view of the natural law school, said: '. . . it is natural to suppose, that nations have agreed, in the case of ambassadors, to dispense with that obedience, which every one, by general custom, owes to the laws of that foreign country, in which, at any time, he resides. The character which they sustain, is not that of ordinary individual, but they represent the Majesty of the Sovereigns, by whom they are sent, whose power is limited to no local jurisdiction.'[8] The approach of the legal positivism is depicted also by Bynkershoek in the following words: 'The sole reason why ambassadors are exempted from the power of those to whom they have been sent is that they should not, while performing the duty of their office, change their status and become subject to another while they are acting as the representatives of their prince who is generally a rival.'[9] With the diplomatic institution made permanent, the ambassador then required the kind of protection that befits the state organ

[7] RA Wilson, 'Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations' (1984) 7 Loy. L. A. Int'l & Comp. L. J., p. 114

[8]Grotius, *De Jure Belli ac Pacis, Published 1625,* (Classics of International Series, Ed. Scott, 1925), Section 4

[9]Bynkershoek, De Foro Legatorum Liba Singularis, Published 1721, (Clarendon Press, Oxford 1946), p. 44

he represents abroad. That brings us to the rudiment of the representative theory which fundamentally 'traces immunity to the sovereignty of the state which sends the agent.'[10] Since the sending State does not owe any allegiance to the receiving State, it therefore follows that the diplomatic agent of the sending State will not be bound by the law of the receiving State.[11] That is, any wrong done to the diplomatic agent of a sovereign State will essentially, be considered an affront to the foreign State itself.[12] The diplomat is the alter ego of his sovereign.[13] The U.S. Chief Justice Marshall has carefully delineated the rationale of the representative character theory in the case of *The Schooner Exchange v. M'Faddon*[14] where he said, in part, that:

> The assent of the sovereign to the very important and extensive exemptions from the territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the consideration that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad.

In the United Kingdom, the representative character theory was for long adopted in the Diplomatic Privileges Act of 1708.[15] It was a reaction to the arrest of Andrei Artemonovich Matveev, the Russian Ambassador to England

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[10] M Ogdon, *Juridical Bases of Diplomatic Immunity,* (John Byrne & Co., Washington D.C. 1936), p. 105
[11] B Sen, op cit., (1988), p.97
[12] CE Wilson, *Diplomatic Privileges and Immunities,* (University of Arizona Press, 1967, Arizona), p. 3
[13] *Bergman v. De Sieiyes*, 71 F. Supp. 334, 341 (S.D.N.Y 1946)
[14] (1812)11 US (7 Cranch) 116, 138. Also available at: http://www.uniset.ca/other/css/11US116.html [accessed 4 August, 2010]
[15] JC Barker, op cit., (2006), p. 45

that necessitated the emergence of the Act[16] which provided that no judicial proceedings could be brought against diplomats or their servants and that it was an offence to commence proceedings.[17] The Act endured up till the enactment of the Diplomatic Privileges Act, 1964.

In modern day diplomatic practice, it is doubtful if personal representative theory will be considered relevant any more in view of the criticisms levelled against it. With States now overwhelmingly embracing democracy, sovereignty has moved from the hands of monarchies into the hands of the people and their elected officials.[18] In democracy, the power of sovereignty is said to be shared amongst the three arms of government: the executive, the legislature and the judiciary. Thus, some critics see the difficulty in identifying on whose behalf the diplomat is acting.[19] This can, however, be counter-argued by the fact that the the so-called separation of power arrangement in democracy is an internal arrangement of each State. A representative abroad is naturally representing the interest of the State as a geo-political entity. He is, thus representing all the three arms of government, even though he was appointed by the Executive arm.[20] Some other commentators also see the personal representation theory as being too wide and too fallacious for the

[16] Ibid
[17] H Barnett, *Constitutional and Administrative Law,* 8th edn., (Routledge, Oxon, 2011), p. 131
[18] CE Wilson, op cit., (1967), p. 4
[19] Ibid.
[20] Indeed in some democracies, like that of Nigeria, under the Constitution, while the Executive arm appoints ambassadors, the National Assembly (the Legislative arm) still has to assess and approve each candidate for the diplomatic posts.

business of conducting international business.[21] However, this theory did not out-rightly fade away with the emergence of modern day politics. One could still trace, to some extent, the representative character in the VCDR which states amongst others, that the functions of diplomatic mission shall consist of '[r]epresenting the sending State in the receiving State.'[22]

B) Exterritoriality Theory: A Fictional Justification of Immunity

This theory, though considered to be the oldest, had a relatively short run in the history of international law.[23] Going by this theoretical reasoning, a diplomat, his home and his office are legally resident within the territory of the sending State even though they are physically resident abroad.[24] This is what the French jurist, Pierre Ayrault, considered in 1576 that the diplomat 'is held to be absent and to be present in his own country.'[25] It should not be a surprise then that as far back as 1883, James Lorimer had declared in his treatise of international law that 'an English ambassador, with his family and his suite, whilst abroad in the public service, is domiciled in England.'[26] Moreover, the theory of exterritoriality presupposes that the receiving State may not enter the premises of the sending State due to want of personal jurisdiction thus, making it impossible for the diplomat to appear in its court

[21] H Rieff, *Diplomatic and Consular Privileges, Immunities and Practice (Ettemad Press, 1954) p. 26*
[22] Art. 3 VCDR
[23] GV McClanahan, op cit., (1989), p. 30
[24] MS Ross, 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities', (1989) 4 Am. U. J. Int'l L. & Pol'y, p. 178
[25] This is cited in M Ogdon, op cit., (1936), p. 68
[26] CE Wilson, op cit., (1967), p. 6

of law.[27] The New York Supreme Court in *Wilson v. Blanco*[28] while giving judicial recognition to the theory, affirmed that the rule 'derives support from the *legal fiction* that an ambassador is not an inhabitant of the country to which he is accredited, but of the country of his origin, and whose sovereign he represents, and within whose territory he is, in contemplation of the law, always abide.' Similarly, an English Court in *The King v. Goerchy*[29] held that 'an ambassador is not subject to the courts of the country to which he is sent but is believed, by legal fiction, to still be a resident of his own country.'

In spite of the increasing and widening scope of disparagement held against the entire theoretical analysis, it is interesting to note that occasionally the philosophy of exterritoriality, though moribund, still finds a place in diplomatic expressions. For example, in April, 1987 the then US Secretary of State, George Shultz, while commenting on the security situation of the US Embassy in Moscow, has this to say: '[The Soviets] invaded our sovereign territory, and we're damned upset about it.'[30]

Legal scholars and commentators, however, agree that the exterritoriality theory is nothing but an 'explanatory fiction'[31] which, by the assessment of Ogdon, 'does not provide the actual reasons for determining rights and duties, it is of little value as a guideline in determining the scope and limits of

[27] Barnes, 'Diplomatic Immunity from Local Jurisdiction: Its Historical Development under International Law and Application in United State Practice', (1960) 43, Dept. St. Bull, p. 175
[28] (1889) 4 N. Y. S 714
[29] (1765) 96 Eng. Rep. 315
[30] *State: The Newsletter*, May 1987, p. 8
[31] E Young, 'The Development of the Law of Diplomatic Relations', (1964) 40 Brit. Y. B. Int'l L., p. 170

diplomatic privileges and immunities.'[32] This explains why states failed to put it into practice despite the fact that the theory is acknowledged as forming the rationale for diplomatic immunities.[33] In fact, the fictional element in the entire approach makes the acceptance of the theory to modern minds much more difficult.[34] Furthermore, the theory has an expansive and broad construction of diplomatic immunity in that it prevents States from restricting the privileges and immunities of diplomats.[35] Finally, the presumed grant of unrestricted privileges and immunities that has the tendency of surpassing the ordinary immunities granted to the diplomat could, in the words of Wilson, 'result in dangerous consequences.'[36] Since the theoretical analyses in both the representative character and exterritoriality have failed in providing sufficient and pragmatic justification for diplomatic immunity, then legal scholarship moved on to consider what is to be known as the 'functional necessity theory.'

C) *Functional Necessity Theory: A Practical Justification of Immunity.*

Modern trends dictate that for the diplomatic envoy to carry out his/her function efficiently, without any interference, intimidation and fear of civil or criminal prosecution, he/she needs to be guaranteed all necessary privileges and immunities in the country of his accreditation. This is the functional

[32] M Ogdon, op cit., (1936), Pp. 102-103
[33] Hurst, 'Diplomatic Immunities – Modern Developments', (1929) 10, Brit. Y. B. Int'l L. p. 13
[34] MJL Hardy, op cit., (1968), p. 10
[35] VL Maginnis, 'Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations', (2002-2003) 28, Brook J. Int'l L. p. 994
[36] RA Wilson, op cit., (1984), p. 117

necessity theory which became generally popular amongst legal scholars in the early twentieth century. One could see the basis for this theory in the statement of de Vattel that a diplomat should be free from domestic jurisdiction and that 'he be not liable to be diverted from his functions by any chicanery.'[37] Likewise, Justice Wills, J. in the case of *Parkinson v. Potter*[38] was very instructive when he declares that extension of exemption from the jurisdiction of the courts was essential to the duties which an ambassador must perform. No wonder, since the post war period, international law jurists have generally taken "functional necessity" as the theoretical basis for granting privileges and immunities.[39]

Essentially, the theory of functional necessity derives its essence and popularity from the important functions performed by the diplomats.[40] More so, this theory gives considerable allowance for the restriction of the entire scope of diplomatic immunity.[41] It is necessary that diplomatic immunity should be in place for a smooth conduct of foreign affairs. This is because those activities which are very crucial to the diplomatic process would then receive the protection of diplomatic immunity. Meanwhile, other activities that are not essential to diplomatic process do not require immunity as they are

[37] E de Vattel, *The Law of Nations,* Trans. by J Chitty, (Philadelphia, 1849), p. 471
[38] (1885) 16 Q.B.D. p. 152
[39] Y Ling, 'A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Official with the Traditional Privileges and Immunities of Diplomatic Agents', (1976) 33, Wash. & Lee L. Rev., p. 94
[40] F Przetacznik, 'The History of Jurisdictional Immunity of the Diplomatic Agents in English Law, (1978) 7 Anglo-Am. L. Rev., p. 357
[41] SL Wright, 'Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts', (1987) 5 B. U. Int'l L. J. p. 200

not of functional necessity.[42]

The popularity gained by this theory is reflected in the preamble of the 1961 VCDR to the effect 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.'[43] In other words, it can rightly be said that immunities and privileges are not granted specifically to diplomatic agents rather, they are for the diplomatic tasks and functions they are to discharge.

Notwithstanding the general acceptance of functional necessity theory over and above the theory of exterritoriality, some commentators still attribute some shortcomings to it. The functional necessity theory is, though, 'fashionable but somewhat question- begging.'[44] It has been criticised for being 'disturbingly vague'[45] in its failure to specify the limits of essential immunities to the accepted practice of diplomacy.[46] Although the restrictions imposed on diplomatic immunities are supposed to be limited 'to what he [the diplomat] needed to accomplish his mission'[47] in strict compliance with the functional approach, but in practice, private acts of diplomats equally enjoy absolute immunity.[48] This, according to Maginnis, could be as a result of the

[42] TA O'Neil, 'A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978', (1980) 54 Tul. L. Rev. p. 669
[43] Paragraph 4 of the preamble to the VCDR
[44] I Brownlie, op cit., (1984), p. 345
[45] CE Wilson, op cit., (1967), p. 22
[46] RA Wilson, op cit., (1984), p. 118
[47] LS Frey and ML Frey, op cit., (1999), p. 339
[48] VL Maginnis, op cit., (2002-2003), p. 996

fact that 'states are fearful that their diplomats could face unjust political prosecution or be rendered unduly cautious in carrying out their functions.'[49] It has also been argued that if breaking the laws of the receiving State is what the diplomat requires to efficiently conduct international relations, then the theoretical rationale of functional necessity stands betrayed.[50]

4.2.2 Justification for Diplomatic Immunity in Islamic International Law (Siyar)

Islamic history has not recorded any theoretical transformation of legal justifications regarding diplomatic immunity similar to that obtained under international law. However, what appears to be predominant as the legal rationale for the practice of diplomatic immunity under Islamic international law is the functional necessity theory. One of the Hanafi jurists, Sarakhsi, was quoted by the Federal Shariat Court of Pakistan in *Re: Islamisation of Laws Public Notice No. 3 of 1983*[51] as saying that 'if somebody claim (sic) to be an envoy and has in his possession the necessary credentials he shall be granted immunity till the completion of his ambassadorial duty and till return.'[52] This is predicated on the fact that '[w]ithout such immunity they cannot satisfactorily perform their functions.'[53] This point was also emphasised by Zawati when he says that '[t]o enable them to exercise their duties and functions, diplomatic agents enjoy full personal immunity under Islamic international

[49] Ibid
[50] MS Ross, op cit., (1989), p. 179
[51] PLD 1985 Federal Shariat Court, 344
[52] Ibid., p. 354
[53] Ibid

law.'[54] It is also pertinent to state that the largest international Islamic organisation, otherwise known as the Organisation of Islamic Cooperation (hereinafter referred to as 'OIC') confirms the functional justification of diplomatic immunity in Islamic international law. Article 13 of the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference states that 'immunities and privileges are accorded to the representatives of Member States, not for their personal benefit, but in order to safeguard the independent exercise of their functions in connection with the organization.'[55]

One can still not completely rule out the importance of what seems like the representative character theory in Islamic international law. One of the renowned authors[56] on this subject gave the following remarks while advising the king on how the ambassadors should be received that: 'Whatever treatment is given to an ambassador, whether good or bad, it is as if it were done to the king who sent him, and kings have always shown the greatest respect to one another.'[57] This therefore, gave an indication that since diplomatic envoys are representatives of their sovereigns in the receiving countries; it necessarily implies that diplomatic immunity should be accorded to them.

[54] HM Zawati, op cit., (2001), p. 79
[55] It was adopted by the Seventh Islamic Conference of Foreign Ministers held in Istanbul, Republic of Turkey, from the 13th – 16th Jamad Al-Awal, 1396H (12th – 15th May, 1976)
[56]Hassan ibn 'Ali, Hubert Darke (tr.), *Siyar Al-Muluk or Siyasat-Nama (The Book of Government or Rules for Government)*, (Persian Heritage Foundation, London, 2002)
[57]Ibid., p.99

One can therefore, reasonably conclude that there is compatibility concerning the rationale for diplomatic immunity in the two jurisprudential systems (Islamic *siyar* and international law). More so, as it has been established in the legal instruments applicable to the two legal systems – the 1961 VCDR and the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference that diplomatic immunity is not granted for the personal benefit of the diplomatic personnel but rather for representing his or her country abroad and particularly to make allowance for efficient discharge of his or her diplomatic responsibilities.

4.3. *Codification of Diplomatic Immunities and the Protection of Diplomatic Personnel*

4.3.1. Movement in the Direction of Uniform Codification.

The notion of diplomatic immunities and privileges has gone through several phases in the history of its codification. Different States, particularly in the eighteenth century, developed their own kinds of immunities and privileges in diplomatic practice. The United States and United Kingdom, for instance, saw no justification for restricting and confining the scope of diplomatic immunities hence, the need to safeguard and protect the diplomats remains absolute.[58] While States like Italy had taken the view since 1922 that absolute immunity has not only ended, but has also become 'one of the political doctrines that have been suspended' in the sense that acts outside the

[58] E Satow, *Satow's Guide to Diplomatic Practice,* (5th edn., Longman Group Limited, London 1979), p. 107

diplomatic business will not be accorded diplomatic immunity.[59] The divergence went as far as some States refusing to grant diplomatic immunity to their citizens who happened to be diplomatic agents of another State, while some States refused to accord them any diplomatic recognition.[60] Yet, other States granted full diplomatic privileges and immunities to diplomats regardless of whether the ambassadors are of their own or not. They also extended this diplomatic shield to cover those working with the diplomat – counsellors, first secretaries, drivers, typists, clerks and cleaners.[61]

Based on these variations and precarious status of diplomatic privileges and immunities, several jurists and a considerable number of international lawyers mooted the idea of having a uniform protection for diplomatic personnel by States signing a multilateral convention. This is what led to the establishment of the 1961 VCDR.

4.3.2. The Making of the 1961 Convention on Diplomatic Relations:

In an effort towards realising the uniform codification of diplomatic law, the American States on the 20th of February, 1928 signed among themselves the Havana Convention on Diplomatic Officers.[62] Though, regional in scope, the treaty contained generally the functions and immunities of diplomatic agents. The Convention, by its preamble, embraces the functional necessity theory as

[59] See *Comina v. Kite*, F. It. Vol. 1 (1922) 343
[60] E Satow, op cit., (1979), p. 107
[61] Ibid
[62] Ibid p. 108

forming the rationale for diplomatic immunities.[63] Also important in an effort to find a universal convention for international diplomacy was the attempt by the Harvard Law School towards the publication of the Harvard Research Draft Convention on Diplomatic Privileges and Immunities in 1932.[64] In spite of this effort, which is of 'great persuasive authority,'[65] various States still clinch on to the provisions of their respective local laws on diplomatic relations.

The United Nations International Law Commission (hereinafter referred to as ILC)[66] sprang into action, as a matter of priority, to consider the codification of diplomatic and consular relations and immunities during its first session in 1949.[67] The ILC was mandated in 1953 by the General Assembly Resolution 685 to undertake the codification of diplomatic law.[68] By 1954, the ILC took up the task of considering a draft expected to become 'a universal comprehensive law'[69] on diplomatic related matters. In the preparation of the draft, all member States of the United Nations, parties to the Statute of the International Court of Justice as well as members of the Specialised Agencies

[63] B Sen, op cit., (1988), p. 103
[64] 26, A.J.I.L (1932) (Suppl.), 19
[65] E Satow, op cit., (1979), p. 108
[66] The International Law Commission (ILC) was created in 1947 by the General Assembly Resolution 174 (II) of the United Nations. The ILC is charged with the task of 'preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently in the practice of States.' In addition, the ILC also work on the codification of international law in fields where there already has been extensive State practice, precedent and doctrine. See *The Work of the International Law Commission,* vol. 1 (United Nations Publications, 2007), p. 7 also available at: http://www.un.org/law/ilc/ [accessed 7 August, 2011]
[67] U. N. General Assembly, Resolution 685 (VII) of 5 December, 1952
[68] *Report of the International Law Commission to the General Assembly*, (1958) Y.B. Int'l L. Comm'n, 45
[69] GV McClanahan, op cit., (1989), p. 42

were all present.[70] The final draft was eventually submitted in 1958 after much deliberation, for adoption not by the General Assembly, but by a specially convened conference in Vienna.[71]

Between the 2nd of March and 14th of April, 1961, eighty-one States met at a Conference in Vienna to discuss and adopt the final draft of the Convention on Diplomatic Relations. The Convention that is made up of fifty-three articles along with two Optional Protocols on acquisition of nationality and obligatory settlement of disputes[72] was ultimately adopted and ratified by 113 States in April 18, 1961.[73] With the Convention came an authority of codification of diplomatic law particularly within the recondite domain of customary rule. Today, not less than 185 states are signatories to the 1961 VCDR which confirms the general acceptability and in fact, the universality of diplomatic relations,[74] out of which 57 Muslim States are parties to the VCDR. This represents not less than one-third of the entire membership of the VCDR. Although one may say that the Vienna Convention indeed 'constitutes the modern law in regard to the privileges and immunities of diplomats'[75] however, the extent of the application of its system of immunities amongst

[70] E Satow, op cit., (1979), p. 108
[71] L Dembinski, *The Modern Law of Diplomacy: External Missions of States and International Organizations,* (Martinus Nijhoff Publishers, 1988), Pp. 8 – 9. See *The Work of the International Law Commission,* (United Nations, New York, 1988), Pp.41 ff
[72] *United Nations Conference on Diplomatic Intercourse and Immunities,* Official Documents, 2 vols. A/Conf. 20/14
[73] E Satow, op cit., (1979), p. 108
[74] R Cohen, 'Reflections on the New Global Diplomacy: Statecraft 2500 BC to 2000 AD' in J. Melissen, Ed. *Innovation in Diplomatic Practice,* (Macmillan Press Ltd., 1999), p. 14
[75] E Satow, op cit., (1979), p. 108

different States remains a matter of substantial divergence.[76] That is why the question of uniformity in the application of the provisions of the Vienna Convention appears unsettled. Nevertheless, it can still be rightly argued in line with the submission of Denza in his authoritative treatise entitled *'Diplomatic Law,'*[77] that 'the Vienna Convention on Diplomatic Relations is probably the most successful product so far of the United Nations 'legislative process' . . .' It was further stressed that '[t]he Vienna Convention is without doubt one of the surest and most widely based multilateral regimes in the field of international relations.'[78]

The VCDR has carefully sets out certain inviolabilities and immunities to be enjoyed by the diplomatic agent so as to guarantee the fulfilment of his/her diplomatic functions without any hindrance or fear of intimidation. These immunities are examined in Section 4.3.3 below.

4.3.3. Diplomatic Immunities According to the 1961 Vienna Convention

The 1961 VCDR consists of fifty-three Articles out of which twelve deal directly with personal immunity. The Convention outlines different categories of immunities and inviolabilities given to various classes of diplomat.[79] The

[76] Article 47 (2) (a) and (b) of the Vienna Convention provides that '(a) [w]here the receiving States 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) [w]here by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention', such actions, for purpose of this Convention, will not be regarded as discrimination.
[77] E Denza, *Diplomatic Law,* (Oceana Publications, New York, 1976), p. 1
[78] J Brown, op cit., (1988), p. 54
[79] These are articles 29 – 40 of the Vienna Convention on Diplomatic Relations, 1961.

various categories of these diplomatic immunities and privileges as they apply to diplomatic personnel and their family members are summed up under the following headings: i) personal inviolability of the mission's members; ii) inviolability of the mission premises and private residence; iii) inviolability of the mission's archives; iv) freedom of communication; v) protection of diplomatic bag and couriers; vi) freedom of movement; vii) immunity from criminal and civil jurisdiction; viii) exemption from taxation; ix) exemption from customs duties; x) exemption from social and security obligations; and xi) exemption from personal and public services. They will be discussed one after the other.

4.3.3.1 Personal Inviolability

It is a fact accepted extensively among jurists and international law writers that the inviolability of the diplomatic envoy is 'the oldest established and the most fundamental rule of diplomatic law.'[80] This principle has been associated with the concept that the diplomatic agent[81] is representing the sovereign, as such, any injury brought against him embodies corresponding affront to the sovereign.[82] The core essence of diplomatic inviolability in the VCDR, going by the spirit of the preamble, is in conformity with the functional necessity theory which is 'to ensure the efficient performance of the functions of diplomatic

[80] E Denza, op cit., (1976), p. 136
[81] The word "diplomatic agent" as defined by Article 1 (e) of the 1961 VCDR 'is the head of the mission or member of the diplomatic staff of the mission'. See J Brown, 'Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Relations', (1988) 37, I.C.L.Q. Pp. 54-55
[82] B Sen, op. cit., (1988), p. 107

missions…'[83] That is why it is so guaranteed by Article 29 of the VCDR[84] that the diplomatic agent 'shall not be liable to any form of arrest or detention.' In addition to that, Article 29 also requires the receiving State to 'take all appropriate steps to prevent any attack on his person, freedom or dignity.'

The provisions of Article 29 are expected to serve as a means of protection for the diplomatic agent from all forms of hindrances and restrictions that may occur in the receiving State. Although, the Article contains no express or implied concept or scope of inviolability.[85] It however, provides a double-pronged protection. Firstly, the authorities of the receiving State are not allowed under any circumstances to detain or arrest a diplomatic agent. Secondly, the Article makes it an obligation on the receiving State to protect the diplomatic agent.[86] Once a State has accepted the creation of a diplomatic relation with another State, it then becomes a must that the State takes 'all appropriate steps' towards the prevention of physical attack or violence against the dignity and freedom of its diplomatic personnel.[87] According to some writers, it is not common to find a diplomatic personnel being arrested

[83] The fourth paragraph of the preamble of the VCDR

[84] Article 29 of the VCDR states that: "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."

[85] R Vark, 'Personal Inviolability and Diplomatic Immunity in Respect of Serious Crime', (2003) Juridica International VIII, Pp. 111-112

[86] L Oppenheim, op cit., (2005) Pp. 561-562. The incidence of the Libyan People's Bureau in London where a diplomatic agent fired shots into the crowd of demonstrators killing a British policewoman, Constable Yvonne Fletcher and injuring eleven people depicts a classical example. The British government understanding the implication of inviolability of diplomatic personnel and mission did not arrest or prosecute the perpetrator but eventually precipitated a severance of diplomatic relations with the Libyan government by declaring its diplomats *persona non grata.* See GV McClanahan, op. cit., (1989), p. 5; LS Farhangi, 'Insuring Against Abuse of Diplomatic Immunity', (Jul., 1986), Vol. 38 No. 6, Stanford Law Review, Pp. 1523-1524

[87] RG Feltham, *Diplomatic Handbook* (5th ed., Longman Group Limited, London 1988), p. 42

or detained for committing an offence even though there seems to be a right to self-defence.[88] But where it thus occurs, reparation or an apology becomes necessary.[89] A public apology was, for instance, received when a Third Secretary of the American Embassy was assaulted at Nanking by a Japanese soldier in January 26, 1938.[90]

The immunity contained in Article 29, by extension, also covers members of the families of diplomatic agents, provided they are not nationals of the receiving State.[91] Similarly, the concept of inviolability is extended to the members of the administrative and technical staffs of the mission including their respective family members. The immunity from civil and administrative jurisdiction is however, subject to acts performed within the scope of their duties and obligations.[92] It is important to note that some Muslim States such as Iraq, Egypt, Morocco, Qatar and Sudan have, meanwhile, entered reservation to the application of Article 37(2) of the VCDR.[93] They have made the reservation either to the effect that members of the administrative and

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[88] CJ Lewis, *State and Diplomatic Immunity* (3rd ed., Lloyd's of London, London 1990) p. 135; The ILC, long before the Vienna Conference for Diplomatic Intercourse and Immunities, a Conference which ushered in the VCDR, has maintained that personal inviolability does not exclude self-defence and, in exceptional circumstances, other measures to prevent a diplomat from committing a crime. See R Vark, op. cit., p. 111; *I.L.C. Yearbook*, 1958, Vol. II, p. 97

[89] In the celebrated *Case Concerning United States Diplomatic and Consular Staff in Tehran* the ICJ ordered reparation against the government of Islamic Republic of Iran for having violated in several respects the diplomatic inviolability and 'obligations owed by it to the United States of America under international conventions in force between the two countries, as well as under long-established rules of general international law.' See *United States of American v. Iran* (1980) ICJ Reports, p. 44, para. 95 (1)

[90] B Sen, op. cit., (1988), p. 107

[91] Article 37 (1) VCDR

[92] Article 37 (2) VCDR

[93] See The United Nations Treaty Collection available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en [accessed 06 August, 2011]

technical staffs of the mission do not have any diplomatic immunity[94] or Article 37(2) shall only apply on the basis of reciprocity.[95] And finally, also immune for official functions only are members of service staff of the mission which includes maintenance and domestic employees.[96] Also included in this category are their family members.

4.3.3.2 Inviolability of Mission Premises and Private Residence

In practice, there does not appear to be a clear-cut distinction between the 'residence of the ambassador' and the 'premises of the embassy' until very recently.[97] With the rate at which the numbers of diplomatic staff have increased in recent times, it has become impossible to accommodate the numerous diplomatic staff of the embassy in the ambassador's residence.[98] It therefore became necessary to physically separate the private residence of the diplomatic personnel from the diplomatic mission premises that serve as chancery building.[99] However, international law writers had always referred to the two premises (the mission and the residence of the diplomats) as enjoying the *'franchise de l'hotel'.*[100] This means that the premises of the mission shall be used solely for the purposes of the mission's functions as designated by the sending State. Moreover, the VCDR gives the definition of the premises of the mission as including both: 'the buildings or parts of the

[94] Egypt, Morocco and Qatar do not apply the provisions of Article 37(2)
[95] For instance, Iraq and Sudan will only apply Article 37(2) on the basis of reciprocity.
[96] Libya, for example, will not be bound by Article 37(3) of the VCDR except on the basis of reciprocity.
[97] E Satow, op. cit., (1979), p. 122
[98] Ibid
[99] Ibid p. 122-123
[100] B Sen, op cit., (1988), p. 110

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.'[101]

However, the reasons for attributing inviolability to the premises of the mission and the residence of the diplomat are quite different. As for the premises of the mission, it is granted inviolability as a 'form of State immunity attaching to a building used for government purposes.'[102] Meanwhile, the inviolability with respect to diplomatic residence comes by virtue of the diplomatic status. But still, the notion of inviolability thus appears to be applicable to both the premises of the mission and the residence of the envoy in equal degree.[103] The premises of the mission and the residence of the envoy have gained universal recognition that they shall remain inviolable.[104] The protection of inviolability of the premises of the mission comes from Article 22 of the VCDR which proscribes the agents of the receiving state from entering the premises of the sending mission without the consent of the head of the mission. In the event of an emergency, such as fire outbreak or gun shot from inside the mission, it was argued before the ILC, that it would amount to 'outright foolishness, if . . . the local authorities were not able to go in and deal with the matter.'[105] After all, for the purposes of averting and

[101] Article 1(i) of 1961 VCDR
[102] Sir G Fitzmaurice, *Yearbook of the International Law Commission,* Vol. 1 (United Nations, 1957) p. 53
[103] This is contained in Article 30 of the VCDR states that: 'The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.'
[104] B Sen, op cit., (1988), p. 111
[105] MJL Hardy, op cit., (1968), p. 44

eliminating grievous harm to human life and property, it is only proper that '[i]n such emergencies, the authorization of the Ministry of Foreign Affairs must, if possible, be obtained.'[106] Despite these arguments, according to Denza, the ILC maintained and concluded 'that this would be inappropriate and unnecessary'[107] as 'it would be dangerous to allow the receiving state to judge when "exceptional circumstances" existed.'[108] Therefore, under no circumstances would the agent of the receiving state enter unto the premises of the mission without the express authorisation of the head of the mission. Not even to serve a writ of summons, for that will amount to an infringement of the respect due the mission[109] However, where the receiving State strongly 'believes its essential security to be at risk,'[110] it may take the option of violating Article 22 of the VCDR. As it happened in 1973 when the Iraqi ambassador was confronted with the mission's illegal smuggling of arms by the Pakistani authorities to which he refused to give consent when requested by the Pakistanis to conduct a search of his Embassy. The Pakistanis maintained that 'their concerns for national security overrode all consideration of diplomatic immunity.' Therefore, in the presence of the ambassador, a raid was carried out by armed policemen and large consignments of arms were found kept in crates. The Iraqi ambassador and an attaché were thus declared *persona non grata* by expelling them from Pakistan and in return,

[106] *Yearbook of the I. L. C., 1957*, Vol. II, p. 137; U.N. Doc. A/CN.4/91, p.2, Article 12
[107] *Yearbook of the I. L. C., 1958,* Vol. I, p. 129. Cited in E Denza, op cit., p. 83
[108] E Denza, op cit., (1976), p. 84
[109] See Commentaries on Article 20 adopted by the International Law Commission at its tenth session.
[110] E Denza, op cit., (1976), p. 84

recalled their ambassador from Iraq.[111] It thus appeared that the action of the Government of Pakistan was justified *ex post facto* as an act of self-defence which was a reprisal for the breach of Article 41(3).[112]

The receiving State is 'under a special duty to take all appropriate steps' towards the protection of the premises of the mission from being entered into or damaged by any private person and prevent any injury to its dignity.[113] Although, 'a special duty' is not define by the VCDR, the ILC's commentary on the 1958 draft suggests that: 'The receiving state must, in order to fulfil this obligation, take special measures – over and above those it takes to discharge its general duty of ensuring order.'[114] The receiving State owes it a duty to protect the mission premises from attack resulting from mob violence or demonstration. On September 9, 2011 a group of about 30 protesters invaded the Israeli Embassy in Cairo and threw documents belonging to the Embassy out of the window.[115] Although, the Egyptian security eventually came in to arrest the situation, the act of forcefully entry into the Embassy, alone, signifies a violation of diplomatic relation. To this effect, the Israeli Deputy Ambassador remarked '[t]hat the government of Egypt ultimately acted to rescue our people is noteworthy and we are thankful. . . [b]ut what happened is a blow to the peaceful relations, and of course, a grave violation of

[111] See The Friday Times website: http://www.thefridaytimes.com/04032011/page26.shtml [accessed on 15/03/2011]; See also *The Observer,* 11 February 1973.
[112] E Denza, op cit., (1976), p. 268
[113] Article 22(2) of the VCDR
[114] *Yearbook of the I.L.C. 1958*, Vol. II, p. 95
[115] The Guardian, *Egyptian Protesters Break into Israeli Embassy in Cairo,* Saturday 10 September, 2011 http://www.guardian.co.uk/world/2011/sep/10/egyptian-protesters-israeli-embassy-cairo [accessed on October 9, 2011]

accepted diplomatic behaviour between sovereign states.'[116] It has also been stated in *United States v. Hand*[117] that an attack upon the house of an envoy is equivalent to an attack upon his person.

It is the practice of the British Government to pay, on the basis of *ex gratia* claims, for damage to diplomatic premises in London even though the British Government is not directly liable.[118] Immediately, any damage is inflicted either upon the British diplomatic mission or its personnel, claims are always reciprocally resorted to.[119] It does not matter that the premises of the mission is rented or leased by the sending State or by individual member of staff in respect of his residence, the most important thing is that rule of inviolability covers the whole premises and they must be protected.

4.3.3.3 Inviolability of the Mission's Archives

The rule of inviolability, by Article 24 of the VCDR, also extends to diplomatic archives and documents of the mission at any time and wherever they may be. The Article states thus: 'The archives and documents of the mission shall be inviolable at any time and wherever they may be.' That is the receiving State shall have no power to seize, detain for examination or compel to

[116] The Guardian, *Israel Evacuates Ambassador to Egypt after Embassy Attack*, Saturday 10 September, 2011 http://www.guardian.co.uk/world/2011/sep/10/egypt-declares-state-alert-embassy?INTCMP=ILCNETTXT3487 [accessed October 09, 2011]
[117] Moore, *Digest,* Vol. VI, p. 62
[118] A typical example was the payment the British Government made to the Nigerian High Commission in London for damage resulting from a car bomb explosion in March 1973 which could not be linked to any deliberate attack on the mission premises. It was even argued that there was no failure on the part of the British police to take appropriate steps to protect the mission. See E Satow, *op. cit.*, (1979), p. 111
[119] Ibid

tender in evidence any documents emanating from the missions' archives. It could also be construed from Article 24 of the VCDR that the sending State shall prevent others from unlawfully interfering with documents and archives of the diplomatic mission. This is because, without respecting the inviolability of these documents, in the words of Vattel, 'the ambassador would be unable to perform his duties in security.'[120]

The term 'archives' was not given any definition the 1961 VCDR. However, it has been argued that considering 'the diversity of modern methods of recording and storing information,'[121] an appropriately wider construction should be given to it. Nevertheless, the meaning of "consular archives" in the VCCR is given to include all the papers, documents, correspondence, books, films, tapes and registry of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.[122] The meaning provided in the VCCR may equally suffice while interpreting the word 'archives' as used in the VCDR.

4.3.3.4 Freedom of Communication

The right to freedom and security of communication, from a functional perspective, is highly necessary for diplomatic mission in the performance of its primary duties. The right to free flow of communication from the sending State to the diplomatic mission has been considered 'probably the most

[120] This is cited in E Denza, *op cit.,* p. 108
[121] E Denza, op cit., (1976), p. 110
[122] Article 1(1) (k) of the VCCR

important of all the privileges and immunities accorded under international law.'[123] The importance of this right is clearly depicted by Vattel in his writing in the eighteenth century as reported by Murty thus:

> The couriers whom ambassador sends or receives, his papers, his letters and despatches, are all so essentially connected with the embassy that they must be regarded as inviolable; for if they were not respected it would be impossible to attain the proper object of the embassy, nor could the ambassador fulfil the duties of his with due security.[124]

The general principle of freedom of communication is guaranteed in Article 27 of the VCDR which prescribes that: 'The receiving State shall permit and protect free communication on the part of the mission for all official purposes.'[125] This Article imposes dual obligations which the receiving State must discharge. First, the receiving State is expected to allow free and unhindered flow of official information in and out of the diplomatic mission. And second, it shall also ensure the inviolability of the communication. This communication which must strictly be for official purposes may take the form of couriers and messages in code or cypher to the government of the sending State and to its various diplomatic missions and consulates wherever they

[123] E Denza, op cit., (1976), p. 119; E Satow, op cit., (1979), p. 116
[124] BS Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order*, (New Haven Press, New Haven 1989), p. 385
[125]There is also identical provision in Article 35 of the 1961 VCCR.

may be situated.[126] In addition, the freedom of communication with the nationals of the sending State residing within the receiving State and with the international organisations must also be safeguarded. [127]

The question of diplomatic wireless transmitter was quite controversial at the Vienna Conference. The richer States are of the view that the installation of wireless transmitters on the missions' premises which already are inviolable, implied that no consent of the receiving State is therefore, needed.[128] Meanwhile, the other States that do not have the means of installing wireless transmitters fear that the installed wireless might be used against their interests.[129] However, at the end, it was a provision that 'the mission may install and use a wireless transmitter only with the consent of the receiving state'[130] and it shall be the responsibility of the sending State to observe international telecommunications regulations.[131] Once the consent to use a wireless transmitter is granted to a diplomatic mission, it then behoves the mission to respect the local laws of the receiving State in compliance with the provisions of Article 41 paragraphs 1 and 3.[132]

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[126] RG Feltham, op cit., (1988), p. 39
[127] E Denza, op cit., (1976), p. 120; Yearbook of the I. L. C. 1957 Vol. Pp. 75-76
[128] E Satow, *op. cit.*, (1979), p. 116-117
[129] Ibid
[130] Article 27 (1) 1961 VCDR
[131] *UK Treaty Series*, No. 41 (1967), para. 261; Yearbook of the I. L. C. 1957 Vol. II p. 138
[132] 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." (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."

4.3.3.5 Protection of Diplomatic Bags and Couriers

The official correspondence of the diplomatic mission whether carried by mail or through personal courier is also declared inviolable as it forms part of the freedom of communication. It is also viewed that part of this freedom of communication 'enables them [diplomatic missions] to receive instructions from their sending State and send home reports of what they have done, said, and observed.'[133] If the sending State is to perform its diplomatic functions freely without any political interference or restrictions, there has to be a high degree of confidentiality in its official correspondence coupled with speedy despatch. Therefore, once an official correspondence is designated as diplomatic bag[134] or carries clear external marks of its character whether accompanied or unaccompanied,[135] the receiving State has to, by the provisions of the 1961 VCDR, protect its inviolability by not opening or detaining it.[136] In other words, the receiving State has to prevent its agents or private members of its State from violating this protection. Even while traversing the territories of third countries, the inviolability of the official despatches of the diplomatic mission must be respected. However, the following States which include Bahrain, Kuwait, Libya, Qatar, Saudi Arabia and

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[133] AB Lyons, 'Personal Immunities of Diplomatic Agents' (1954) Brit. YB Int'l L p. 334

[134] Diplomatic bags have been defined as 'usually large sacks sealed with the official stamps of the sending country and a label identifying the contents as diplomatic.' A Zeidman, 'Abuse of the Diplomatic Bag: A Proposed Solution', (1989-1990) 11 Cardozo L. Rev., p. 427 (Footnote 3)

[135] *ILC, Report on the 41st Session* (1986), A/41/10, Article 3, paragraph 1, point (2)

[136] See Article 27 paragraphs (2), (3) and (4) of the 1961 VCDR which 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 package constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use

Yemen out of the 57 Muslim States seem to believe that the protection given to diplomatic bag is rather too absolute. Consequently, they have made a reservation concerning the application of Article 27 to the effect that if a diplomatic bag is believed to contain unauthorised articles it could be opened in the presence of the representatives of the sending State, otherwise the bag will have to be returned to its origin unopened.[137]

The inviolability granted diplomatic bag has been, of recent, grossly abused and likely to be misused in carrying out or sponsoring series of criminal acts against other States or their citizens.[138] There are cases where diplomatic bags have been used to smuggle such things as drugs[139] and black market commodities.[140] Even human beings had also been disguised for 'diplomatic article' provided it is marked as diplomatic pouch. An example is that of the former Nigerian Minister of Transportation, Alhaji Umaru Dikko who was kidnapped and dumped in a crate designated for the Ministry of External Affairs, Federal Republic of Nigeria by the Nigerian High Commission, London. The kidnap attempt was, however, aborted by the quick intervention of the

[137]See The United Nations Treaty Collection available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en [accessed 06 August, 2011] It must be noted, however, that the practice of challenging a consular bag where it is suspected to have contained unauthorised contents is still in operation. See E Satow, op cit., (1979), p. 117 Also see Article 35 of the 1963 VCCR.

[138] Goldberg, 'The Shoot-Out at the Libyan Self-Styled People's Bureau: A Case Supported International Terrorism (1984) 30 S. Dak. L. Rev. p. 1

[139] In May, 1982, it was reported that a Thai diplomat smuggled up to twenty million dollars' worth of heroin into the United States in diplomatic bags. See *New York Time*, May 2, 1982, p. A34, col. 1

[140] See *New York Time*, Dec., 2, 1988, p. D1, col. 1 which disclosed that two million dollars were laundered into the United States by using the Yugoslav diplomatic channels.

British government.[141] These instances have, however, given credence to the assertion that 'just as absolute power corrupts absolutely, so total diplomatic immunity can undermine totally the duties of foreign diplomats to "respect the laws and regulations of a host country".'[142]

Several suggestions by some countries towards amending the VCDR believing that the absolute inviolability of diplomatic bag contained therein could be limited was met with rejection fearing that it might 'limit the bag's utility.'[143] This is because despite some instances of abuse, the inviolability of diplomatic bag 'needs to be preserved and safeguarded in the interest of all states.'[144]

The 1961 VCDR also protects the diplomatic couriers while they discharge their duties. It provides that '[t]he 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.'[145] Similarly, a person could also be designated an ad hoc courier which implies that his diplomatic immunity ceases once he delivers the diplomatic bag.[146] Also, captains of

[141] See The Economist*, Nigeria Kidnapping,* July 14, 1984, Pp. 55-56; Also see Davenport, *Mercenaries Held After Kidnap of Doped Nigerian,* The Times (London), July 7, 1984, p. 1, col. 2
[142] Brett, 'Giving the Diplomatic Rules Some Teeth', The Times (London), April 28 1984 at page 8 col. 2
[143] A Zeidman, op cit., (1989-1990), p. 433
[144] B Sen, op cit., (1988), p. 136
[145] Article 27(5) of the VCDR
[146] Article 27(6) of the VCDR

commercial flights could also take responsibility of diplomatic bag, but they do not have diplomatic status.[147]

4.3.3.6 Immunity from Criminal and Civil Jurisdiction

It is generally accepted that after the rule of personal inviolability, came the immunity of diplomats from the criminal and civil jurisdiction of the receiving State.[148] This immunity is widely defined as 'the freedom from local jurisdiction accorded under international law by the receiving state to [foreign diplomats and to] the families and servants of such officers.'[149] In essence, the word 'immunity' has been defined by the ILC as 'the privileges of exemption from, or suspension of, or non-amenability to, the exercise of the jurisdiction by the component authorities of the territorial State.'[150] The diplomatic immunity from criminal jurisdiction gets full support from the functional necessity theory in that it gives to the diplomatic agent uninterrupted relations amongst nations.[151] Hence, Article 31 (1) of the VCDR clearly sets out, without any exception, the immunity of a diplomatic agent from the criminal jurisdiction of the receiving State.[152] The diplomatic agent needs to be protected by way of diplomatic immunity from the jurisdiction of the receiving State commencing penal proceedings against him and members

[147] Article 27(7) of the VCDR
[148] E Denza, op cit., (1976), p. 149
[149] Reports on Legislative History of the Diplomatic Relations, (96th Cong. 1st Session, 1979), 12
[150] Draft articles of the jurisdictional immunity of States and their property as discussed by the ILC at its 1982 session, UN doc. A/CN.4/L.345, paragraph 18, note 22: draft Article 2, par. 1(a).
[151] DB Michaels, *International Privileges and Immunities: A Case for Universal Statute* (Martinus Nijhoff, The Hague, Netherlands 1971), p. 50
[152] Article 31 (1) of the VCDR provides that: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State."

of his family provided they are not residents or nationals of the receiving State.[153] Thus, the immunity granted to the diplomat and his immediate family members can be said to be absolute.

Moreover, this immunity applies to prohibit the exercise of criminal jurisdiction as well as civil jurisdiction of the receiving State in respect of acts which the diplomat performed in his official capacity.[154] With regards to certain private acts, a diplomatic agent is, however, subject to local jurisdiction. This is contained in Article 31 (1) (a-c) of the 1961 VCDR which stipulates exceptional cases where a diplomatic agent will be subject to the civil jurisdiction of the receiving State provided they are acts performed in his private capacity. These are acts relating to: 1) real property situated in the receiving State; 2) actions where the diplomatic agent is involved privately as administrator, executor, heir or legatee; and 3) actions relating to professional or commercial activity outside the official function of the diplomatic agent.[155]

The fact that a diplomatic agent cannot under any circumstances be tried or punished by the local criminal courts of the receiving State does not give him the licence to flout with impunity the laws and regulations of the receiving State. Truly, he may be immune from criminal prosecution, but going by the

[153] Article 37 of the 1961 VCDR provides that: "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."
[154] See *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) Judgment, I.C.J. Reports 2002,p. 3, at para. 54; H Fox, *The Law of State Immunity* (2nd edn, OUP, Oxford 2008), p. 694
[155] See MS Ross, op cit., (1989), p. 181

famous decision of the court in *Empson v. Smith*[156] which says 'it is elementary law that diplomatic immunity is not immunity from legal liability,' he could be prosecuted provided he submits to the jurisdiction of the receiving state or whenever his duties are terminated. In the case of *Dickinson v. Del Solar*, Lord Hewart C.J (as he then was) observed that: 'Even if execution could not issue in this country while Mr. Del Solar remains a diplomatic agent, presumably it might issue if he ceases to be a privileged person, and the judgment might also be the foundation of proceedings against him in Peru at any time.'[157] This shows that criminal proceedings against a diplomatic agent does not necessarily become null and void merely because of diplomatic immunity but rather, it could be stayed until such a time when the diplomat loses his immunity.[158] After all, the limitation of time does not apply to criminal liability. Similarly, the diplomatic agent can be prosecuted and punished by the judicial authorities of his home State if he is found to have committed any crime particularly the more serious offences.[159] This is so as some nations empower their courts to prosecute and punish crimes committed by their citizens even if it was committed abroad.[160] Once an offence, particularly a more serious one, is committed by a diplomat, the receiving State may request his home government to recall him back home for the purpose of prosecuting him.[161]

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[156] (1996) 1 Q.B. p. 426
[157] (1930) 1 K.B. 376
[158] See R Vark, op cit., (2003), p. 113
[159] B Sen, op cit., (1988), p. 137
[160] It is important to stress that courts in common law countries do not generally exercise jurisdiction over offences committed while abroad. See MJL Hardy, op cit., (1968), p. 55
[161] B Sen, op cit., (1988), p. 137

The approach of the receiving State to offences committed by diplomatic agents depends on the direct consequence of the offence on the State. For instance, where a diplomat commits the offence of espionage or terrorism, it is always the practice of States that such a diplomat will be *declared persona non grata* or expelled.[162] But in the case of other offences such as drunken driving, sexual offences, drug abuse, over speeding and parking violation, diplomats have been able to successfully claim diplomatic immunity.[163] However, the British government has the practice of informing heads of missions regarding any violation of its laws and in case of serious offences, they will usually request that the offender be recalled or his diplomatic immunity waived.[164]

While reiterating the international customary law practice, the ILC accepted[165] that the diplomatic agent is not under an obligation to appear as witness in the court of law.[166] That is, he is exempted from liability if he fails or refuses to give evidence as a witness. It should be stated, however, that the sending State may permit a diplomatic agent to give testimony in a case provided the case does not directly relate to his diplomatic duties. For instance, diplomats from United Kingdom usually have to be expressly instructed for them to give

[162] B Sen, op cit.,(1988), p. 140
[163] Ibid
[164] Ibid
[165] In 1958 the International Law Commission took deliberations on whether the draft Articles should contain immunity as stated in the original draft thus: 'A diplomatic agent cannot be compelled to appear as a witness before a court' or confer on diplomatic agent an exemption from liability. The Vienna Conference eventually opted for the second option by adopting the proposal of Sir Gerald Fitzmaurice which was Article 31(2). See E Denza, op cit., (1976), Pp. 168-169
[166] Article 31(2) of the 1961 VCDR

evidence in local courts[167] and such evidence, though, not connected to their official functions, must be for the purpose of establishing justice.[168]

4.3.3.7 Freedom of Movement

The freedom of movement of diplomatic agent is so vital to some of the functions of diplomatic relations that it cannot be over-looked. Prior to the World War II, all members of the diplomatic community enjoyed unrestricted movement within the territory of the receiving States. But after the World War II, all the Communist States of Eastern Europe particularly the Soviet Union imposed a travel restriction of 50 kilometres from the capital on members of diplomatic missions. China later joined in also imposing travel restriction on diplomats within its territory. They need to get an express permission from the State to travel beyond these limits.[169] The United Kingdom, the United States including other Western States reciprocated by imposing a similar travel restriction on diplomats from Eastern Europe.[170] This limited diplomatic freedom of movement has been the established diplomatic practice between the West and the East although with varying alteration.[171]

At the 1961 Vienna Conference, the Final Report of the ILC with regards to diplomatic freedom of movement was accepted without any reservation. This

[167] JB Moore, Digest of International Law, Vol. IV, p. 642
[168] E Denza, op cit., (1976), p. 170
[169] GR Berridge, *Diplomacy: Theory and Practice*, (2nd edn., Palgrave, Hampshire 2002), p. 114
[170] E Satow, op cit., (1979), p. 118
[171] J Kish, *International Law and Espionage,* (Kluwer Law International, The Hague, The Netherlands 1995), p. 59

led to the unanimous adoption of the provisions contained in Article 26 of the 1961 VCDR which provides that:

> Subject to its law 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.

It thus appears unambiguous that aside from the receiving State adopting specific regulations to the contrary on grounds of national security, the diplomatic agents exercise and enjoy unrestricted freedom of movement in the territory of the receiving State. However, the Saudi Arabian representative at the 1961 Conference on Diplomatic Intercourse and Immunities did mention that while accepting the provisions of Article 26 of the 1961 VCDR, the conference has to recognise the fact that for the past 1,300 years, the cities of Mecca and Medina, being the birthplaces of Islam, had remained and still remain 'accessible only to members of the Muslim faith.'[172] This restriction, had not been imposed by the Saudi Arabian Government, but had been historically and firmly established 'over 1,300 years by all the governments, without exceptions.'[173] It was thus unanimously accepted, though tacitly, by all diplomatic missions that the restriction

[172] Official Records, Vol. 1, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, (Geneva 1962), p. 152
[173] Ibid

does not constitute any hindrance to the freedom of movement of diplomatic personnel within the meaning of Article 26 of the 1961 VCDR.[174] Where a diplomatic agent goes beyond the permitted zone ignoring the police request in that regard, the receiving State has the option to declare him *persona non grata*.[175]

4.3.3.8 Immunity from Taxation

Usually, States levy taxes on their citizens and even on aliens who are resident within their territorial jurisdictions but these fiscal impositions do not generally, extend to diplomatic missions and their personnel. This, of course, is heavily linked to the functional necessity theory of diplomatic immunity. The diplomatic missions and its members enjoy diplomatic exemption from the payment of dues and taxes to public authorities mainly to enable them carry out their diplomatic functions without any hindrance from the public authorities of the receiving state. As a diplomatic envoy, free from the territorial supremacy of the receiving State, he is also expected to be exempt from all direct personal taxes. The members of the family of the diplomatic agents as well as members of administrative and technical staff including their families, provided they are not nationals or permanent residents of the receiving State, are equally exempted from these fiscal charges. The 1961 VCDR in Article 34 provides the general immunity from taxation

[174] Ibid
[175] E Denza, op cit., (1976), p. 118

in the following words: 'A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal.'[176] At the same time, it also furnishes some exceptional cases where the diplomat will not be entitled to tax exemption.

Firstly, where the taxes are indirect, that is where they 'are normally incorporated in the price of goods or services,'[177] in such a situation, it will be administratively impossible for an exemption or refund arrangements to be made. Such case will usually involve excise duties, taxes on sale or purchase, value added tax as well as airport tax. The United Kingdom is, however, known to make refunds of value added tax to diplomatic personnel in respect of three items namely: cars, spirits (for heads of mission only) and fine furnishings provided that these commodities are manufactured in the United Kingdom.[178] Secondly, the diplomat is expected to pay taxes and dues on private immovable property situated within the territorial jurisdiction of the receiving State 'unless he holds it on behalf of the sending State for the purposes of the mission.'[179] This clause rightly suggests that once the diplomatic mission premises is held in the name of a member of the mission, the premises becomes exempt from any fiscal imposition. Also, a diplomat is to pay inheritance tax in respect of the deceased

[176] A similar provision is also contained in Article 49 of the 1963 VCCR which states thus: "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. . ."
[177] Article 34(a) of the VCDR
[178] E Satow, op cit., (1979), p. 136
[179] Article 34(b) of the VCDR

estate if he inherits such estate.[180] The only exception is where the estate belongs to a diplomat or any of his family members who dies within the tenure of his office in the receiving State.[181] The reason being that the receiving State has 'territorial jurisdiction' in respect of all immovable properties including matters of succession or inheritance of estates within its boundaries.[182] The third category of exception to diplomatic tax immunity are '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.'[183] These are privately earned income or capital within the territorial jurisdiction of the receiving State by the diplomatic agent having no connection with his official functions. It is only reasonable that taxes are imposed on such income or profit privately earned by the diplomat while excluding salaries and emoluments which come to him from his home government as income for his official duties.[184]

4.3.3.9 Exemption from Customs Duties

The diplomatic missions enjoy exemption from custom duties as provided in the two Conventions (the VCDR and the VCCR).[185] That is, they are entitled to import articles that are meant for official use without having to pay customs or any other similar duties on them. The same thing applies to articles that

[180] Article 34(c) of the VCDR
[181] Article 39(4) of the VCDR
[182] B Sen, op. cit., (1988), p. 176
[183] Article 34(d) of the 1961 VCDR
[184] B Sen, op. cit., (1988), p. 177
[185] Article 36 of the 1961 VCDR and Article 50 of the 1963 VCCR

are imported for personal use by the diplomat and his family members. However, these articles will only be brought in customs duties-free 'subject to such laws and regulations as it (the receiving state) may adopt.'[186] Even though there is no restriction on the frequency of their importation, the items must necessarily correspond to the needs of the mission.[187] Also, the items must not be passed on to a third party in the name of gifts.[188]

It has been argued by Denza that the period preceding the emergence of the Vienna Convention witnessed 'the grant of customs privileges to members of diplomatic missions' not as 'a legal requirement of customary international law' but as 'a matter of courtesy, comity or reciprocity only.'[189] This argument does not appear convincing enough to Dembinski in the sense that 'the exemption from paying customs duties is not a superfluous privilege granted to foreign envoys, but a logical consequence of the other immunities, important for the efficient functioning of the external mission.'[190] He proffers two main reasons for the functional necessity implication of the diplomatic exemption from customs duties. By submitting the baggage of a diplomat to the authority of the receiving state, it would amount to the imposition of restriction on his luggage and also constitute an unnecessary inhibition on the habits and traditions of the diplomat.[191]

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[186] Ibid
[187] L Dembinski, op. cit., (1988), p. 219
[188] Ibid
[189] E Denza, op. cit., (1976), p. 211; E Satow, op. cit., (1979), p. 137
[190] L Dembinski, op. cit., (1988), Pp. 218-219
[191] Ibid

Nevertheless, diplomatic missions have to consult the laws and regulations of the receiving State in order to ascertain the limits imposed on the importation of certain goods and also the procedure attached to their clearance. This information can always be obtained from the Ministry of Foreign Affairs or the Ministry of External Affairs.

4.4 *The Treaty of Hudaybiyyah (628 AD) and the Concept of Diplomatic Immunity under the Islamic Siyar.*

In discussing the principles of Islamic diplomatic law, many scholars of Islamic jurisprudence are of the view that the *Treaty of Hudaybiyyah* (628 AD) establishes the legal basis for its application.[192] It is important to note that, although, prior to the *Treaty of Hudaybiyyah*, Islam recognised and acknowledged the fact that diplomatic envoy must be protected. It was the first treaty that, by implication, confirmed the principles of diplomatic immunity and also established the legal validity of international agreements. It may therefore, be proper for the Muslim scholars to always refer to the *Treaty of Hudaybiyyah* as a classical model for Islamic diplomatic law. It is, therefore, necessary to evaluate the events leading to the formation of the *Treaty of Hudaybiyyah* and its terms as they apply to the Muslims (represented by Prophet Muhammad) on the one hand and the Makkans (represented by Suhayl bin Amr) on the other. Then, the diplomatic concepts of immunity under Islamic diplomatic law will be discussed by looking at the various kinds of immunities guaranteed. It should be noted, that the Muslim States, in recognition of the universal importance of guaranteeing protection

[192] MC Bassiouni, 'Protection of Diplomats Under Islamic Law', (1980) 74 AJIL, p. 611

for diplomatic personnel, have also codified these immunities and privileges particularly in Articles 10, 11, 12 and 13 of the 1976 Convention of the Immunities and Privileges of the Organization of Islamic Conference. Likewise, the concept of *Aman* (safe conduct) will also be considered in order to ascertain whether it grants diplomatic immunity to diplomatic personnel.

4.4.1 *Events Leading to the Making of the Treaty of Hudaybiyyah*

The *Treaty of Hudaybiyyah*, though not pre-meditated, came into being in 628 AD. It was the year the Muslims numbering about one thousand five hundred under the leadership of Prophet Muhammad (pbuh) left Madinah for Makkah to perform the lesser pilgrimage (*'Umrah*).[193] They had their camp located at a place called *Al-Hudaybiyyah*, which was not far away from the city of Makkah. To manifest their peaceful intention, they carried no weapons but had with them seventy sacrificial animals to be used for the pilgrimage rituals. Information got to Prophet Muhammad (pbuh) that the Makkans, who, at that time, were still pagans, had maintained a barricade against the Muslims from entering Makkah. They also sent out their forces to fight the Muslims. The reaction of Prophet Muhammad (pbuh) to the war-mongering attitude of the Makkans portrayed the peaceful relations established by Islam against the antagonistic attitude of the Makkans in the following words:

[193] This is a pilgrimage to Makkah at any other time outside the specified period for the obligatory hajj. Unlike the hajj which is obligatory, the umrah is only considered a meritorious act of worship. See JL Esposito, op cit., (2003). P. 327

> Shame on the Quraysh! War has corrupted them. What good would it do them if they cleared the way between me and the other Arabs. If they kill me, then this is what they wanted. And if Allah grants me victory over them, they will enter into Islam in large numbers. And if they do not, they will fight as long as they have strength. So what do the Quraysh think?[194]

In addition to the verbal commitment to peace, Prophet Muhammad (pbuh) once sent Khirash ibn Umayyah as an envoy to the Makkans to explain the peaceful mission of the Muslims which was worship.[195] Khirash's visit failed after an attempt was made on his life despite the fact that he was an emissary who was expected to be protected from molestation or being killed.[196] Again, Prophet Muhammad (pbuh) intended to despatch 'Umar bin Khattab as an envoy to Makkah to negotiate further on behalf of the Muslim community. But 'Umar politely refused, pleading with Prophet Muhammad (pbuh) that he had none of his clansmen, the Banu 'Adiyy ibn Ka'b, left in Makkah, and moreover, the Quraysh might use that opportunity to descend heavily on him in revenge for his numerous offences against them.[197] Consequently, 'Uthman bin Affan was otherwise chosen and charged with the

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[194] It was narrated by Ibn Ishaq with a sound chain from Muswar ibn Makhramah and Marwan ibn al-Hakim. According to Bukhari and Ahmad in another narration, this was the reply given by Prophet Muhammad when he was asked by Budayl bin Warqa' Al-Khuza'i what was his mission. See also S Al-Mubarakpuri, op cit., (2002), p. 300; SA Ali Nadwi, Muhammad Rasulallah, (Academy of Islamic Research and Publication, India 1979), Pp. 264-265; Ibn Al-Athir Izzuddin, *Al-Kamil Fil-Tarikh*, Vol. II (Dar Sadir, Beirut 1979), p. 200 cited in Y Istanbuli, op cit., (2001), p. 39

[195] M Al-Ghazali, *Fiqh-Us-Seerah: Understanding the Life of Prophet Muhammad,* (International Publishing House, Riyadh 1999), p. 360

[196] Ibid

[197] See MH Haykal, IRA al-Faruqi (tr.), op cit., (1976), p. 350.

diplomatic task of conveying the peaceful intention of the Muslims to the Makkans. The imprisonment of 'Uthman by the Makkans which was later rumoured that he had been killed was met with great rage for vengeance. The Muslims pledged to storm Makkah in revenge for the death of 'Uthman even though they initially did not have the intention of fighting.[198] For Prophet Muhammad (pbuh) strongly believed in the sacrilegious position of a diplomatic envoy that he must not be killed or imprisoned. However, 'Uthman eventually returned unhurt and the need for war was therefore, averted. Although the diplomatic mission for which he went was unsuccessful, but he was able to meet with some Muslims residing in Makkah by giving them assurance of the impending victory and moral support.[199]

4.4.2. The Making of the Treaty of Hudaybiyyah

After a multiple exchange of emissaries between the Makkans and Prophet Muhammad, the Makkans eventually sent Suhayl ibn 'Amr to arrange and execute a treaty, which is to be known as the *Treaty of Hudaybiyyah,* with Prophet Muhammad (pbuh). This treaty was to become, in the eyes of the Muslim scholars, a model of Islamic diplomatic law and a paradigm of subsequent treaties (both domestic and international treaties) under Islamic

[198] All the Muslims took a pledge in the hand of Prophet Muhammad to avenge the death of 'Uthman bin Affan by fighting to the last man. Thus the pledge of Ridwaan which was taken under the acacia tree finds a mention in Qur'an 48:18 where Allah says: 'Certainly was Allah pleased with the believers when they pledged allegiance to you [O Muhammad], under the tree, andHe knew what was in their hearts . . .'
[199] Y Istanbuli, op cit., (2001), p. 42

law.[200] With the refusal of Suhayl to accept and give in to any concessions coupled with the acquiescence and leniency exhibited by Prophet Muhammad (pbuh) particularly in the face of Suhayl insulting posture,[201] the peaceful negotiation still went ahead uninterrupted.[202] The Muslims understanding and acceptance of the principle of diplomatic inviolability will not allow for any unpleasant reaction towards a rude diplomatic envoy.[203]

The terms of the treaty were that peace was to be maintained for ten years between the Muslims and the Makkans and that anyone from amongst the Quraysh moving into Muhammad's (pbuh) camp without the permission of his guardian shall be returned by the Muslims. While on the other hand, if a Muslim emigrates from Muhammad's (pbuh) camp to Makkah, he shall not be returned. It was also agreed that the Muslims should return to Madinah without having to perform the *'Umrah* that year, but could come as pilgrims the following year, and that they will be allowed to stay in Makkah for only three days. Also indicated in the pact was the freedom of any tribe to seek

[200] See Ibn Hajar, Ahmad ibn Muhammad al-'Asqalaani, (Ali Muhammad al-Bajawi ed.) *Al-Isaaba fi Tamyiz as-Sahaba,* (Maktabat al-Nahdha, Cairo, 1392/1972), 1: 94; Muhammad ibn Sa'ad, *al-Tabaqaat al-Kubra,* (Daar Saadir, Beirut, 1958), 2: 95

[201] While reducing the treaty into writing, Suhayl insisted that the phrase 'in the name of God, the Merciful, the Compassionate' should be removed saying that he did not reckon with those attributes; he also demanded that the phrase 'Muhammad, the Prophet of God' be expunged on the ground that he had never accepted Muhammad as the Prophet of God. See MH Haykal, op cit., p. 353

[202] MH Haykal, op cit., (1976), p. 352; M Hamidullah, A Iqbal (tr.), *The Emergence of Islam,* (Adam Publishers and Distributors, New Delhi, 2007), p. 234

[203] Tabari, Abu Ja'far Muhammad ibn Jarir, (Joseph Shacht ed.), *Ikhtilaaf al-Fuqahaa',* "Kitaab al-Jihaad wa al-Jizya wa Ahkaam al-Muhaaribun" (Leiden, 1933), p. 32

alliance with either the Makkans or the Muslims without any inhibition or intimidation.[204]

The Muslims were at first dissatisfied with the entire treaty for having given too much to the Makkans in utter disregard to the yearnings of the Muslims. This position was usefully chronicled by Hamidullah thus: 'There were some ... provisions which were apparently humiliating and seemed to be disadvantageous for the Muslims. But the Prophet (peace be upon him) accepted them.'[205] However, they submitted to the command and farsightedness of Prophet Muhammad (pbuh) which eventually, paid off in the words of Haykal that: 'Indeed, the treaty even made it possible two months later for Muhammad to begin to address himself to the kings and chiefs of foreign states and invite them to join Islam.'[206]

This was the position between the Muslims and the Makkans until after two years when the treaty was violated. The Quraysh was reportedly held to have violated the treaty by attacking Muhammad's (pbuh) ally, the Banu Khuza'.[207] This was considered to be a fundamental breach of the *Treaty of Hudaybiyyah* on the part of the Makkans which eventually led to the conquest of Makkah in 630 AD, described by Haykal as 'the greatest victory of Islamic history'[208] devoid of any violence or bloodshed.

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[204] MH Haykal, op cit., (1976), Pp. 353-354; Y Istanbuli, op cit., Pp. 42-43; Salamat AM, *The Life of Muhammad,* (Dar Al-Huda Publishing and Distributing House, Riyadh 1997), p. 634
[205] M Hamidullah, op cit., (2007), p. 234
[206] MH Haykal, op cit., (1976), p. 356
[207] M Khadduri, op cit., (1955), p. 212-213
[208] MH Haykal, op cit., (1976), p. 404

The diplomatic ingenuity displayed by Prophet Muhammad (pbuh) throughout the making of the *Treaty of Hudaybiyyah* coupled with the exemplary patience exhibited by his companions culminated into an indelible success. The success of the treaty confirms the importance of diplomacy in Islam. It also further establishes the precedential value of international treaty. The exchange of diplomatic emissaries between the Makkans and Prophet Muhammad was prominent in the making of the *Treaty of Hudaybiyyah*, particularly, the mission of Suhayl ibn 'Amr that was sent to conclude the treaty. He was treated with utmost respect and held as an inviolable ambassador throughout the formation of the *Treaty of Hudaybiyyah*. It could be rightly concluded that the *Treaty of Hudaybiyyah* and its negotiating history, in the words of Bassiouni, 'demonstrate the sanctity of emissaries, that a violation of an ambassador's is a *casus belli*, and that no ambassador may be detained or harmed.'[209]

4.4.3 Legal Authority of Islamic Diplomatic Immunities

The Islamic diplomatic immunities derive its legal authority, first, from the Qur'an which happens to be the prime source of the Islamic jurisprudence. The Prophetic traditions, otherwise known as the Sunnah, also establish the validity of diplomatic immunities in Islamic law as indicated by several statements of Prophet Muhammad (pbuh). Likewise, the practices of the Muslim Caliphs, starting from the period of the first four caliphs, up to the

[209] MC Bassiouni, op cit., (1980) p. 611

present Muslim countries confirm the legitimacy of diplomatic protection. For the purpose of clarity, each of these legal sources will be briefly considered:

4.4.3.1 Text from the Qur'an:

The incidence that validates the exchange of emissaries and further confirms diplomatic immunity, according to Bassiouni,[210] is cited in Qur'an 27:23-24 of the Qur'an. It occurred when Bilqees bint Sharahil, the Queen of Saba',[211] in response to the letter of Prophet Sulayman (992-952 BC), sent emissaries with gifts to be presented to Prophet Sulayman. The Qur'an recounts the incidence when Bilqees said:

> But indeed, I will send to them a gift and see with what [reply] the messengers will return.[212]

While declining the gifts which were considered as a sort of bribery, Prophet Sulayman restrained himself from visiting his annoyance or anger on the envoys, because he understood the importance of their personal inviolability. He appreciated the essence of 'diplomatic communication between Muslim and non Muslim heads of State.'[213] As such, it will be considered sacrilegious to harm or detain the envoys of another sovereign. He eventually sent them back with the gifts they brought by saying:

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[210] Ibid, P. 610
[211] Saba' is also known as Himyar and according to Ibn Katheer, it was a dynasty in Yemen. See Abi Fidaai Ismaeel Ibn Katheer, *Tafseer al-Qur'an al-'Adheem,* Vol 3 (Dar al-Marefah, Beirut Lebanon) p.373
[212] Qur'an 27:35
[213] MC Bassiouni, op cit., (1980), p. 610

> Do you provide me with wealth? But what Allah has given me is better than what He has given you. . . Return to them, for we will surely come to them with soldiers that they will be powerless to encounter, and we will surely expel them therefrom in humiliation, and they will be debased.[214]

4.4.3.2 The Prophetic Tradition

The Sunnah has numerously established the fundamental principles of privileges and immunities that are granted to diplomatic envoys under Islamic *siyar.* This is as a result of the exchange of diplomatic envoys between Prophet Muhammad (pbuh) and other nations. According to historical record, Prophet Muhammad (pbuh) sent different emissaries to various places including Makkah, Byzantium, Egypt, Persia and Ethiopia either for religious or political reasons. He equally warmly received delegations and embassies in his mosque at a place designated as *Ustuwanaat al-Wufuud* (the pillar of embassies).[215] He so much held the respect and inviolability accorded foreign ambassadors in high esteem to the extent that while he was on his death bed he was reported to have instructed his companions to award gifts to envoys as he himself used to during his lifetime.[216] Moreover, Prophet Muhammad (pbuh) cherished the honouring of guests generally to the extent that he was reported as saying that: 'Whoever believes in Allah and the Last Day should

[214] Qur'an 27: 36-37
[215] HM Zawati, op cit., (2001), p. 77
[216] M Hamidullah, op cit., (1961), p. 146

be hospitable with his or her guests.'[217] Meaning that as a Muslim, you are required to be hospitable to your guest, even if he or she is a non-Muslim.

Apparently, diplomatic interactions exist between countries usually on the basis of international agreement duly signed or given accession to by the representatives of the countries. The validity of this international agreement in Islamic *Siyar* also has its origin in the various treaties entered into by Prophet Muhammad (pbuh) followed by his statement, the like of which was said to Abu Jandal that: 'We have entered with the Quraysh into a treaty of peace and we have exchanged with a solemn pledge that none will cheat the other.'[218] Meaning that, once a treaty has been concluded, it is legally required that it must be fulfilled.

4.4.3.3 Consistent Practice of Muslim Heads of State

Flowing from the two divine sources, the generality of the Muslim heads of States (the Caliphs, Sultans and the current heads of the Muslim countries) also acknowledge and establish diplomatic protection and immunity in their international transactions. The clear instruction of Abu-Bakr (632-634 AD), the first Caliph after Prophet Muhammad (pbuh), to Yazid ibn Abi Sufyan that 'in case envoys of the adversary come to you, treat them with hospitality'[219] indicates the extent of the Prophet's companions' understanding of diplomatic

[217] Cited in Abubakr Jabir Al-Jazaa'iri, *Minhaaj Al-Muslim,* (Maktabat Al-'Ulum wal-Hakam, Madinah, 1995), p. 112
[218] Cited in MH Haykal, op cit., (1976), p. 354
[219] Arjoun, Sadiq Ibrahim, *Khalid Ibn al-Walid*, Al-Dar Alsaudiah, 1981, p. 244

privileges.[220] The rule has been established throughout the Caliphates that foreign emissaries can enter the Muslim States and have access to diplomatic protection and privileges provided 'they abstained from doing acts injurious to the Muslim states such as spying or buying weapons for shipment to Dar al Harb.'[221]

It is no surprise, therefore, that the generality of the Muslim States under the auspices of the OIC came together to recognise the inviolability and immunities of the diplomatic personnel of individual State members[222] This was made in addition to their being signatories to the two famous diplomatic and consular conventions, the 1961 VCDR and 1963 VCCR.

4.4.4 Diplomatic Immunities under the Islamic Siyar

4.4.4.1 Personal Inviolability

The inviolability of emissaries has been a pre-modern universal concept although with varying degree of recognition attached to it. Perhaps, Bassiouni was right when he said that the 'inviolability of envoys was ill recognized in Arabia Peninsula'[223] before the emergence of Prophet Muhammad (pbuh). However, the coming of Islam did not only widen the scope of diplomatic intercourse, but it also accorded the diplomatic personnel along with their

[220] Evidence of the diplomatic interactions of the Islamic eras, starting from the periods of the first four caliphs (632-661 AD), the Umayyad and the Abbasid dynasties (661-750 AD) down to the Ottoman periods have been discussed in Chapter 2, pages 81-91

[221] See I Shihata, 'Islamic Law and the World Community', (1962) 4 Harv. Int'l Club J., p. 109. See also Shaybani, Sharh Al-Siyar Al-Kabir with Sharakhsi's Commentary (Hyder Abad, 1335 AH), Pp. 66-67

[222] This was the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference

[223] MC Bassiouni, op cit., (1980), p. 612

family full personal inviolability.[224] Personal inviolability requires that the diplomats are not to be killed or maltreated,[225] but should be respected. The Prophet Muhammad (pbuh) was reported to have granted this immunity to the two ambassadors of Musaylamah – Ibn Al-Nawwaaha and Ibn Aathaal, regardless of their impertinent mannerism saying: 'By God, if it were not the tradition that envoys could not be killed, I would have severed your heads.'[226] Likewise Wahshi's mission as the ambassador of the people of Ta'if was generously received by Prophet Muhammad (pbuh) despite the fact that he was the one who killed Hamzah, the uncle of the Prophet, at the battle of Uhud.[227] This generous reception led to Wahshi's acceptance of Islam.[228] In the words of Saif, '[t]he Prophet, stressing the diplomatic immunity of ambassadors, did not hold their earlier antagonism against them,'[229] but instead he cheerfully received and welcomed them into the newly found faith of Islam. The Federal Shariat Court of Pakistan was correct when it held that Prophet Muhammad never permitted any [diplomatic] representatives to be maltreated, 'rather he showed them greatest honour and respect and granted

[224] M Hamidullah, op cit., (1961), p. 147
[225] A Iqbal, *The Prophet's Diplomacy: The Art of Negotiation as Conceived and Developed by the Prophet of Islam*, (Claude Stark & Co., Cape Cod, Massachusetts, 1975), Pp. 54-55
[226] Ibn Hishaam, *As-Seeratu-n-Nabawiyyah*, Vol. IV, (Darul Gadd al-Jadeed, Al-Monsurah, Egypt), p.192
[227] This is the second major battle Prophet Muhammad and the Muslims fought against the Makkans in 625 AD.
[228] See Abu al-Fidaa' al-Hafiiz Ibn Katheer, *al-Bidaaya wal-Nihaaya,* Vol. 4, (al-Maktabat al-Ma'aarif, n.d., Beirut), 4:17-19; See also Abu Ja'far Muhammad Ibn Jareer al-Tabari, *Tarikh al-Tabari: Tarikh al-Umam wal-Muluk,* Vol. 1, (Mu'assasat 'Izz al-Deen lil-Tibaa'a wal-Nashr, Beirut, 1987), 1:576
[229] AA Saif, 'Taif' in Michael Dumper, Bruce E. Stanley (eds.), *Cities of The Middle East and North Africa: A Historical Encyclopedia,*(ABC-CLIO, California, 2007), p. 342

immunities to them *inter alia* from imprisonment and death, however, hostile was their behaviour and threatening their language.'[230]

The rule that diplomatic envoy must not be detained was expressly canvassed in the case of Abu Rafi', the Makkan emissary that was sent to Prophet Muhammad (pbuh) in Madinah soon after the battle of *Badr* in 624 AD. He eventually became a Muslim and would not want to return to Makkah. The Prophet (pbuh) discouraged his refusal to return to Makkah by saying: 'I do not break a covenant or imprison envoys [you are an ambassador], but return, and if you feel the same as you do just now, come back.'[231] It was reported that Abu Rafi' later returned back to Madinah not as an envoy, but as a Muslim emigrant. It is in recognition of the above principle that it has been adopted as Muslim States practice, which also was in accordance with Article 10 (a) of the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference that provides that representatives of member States shall be guaranteed 'immunity from personal arrest or detention.'

The inviolability of diplomatic envoy was deemed so important that its violation either by way of detention or arrest could result in a *casus belli*. A vivid example was the case of 'Uthman ibn Affan that was sent as an emissary to the Quraysh during the *Hudaybiyyah* episode. The Prophet

[230] *Re: Islamisation of Laws Public Notice No. 3 1983* PLD (1985) Federal Shariat Court 344 at p. 354

[231] Partial Translation of Sunan Abu-Dawud, Book 14, Jihad (Kitab al-Jihad), Hadith Number 2752 http://www.muslimaccess.com/sunnah/hadeeth/abudawud/014.html [accessed 12 September, 2011]

Muhammad (pbuh) was so much convinced about the sanctity of diplomatic envoy that he found it difficult to believe that 'Uthman could be killed, harmed or detained by the Quraysh. However, when the news got to the Muslims that 'Uthman had been killed, it was not only deemed *casus belli*, for which the Muslims were fully prepared to go to war, but also led to the detention of the Makkan's envoy that was sent to Prophet Muhammad (pbuh).[232] This incidence confirms the statement of Tabari (838-923 AD) that 'only under extraordinary circumstance may envoys be detained and imprisoned, and that would be in the form of specific reprisals in kind.'[233] Eventually, the news was confirmed to be mere rumour, and when the safety of 'Uthman was ascertained, the Muslims wasted no time in releasing the detained Makkan envoy.[234]

Another limitation to personal inviolability of diplomatic personnel is when an envoy acquired, through the act of spying, military intelligence report that could be inimical to the interest of the Muslim army, it will then become necessary to retain him until he purges himself of those information.[235] Even then, this may not warrant the maltreatment, imprisonment or death of a diplomatic envoy.[236]

4.4.4.2 Immunity from Court's Jurisdiction

[232] M Hamidullah, op cit., (1961), p. 148
[233] Cited in MC Bassiouni, op cit., (1980), p. 612
[234] M Hamidullah, op cit., (1961), p. 148
[235] A Rashid, *Islam* et droit des gens, Recueil des Cours, Vol. II, (Librairie de Recueil Sirey, Paris, 1973), p. 498
[236] Y Istanbulii, op cit., (2001), p. 146

In addition to the granting of diplomatic inviolability, Islamic law also exempts the diplomatic envoy from the jurisdiction of its court. In other words, an emissary is not answerable to the court of his host for the offence he must have committed during his ambassadorial responsibility. The case of the two emissaries sent to Prophet Muhammad (pbuh)by Musaylimah is of great relevance. After reading the content of Musaylimah's letter to Prophet Muhammad (pbuh), they were asked by the Prophet: 'Do you also say what he (Musaylimah) has said'? They replied: 'We say exactly what he (Musaylimah) said.'[237] However, these words which could be taken as a direct contempt of Prophet Muhammad (pbuh) never bothered him as they (the two emissaries) were considered as ordinary means of diplomatic communication, and more so, they possessed diplomatic immunity.

Thus, it remains very clear that under the Islamic *Siyar* where a non-Muslim who claims to be an emissary enters the territory of Islam and commits an offence, once he is able to produce a genuine letter of credence from his ruler confirming his status, he is automatically covered by diplomatic immunity.[238] In a situation where the non-Muslim is unable to produce a letter of credence from his ruler, both him and his belongings will be taken as *Fay'* (proceeds of the State from the enemy property other than war booty).[239]

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[237] Ibn Hishaam, op cit., p. 192

[238] MA Gazi (Tr.), *Kitab Al-Siyar Al-Kabir The Shorter Book on Muslim International Law,* (Adam Publishers & Distributors, New Delhi, 2004), p. 63; M Khadduri (Tr.), op cit., (1966), p. 170.

[239] See MA Gazi (Tr.), op cit., (2004), p. 63. Khadduri's submission that in the event the messenger is unable to produce a confirmation letter from his ruler, 'he will be liable to be killed' calls for a further clarification as to reference. See M Khadduri, op cit., (1955) Pp. 165-166.

In this regard, Abu Hanifah (699-767 AD), the eponym of the Hanafi Law School of Islamic jurisprudence, further maintains that a *musta'min* (a non-Muslim having security and safety passage within an Islamic State) who commits one of the *huduud*[240] offences cannot be held liable or punishable under the *huduud* laws.[241] But in the case of theft, he will be liable to return the stolen property, and if he has consumed or misplaced it, then he is liable to pay compensation up to the value of the stolen property.[242] The court will not impose the *hadd* punishment of amputation on them.[243] In support of this view was Abu Yusuf (d. 798 AD), one of the famous students of Abu Hanifah, who argues that considering the fact that a *musta'min* does not acknowledge the supremacy of Islamic law in the first instance, it will therefore be inappropriate to subject him to punishment under the *hudud* laws.[244] To further buttress the argument that an envoy who commits an offence in the receiving State will be immune from the criminal jurisdiction of the receiving State, Hamidullah says that 'even if the envoy, or any of his company, is a criminal of the state to which he is sent, he may not be treated otherwise

[240] Crimes are designated as *hudud* (sing. *hadd*) when they fall within the categories of 'prohibitions ordained by Divine Law [Shari'ah], from which we are restrained by God with punishment decreed by Him; they form an obligation to God.' These are offences with specific punishments contained in the Qur'an and Sunnah otherwise known as *'uquubaat muqaddarah*. These crimes are theft (*sariqah)*; drinking of alcohol *(shrub al-khamr);* unlawful sexual intercourse *(zinah)*; false accusation of unlawful sexual intercourse *(qadhf)*; banditry and highway robbery *(hiraabah)*; and apostacy *(ridda)*. See JL Esposito, op cit., (2003), p. 101 See also R Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, (Cambridge University Press, Cambridge, 2005), p. 53 and MA Baderin, 'Effective Legal Representation in "*Shari'ah*" Courts as a Means of Addressing Human Rights Concerns in the Islamic Criminal Justice System of Muslim States', (2004-2005) 11 Yearbook of Islamic and Middle Eastern Law, p. 145

[241] Abu Yusuf, *Al-Radd 'ala Siyar al-Awza'I* (Cairo, n.d.), Pp. 80-83

[242] Ibid

[243] M Khadduri (Tr.), op cit., (1966), 225, p. 172

[244] Ibid, p. 94 See also Abu Ja'far Muhammad Ibn Jarir Tabari, *Ikhtilaaf al-Fuqaaha',* ed. Joseph Schacht, (Berlin, 1933), Pp. 56-57

than as an envoy...'[245] No doubt, diplomatic immunity should not be taken as a licence of impunity whereby diplomats will be free to commit offence at will just because they are immune from the criminal jurisdiction of their host. The opinion expressed by Munir that '. . . diplomats are immune from criminal jurisdiction in the receiving state but this immunity is not absolute as the Quranic verse 5:45[246] does not exempt any one even a diplomat'[247] may appear convincing, but one wonders if it is strong enough to overturn the long-established rule of the Islamic diplomatic immunity. The rule is 'By God, if it were not the tradition that envoys could not be killed, I would have severed your heads.'[248] Prophet Muhammad (pbuh) exercised restraint in enforcing the death penalty against the two envoys of Musaylamah for committing a serious offence just because of their diplomatic status.

4.4.4.3 Freedom of Religion

Generally, the Qur'an prohibits the imposition of Islam or any of its dictates on a non-Muslim.[249] Therefore, freedom to pray and involve in other religious practices are also granted to diplomatic personnel under Islamic diplomatic law. History has it that when the Christians of Najran visited Prophet Muhammad in Madinah, they were allowed to have their Christian service

[245] Hamidullah, op cit., (1961), para. 291
[246] Qur'an 5:45 provides that: 'And We ordained for them therein a life for life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, and for wounds is legal retribution.'
[247] M Munir, Immunity or Impunity: A Critical Appraisal of the Immunity of Diplomats in International Law and Its Status in Sha'ria', (2000) 12:35 Journal of Law and Society, p. 49
[248] Ibn Hishaam, op cit., p. 192
[249] See Qur'an 2:256 that says 'There shall be no compulsion in [acceptance of] the religion. The right course has become distinct from the wrong.'

right in the mosque of Prophet Muhammad (pbuh).[250] It was even recorded that these Christians faced toward the direction of the east while praying.[251] The fact that they belong to a different faith does not take away their diplomatic privileges and immunities.

4.4.4.4 Exemption from Taxation

The properties of foreign diplomats are exempt from custom duties and all other form of taxation once they are within the Muslim State provided that the Muslim envoys are also accorded the same exemption while in foreign State by way of reciprocity.[252] The issue of reciprocation has, however, been usefully illustrated by Shaybani that 'if the foreign States exempt Muslim envoys from custom duties and other taxes, the envoys of such States will enjoy the same privileges in the Muslim territory; otherwise they may, if the Muslim State so desire, be required to pay ordinary dues like foreign visitors.'[253] This, in effect means that the diplomats will only be exempted from taxation once it has been agreed upon by the two countries. Generally, the Qur'an requires that good or positive conduct should be rewarded with a good one too.[254]

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[250] See M Hamidullah, op cit., (1961), Pp. 147-148; A Iqbal, op cit., (1975), p. 55; MA Hamoud, *Diplomacy in Islam: Diplomacy During the Period of Prophet Muhammad,* (Pricewell, Jalpur, India, 1994), p. 232; HM Zawati, op cit., (2001), p. 80; and C Bassiouni, op cit., (1980), p. 612
[251] M Hamidullah, op cit., (1961), p. 148
[252] HM Zawati, op cit., (2001), p. 80
[253] Quoted from Sarakhsiy, *Sharh al-Siyar al-Kabeer*, Vol. IV, p. 67 by M Hamidullah, op cit., (1961), p. 148
[254] See Qur'an 55:60

It is also important to stress that for any item brought into a Muslim territory by a diplomatic envoy to qualify for tax exemption, it must not be for commercial purposes. According to the author of *Kitab al-Kharaj*,[255] once the item is commercialised, one-tenth of tax becomes payable after the sale of the commodity.[256] This exception has been clearly echoed in Article 10 (g) of the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference which provides that 'except that they shall have no right to claim exemptions from custom and excise duties on articles imported other than their personal baggage.' This type of exception is also directly compatible with the provisions of Article 34 (d) of the VCDR that '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' do not form part of the exemption from taxation.

4.4.4.5 Other Privileges are Guaranteed

The other principles of diplomatic immunity such as freedom of movement; freedom of communication; protection of diplomatic bags and couriers; and inviolability of diplomatic mission and archives are equally guaranteed under Islamic *Siyar* based on jurisprudential principles. Moreover, it is a basic principle under the *Shari'ah* that nothing will be considered prohibited except it is categorically mentioned as such in a sound and explicit *nass*[257] from

[255] Abu Yusuf, *Kitab al-Kharaj,* (Dar Al-Ma'a refah, Beirut-Lebanon)
[256] Ibid., p. 106
[257] *Nass* denotes either a verse of the Qur'an or a clear, authentic and explicit sunnah of Prophet Muhammad (pbuh)

Allah.[258] Therefore, whatever is not specifically prohibited either in the Quran or the *Sunnah* will automatically fall under the general principle of the permissibility of things and within the gamut of Allah' favour.[259] Prophet Muhammad was reported to have said in this regard that:

> What Allah has made lawful in His Book is halal and what He has prohibited is haram, and that concerning which He is silent is allowed as His favour. So accept from Allah His favour, for Allah is not forgetful of anything.[260]

Therefore, once these diplomatic principles are required for the effective transaction of diplomatic matters which are protected under the public interest – *maslahah,* and provided that they are not prohibited by the *Shari'ah*, they are definitely covered by the Islamic law.

4.4.5 Complementary Role of Aman (Safe-Conduct) to Diplomatic Immunities.

Islamic *Siyar* has a temporary pledge of protection which is available for the benefit of a non-Muslim, otherwise known as *must'amin* to stay within the Muslim territory. This pledge of protection which guarantees security of life

[258] See Y al-Qaradawi, *The Lawful and the Prohibited in Islam (Al-Halal Wal-Haram Fil Islam),* (Al-Falah Foundation, Cairo, 2001), p. 6
[259]Y al-Qaradawi, op cit., (2001), p. 7
[260] This hadith was narrated by Al-Haakim, who classified it as authentic and was cited in Y al-Qaradawi, op cit., (2001), p. 7

and property is known as *Aman* (safe-conduct).[261] It is supported by the authority of the Qur'an and the Sunnah. In the Qur'an, Allah says:

> And if any one of the polytheists seeks your protection, then grant him protection so that he may hear the words of Allah [i.e., the Qur'an].Then deliver him to his place of safety.[262]

Prophet Muhammad (pbuh) gave his approval to the *Aman* granted by some Muslim women to the polytheists. He categorically gave his authority to Umm Hani' Bint Abi Talib's grant of *aman* to the two polytheists at the conquest of Makkah when Ali Ibn Abi Talib[263] threatened to have the polytheists killed when he said: 'We have given security to those to whom you have given it.'[264] In fact, on several occasions the companions of the Prophet would come seeking clarification concerning the status of a non-Muslim within the Muslim territory. The Prophet Muhammad (pbuh) had never wavered in encouraging his companions that it is permissible to grant the *Aman* to the non-Muslim within Muslim territory if he applies for it.[265]

There are two identifiable ways by which *Aman* can be put into use, according to the Muslim jurists. There is the individual *Aman*, otherwise known as

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[261] HM Zawati, op cit., (2001), p. 58;
[262] Qur'an 9:6
[263] Ali Ibn Abi Talib was the fourth caliph after the death of Prophet Muhammad
[264] Abu Dawud Sulayman Ibn al-Ash'ath, *Sunan Abi Dawud,* 2 Vols. (Dar al-Janaan, Beirut, 1988), 2:93
[265] See LA Bsoul, 'International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Siyar (Islamic International Law), (PhD Thesis, McGill University, Montreal, 2003), p. 140

unofficial *Aman*, which can be granted by any sane and mature Muslim, male or female, including the blind. The Muslim jurists are not unanimous concerning the eligibility of a Muslim to grant *Aman.* The majority of Muslim jurists consisting of Maliki, Shafi'i and Hanbali jurists are of the view that a Muslim slave can validly grant *Aman.* However, Abu Hanifah and Abu Yusuf, on the other hand, will allow a slave the authority to grant *Aman* only if he is permitted to part-take in war by his master.[266] The *Aman* granted by a minor or a person of unsound mind is also disregarded by Muslim jurists.[267] But where there is evidence that the *Aman* is given by a discerning minor, according to Malik Ibn Anas, Ahmad Ibn Hanbal and Muhammad Ibn al-Hasan, such *Aman* will be held valid. Meanwhile, Abu Hanifah, Abu Yusuf and al-Shafi'i still consider such *Aman* to be invalid since it is granted by a minor.[268] Once a valid *Aman* is given to a non-Muslim within the Muslim territory, it becomes enforceable by and binding on the entire Muslim State.[269]

There is also the collective *Aman*, otherwise known as the official *Aman*. It is mainly granted by the Head of State or his representatives to a non-Muslim State usually based on a treaty of peace (*muwaada'a* or *muhaadana*).[270] Once granted, it opens up the facilitation of peaceful negotiations by visiting

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[266] Tabari, *Kitaab al-Jihaad wa al-Jizya wa Ahkaam al-Muhaaribun,* Joseph Shacht ed., (Leiden, 1933), p. 29 See also Abul-Hassan al-Mawardi, *Al-Ahkam As-Sultaniyyah (The Laws of Islamic Governance),* Asadullah Yate tr., (Ta-Ha Publishers Ltd, London), p.79

[267] See HM Zawati, op cit., (2001), p. 59. See generally Abu Bakr Muhammad Ibn Ahmad al-Qaffaal al-Shaashi, *Hilyat al-'Ulamaa' fi Ma'rifat Madhaahib al-Fuqahaa',* 8 vols. (Maktabat al-Risaala al-Haditha, Amman, 1988), 3:449; Muhammad Ibn 'Abd al-Waahid Ibn al-Humaam, *Fath al-Qadeer Sharh al-Hidaaya lil-Margheenaani,* 10 vols. (Dar al-Fikr, Beirut, 1990), 4:302

[268] See HM Zawati, op cit., (2001), p. 59

[269] N Yakoob and A Mir, 'A Contextual Approach to Improving Asylum Law and Practices in the Middle East' in YY Haddad and BF Stowasser (eds.), *Islamic Law and the Challenges of Modernity,* (Altar Mira Press, Walnut Creek, 2004), p. 109

[270] M Khadduri (1955), op cit., p. 164

emissaries between Muslim and non-Muslim countries[271] and gives allowance to both 'Muslims and non-Muslims to cross frontiers and travel in each other's countries on the basis of reciprocity.'[272] It was further stated by Boisard that the 'very liberal Muslim legislation facilitated the passage of foreigners across the Muslim world and that of Muslims to the outside.'[273]

The stay of a *musta'min* (the beneficiary of *Aman*) within the Muslim territory is for a limited period of time. It is the opinion of the Maliki and Shafi'i jurists, based on the provisions of Qur'an 9:2[274] that the length of *Aman* should not, as a rule, exceed four months. But the Hanafi jurists are of the view that *Aman* should not go beyond the period of one lunar year, otherwise the *musta'min* will be treated as a *dhimmi* (non-Muslim living under Islamic rule), and hence, he would be liable to the payment of *jizya* (annual poll tax).[275] However, Hanbali jurists, opine that the *musta'min* should not be subjected to the payment of *jizya* even where he stays beyond the period of one lunar year.[276] There is no specific formality for the acceptance of a request for *Aman*. One can draw an inference of *Aman* from any means of assent,

[271] J Allain, "Acculturation Through Middle Ages: The Islamic Law of Nations and Its Place in the History of International Law", in A Orakhelashvili, *Research Handbook on the Theory and History of International Law,* (Edward Elgar Publishing Limited, Cheltenham, 2011), p. 399
[272] *History of Humanity,* (UNESCO, 2000), p. 53
[273] MA Boisard, op cit., (1980), p. 432
[274] Qur'an 9:2 states that: 'So travel freely, [O disbelievers], throughout the land [during] four months but know that you cannot cause failure to Allah and that will disgrace the disbelievers.'
[275] HM Zawati, op cit., (2001), p. 60
[276] Ibid.

including non-verbal.[277] Meanwhile, a *musta'min* could have his grant revoked if he violates any of the terms of the *Aman* or commits crimes[278]

It ought to be noted that the principle of *Aman*, though, viewed as a factor fostering peaceful relationship between the Muslim and non-Muslim States, is generally distinct from diplomatic immunity. This distinction stems from the limitations imposed by the Islamic jurisprudence on what the beneficiary of *Aman* (*musta'min*) can and cannot do.[279] The *musta'min* may be subject to the criminal jurisdiction of the Muslim State where he is found to have committed any offence, since the grant of *Aman* is not synonymous with diplomatic immunity.[280] The Islamic concept of diplomatic immunity, unlike the principle of *Aman*, is considered to be absolute from the point of view of the Qur'an and *Sunnah*.[281] Nevertheless, the significance of *Aman* to Islamic concept of diplomatic immunity cannot be over emphasised. It was remarkably stressed by Lambton that:

> Ambassadors and diplomatic envoys automatically enjoyed the status of a *musta'min*, but from the end of the 6th/12th century onwards the institution of *aman* tended to be superseded by the treaties beginning to be made between Islamic and Christian

[277] N Yakoob and A Mir, op cit., in YY Haddad and BF Stowasser (eds.), *Islamic Law and the Challenges of Modernity,* (Altar Mira Press, Walnut Creek, 2004), p. 109; See generally LA Bsoul, op cit., Pp. 141-143
[278] See M Khadduri (1955), op cit., p. 168; See also HM Zawati, op cit., (2001), Pp. 60-61
[279] MC Bassiouni, op cit., (1980), p. 613
[280] There are disagreements amongst Muslim jurists as to the application of the hudud penalties against an offending musta'min. See generally M Khadduri (1955), op cit., Pp. 166-167; LA Bsoul, op cit., Pp. 151-152; and MR Zaman, op cit., p. 93
[281] MC Bassiouni, op cit., (1980), Pp. 613-614

> powers, which gave greater security and more rights than the institution of *aman*.[282]

Also, Basiouni gave a clear and valuable description of the complementary nature of *Aman* to the principle of diplomatic immunity in the following words:

> The diplomat is the beneficiary of *Aman*, a legally binding privilege that obligates the state to protect the beneficiary until his departure from its territory. The state may revoke the *Aman* and expel the beneficiary, but may not violate it. The beneficiary who violates its terms may be prosecuted, but not if he is a diplomat, who in addition to benefitting from the *Aman*, is also the beneficiary of other forms of legal protection and privileges.[283]

In addition, Istanbuli gave an insight into how the concept of *Aman* benefits the ambassador within an Islamic territory when he says that:

> The ambassadors were granted immunities and certain privileges. They benefitted from the principle of Aman, accorded to any foreigner who sought safety entry into a Muslim country, and from the traditional immunity granted to foreign envoys.[284]

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[282] AKS Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists,* (OUP, Oxford), p. 209-210
[283] MC Bassiouni, op cit., (1980), p. 610
[284] Y Istanbuli, op cit., (2001), p. 127

It could therefore be right to say, in this regard, that *Aman* is now a component of the privileges granted under Islamic diplomatic setting. It is no longer a privately arranged or granted privilege as between a citizen of an Islamic State and non-Muslim immigrant.

4.5 CONCLUSION

It can be gleaned from the above discussion that Islamic *siyar* recognises the functional necessity and representative character theories as the prevailing justifications for diplomatic immunity just as they are equally recognised by international diplomatic law. It has also been shown that all the principles of diplomatic immunity that are highlighted in the 1961 VCDR and the 1963 VCCR are similarly acknowledged by Islamic *siyar*. This, in essence, signifies the compatibility in the principles of diplomatic immunity as contained in international diplomatic law and Islamic *siyar*. The fact that some of the principles of Islamic diplomatic immunities discussed in this chapter have been codified by the provisions of the 1976 Convention of the Immunities and Privileges of the Organisation of the Islamic Conference just as they were reduced into laws in the VCDR and the VCCR, confirms the compatibility between Islamic diplomatic law and international diplomatic law. Moreover, one may also draw an analogical conclusion that since the entire provisions of the VCDR and VCCR are not in anyway repugnant or contradict any principles and main objectives of Islamic law, it therefore means that the codification of the VCDR and VCCR in international diplomatic law can as well be considered a codification in Islamic diplomatic law. In essence, it may not amount to a

mistatement to say that diplomatic immunities have also been codified in Islamic law. This conclusion, however, coincides with the assertion made by Lewis that 'the rights and immunities of envoys, including those from hostile rulers, were recognized from the start, and enshrined in the *Shari'ah*.'[285]

[285] B Lewis, *The Political Language of Islam,* (The University of Chicago Press, Chicago, 1988), p. 76 See also S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p. 266

CHAPTER FIVE

DIPLOMATIC IMMUNITIES IN MUSLIM STATES AND ISLAMIC LAW PERSPECTIVE

5.1 *Introduction*

The generality of the Muslim States[1] have signed and ratified the two globally recognised diplomatic and consular legal frameworks: the 1961 VCDR and the 1963 VCCR. Most of the Muslim States, particularly those that have adopted the Islamic legal system, are expected to observe diplomatic immunities as enchrined under Islamic *siyar* in addition with the various international diplomatic and consular treaties they have entered into. The Muslim States are, of course, required by Islamic law to observe the terms and conditions of treaties once entered into with other States. Needless to say that the diplomatic immunities guaranteed under Islamic *siyar* and particularly entrenched in the two Vienna Conventions have been grossly abused by the diplomats themselves. The alarming proportion of these abuses of diplomatic immunities, definitely call for a serious attention.

It is in the light of this observation that this chapter will be discussing diplomatic practices in some Muslim States, particularly, the Islamic Republic of Pakistan, the Islamic Republic of Iran and Libya.[2] This discussion will focus on the application of

[1] The Muslim States are as listed by the Organisation of Islamic Cooperation. See Chapter 1, page 29, footnote 47 of this dissertation.

[2] It was formerly known as the 'Libyan Arab Jamahiriya', but following the adoption by the General Assembly of resolution 66/1, the Permanent Mission of Libya to the United Nations formally notified the United Nations of a Declaration by the National Transitional Council of 3 August 2011 changing the official name to 'Libya'.

diplomatic law in Pakistan with the recent criminal act perpetrated by Raymond Davis, an American, in 2011 all in the name of the so-called diplomatic immunity. The United States government maintained, as at the time he committed the offence, that he had diplomatic immunity being a diplomatic staff of the United States Embassy. On the other hand, the Pakistani authority denied the fact that Davis had any diplomatic or consular immunity. Islamic law implications of the 1979 seizure of the embassy of the United States in Tehran and the 2011 attacks on the British High Commission in Iran will also be evaluated. The purpose is to ascertain the illegality of the failure of the Iranian authority to provide adequate protection for diplomatic missions and personnel in accordance with Islamic *siyar*. This chapter will again consider the 1983 shoot-out from the Libyan People's Bureau leading to the death of a British woman police officer, Yvonne Fletcher, with a view to examining the extent of abuse of diplomatic immunity also under Islamic *siyar.*

5.2 Diplomatic and Consular Immunity under Pakistan Law

5.2.1 Legal Efficacy of Diplomatic Immunity in Pakistan:

The provisions of the VCDR and VCCR were statutorily recognised and locally enacted in Pakistan by the Diplomatic and Consular Privileges Act, 1972[3] (hereinafter referred to as DCP Act) which gave them legal efficacy under the Pakistan legal system. Section 2(1) of the DCP Act particularly enforces the two Conventions by stating that:

[3] It was originally enacted in Pakistan as Diplomatic and Consular Privileges Ordinance XV of 1972 (gazetted on 4-5-1972) but later re-enacted and repealed on September 12, 1972 by Diplomatic and Consular Privileges Act as No 9 of 1972. See *A. M. Qureshi v. Union of Soviet Socialist Republics* PLD (1981) SC at p. 396

> Notwithstanding anything to the contrary 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.

It is, however, interesting to note that Pakistan endorsed these two treaties without any reservation and objection. In recognition of the general principles of diplomatic immunity, once a certificate confirming the diplomatic status of a person is issued or authorised to be issued by the government of Pakistan, it thus becomes a conclusive evidence of fact.[4] This was further reiterated by the Supreme Court of Pakistan in *Ghulam v. United States Agency for International Development (USAID) Mission, Islamabad*[5] when it states that 'the certificate issued by or under the authority of the Federal Government, in respect of diplomatic status of the agency for International Development is conclusive evidence of the facts stated therein. The said certificate . . . cannot, therefore, be allowed to be disproved.'[6] In other words, it is usually not sufficient to claim diplomatic immunity either by asserting diplomatic status or by producing a diplomatic passport in the law court. What is legally required for a plea of diplomatic immunity to be validly made before a Pakistani court is the production of a certificate confirming his or her diplomatic status which is normally issued or

[4] See Section 4 DCP Act.
[5] (1986) 19 SCMR (SC) 907 (Pak.) See also *British High Commission Diplomatic Enclave v. Sajjad Anwar*, 2000 YLR (Lahore) 1833, 1839–40 (Pak.)
[6] (1986) 19 SCMR (SC) at p. 915

authorised to be issued by the Pakistani government. In *Sher Zaman v. The State,*[7] the accused in this case successfully pleaded diplomatic immunity on the ground that he was a member of the German embassy in Pakistan. In admitting his petition, the Lahore High Court held that:

> The record of the case reveals that there is a certificate to show that Sher Zaman was an employee of the German Embassy for the last nine years since the issue of the certificate. In view of the above . . . the petitioner . . . would be in his right to claim immunity against his trial by the Courts in Pakistan.[8]

It should be noted however, that it is not binding on the government of Pakistan to issue or authorise the issuance of this certificate, as Section 4 of the DCP Act is not a mandatory provision but an enabling one.[9]

The VCDR makes it abundantly clear that '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.'[10] This, in essence, means that diplomatic immunities should not and cannot be taken as a licence to violate the laws of the receiving State. Diplomatic agents are expected to be under the legal obligation to respect the local laws of the host State. Although, diplomats have been,

[7] (1977) P.Cr.L.J. (Lahore), p. 686
[8] Ibid., p. 687
[9] T Hassan, 'Diplomatic or Consular Immunity for Criminal Offences', (2011) 2:1 Virginia Journal of International Law Online, p. 27
[10] Article 41 (1) of the VCDR. There is also a corresponding provisions in Article 55 (1) of the VCCR

arguably, said to enjoy absolute immunity,[11] unlike the consular officers.[12] However, this absolute immunity could be curtailed particularly when a diplomat is involved in a serious crime, such as murder, criminal conspiracy, terrorism, espionage etc.[13] In which case, the receiving State may have to approach the diplomat's home country to withdraw by waiving the diplomatic immunity so that the diplomat could be prosecuted in accordance with the laws of the receiving State.[14] In the event that the sending State refuses to waive diplomatic immunity for a diplomat who is involved in any of the serious offences, the least action that could be taken by the receiving State is to declare the particular diplomat as *persona non grata* under Article 9 of the VCDR.

5.2.2 Diplomatic Implication of Raymond Davis' Case:

There was an incident that almost led to a major foreign policy issue between Pakistan and the United States. It was the shooting of two Pakistanis by an American, Raymond Davis, out of the consulate in Lahore on January 27, 2011. He claimed that the shooting of the two men was in self-defense as they were attempting to rob him.[15] Davis was immediately arrested and kept in prison custody pending his appearance in court. On 28 January, 2011, he was charged with the

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[11] O Engdahl, *Protection of Personnel in Peace Operation: The Role of the 'Safety Convention' against the Background of General International Law,* (Martinus Nijhoff Publishers, The Netherlands, 2007), p. 51

[12] See Article 43 (1) of the VCCR which provides that '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.' Once the criminal acts are not committed during the performance of their consular functions, they may be liable to prosecuted.

[13] See TJ Gardner and TM Anderson, *Criminal Law,* 11th edn. (Wadsworth, Belmont, 2012), p. 160

[14] Article 32 (1) of the VCDR

[15] *US Man Raymond Davis Shot Pakistan Pair in 'Cold Blood'* BBC News, 11 February, 2011 available at http://www.bbc.co.uk/news/world-south-asia-12427518 [accessed 12 June, 2012]

offence of *qatl-i-amd* (intentional murder) under section 302 of the Pakistani Penal Code (hereinafter referred to PPC).[16]

The arrest of Davis led to a serious controversy between the governments of Pakistan and the United States concerning his diplomatic status. This episode almost plunged the Pakistan-U.S diplomatic relations into a state of confusion. In fact, the incidence snowballed into public criticism and resentment that took the form of public demonstrations across Pakistan against the United States which added fuel to the already inflamed anti-American sentiment in Pakistan. The United States vigorously argues in favour of diplomatic immunity for Raymond Davis by stressing in a Press Release dated January 29, 2011 that '[t]he diplomat, assigned to the U.S. Embassy in Islamabad, has a U.S. diplomatic passport and Pakistani visa valid until June 2012', as such, the Embassy called 'for the immediate release of a U.S. diplomat [Raymond Davis] unlawfully detained by authorities in Lahore.'[17] Mr Crowley who is the U.S. Assistant Secretary of State emphatically maintained that '[Raymond Davis] is a U.S. diplomat. He was assigned to the Embassy in Islamabad. He has immunity. And we again call for his release.'[18] The President of the United States, Barak Obama, in stressing the importance of the principles of the VCDR said that '. . . if our diplomats are in another country, then they are not subject to that country's local prosecution. We expect Pakistan, that's a signatory and recognizes

[16] Pakistan Penal Code, Act XLV of 1860 available at http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html [accessed 14 June , 2012]
[17] Press Release, U.S. Embassy in Pak., 'U.S. Calls for Release of American Diplomat' (Jan. 29, 2011), available at http://islamabad.usembassy.gov/pr_11012901.html [accessed 12 June, 2012]
[18] *Daily Press Briefing*, U.S. Department of State, (February 9, 2011) available at http://www.state.gov/r/pa/prs/dpb/2011/02/156277.htm#PAKISTAN [accessed 12 June, 2012]

Mr. Davis as a diplomat, to abide by the same convention.'[19] The United States House of Representative by a resolution presented to the Committee on Foreign Affairs, threatened to freeze all monetary assistance meant for Pakistan if Davis is not released on the basis of his diplomatic status and in accordance with international standards of diplomatic practice.[20]

The Pakistani government was, however, reluctant in taking a decisive stance as to the diplomatic status of Davis, perhaps, due to political repercussion and possibly, public backlash.[21] Most political parties in Pakistan had warned that if Davis was not brought to justice, they would not hesitate to storm the U.S. Consulate in Lahore and the U.S. Embassy in Islamabad.[22] But then, the Pakistani government remained non-committed to the making of any pronouncement on the diplomatic status of Davis which made them leave the entire matter, which was then '*sub judice* before the court',[23] to be resolved by judicial pronouncement.[24]

As expected, the court would have been confronted with the question of determining the diplomatic or consular status of Davis v*is-a-vis* the offence of murder committed by him. It is also possible that the court would have been given the opportunity to

[19] J Tapper and L Ferran, 'President Barak Obama: Pakistan Should Honor Immunity for 'Our Diplomat'' *ABC News* (February 16, 2011) available at http://abcnews.go.com/Blotter/raymond-davis-case-president-barack-obama-urges-pakistan/story?id=12922282 [accessed 12 June, 2012]
[20] T Hassan, op cit., (2011), Pp. 19-20
[21] See T Hassan, op cit., (2011), p. 23
[22] S Ashraf, 'Raymond Davis Affair: A Case with Global Ramification', (3 March, 2011) 33, p. 2 also available at http://dr.ntu.edu.sg/bitstream/handle/10220/7868/RSIS0332011.pdf?sequence=1 [accessed 15 June, 2012]
[23] Ibid
[24] H Yusuf, 'Dealing with Davis: Inconsistencies in the US – Pakistan Relationship', (March 28, 2011) 103, Asian Pacific Bulletin, p. 1 also available at http://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/19853/APB%20no.%20103.pdf?sequence=1 [accessed 15 June, 2012]

scrutinise the different positions maintained by the United States and Pakistan in view of their respective diplomatic and consular practices including applicable laws. The court would have also called for evidence of the credential appointing Mr. Davis as either a diplomatic or consular officer from the United States and a certificate issued or authorised to be issued by the Pakistani authority confirming the appointment of Davis as a diplomatic or consular staff of the United States. Meanwhile, the Pakistan Foreign Office chose not to issue the diplomatic certificate in favour of Davis in spite of the concerted pressure mounted by the United States authority. But then, assuming the court concludes that Davis is protected from prosecution under the diplomatic or consular immunity as a result of his diplomatic or consular status, it is very much doubtful if that would have finally exonerated Davis from the criminal jurisdiction of the Pakistani court. After all, it is generally accepted that 'immunity is not a license to break the law or a get-out-of-jail-free card.'[25] Moreover, it is a common diplomatic practice amongst several nations that diplomatic immunity should not be a licence to commit criminal offence or to kill as in this present case.[26]

The Pakistani authority will be acting within the confines of the law if it were to call upon the United States government to waive the immunity of Davis so as to legally commence criminal prosecution against him. This will be in accordance with Article 32 (1) of the VCDR.[27] It must be noted, however, that the United States may as well decide not to waive immunity in respect of the accused diplomat since the provision

[25] H Kopp and CA Gillespie, *Career Diplomacy: Life and Work in the U.S. Foreign Service,* 2nd edn., (Georgetown University Press, 2011), p. 68
[26] S Ashraf, op cit., (2011), p. 2
[27] See also Article 45 (1) of the VCCR.

of waiver is not mandatory. But the Pakistani government will be making a good case by invoking the application of the principle of reciprocity which generally operates amongst nations with regards to diplomatic and consular relations. Firstly, the Pakistani DCP Act provides that:

> 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 consular post of that State or on persons connected with that mission or consular post, the Federal Government may, by notification in the official State or, as the case may be, from all or any of the consular posts of that State, or from such persons connected therewith as it may deem fit.[28]

This provision requires the government of Pakistan to extend equal treatment to diplomatic missions or consular posts of other States within its territory in accordance with the spirit of the two Vienna Conventions. Secondly and most importantly, the Pakistani government may advance the argument that the United States has clearly marked out procedures of dealing with the waiver of immunity in respect to any diplomatic agents, administrative and technical staff of any embassies and consular officers that are involved in criminal offence within the United States. The guide, otherwise known as 'Diplomatic and Consular Immunity – Guidance for Law Enforcement and Judicial Authorities' provides that:

[28] Section 3 of the DCP Act, 1972

> The U.S. Department of State will, in all incidents involving persons with immunity from criminal jurisdiction, request a waiver of that immunity from the sending country if the prosecutor advises that but for such immunity he or she would prosecute or otherwise pursue the criminal charge.[29]

This procedural guidance has been implemented several times by the United States on issues of diplomatic concerns. The U.S. State Department was very quick to request a waiver of immunity when in January, 1997 an intoxicated Georgian diplomat, Gueorgui Makharadze, killed a 16-year-old girl in New York in a drink-driving accident. The Georgian authority unhesitatingly waived the diplomat's immunity which legally allowed the United States to prosecute him.[30] At the end of the prosecution, he was sentenced to seven years imprisonment for manslaughter.[31]

In a more related case that happened in January, 2003 when the Pakistani government was asked to withdraw the diplomatic immunity in respect of its permanent representative to the UN, Munir Akram, by the U.S. States Department. Misdemeanour assault charges were to be brought against him for having allegedly

[29] United States Department of State Bureau of Diplomatic Security, 'Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities', Publication No. 10524 (Revised July 2011), p. 14 available at http://www.state.gov/documents/organization/150546.pdf [accessed 17 June, 2012]
[30] Ardeshir Cowasjee, 'A Diplomatic Tangle', 6th February, 2011, *Dawn.Com Opinion,* available at http://dawn.com/2011/02/06/a-diplomatic-tangle/ [accessed 17 June, 2012]
[31] Ibid

assaulted and injured his girlfriend, Marjiana Mihic, after an argument.[32] The Pakistani government wasted no time in waiving diplomatic immunity as requested by the United States, even though the incident was resolved after the girlfriend withdrew the charges against the diplomat in court.[33] It can, thus, be said that the United States insistence on blanket immunity for Raymond Davis, even though his immunity was unlikely to be ascertained, was legally and morally unjustifiable. Meanwhile, diplomatic relations dictate a give and take situation between nations. In the words of Khurram Baig, '[i]f the U.S. can ask for a waiver of immunity when it feels inclined to do so, and invokes it when it suits itself,'[34] what stops other nations from doing the same thing whenever the situation so demands? The policies and procedures regarding the grant of diplomatic or consular immunity for criminal offences laid down by the United States can be emulated by the Pakistani authority, in the spirit of reciprocity, which is also firmly established in the Pakistani law.[35]

5.2.3 Intervention of the Islamic Law

This legal discourse is just a theoretical analysis of Davis' case which was suddenly finalised by Islamic law principle of *badl-i-sulh* which has been defined under the Pakistan law as 'the mutually agreed compensation according to the *Shari'ah* to be paid or given by the offender to a *wali* in cash or in kind or in the form of moveable

[32] J Preston, 'U.S. Asks Pakistan to Lift U.N. Envoy's Immunity After a Violent Quarrel', *The New York Times,* January 08, 2003 available at http://www.nytimes.com/2003/01/08/world/us-asks-pakistan-to-lift-un-envoy-s-immunity-after-a-violent-quarrel.html [accessed 17 June, 2012]
[33] A Cowasjee, 'A Diplomatic Tangle', 6th February, 2011, *Dawn.Com Opinion,* available at http://dawn.com/2011/02/06/a-diplomatic-tangle/ [accessed 17 June, 2012]
[34] K Baig, 'Raymond Davis, America and Justice', *The Express Tribune*, February 20, 2011 available at http://tribune.com.pk/story/121295/raymond-davis-america-and-justice/ [accessed 17 June, 2012]
[35] T Hassan, op cit., (2011), p. 36

or immoveable property.'[36] It was, indeed, a timeous intervention. The court did not determine the issue concerning Davis' diplomatic immunity, even though, Davis was later reported to be a CIA (Central Intelligence Agency) contractor responsible for providing security for CIA spies travelling in Pakistan.[37]

While waiting for the court to play its legal role in deciding whether Davis could claim diplomatic immunity, which did not happen, the Prime Minister of Pakistan, Yusaf Raza Gilani, suggested the possibility of resolving this diplomatically sensitive matter under Islamic law by offering to pay compensation to the families of the two men that were killed.[38] It was also reported that the families of the dead men had been under intense pressure from some religious parties not to accept the payment of financial compensation, otherwise known as '*diyat*'[39] from the accused person.[40] Nevertheless, on Wednesday, 16 March, 2011, family members of the two men that were killed, Faizan Haider and Fahim Shamshad, announced to the court that they have pardoned Davis by accepting financial compensation from him.[41] Ordinarily, if

[36] Section 310 of the PPC
[37] J Ditz, 'Raymond Davis a CIA Contractor, US Confirms', *AntiWar.Com,* February 21, 2011 available at http://news.antiwar.com/2011/02/21/raymond-davis-a-cia-contractor-us-confirms/ [accessed 18 June, 2012]
[38] *The Express Tribune* 'Kerry Meets Political Leadership' February 16, 2011 available at http://tribune.com.pk/story/119713/court-to-decide-raymond-davis-immunity-gilani/ [accessed 18 June, 2012]. See also *'Raymond Davis and Lahore Shootings-Unanswered Questions'* BBC News South Asia, 16 March, 2011 available at http://www.bbc.co.uk/news/world-south-asia-12491288 [accessed 18 June, 2012]
[39] *Diyat* is defined in Section 299 (e) of the PPC as the compensation specified in Section 323 [of the PPC] payable to the heirs of the victim.
[40] '*CIA Contractor Ray Davis Freed Over Pakistan Killings'* BBC News South Asia, 16 March, 2011 available at http://www.bbc.co.uk/news/world-south-asia-12757244 [accessed 18 June, 2012]
[41] *Los Angeles Times,* 'CIA Contractor Raymond Davis Freed in Pakistan Killings', March 17, 2011 available at http://articles.latimes.com/2011/mar/17/world/la-fg-pakistan-davis-freed-20110317 [accessed 19 June, 2012]

the relatives of the victims had not compounded their rights of retaliation (*qisaas*)[42] by accepting the *diyat* under Islamic law, the murder trial brought against Davis would have ended up differently. That is to say, if at the end of the trial, Davis were to be found guilty of the offence of *qatl-i-amd* (intentional murder), he would have been sentenced to death or life imprisonment under *qisaas* by virtue of Section 302 of the PPC. The PPC allows the *wali*[43] to voluntarily and without duress waive the right of *qisaas* provided it is to the satisfaction of the court.[44] That was exactly what the relatives who stood in as the *wali* of the victims in this case did in exercise of their right which is sanctioned 'by Sharia [Islamic law] and Pakistan law, and neither you nor I nor the court can snatch this right from them. They used their right, and the court released him.'[45] With the payment of $2.3 million to the relatives of the victims as 'blood money' (*diyat*) which was unequivocally acknowledged by them,[46] the court made an order of acquittal in favour of Raymond Davies pursuant to Section 345 of the Pakistan Code of Criminal Procedure[47] read in conjunction with Section 310 of the PPC.

One may want to consider the relevance of the provisions of Section 311 of the PPC to the determination of Davis' case. Section 311 of the PPC provides that:

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[42]The word *'qisas'* has been defined as 'punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed *qatl-i-amd* in exercise Of the right of the victim or a *Wall* in Section 299 (k) of the PPC.
[43] Section 299 (m) of the PPC defines the '*wall* to mean 'a person entitled to claim *qisas*.'
[44] Section 307(1)(b) of the PPC.
[45] This was a statement made by Rana Sanaullah, the Punjab Provincial Law Minister and reported in *Los Angeles Times,* 'CIA Contractor Raymond Davis Freed in Pakistan Killings', March 17, 2011 available at http://articles.latimes.com/2011/mar/17/world/la-fg-pakistan-davis-freed-20110317 [accessed 19 June, 2012]
[46] *The Washington Post*, March 17, 2011 available at http://www.washingtonpost.com/cia-contractor-raymond-davis-freed-after-blood-money-payment/2010/08/19/AByVJ1d_story.html [accessed 19 June, 2012]
[47] The Pakistan Code of Criminal Procedure, 1898 was amended by Act 2 of 1997.

> Notwithstanding anything contained in Section 309 or Section 310, where all the wali do not waive or compound the right of qisas, or [if] the principle of fasad-fil-arz the Court may, having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded with [death or imprisonment for life or] imprisonment of either description for a term of which may extend to fourteen years as ta'zir.

The question that quickly comes to mind is: why did the court not apply the provisions of Section 311 of the PPC while determining the case of Raymond Davis? Firstly, we have to understand that the two *wali* in Davis' case unanimously compounded the right of qisas, and this will definitely take the case out of the contemplation of Section 311 of the PPC. The second condition which has to be considered was whether the offence committed by Davis amounted to fasad-fil-arz as envisaged by Section 311 of the PPC. The interpretation of the meaning of 'fasad-fil-arz' has been given to include anyone of the following points: i) the past conduct of the offender; or ii) whether he has any previous convictions; or iii) the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience; or iv) if the offender is considered a potential danger to the community; or v) if the offence has been committed in the name or on the pretext of honour.[48] It thus appears, considering the facts of Davis' case, that points i, ii, iv and v listed above may not be applicable to his case. Point iii seems to be relevant

[48] See the explanation of Section 311 of the PPC at http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html#f125` [accessed 04 April, 2013]

to the offence committed by Raymond Davis, particularly when one considers the extent of public indignation it caused. One would have expected the court to move a step further in deciding whether the offence committed by Davis amounts to *fasad-fil-arz*.

The court was, at least, expected to have 'regard to the facts and circumstances of the case' of Davis before arriving at its decision. Although, the application of Section 311 appears to be discretionary, but still, such discretion must be seen to be exercised judiciously. For instance, in *Abdul Ghafoor v. State,*[49] the Lahore High Court went ahead to sentence the accused person to 10 years imprisonment under Section 311 of the PPC despite the fact that the legal heirs of the deceased and the accused had reached a compromise in accordance with Section 310 of the PPC. The punishment was awarded on the basis that the offence in question amounted to 'fasad-fil-arz'. The *case of Abdul Ghafoor* appears to be distinguishable with Davis' case which would have worked against an automatic acquittal for Raymond Davis.

Thus, this discussion has shown how the court, in applying a segment of the Islamic criminal law, based upon the application by the *wali*, has succedded in bringing a case that would have otherwise led to a diplomatic impasse between Pakistan and the United States to an abrupt finality. Even if the court had found in favour of Davis that he was, indeed, a diplomatic or consular agent of the United States as at the time he committed the offence; and his home country, the United States, also agreed to waive his diplomatic immunity under the principle of reciprocity, the

[49] (2000) PCRLJ 1841

matter would have probably ended in the same way. The fact that he had, for the sake of argument, diplomatic immunity should not be taken as licence to kill or commit criminal offence. Moreover, the way this case ended has shown how the Islamic law may be used in resolving a diplomatic crisis between two States. In other words, it has gone to show the relationship that could possibly occur between Islamic law and international diplomatic law in resolving what could have led to international imbroglio. Hassan was actually correct when he said in his concluding remarks that '[t]he matter has thus been settled judicially through the application of Islamic law principles without having to deal with politically sensitive and legally contentious issues involved in the determination of diplomatic status and immunity.'[50]

5.3 Revisiting the 1979 Iranian Hostage Case under Islamic International Law

It has been more than three decades ago, precisely, on November 4, 1979, that some Iranian militant students otherwise known as the 'Muslim Student Followers of the Imam's Policy,' invaded the American Embassy in Tehran and held 52 of its personnel as hostages for 444 days. It was said that the decision of the United States in October, 1979 to admit the former Shah of Iran, Mohammed Reza Pahlavi, into the United States for a life-saving medical treatment was conspicuously contributory to this incidence.[51] As soon as the news was publicized, it then became

[50] T Hassan, op cit., (2011), p. 39
[51] See A Rafat, 'The Iran Hostage Crisis and the International Court of Justice: Aspects of the Case Concerning United States Diplomatic and Consular Staff in Tehran', (1980-1981) 10 Denv. J. Int'l. L & Pol'y, p. 426

apparent, according to Daugherty,[52] that that the seizure of the United States embassy 'iwould jeopardize the safety and security of all Americans in Iran.'[53] Aside from the thirteen female and the African-American hostages that were released within the first month,[54] and later another hostage that was released due to illness, the rest members of the diplomatic and consular staff of the United States were not released until January 20, 1981.

After considering 'innumerable pleas, resolutions, declarations, special missions and even sanctions'[55] to secure the release of the hostages without success, the United States also turned to the judicial arm of the United Nations, the International Court of Justice, on 29 November, 1979 for a judicial pronouncement. The ICJ, by its unanimous decision of 15 December, 1979, gave an interim order directing that the US Embassy be restored back to the US government, the hostages be released and given full diplomatic protection with freedom and facilities to leave Iran.[56] Also, on 24 May, 1980, the Court finally gave judgment on the merits of the case in which Iran was found to be in contravention of its obligations under international conventions and under long-established rules of general international law, as such, it

[52] Now a Professor of Political Science, he was then assigned to the United States embassy, in Tehran and he happened to be one of those taken as hostage by the Iranian militants in 1979.
[53] WJ Daugherty, 'Jimmy Carter and the 1979 Decision to Admit Shah into the United States', (2003) http://www.unc.edu/depts/diplomat/archives_roll/2003_01-03/dauherty_shah/dauherty_shah.html [accessed 17 October, 2011]
[54] See *New York Times*, Nov. 19, 1979, col. 6, p. 1 where it was reported that a woman and two African- American men were released on November 18, 1979. Another ten female and an African-American hostages were again released on November 19, 1979. See *New York Times*, Nov. 20, 1979, col. 4, p. 1
[55] LH Legault, 'Hostage-Taking and Diplomatic Immunity', (1980-1981) 11, Man. L. J., p. 359
[56] See Order of 15 December, 1979, I.C.J Reports, (granting provisional measures) Pp. 10-11

is under an obligation to make reparation to the United States.[57] Iran, however, chose to defy both the interim order[58] and judgment of the ICJ.

It is important to mention that throughout the entire trial, the United States hinged their legal arguments mainly on well-acknowledged principles of diplomatic immunity which are viewed and understood from the Western legal perspective. The fact that Iran is an Islamic Republic calls for additional argument from the view point of Islamic law by the United States. After all, it has been argued by Weeramantary that Islamic international law which is equally 'rich in principles relating to the treatment of foreign embassies and personnel'[59] would have, possibly, had a three-fold effect on Iran if the United States had availed itself the opportunity of canvassing it before the Justices of the ICJ. The three-fold effect, according to Weeramantary, is as follows:

> [I]ts persuasive value would have been immensely greater; it would have shown an appreciation and understanding of Islamic culture; and it would have induced a greater readiness on the Iranian side to negotiate from a base of common understanding.[60]

We must not forget the general references made by two of the judges of the ICJ (Waldock and Tarazi) to the contribution of the Islamic jurisprudence to the body of

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[57] *United States Diplomatic and Consular Staff in Tehran,* Judgment, I.C.J Reports 1980, para. 95, p. 44
[58] Ibid., para. 75, p. 35
[59] CG Weeramantry, op cit., (1988), p. 166
[60] Ibid

diplomatic immunity and inviolability. The ICJ as per Justice Waldock, in the lead judgment did not mince words when it says that:

> [T]he principle of the inviolability of the persons of diplomatic agent and the premises of diplomatic missions is one of the very foundations of long-established regime, to the evolution of which the traditions of Islam made a substantial contribution.[61]

Likewise, Tarazi, while delivering a dissenting opinion,[62] cited with approval a 1957 lecture delivered by Professor Ahmed Rechid of the Istanbul law faculty confirming the respect conferred on diplomatic personnel under Islamic law as follows:

> In Arabia, the person of the Ambassador has always been regarded as sacred. Muhammad consecrated this inviolability. Never were Ambassadors to Muhammad or to his successors molested.[63]

It would then be of paramount interest to examine the framework of basic Islamic legal structures and principles of international law concerning the invasion and detention of the United States diplomatic mission and personnel in Tehran. Considerng the fact that not much has been written concerning how Islamic *siyar* views the Iranian invasion of the United States embassy, this section will, therefore,

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[61] *United States Diplomatic and Consular Staff in Tehran,* Judgment, I.C.J Reports 1980 at para. 86, p. 40

[62] It must be noted that the dissenting opinion of Justice Tarazi only related to the grounds of the jurisdiction of the Court and the issue of the responsibility of the Iranian Government in the matter of reparations

[63] *United States Diplomatic and Consular Staff in Tehran*, (1980), 19 I.L.M. 553 (I.C.J.)

survey the facts surrounding the i) seizure of the embassy and the hostage taking crisis; ii) the applicable international conventions between Iran and the United States and their legal implications under the Islamic *siyar*; iii) the rational for taking members of the United States diplomatic and consular staff as hostages; and iv) the jurisprudential justification of the rational, if any, under Islamic *siyar*.

5.3.1 Seizure of the Embassy

It was in November 4, 1979 that some Iranian student demonstrators stormed the United States Embassy in Tehran, the Iranian capital, and likewise the American Consulates in Tabriz and Shiraz which led to the detention of 52 members of the American diplomatic and consular staff. Although, two of the hostages did not possess either diplomatic or consular status, but they were nationals of the United States. These students who described themselves as the 'Muslim Student Followers of the Imam's Policy'[64] were said to be agitated by the resolve of the United States to admit the former Shah of Iran, Mohammed Reza Pahlavi, into the United States.[65] Consequently, the hostage takers threatened that unless the Shah is extradited along with his wealth, they would not hesitate to put the hostages on trial for the offence of espionage.[66]

[64] *United States Diplomatic and Consular Staff in Tehran,* Judgment, I.C.J Reports 1980 at para. 17, p. 12
[65] A Rafat, op cit., (1980-1981), p. 426; BVA Roling, op cit., (1980), p. 125;
[66] A Rafat, op cit., (1980-1981), p. 428

Nevertheless, it remains clear that United States would not have extradited the Shah due to the absence of any extradition treaty between the two countries.[67]

5.3.2 Iranian Government Endorses Students' Action:

The Iranian authority, particularly, Imam Ayatollah Khomeini has been severally alleged to have backed and directly endorsed the entire actions of the students regarding the seizure of the US Embassy.[68] It has been argued that not only was the Iranian Government in cooperation with the student demonstrators by not preventing them from entering the embassy, it also gave a mark of approval to and showering encomium on the US Embassy hostage takers.[69] The Iranian Foreign Ministry, for example, was recalled as saying that: '[t]oday's move by a group of our compatriots is a natural reaction to the U.S. Government's indifference to the hurt feelings of the Iranian people about the presence of the deposed Shah, who is in the United States under the pretext of illness.'[70] He further said that '[if] the U.S. authorities respected the feelings of the Iranian people and understood the depth of the Iranian revolution, they should have at least not allowed the deposed Shah into the country and should have returned his property.'[71] In a pronouncement attributed to the then Iranian Foreign Minister, Mr Ibrahim Yazdi, that the students' action 'enjoys the endorsement and support of the government, because America herself is

[67] R Falk, 'The Iran Hostage Crisis: Easy Answers and Hard Questions' (1980) 74 AJIL, Pp. 411 – 412 See also M Whiteman, *Digest of International Law* 6 (1968) , Pp. 732 -737; J Rehman, op cit., (2005), p. 124
[68] A Rafat, op cit., (1980-1981), p. 427
[69] Ibid., para. 71, Pp. 33-34
[70] 'Tehran Students Seize U.S Embassy and Hold Hostages', *The New York Times*, November 5, 1979 http://www.nytimes.com/learning/general/onthisday/991104onthisday_big.html? [accessed 22 November, 2011]
[71] Ibid

responsible for this incidence'[72] was also regarde as a general ratification to the entire hostage incidence.

The then President of the United States, Jimmy Carter, decided to explore the possibility of resolving the imbroglio through diplomatic process by instructing his Attorney-General, Mr Ramsey Clark, accompanied by Chief Counsel for the Senate Select Committee on Intelligence, William Miller, to go and deliver a message to Ayatollah Khomeini requesting the release of the hostages.[73] Khomeini and members of the Revolutionary Council refused to meet with the emissary sent by the United States. It was related that while Clark was en route, the Tehran Radio broadcast the speech made by Ayatollah Khomeini on 7 November, 1979 forbidding any member of the revolutionary council from holding any discussion with them while also maintaining that 'the US embassy in Iran is our enemies' centre of espionage against our sacred Islamic movement . . . Should the United States hand over to Iran the deposed shah . . . and give up espionage against our movement, the way to talks would be opened on the issue of certain relations which are in the interest of the nation.'[74] The final seal of the Iranian Government approval to the taking of the US Embassy was set when he decreed that 'those people who hatched plots against our

[72] *United States Diplomatic and Consular Staff in Tehran,* Judgment, I.C.J Reports 1980 at para. 70, p. 33

[73] The choice of Clark may not be unconnected to the fact that he happened to be a relentless critic of the former Shah of Iran and more so, he was known to have indicated his support for the Islamic revolution during his meeting with Ayatollah Khomeini while he (Khomeini) was in exile. See LS Vandenbroucke, *Perilous Options: Special Operation as an Instrument of U.S. Foreign Policy,* (OUP, New York/Oxford, 1993), 117. According to Phillips, the US rested their trust on the 'anti-shah credentials of these two liberals (Clark and Miller)' whom they thought could give them credibility by having the crisis resolved through diplomatic means. See A Phillips, op cit., p. 13

[74] *United States Diplomatic and Consular Staff in Tehran,* Judgment, I.C.J Reports 1980 at para. 26, p. 15

Islamic movement in that place do not enjoy international diplomatic respect.'[75] Khomeini's declaration that '[t]he noble Iranian nation will not give permission for the release of the rest of them (the hostages). Therefore, the rest of them (the hostages) will be under arrest until the American Government acts according to the wish of the nation'[76] depicted, in an obvious fashion, the lucid intent of the State of Iran in ratifying the acts perpetrated by the Iranian students.

The possible legal implication one could deduce from these official statements is that the hostage takers have hence become the agents of the Iranian government. One may not, as it appears, require any further prove to draw an inference of collusion between the Iranian authority and the hostage takers, particularly, as there are ample evidence confirming the complicity of the Iranian Government. It would seem difficult for the Iranian Government, if it does, to claim lack of responsibility just because it did not officially carry out or direct the seizure of the United States Embassy and the detention of its personnel. The Iranian authorities can at best be described according to the remark of Rafat as 'wholehearted participants in the violation of international law that had occurred.'[77] In Islamic law, an act may be deemed validly constituted by an unauthorised agent, provided such act is eventually ratified by the principal[78] following the principle that says 'subsequent ratification has the same effect as a previous authorization to act as an agent.'[79] Therefore, the

[75] Ibid., para. 73, p. 34
[76] Ibid
[77] A Rafat, op cit., (1980-1981), p. 427
[78] M Ayub, *Understanding Islamic Finance,* (John Wiley & Son Ltd., England, 2007), p. 348
[79] This is a quotation in S Mahmassani, 'Transactions in Shari'a' in M Khadduri and HJ Liebesny (eds.), *Origin and Development of Islamic Law,* (The Lawbrook Exchange Limited, New Jersey, 2008), p. 187

Iranian Government should be held accountable for the acts perpetrated by the Iranan demonstrating students.

5.3.3 The Iranian Violation of International Treaties

The Iranian Government and the United States of America have entered into international obligations specifically relating to the protection of diplomatic and consular premises and personnel. These international obligations are variously contained in the VCDR,[80] VCCR,[81] 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[82] and 1955 Treaty of Amity, Economic Relations and Consular Rights[83] between the United States and Iran. Sovereign nations have been able to interact peacefully and maintain regular connection among themselves due to the age-long international community's legal method in the form of treaties and covenants. It has been alleged according to the application filed by the United States before the ICJ in November 29, 1979 that the Islamic Republic of Iran has grossly violated their

[80] The VCDR was signed by the Islamic Republic of Iran in May 27, 1961 and also signed by the United States of America in June 29, 1961. See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en [accessed 2 December, 2011

[81] The VCCR was signed in April 24, 1963 by the Islamic Republic of Iran and the United States of America. See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en [accessed 2 December, 2011]

[82] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents was adopted by the General Assembly of the United Nations at New York and open for signature on 14 December, 1973 (United Nations Treaty Series, Vol. 1035, No. 15410) The Convention was ratified by the Islamic Republic of Iran in July 12, 1978 while the United States of America signed in December 28, 1973 See http://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xviii/xviii-7.en.pdf [accessed 2 December, 2011]

[83] Treaty of Amity, Economic Relations and Consular Rights was signed between the Governments of the United States of America and Iran at Tehran in August 15, 1955 and entered into force in June 16, 1957

international obligations stipulated in these treaties to ensure the safety and inviolability of their diplomatic mission and personnel in Iran.[84]

The Islamic Republic of Iran has, by all legal implications, under the contemporary conventional international law, likewise under Islamic *siyar*, covenanted with the United States to respect and discharge the following obligations:

a. Protect the inviolability of the diplomatic premises and the correspondence and archives;[85]
b. Safeguard the inviolability of diplomats and protect them from arrest and detention;[86]
c. Guarantee the diplomatic and consular immunity from criminal prosecution;[87]
d. Ensure immunity from criminal prosecution of the administrative and technical personnel of the mission;[88]
e. Guarantee the freedom of movement of the diplomatic and consular staff;[89]
f. Co-operate in the prevention of crimes against the internationally protected person;[90] and
g. Give the most constant protection and security to the nationals of the United States and their consular representatives within the territory of the Islamic Republic of Iran.[91]

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[84] See *United States Diplomatic and Consular Staff in Tehran,* Judgment, I.C.J Reports 1980 at para. 8 (a), p. 5-6 See also A Rafat, op cit., Pp. 425-426
[85] Articles 22, 24 and 27 of the VCDR and Articles 31 and 33 of the VCCR.
[86] Article 29 of the VCDR and Article 40 of the VCCR
[87] Article 31 of the VCDR; Article 43 of the VCCR and Article XVIII of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the Islamic Republic of Iran and the United States of America.
[88] Article 37 of the VCDR
[89] Article 26 of the VCDR and Article 34 of the VCCR
[90] Article 2 (3), 4 and 7 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents

Iran, being a State that proclaims to be Islamic by its Constitution and its governing system,[92] cannot claim to be oblivious of the fundamental importance of covenants in the Islamic legal system. Even though, Iran has an overwhelming majority following the *Shi'a Imamiyyah* sect of Islam,[93] the fact remains true that in both the *Sunni*[94] and *Shi'a* schools of law, the religious importance and the binding nature of contract is ever intact. After all, the Islamic jurisprudence attaches great value to the concept of agreements to the extent that they are not only considered legally binding on Muslims, they are equally held with much sense of religiousness. The maxim '*Al Muslimun 'inda shurutihim* (Muslims are bound by their stipulations)' is generally accepted as traditional rule by all the *madhaahib* – Muslim schools of law.[95]

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[91] Articles II (4) and XIII of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the Islamic Republic of Iran and the United States of America

[92] Ayatollah Khomeini proclaimed the Iranian Islamic Revolution in February, 1979, but Iran was properly voted, constitutionally as an Islamic State in December 3, 1979. See MC Bassiouni, op cit., (1980), p.622

[93] The *Shi'a Imamiyyah* is the predominant sect in the Islamic Republic of Iran, although there are numerous denominations within the Shi'a sect. One of the core principles within the *Shi'a Imamiyyah* sect is that Prophet Muhammad (pbuh) bestowed his succession on his son-in-law who was also his cousin, 'Ali ibn Abu Talib (d. 661). They also hold the view that the position of Imam which started with 'Ali ibn Abu Talib, then continued with his male heirs up to the twelfth Imam, Muhammad ibn al-Hassan al-Askari, who was said to have disappeared miraculously upon God's command in the year 873-74 AD. This, perhaps, explains why the *Shi'a Imamiyyah* sect is sometimes referred to as *al-Ithna-Ashariyyah,* the Twelvers. See S Akhavi, 'Shiite Theories of Socia Contract', in A Amanat and F Griffel (eds.), *Shari'a: Islamic Law in the Contemporary Context,* (Stanford University Press, California, 2007), p. 140. See also MC Bassiouni, op cit., (1980), p. 617

[94] The *sunni*, otherwise known as *ahlu-sunnah wal-jama'ah*, which means the people of the tradition of Prophet Muhammad (pbuh) and the consensus of the *ummah*, forms the largest group in Islam

[95] S Habachy, 'Right, and Contract in Muslim Law', (1962) 62, Columbia Law Review, p. 459

The contractual principles of Islamic law are carefully and clearly stated in the international arbitral proceedings of *Saudi Arabia v. Arabian American Oil Company*[96] thus:

> Moslem law does not distinguish between a treaty, a contract of public or administrative law and a contract of civil or commercial law. All these types are viewed by Moslem jurists as agreements or pacts which must be observed, since God is a witness to any contract entered into by individuals or by collectives. Under Moslem law, any contract is obligatory in accordance with the principles of Islam and the Law of God . . .[97]

Regardless of whether it is an agreement between individual Muslim and the Muslim State or between a Muslim State and a non-Muslim State, it remains sacrosanct. The Imam of a Muslim State is particularly under a duty to discharge his covenants to Muslims and non-Muslims alike. According to the tradition of Prophet Muhammad (pbuh) quoted by the Hambali jurist, Ibn Taymiyah, that: 'For everyone who has committed a breach of faith there shall be a flag [of disgrace]. On the day of judgment it will be hoisted. It height will be in proportion to the enormity of his breach of faith. No breacher of faith is more unjust than an *amir* [prince] who breaks his covenants."[98] In fact, a Muslim State is expected to be a model for it citizens in fulfilling and discharging all contractual obligations it has lawfully granted to any

[96] *Saudi Arabia v. Arabian American Oil Company* (ARAMCO), (1963) 27 I.L.R. 117
[97] Cited in S Habachy, op cit., (1962), p. 452
[98] Ibn Taymiyyah, *Majmu'at Fatawa*, (1908-1911), p. 331

foreign country.[99] The legal sanctity and authority of covenants in Islamic law are firmly rooted in the two prime sources of the Islamic jurisprudence and therefore, receive unanimous approval from the generality of the Muslim schools of law. According to a classical expression attributed to Ibn Taymiyyah that 'If proper fulfilment of obligations and due respect for covenants are prescribed by the Lawgiver, it follows that the general rule is that contracts are lawful . . . since the Lawgiver recognizes the legality of their objectives.'[100]

When the Qur'an says: 'O you who have believed, fulfil [all] contracts,'[101] it is generally understood that it incorporates all forms of obligations, contracts and covenants that are made between man and man and 'spiritual covenants between man and God.'[102] It is mandatory that all obligations must be discharged once they are agreed upon. Particularly relevant to this discussion is the verse of the Qur'an that categorically forbids any violation of the treaties entered into between the Muslims and non-Muslims that: 'Excepted are those with whom you made a treaty among the polytheists and then they have not been deficient toward you in anything or supported anyone against you; so complete for them their treaty until their term [has ended]. Indeed, Allah loves the righteous [who fear Him].'[103] This means that once the non-Muslims remain faithful and do not breach their covenants, then, the Muslims are duty bound to respect the terms of the agreements until their

[99] S Habachy, op cit., (1962), p. 451
[100] This is a quotation from S Habachy, op cit., (1962), p. 460
[101] Quran 5:1
[102] JND Anderson and NJ Coulson, 'The Moslem Ruler and Contractual Obligations', (1958) 33 N.Y.U.L. Rev. p. 923 See also PN Kourides, 'The Influence of Islamic Law on Contemporary Middle Eastern Legal System: The Formation and Binding Force of Contracts', (1970) 9 Colum. J. Transnat'l L., p. 394
[103] Qur'an 9:4

expiration. In fact, Allah describes those who violate covenants as those who are faithless.[104]

Prophet Muhammad (pbuh) entered into a treaty with the non-Muslims of Makkah which was known as the *Treaty of Hudaybiyyah (628 AD)*, and he tenaciously observed the terms of the treaty to the latter. That treaty, according to Muslim jurists, later became a paradigm that authenticates the validity of all forms of legal instruments between the Muslim and the non-Muslim States.[105] In the same vein, there are numerous statements of Prophet Muhammad (pbuh) giving authority to the validity of covenants and treaties in Islamic law, more so, if such treaties do not contain any unlawful objects according to the *Shari'ah*. Prophet Muhammad (pbuh) is reported to have said that: 'The Muslims are bound by their obligations, except an obligation that renders the lawful unlawful and the unlawful lawful.'[106] It is considered sacrilegious for a Muslim to violate a treaty or a term in a treaty once it has been agreed upon, regardless of whether the other party is a non-Muslim. Prophet Muhammad (pbuh) was very blunt in informing Abu Jandal that '[w]e have entered with the Quraysh into a treaty of peace and we have exchanged with a solemn pledge that none will cheat the other'[107] when he requested to join the Muslims in Madinah immediately after signing of the *Treaty of Hudaybiyyah.* The third caliph in Islam, Uthman ibn 'Affan (579–656 AD), was said to have entered into

[104] See Qur'an 2:100 that says: 'Is it not [true] that every time they took a covenant a party of them threw it away? But, [in fact], most of them do not believe.'
[105] GW Heck, *When the World Collide: Exploring the Ideological and Political Foundations of the Clash of Civilizations,* (Rowman & Littlefield Publishers, Maryland, 2007), p. 170
[106] Tirmidhi, Sahih, VI, 104 (Cairo 1931)
[107] Cited in MH Haykal, op cit., p. 354

a treaty with the people of Nubia promising not to wage war or prepare to wage war against them or attack them on basis of the treaty that binds the two of them.[108]

It is, of course, a proven fact that the State of Iran is a signatory to all these treaties which, by implication, means that all the terms of the treaties deserve to and must be observed.[109] It is also rightly assumed that the objects and terms of these treaties are not in any way contradictory to the core objectives of the *Shari'ah* (*maqaasid al-shari'ah).* In other words, these treaties, both under the conventional international law and the Islamic international law, must be observed to the latter since they have become applicable in themselves.[110] The failure of the Iranian Government to provide adequate security to the United States Embassy especially on November 4, 1979 when it was desperately needed to protect the US mission and its numerous personnel from the students' incursion definitely constituted a breach of these international treaties both under the Islamic *siyar* and international law.

It is important to mention that assuming the Iranian Government was right in its allegation of espionage against the United States, it would have justifiably refused to observe the terms of the treaties it had with the United States. The Iranian Government refusal to fulfil the terms of the treaties would have been well supported by the Qur'anic verse that says: 'If you [have reason to] fear from a people betrayal, throw [their treaty] back to them, [putting you] on equal terms.

[108] M Hamidullah, op cit., (1961), p. 102
[109] See *footnotes* 78, 79,80 and 81 of this Chapter confirming that the Islamic Republic of Iran was indeed a signatory to the following treaties: VCDR; VCCR; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; and 1955 Treaty of Amity, Economic Relations, and Consular Rights
[110] MC Bassiouni, op cit., (1980), p. 615

Indeed, Allah does not like traitors.'[111] In addition, such refusal to observe the terms of the treaties which Iran had with the United States would have received legal justification from Article 60 (2) (b) of the VCLT which provides that: 'A material breach of a multilateral treaty by one of the parties entitles: . . . a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State.' The Iranian Government would have, in compliance with the foregoing verse of the Qur'an and the provisions of the VCLT, made their position known to the United States that they do not want to be bound by the provisions of the VCDR and the VCCR anymore due to the activities of the United States which they found to be a gross violation of Article 41 of the VCDR.[112] Having said this, the Iranian Government would have still been held liable to the United States under Islamic law and international law for invading the United States Embassy and detaining their diplomatic personnel.

5.3.4 Violation of Diplomatic Immunity

The protection of diplomatic envoys has been known and practiced since the ancient times up till the present modern States.[113] Certainly, there have been series of cases involving the violation of diplomatic inviolability ranging from kidnap, arrest, detention to even killing of diplomatic personnel. It is, however, doubtful if there is any violation of diplomatic immunity that can be likened to the taking and eventual detention of the United States Embassy and its personnel by Iran on 4 November,

[111] Qur'an 8:58
[112] Article 41 of the VCDR provides that: '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 States. They also have a duty not to interfere in the internal affairs of that State.'
[113] LH Legault, op cit., (1980-1981), p. 359

1979. It is not surprising when Barker makes an unequivocal submission that '[u]ndoubtedly, the most significant failure to protect diplomats in history concerned the seizure and subsequent occupation of the US Embassy in Tehran, Iran in 1979.'[114] The occupation of the US Embassy by the Iranian students demonstrators was described by Adib-Moghaddam as 'the most explicit rejection of international 'norms of appropriate behaviour,' and here specifically the institutions of international law.'[115] Richard Falk has also made a similar submission in 1980 when he said that 'Ayatollah Khomein's refusal to honor the rules of international law relating to diplomatic immunity is among the most serious charges brought against his leadership. Even Hitler, it is alleged, never violated the diplomatic immunity of his enemies.'[116]

It seems clear that the seizure of the US Embassy in Iran could not have been condoned or in any way made permissible under the Islamic legal system. If one is to place the Iranian acts of forceful entry into the US Embassy; the acts of detaining personnel of the US Embassy; the acts of seizing and searching the documents and archives of the US Embassy; and the acts of restriction imposed on the freedom of movement of the US diplomatic personnel on the platform of Islamic law, being a legal system officially proclaimed to be adopted by the Islamic Republic of Iran, it will not be a surprise that Iranian would have been held responsible were they to be prosecuted under the Islamic legal system. The reason, of course, is obvious. As we know that under Islamic *siyar*, the diplomatic envoys must not only be respected,

[114] JC Barker, op cit., (2006), p. 8
[115] A Adib-Moghaddam, *The International Politics of the Persian Gulf: A Cultural Genealogy,* (Routledge, Oxon, 2006), p. 25
[116] R Falk, op cit., (1980), p. 411

but must actually be protected from all forms of molestation or maltreatment. This principle of Islamic *siyar* was further buttressed by Hamidullah that '[diplomatic] envoys, along with those who are in their company, enjoy full personal immunity: they must never be killed, nor be in any way molested or maltreated.'[117] Coincidentally, this represents the general position of how the diplomatic personnel should be treated according to the *Shiite* and the *Sunni* schools of Islamic jurisprudence.[118]

There are, of course, authorities in the two primary sources (the Qur'an and the *Sunnah*) of Islamic law confirming kind treatment and protection for the diplomatic envoys. The Islamic principles of diplomatic immunity and inviolability which have been examined in much detail in the Chapters 2 and 4 may not be out of place to again mention a bit of them as supporting evidence for diplomatic protection. According to the Qur'an, the decision of Prophet Sulayman to send the emissaries of Bilqees (the Queen of Sheba) back along with their gifts, which were considered as bribery and an insult to his personality, exhibited the kind of respect he had for foreign messengers.[119] He did not hold them responsible for offering him a bribe, but rather, he sent them out of his domain which could be said to be another way of declaring them as *persona non-grata*. Hence, the Qur'anic narration, according to Bassiouni, signifies that 'the emissaries were immune from the wrath of the host state and were not held responsible for the acts or messages sent by their head of

[117] M. Hamidullah, op cit., (1961), p. 147
[118] MC Bassiouni, op cit., (1980), p. 618
[119] See generally Qur'an 27:35-37

state.'[120] He further concludes that 'expulsion is the only sanction to be taken against them.'[121] Therefore, it is required as it is imperative, according to the Qur'an, for all Islamic States to ensure and guarantee 'the personal safety and well-being of diplomats and their family' within their territories.[122]

The Prophetic traditions further elaborated the Qur'anic injunctions regarding ways and how the diplomatic envoys should be treated. An incidence that comes to mind is the case of the two emissaries sent to Prophet Muhammad (pbuh) by Musaylimah who also claimed to be a prophet of God. In spite of the annoying message the two diplomats brought to Prophet Muhammad (pbuh) which could have led to their incarceration or even extermination, rather, Prophet Muhammad said to them: 'By God, if it were not the tradition that envoys could not be killed, I would have severed your heads.' [123] Also was the case of Wahshi, the one who murdered Hamzah, the uncle of Prophet Muhammad (pbuh) in the battle of Uhud. He was accorded diplomatic immunity when he visited Prophet Muhammad (pbuh) as an ambassador of the people of Taif. It was further said that he embraced Islam on that account.[124] The detention of foreign envoy was specifically discouraged by Prophet Muhammad (pbuh). It was narrated by Abu Rafi' who was designated as the Makkans envoy to Prophet Muhammad (pbuh) in Madinah immediately after the battle of Badr (624 AD), and upon seeing Prophet Muhammad (pbuh), Islam was cast into his heart straight away to the extent that he requested never to return back to Makkah. The Prophet blatantly rejected his request by saying: 'I do not

[120] MC Bassiouni, op cit., (1980), p. 610
[121] Ibid, Pp. 610-611
[122] J Rehman, op cit., (2005), p. 117
[123]Ibn Hisham, *As-Seeratu-n-Nabawiyyah*, Vol. IV, (Darul Gadd al-Jadeed, Al-Monsurah), p. 192
[124] HM Zawati, op cit., (2001), p. 80

break a covenant or imprison messengers, but return, and if you feel the same as you do just now, come back.'[125] The request of Abu Rafi' was rejected by Prophet Muhammad (pbuh) on the basis of diplomatic inviolability as he was, then, an ambassador of the Makkans, he deserved not to be detained in Madinah. It was reported that Abu Rafi' later came back, not as diplomatic envoy, but as a Muslim emigrant.[126]

It is precisely clear from the foregoing authorities in the Qur'an and the Prophetic traditions that diplomatic envoys must be respected and particularly protected throughout the duration of their stay within any Muslim State. The Islamic Republic of Iran, not being an exception, owes it a duty to safeguard and protect the inviolability of all diplomatic missions and their personnel within its territorial sovereignty. Moreover, since the Islamic Republic of Iran has the duty of 'framing the foreign policy of the country on the basis of Islamic criteria' as specified in its Constitution,[127] it is also expected that Iran will be totally committed to the principles of diplomatic immunity as contained under Islamic international law. Islamic international law imposes it as a duty on the Islamic Republic of Iran to provide adequate protection against the invasion and seizure of the United States Embassy. There is no doubt that the Islamic Republic of Iran has indeed contravened the principles of diplomatic immunity as contained in the Islamic diplomatic law.

[125] Partial Translation of Sunan Abu-Dawud, Book 14, Jihad (Kitab al-Jihad), Hadith Number 2752 http://www.muslimaccess.com/sunnah/hadeeth/abudawud/014.html [accessed 29 December, 2011]
[126] Ibid
[127] Article 3 (16) 1979 Constitution of the Islamic Republic of Iran

5.3.5 Basis of the Iranian Justification under the Islamic Law:

However, the Iranian Government claimed justification for the demonstrating students' invasion of the United States Embassy in November 4, 1979. But then, there is a need to critically evaluate the justification of the Iranian Government, and consider how justifiable it was under Islamic law? It is to be noted though, that the Iranian Government neither put up appearance nor filed any Counter-Memorial before the ICJ.[128] Iran never participated in the entire judicial proceedings, but rather, it sent the two letters dated December 9, 1979 and March 16, 1980 which emanated from the Minister for Foreign Affairs of Iran to the ICJ. These letters which were almost similar in contents contained the reasons why the Iranian Government felt that 'the Court cannot and should not take cognizance of the case'[129] brought by the United States.

The letter of 9 December 1979 stressed in paragraph 2 by drawing the attention of the Court to the 'deep-rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters, the examination of whose numerous repercussions is essentially and directly a matter within the national sovereignty of Iran.'[130] As far as the Islamic Republic of Iran is concerned, the entire question before the ICJ

[128] *Case Concerning United States Diplomatic and Consular Staff in Tehran,* Judgment, (1980) I.C.J Reports, para 5, p. 5

[129] *Case Concerning United States Diplomatic and Consular Staff in Tehran,* Judgment, (1980) I.C.J Reports, para 10, p. 8; Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Order of Dec. 15, 1979, [1979] I.C.J. Rep. Pp. 10-11

[130] Ibid

> Only represents a marginal and secondary aspect of an over-all problem, one such that it cannot be studied separately, and which involves, *inter alia,* more than 25 years of continual interference by the United States in the affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.[131]

It was further mentioned in the letter that the dispute between the Iranian Government and the United States Government is not predicated on 'the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements.'[132] Therefore, according to Iran, it will be improper for the ICJ to 'examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years.'[133]

In addition, the spiritual leader of the Islamic Republic of Iran, Ayatollah Khomeini, issued a decree on 17 November 1979 which may be considered as an approval and justification for taking over the United States Embassy by saying that:

[131] Ibid
[132] Ibid, para 10, Pp. 8-9
[133] Ibid

> [the American Embassy was a 'centre of espionage and conspiracy' and that 'those who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respects'.[134]

It can as well be inferred from the above statement that since the US Embassy had been used as a place to spy on and conspire against the Islamic Republic of Iran, it will then be justified to detain its diplomatic and consular staff and therefore, seize the entire embassy.

In summary, one could say that the Iranian Government relied on the following justifications as the basis for its action:

- A continual interference by the United States in the affairs of Iran and the numerous crimes committed against the Iranian people for more than 25 years.
- The use of the United States Embassy as a 'centre of espionage and conspiracy' against the Islamic Republic of Iran.

Regarding the first justification, there are impressive examples in the Qur'an and the *Sunnah* of Prophet Muhammad (pbuh) which made it abundantly clear that it will amount to violating the immunity of diplomatic envoys if the diplomats should be subjected to punishment or detention by the host country for any offence they might have allegedly committed.[135] Rather, the diplomats should be seen as 'ordinary

[134] Ibid, para. 73, p. 34
[135] See J Rehman, op cit., (2005), p. 119

means of diplomatic communications' between the Islamic Republic of Iran and the United States.[136]

The second justification by the Iranian Government is that the United States Government was using its Embassy in Iran as a spy nest which, according to the Iranian Government, automatically took away the United States enjoyment of international diplomatic respects.[137] Truly, according to the Islamic law of crime, espionage is an offence, but it does not go to the extent of stripping diplomatic and consular staff of their immunity. One has to understand that espionage as an offence belongs to the *ta'azir*[138] (discretionary) category of crimes as it is not considered *haraam* (prohibited) under the Islamic Criminal law.[139] It does not fall under the *huduud*[140] (determined) and *qisaas*[141] (retaliation) offences. As for the

[136] MC Bassiouni, op cit., (1980), p. 610

[137] *Case Concerning United States Diplomatic and Consular Staff in Tehran,* Judgment, (1980) I.C.J Reports, para 73, p. 34

[138] Since the fulfilment of the principle of *Shari'ah* demands that all forbidden or sinful acts do not go unpunished howbeit that these acts do not fall within the ambit of either the *huduud* or *qisaas* offences, the Islamic penal system empowers the state and the judges to impose punishments on these forbidden acts which are accordingly designated as *Ta'azir*. By reason of its flexibility, offences that are most likely to fall under *Ta'azir* have been considered to be much wider in scope than those of *huduud* or *qisaas.* See SH Ibrahim, 'Basic Principles of Criminal Procedure Under Islamic Shari'a' in M. A. Abdel Haleem *et al,* (Ed.), *Criminal Justice in Islam: Judicial Procedure in the Shari'a*, (I. B. Tauris & Co. Ltd.London 2003), Pp. 20-21 See also R Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, (CUP, Cambridge, 2005), p. 65

[139] MC Bassiouni, op cit., (1980), Pp. 623-624

[140] A fuller explanation of *huduud* is given in Chapter 4 footnote 240 at page 217 of this dissertation. This explains why vast majority of Muslim scholars fully support the usage of the term '*hadd'* to describe crime whose punishment is specified and decreed by the Qur'an and the Sunnah of the Prophet otherwise known as *'uquubaat muqaddarah*. See SH Ibrahim, op cit., p. 18

[141] Unlike *huduud* offences which in the main are considered to involve the rights of God *(huquq-llaah)*, *qisaas* offences also referred to as retaliation concern the rights of man. The offences that fall under the qisaas are five, namely: (a) murder (b) voluntary killing (c) involuntary killing (d) intentional physical injury or maiming and (e) unintentional physical injury or maiming. See M Tamadonfar, 'Islam, Law, and Political Control in Contemporary Iran', (2001) 40 Journal for the Scientific Study of Religion, p. 212

huduud and *qisaas* offences, there are fixed penalties for them in the Qur'an and the *Sunnah* of Prophet Muhammad (pbuh).[142]

However, it is trite in Islamic law that *ta'azir* offences, being discretionary in nature, could generally be waived, particularly, by diplomatic immunity.[143] In other words, since espionage is classified as one of the *ta'azir* offences, it therefore, follows that any detention or arrest of internationally protected person for the commission of espionage will be rendered nugatory. The Iranian Government would have contravened Islamic international law for detaining the American diplomats for allegedly committing the offence of espionage. Even if the American diplomats were involved in the act of spying in Iran, the most appropriate action to be taken by the Iranian regime, according to Islamic *siyar,* would have been to expel them from Iran. This action is, however, compatible with the provisions of Article 9 (1) of the VCDR which provides that:

> [t]he 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

[142] G Benmelha, 'Ta'azir Crimes' in MC Bassiouni (ed), *The Islamic Criminal Justice System,* (Oceana Publications, London, 1982), Pp. 211-25 at p. 212
[143] Ibid

declared *non grata* or not acceptable before arriving in the territory of the receiving State.

The purported justifications put forward by the Islamic Republic of Iran can, at best, be described, according to Rehman, as 'national, political and economic grievances'[144] which may not constitute an arguable legal defence under Islamic *siyar* and conventional international law. For instance the lamentation of Ayatollah Khomeini that: '[w]hat kind of law is this? It permits the US Government to exploit and colonize peoples all over the world for decade. But it does not allow the extradition of an individual who has staged great massacres. Can you call it law?'[145] appeared to be morally and politically defensible, but will fall short of the principles of diplomatic immunity under both legal systems. Rehman further stressed that although 'there was a sense of unfairness, injustice and exploitation perpetuated by successive United States governments,'[146] but then, the relevance of the Iranian claims to Islamic international law remains very much doubtful. Meanwhile, the justifications canvassed by the Iranian Government, though not legally viable, but at the same time, indict international law of its 'arbitrariness and one-sidedness' which call for a critical attention.

5.3.6 The 2011 Invasion of the British High Commission in Tehran

Since 32 years ago when the American Embassy in Tehran was invaded and 52 of its personnel were detained, the Iranian demonstrators have again triggered 'one of the

[144] J Rehman, op cit., (2005), p. 123
[145] *Time*, January 7, 1980, p. 27
[146] Ibid

worst crises in bilateral relations' according to the report carried by *The Guardian* newspaper.[147] On Tuesday 29 November, 2011 the British Embassy and the British diplomatic compound in Tehran were both the targets of public demonstration. The protestors, mostly students, went into the embassy, shattering windows, ransacking offices, setting ablaze the embassy vehicle, looting and damaging embassy properties and removing and replacing the British flag with the Iranian flag.[148] The demonstration was initially meant to commemorate the first anniversary of the assassination of a senior Iranian nuclear scientist, Majid Shahriari, when they eventually, stormed the British Embassy mainly to protest the UK Government's decision to cut off all dealings with the Iranian Central Bank as a result of the Iranian nuclear programme.[149]

This incidence may not be comparable with the 1979 United States Embassy seizure which was adorned with governmental approval, particularly when one considers the rate at which the Iranian Government quickly condemned the attack by saying that: 'The foreign ministry regrets the protests that led to some unacceptable behaviours. . . We respect and we are committed to international regulations on the immunity and safety of diplomats and diplomatic places.'[150] But then, one would have expected the Iranian Government to provide adequate and special measures to protect the embassy and its personnel before the attacks took place. Had they done

[147] The Guardian, *British Embassy Stormed: Cameron Threatens Iran with 'Serious Consequence' after Attack by Mob,* Wednesday 30 November, 2011, p. 1
[148] The New Zealand Herald, *'Death to Britain' – Embassy Stormed in Iran,* Wednesday November 30, 2011 http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10769789 [accessed 16 January, 2012]; *The Daily Telegram,* December 1, 2011, (para. 8), p. 29
[149] *The Daily Telegram*, November 30, 2011, p. 18
[150] The Guardian, *Iran Protesters Attack UK Embassy in Tehran – Tuesday 29 November,* Tuesday 29 November, 2011 http://www.guardian.co.uk/world/blog/2011/nov/29/iran-protesters-attack-uk-embassy-tehran-live#block-1 [accessed 16 January, 2012]

that, Iran would have been vindicated and seen by the international community to have complied with the terms embedded in the 1961 and 1963 Vienna Conventions as well as upholding the principles of diplomatic immunity entrenched in Islamic international law. Moreover, it is a fundamental precept in Islamic law that individual and State are strictly bound by the terms of the treaties they made to other individuals and States, be they Muslims or non-Muslims.[151] Allowing the demonstrators to gain access to the premises of the embassy, in the words of the British Foreign Secretary, William Hague, would amount 'to a grave breach of the Vienna Convention which requires the protection of diplomats and diplomatic premises under all circumstances.'[152]

Nonetheless, the Iran security precautions prevailed by evacuating the protestors from the twin diplomatic properties and arresting several of them.[153] However, there remains a big scepticism in the minds of some people that '[t]he idea that the Iranian authorities could not have protected our [the British] embassy or that the assault could have taken place without some degree of regime consent is fanciful.'[154] Consequently, the British Government, abruptly, decided to severe diplomatic ties with the Islamic Republic of Iran by recalling all their diplomats from Iran, and then ordering the closure of the London office of the Iranian Embassy.[155] The fact that there are in existence international treaties between the Islamic Republic of Iran and

[151] See *Saudi Arabia v. Arabian American Oil Company* (ARAMCO), 27 I.L.R. 117 (1963) cited in S Habachy, op cit., p. 452
[152] The Guardian, *Iran Protesters Attack UK Embassy in Tehran – Tuesday 29 November,* Tuesday 29 November, 2011 http://www.guardian.co.uk/world/blog/2011/nov/29/iran-protesters-attack-uk-embassy-tehran-live#block-1
[153] *The Daily Telegram*, November 30, 2011, (para. 14) p. 18
[154] The Guardian, *Britain Expels Iranian Diplomats After Attack on Embassy,* Thursday 1 December, 2011
[155] Ibid; *The Daily Telegram,* December 1, 2011, (para. 8), p. 29

the United Kingdom regarding the protection and safety of their respective diplomats and diplomatic facilities, and the Islamic Republic of Iran having desecrated those commitments should be held accountable under Islamic international law.

5.4 The 1984 Libyan Bureau Shoot-Out: An Abuse of Diplomatic Immunity in Islamic International Law?

Among the reasons for maintaining a strong diplomatic relations with nations is mainly for the purpose of implementing the foreign policy of the sending State within the territory of the receiving State.[156] Meanwhile, diplomatic law has put in place diplomatic immunity for the personnel of the foreign States to ensure and guarantee smooth and efficient dispensation of their diplomatic transactions.[157] However, it is a common knowledge that some Muslim States have also contributed, in no small way, in the flagrant abuse of diplomatic privileges and immunities.[158] The statement of Rehman that 'a number of cases [i.e. abuses of diplomatic immunity] have emerged from the Islamic world' cannot be distanced from the truth.[159] These abuses happened regardless of the unambiguous provisions of the VCDR that diplomatic

[156] JT Southwick, 'Abuse of Diplomatic Privilege and Immunity: Compensatory and Restrictive Reforms', (1988) 15 Syr. J. Int'l L. & Com., p. 83
[157] L Dembinski, op cit., (1988), p. 201
[158] The 1973 encounter between the Iraqi Embassy, Islamabad and the Pakistani authorities See L Dembinski, op cit., p. 194; J Rehman, op cit., Pp. 126-127; See also generally R Khan, *The American Papers: Secret and Confidential Indian-Pakistani-Bagladeshi Documents 1965-1973* (OUP, Karachi, 1999). The case of an Israeli diplomatic agent that was found drugged and sealed in a diplomatic bag by the Egyptian Embassy in Rome in 1964 See DJ Harris, *Cases and Materials on International Law,* 5th edn. (Sweet & Maxwell, London 1998), Pp. 355-356. The Umaru Dikko's case where the Nigerian High Commission, London was involved in an attempt to smuggle him out of London by dumping him in a crate designated for the Ministry of External Affairs, Federal Republic of Nigeria, but without any official markings or seal as required by Article 27 of the VCDR. See The Economist, *Nigeria Kidnapping,* July 14, 1984, Pp. 55-56; Also see Davenport, *Mercenaries Held After Kidnap of Doped Nigerian,* The Times (London), July 7, 1984, p. 1, col. 2; AM Farahmand, 'Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses', (1989) 16 Journal of Legislation, p. 98
[159] J Rehman, op cit., p. 126

immunity does not operate as a licence to disregard or flout the local laws of the receiving State.[160]

The abuses of diplomatic protection, according to Farahmand, mostly occur in three different dimensions, namely: '1) the commission of violent crimes by diplomats; 2) the illegal use of diplomatic bag; and 3) the promotion of state terrorism by foreign governments through the involvement of their embassy in the receiving state.'[161] It may also be necessary to include the commission of traffic offences by some diplomats particularly in countries like the United States that hosts the United Nations and some specialised agencies in the state of New York.[162] This section will, however, focus mainly on violent crimes committed by diplomats with specific reference to the infamous 1984 Libyan People's Bureau shoot-out.

It is almost three decades ago that a woman police constable, Yvonne Fletcher, was killed by gun shots from the then 'Libyan People's Bureau', which is now known as the Libyan Embassy, London[163] in one of the most publicised abuses of diplomatic immunity. On April 17, 1984, a peaceful demonstration was organised by about 70

[160] Article 41(1) of the 1961 VCDR provides that: "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."

[161] AM Farahmand, op cit., (1989), p. 97 See also LS Farhangi, 'Insuring against Abuse of Diplomatic Immunity', (1986) 38 Stanford Law Review, p. 1523 where he broadly categorised abuses of diplomatic immunity into two parts: a) the use of the diplomatic bag to smuggle illegal goods into or out of the receiving state; and b) crimes committed by the diplomats themselves.

[162] R Higgins, 'Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience', (1985) 79, AJIL, p. 642

[163] It was in February 18, 1984 that some so-called revolutionary committees took over the affairs of the Libyan Embassy and had it renamed as the Libyan People's Bureau with alleged support of Col. Muammar Gaddafi. See R Higgins, op cit., p. 643 See also The Time (London), *Timetable of Past Incidents,* April 18, 1984, p. 1, col. 1; Y Ronen, 'Libyan Conflict with Britain: Analysis of Diplomatic Rupture', (2006), Middle Eastern Studies, 42:2, p. 272; *The Foreign Affairs Committee Reports,* (1985) 34, I.C.L.Q., p. 610

Libyans in London, protesting against the government of Col. Muammar Gaddafi for ordering the hanging of two Libyan students of Tripoli University.[164] The demonstration was staged on the pavement in St. James' Square, London facing the Libyan People's Bureau.[165] Also demonstrating on that day was a group of Gaddafi's supporters.[166] The British police were also present to avert any public disorder. In addition, it must be mentioned that a day before the incidence, the British ambassador in Tripoli and the Foreign Office in London were both advised by the Libyan regime that Libya 'would not be responsible for its consequences' should the demonstration be allowed to take place.[167] Surprisingly, shots of ammunition were heard and believed to be from inside the Libyan People's Bureau directed towards a crowd of demonstrators, killing a British policewoman, Constable Yvonne Fletcher, who was on duty in the square. Several people, running to almost a dozen, were also seriously wounded.[168]

Immediately after this sad incidence, the British authorities sent words to the Libyan Government requesting that permission be given to the police to enter the Libyan Bureau for the purposes of questioning the occupants and searching for evidence.

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[164] Col. Gaddafi was determined on crushing any opposition against his regime which he strongly believed must survive. On 16 April, 1984 two students of Tripoli University were killed by public hanging for engaging in 'anti-revolutionary activity'. See Y Ronen, op cit., p. 274

[165] The Times (London), April 18, 1984, p. 1, col. 1

[166] Smith, *Libya's Ministry of Fear,* Time, April 30, 1984, p. 36

[167] R Higgins, op cit., (1985), p. 643. Also see JS Beaumont, 'Self-Defence as a Justification for Disregarding Diplomatic Immunity', (1991) 29 Can. Y.B. Int'l L., p. 393

[168] See JC Sweeney, 'State Sponsored Terrorism: Libya's Abuse of Diplomatic Privileges and Immunities', (1986) 5:1 Dick. J. Int'l L., p. 135; SL Wright, 'Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts', (1987) 5 B. U. Int'l L. J., Pp. 179-180; AM Farahmand, op cit., (1989), p. 98; J Rehman, op cit., (2005), p. 127; AJ Goldberg, 'The Shoot-Out at the Libyan Self-Styled People's Bureau: A Case of State Supported International Terrorism', (1984) 30 S. D. L. Rev., p. 1

This request was never conceded by the Libyan authorities.[169] The British Government, apparently, severed diplomatic relations with the Libyan regime and consequently, gave the Libyan diplomats seven days within which to leave the United Kingdom.[170] The Libyan diplomatic personnel were thus declared *persona non grata* in accordance with Article 9 of the VCDR. It was said that upon the departure of the Libyan diplomats, the British police entered the Libyan Bureau, and in the presence of a representative from Saudi Arabian Embassy, carried out a search which led to the discovery of spent cartridges from a submachine gun and seven handguns.[171] It is worth mentioning also that when the Libyan diplomats were leaving the United Kingdom their bags and couriers were given due protection.[172]

In fact, Britain display of maturity and exercise of adequate respect for diplomatic immunity in the face of this unfortunate provocation perpetrated by the 'Libyan People's Bureau' cannot but be acknowledged. Of course, Islamic *siyar* guarantees immunities and privileges to diplomats and diplomatic missions as elaborately stated in the preceding chapter[173] However, these immunities and privileges, going by the functional theoretical justification under conventional diplomatic law and Islamic diplomatic law, should be for the purpose of discharging their diplomatic duties efficiently without any intimidation or unnecessary distraction. Also, Libya being an active member of the OIC signed and ratified the provisions of the 1973 Convention

[169] See JC Barker, *International Law and International Relations,* (Continuum, London, 2000), p. 160. See also *The Foreign Affairs Committee Reports,* (1985) 34, I.C.L.Q., p. 610
[170] *The Foreign Affairs Committee Reports,* (1985) 34, I.C.L.Q., p. 610
[171] Ibid, p. 614; JC Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil* (Aldershot, Dartmouth, 1996), p. 4
[172] AJ Goldberg, op cit., p. 1
[173] See particularly chapter 4 paragraphs 4.4

of the Immunities and Privileges of the OIC.[174] Although, the provisions of 1973 Convention of the Immunities and Privileges of the OIC mainly applied to member States of which Britain is not. But then, the fact that Article 13 of the 1973 Convention of the Immunities and Privileges of the OIC provides that 'immunities and privileges are accorded to the representatives of Member States, not for their personal benefit, but in order to safeguard the independent exercise of their functions in connection with the organization,' implies the general justification for the exercise of diplomatic immunity under Islamic international law. How can the killing of Fletcher by the Libyan People's Bureau be justified as safeguarding the independent exercise of their diplomatic functions? Or how would they connect their diplomatic functions with the shooting of peaceful demonstrators? Definitely, they are incomparable as they are not connected in any way.

Moreover, Libya has equally, on behalf of its diplomatic personnel, covenanted to 'respect the laws and regulations' of the United Kingdom.[175] It further covenanted that its diplomatic mission will not be used 'in any manner incompatible with the functions of the mission as laid down in the Convention or by other rules of general international law.'[176] Islamic law requires Libya, being a Muslim State, to comply with these legal commitments as they are bound to perform the terms and conditions of the treaties they have signed in good faith. After all, Muslims, according to Weeramantry, 'were obliged to honour their treaties even with non-believers "to the end of their term" . . . and "not to break oaths after making them" .

[174] It was adopted by the Seventh Islamic Conference of Foreign Ministers held in Istanbul, Republic of Turkey, from the 13th – 16th Jamad Al-Awal, 1396H (12th – 15th May, 1976)
[175] Article 41(1) of the 1961 VCDR
[176] Article 41(3) of the 1961 VCDR

. . *Pacta sunt servanda* was the underlying doctrine.'[177] As such, Libya cannot be said to have acted in compliance with the principles of diplomatic immunity as stipulated in Islamic siyar and international diplomatic law.

5.5 Conclusion

In summary, we have seen how some Muslim States practices (the Islamic Republic of Iran and Libya for instance), in their diplomatic relations with other States, as we have mentioned above, may appear not to be compatible with the principles of diplomatic immunity as stipulated in the two Vienna conventions – 1961 VCDR and 1963 VCCR. It must be emphasised also that such practices have equally been found to contravene the laid down principles diplomatic immunity according to Islamic *siyar*. What we need to note is that Islamic *siyar* frowns at any action on the part of the diplomatic personnel that could amount to an abuse of diplomatic immunities and similarly condemns any contravention of its principles. The Pakistani case of Raymond Davis has shown clearly the possible relationship that could exist between Islamic law and diplomatic law in resolving what initially appeared to be diplomatic conflict.

We must acknowledge that there are many Muslim States that are up to task in defending the principles of diplomatic immunity[178] mainly because of their

[177] CG Weeramantry, op cit., (1988), at p. 141

[178] For instance, the Egyptian Government acted quickly in rescuing the Israeli Embassy from attacks in the hands of demonstrators in 2011. The said rescue earned the Egyptian authority a beautiful remark from the Israeli Deputy Ambassador thus: "[t]hat the government of Egypt ultimately acted to rescue our people is noteworthy and we are thankful. . ." See The Guardian, *Israel Evacuates Ambassador to Egypt after Embassy Attack*, Saturday 10 September, 2011 http://www.guardian.co.uk/world/2011/sep/10/egypt-declares-state-alert-embassy?INTCMP=ILCNETTXT3487 [accessed on January 25, 2012]

commitments to various diplomatic treaties and probably, due to the compatibility between Islamic diplomatic law and international diplomatic law.

CHAPTER SIX

TERRORIST ATTACKS ON DIPLOMATIC INSTITUTIONS: JIHAAD AND ISLAMIC LAW VIEW POINTS

6.1 Introduction

The terrorist attacks on modern diplomatic missions have increased in recent years.[1] Diplomats and diplomatic facilities have been soft targets for terrorist attacks possibly, because they are on the front line of the so-called 'world-wide war' often perpetrated by non-state actors against various States.[2] International diplomatic relations have been greatly disturbed by the incessant terrorist crimes usually perpetrated in the form of murder, arson, kidnap and even detention often committed against diplomatic agents of foreign countries. In fact, since the attack on the World Trade Centre on September 11, 2001,[3] terrorism has gradually but sophisticatedly become a global catastrophe requiring a global challenge.[4] A recent statistical survey, for instance, indicates that between 1969 and 2009 there were approximately 38,345 terrorist incidents around the world, with 7.8 percent (2,981) of these attacks directed against the United States.[5] Out of these terrorist attacks that

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[1] B Zagaris and D Simonetti, 'Judicial Assistance under U.S. Bilateral Treaties' in MC Bassiouni (ed.), *Legal Responses to International Terrorism: U.S. Procedural Aspects,* (Kluwer Academic Publishers, Netherlands, 1988), p. 219

[2] BM Jenkins, 'Diplomats on the Front Line', (1982), Rand Corporation, Santa Monica, California, p. 1

[3] J Rehman, op cit., (2005), p. 71

[4] DA Schwartz, 'International Terrorism and Islamic Law', (1991) 29, Colum. J. Transnat'l L., p. 630

[5] See D Muhlhausen and JB McNeil, 'Terror Trends: 40 Years' Data on International and Domestic Terrorism', (Heritage Special Report) p. 1, May 20, 2011 available on http://report.heritage.org/sr0093 [accessed on 01/02/2012]

were directed against the United States, 28.4 percent were directly against the diplomatic offices of the United States.[6]

It has been suggested that quite considerable amount of terrorist attacks are recently 'perpetrated by or upon Muslims, or within Islamic lands.'[7] Also attesting to this fact is the submission of Esposito that 'the most widespread examples of religious terrorism have occurred in the Muslim world.'[8] However, this should not and cannot be understood to mean that terrorism originated from amongst the Muslims and the Arab world.[9] According to historical account, terrorism is as old as human history.[10] These attacks that are often carried out by small groups within the Muslim community *(ummah)* cannot be taken as representing the voice of the generality of the Muslim population. Surprisingly, these groups of Muslims often rely on the general concept of *jihaad* as a basis for declaring war mostly against the 'Anglo-Americans and their allies.'[11] It should be borne in mind that these groups of Muslims are mostly non-State individuals or organisations. These attacks on diplomatic personnel and facilities have generally provoked the following questions: (a) Is it legal for non-State actors either as a group or an individual to collectively or unilaterally declare *Jihaad*? (b) Even when *Jihaad* is declared, can

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[6] Ibid., p. 2
[7] DA Schwartz, op cit., (1981), p. 630
[8] JL Esposito, *Unholy War: Terror in the Name of Islam,* (Oxford University Press, Inc., New York 2002), p. 151
[9] Khadduri (spelt as Elie Kedourie), 'Political Terrorism in the Muslim World' in B Netanyahu (ed.), *Terrorism: How the West Can Win,* (The Jonathan Institute, New York, 1986), p. 70 See generally B Lewis, 'Islamic Terrorism?' in B Netanyahu (ed.), op cit., Pp. 65 - 69
[10] See RD Law, *Terrorism: A History,* (Polity Press, Cambridge, 2009), Pp. 1 and 5; AK Cronin, 'Behind the Curve: Globalization and International Terrorism', (2002/03) 27 International Security, p. 34
[11] NA Shah, op cit., (2008), p. 47

diplomatic envoys and diplomatic missions be targeted for attacks? (c) Is the maiming or killing of unarmed civilians justified in *Jihaad*? (d) How realistic is the concept that divides the world into *dar-al-harb (the abode of war) and dar-al-Islaam* (the abode of Islam)? (e) What are the responses of Muslim States to these terrorist attacks and how are the violations of the principles of international diplomatic law treated, strictly based on the criminal jurisdiction of Islamic law? These are the questions to be carefully considered in this chapter from Islamic law points of view. The issues will be analysed by using directives from the Qur'an, the prophetic instructions and advices from the Caliphs to military commanders as contained in Islamic *siyar*. Before going into these issues, we may need to first look at the definition of terrorism in contradistinction with the meaning of the Islamic concept of *jihaad*.

6.2 Defining Terrorism

The definition of terrorism has given rise to much controversy amongst policy-makers, international lawyers, academics, national legislators, regional organisations and even the United Nations.[12] Perhaps, this definitional ambiguity may be traced to the general aphorism that 'one man's terrorist is another man's freedom fighter.'[13] Yet, it is very much important that a clear-cut definition of terrorism be given as noted by the former President of Lebanon, Emile Lahoud, that '[i]t is not enough to declare war on what one

[12] See B Golder and G Williams, 'What is 'Terrorism'? Problem of Legal Definition', (2004) 27(2) UNSW Law Journal, p. 270. See also J Weinberger, 'Defining Terror', (2003) 4 Seton Hall J. Dipl. & Int'l Rel., p. 63

[13] E Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism', (2003) 97 AJIL, p. 334

deems terrorism without giving a precise and exact definition.'[14] One begins to wonder whether it is sufficient, particularly at this era of political sensitivity, to generalise the definition of terrorism to cover '[w]hat looks, smells and kills like terrorism is terrorism.'[15] Definitely not, for such generalisation will be too far-reaching. The fact remains that once an act is not terrorism, it can never be terrorism.

Then, what is terrorism? No wonder, 'terrorism' has been viewed as a 'chameleon-like' in character[16] due to it adaptability to different definitions to the extent that any effort made in the direction of comprehending the definition of terrorism has been likened to a 'quest for the Holy Grail.'[17] Thus, Bassiouni appears to be correct in his estimation when he said that 'the pervasive and indiscriminate use of the often politically convenient label of 'terrorism' continues to mislead this field of inquiry.'[18]

Under international law, terrorism is perceived as a crime which precipitates serious violations of individual and collective rights.[19] Such activities as armed assault on civilians, indiscriminate bombings, kidnapping, focused

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[14] *Beruit Wants Terrorism Defined*, ALJAZEERA, Jan. 13, 2004, available at http://english.aljazeera.net/NR/exeres/854F5DE3-FC2D-4059-8907-7954937F4B6C.htm. [accessed February 10, 2012

[15] This was in a speech delivered by the former British Ambassador to the United Nations, Sir Jeremy Greenstock, following the pathetic incidence of September 11, 2001. See J Collins, 'Terrorism' in J Collins and R Glover (eds.), *Collateral Language: A User's Guide to America's New War,* (New York University Press, New York, 2002), Pp. 167 - 168

[16] A Roberts, 'Can We Define Terrorism?', (2002) 14 Oxford Today, p. 18

[17] G Levitt, 'Is "Terrorism" Worth Defining?', (1986) 13 Ohio N. U. L. Rev., p. 97

[18] MC Bassiouni, 'A Policy-Oriented Inquiry into the Different Forms and Manifestations of "International Terrorism"' in MC Bassiouni (ed.), op cit., p. xvi

[19] J Rehman, op cit., (2005), p. 71

assassination, hostage-taking and hijacking have been generally considered by the international community to be illegal and criminal in nature.[20] In spite of the proliferation of instruments both regionally and internationally condemning terrorism,[21] there is still no universally accepted definition of terrorism in international law.[22] The question of terrorism in international law, however, remains problematic and very much complicated. The complications do occur usually when it comes to the question of differentiating a terrorist from a freedom fighter.[23] Labelling someone or a particular group as terrorists appears to depend on 'political persuasion and nationalistic sentiments.'[24] After all, Usama Bin Laden was once considered a freedom fighter, with the support of the American CIA (Criminal Investigation Agency), when he was fighting against the Russian communist occupation in Afghanistan.[25] In the same way, Nobel Peace Prize laureates Yasser Arafat, Nelson Mandela and

[20] AP Schmid, 'Frameworks for Conceptualising Terrorism', (2004) 16:2, Terrorism and Political Violence, p. 197

[21] Some of these instruments are: The Convention for the Prevention and Punishment of Terrorism, 16 November 1937, 19 League of Nations Official Journal (1938), p. 23; 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft; 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; 1973 New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons; 1979 New York Convention Against the Taking of Hostages; 1997 International Convention for the Suppression of Terrorist Bombing; 1999 Convention on the Suppression of Financing of Terrorism; 1998 Arab Convention on the Suppression of Terrorism; 1999 Organisation of African Unity Convention on the Prevention and Combating of Terrorism; 1971 OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance; 1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism; 1977 European Convention on the Suppression of Terrorism; and 1987 South Asian Association for Regional Cooperation's Regional Convention on the Suppression of Terrorism.

[22] M Williamson, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* (Ashgate Publishing Limited, England, 2009), p. 49

[23] J Rehman, op cit., (2005), p. 73

[24] Ibid, 74

[25] PA Thomas, 'September 11th and Good Governance', (2002) 53 N. Ir. Legal Q., Pp. 385-386

Menachem Begin were, at different point in their careers, famously labelled as terrorists.[26]

Most African and Muslim States generally have always maintained that terrorism does not and cannot include those struggling against armed occupation and foreign aggression.[27] However, majority of the Western States including the United States and Israel, on the other hand, contend that 'state terrorism' cannot be included in the definition of terrorism.[28] These constitute a crucial point in arriving at a common universal definition of terrorism. Many scholars have, in their quest for a universal definition of terrorism, come to the conclusion that since States and regional organisations cannot be unanimous on the definition of terrorism, it would then be difficult to have or invoke a universal criminal jurisdiction on it.[29] In a recent article written in 1997, Higgins concludes that '[t]errorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.'[30] It therefore means that different countries will have to adopt different definitions of terrorism depending on

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[26] See H Gardener, *American Global Strategy and the 'War on Terror',* (Ashgate Publishing Limited, England, 2005), p. 74 See also O Elagab, *International Documents Relating to Terrorism,* (Cavendish Publishing Limited, London, 1995), p. iii

[27] G Levitt, op cit., (1986), p. 109

[28] R Higgins, 'The General International Law of Terrorism' in R Higgins & M Flory (eds.), *Terrorism and International Law,* (Routledge, London, 1997), p. 16

[29] R Baxter, op cit., 380; R Mushkat, ''Technical' Impediments on the Way to a Universal Definition of International Terrorism', (1980) 20 Indian Journal of International Law, Pp. 448-71; R Higgins, op cit., in R Higgins and M Flory (eds.), *Terrorism and International Law,* (Routldge, London and New York, 1997), Pp. 14-19

[30] R Higgins, 'The General International Law of Terrorism', in R Higgins and M Flory (eds.), *Terrorism and International Law,* (Routledge, London and New York, 1997), p. 28 See also J Lambert, *Terrorism and Hostages in International Law,* (Grotius Publications, Cambridge, 1990), p. 13

how it is perceived by individual countries. Needless to say too that international definition of terrorism will have to endure lack of a unanimous acceptance from the international community.[31]

However, for the purpose of this discussion which focuses on whether the principles of *jihaad* sanction the acts of terrorism particularly against internationally protected persons, we may not have to belabour the issue concerning the universal definition of terrorism. Rather, we may want to agree with the argument canvassed by the United States Government that '[c]onvening a conference to consider this question (i.e., the universal definition of terrorism) once again would likely result in a non-productive debate and would divert the United Nations attention and resources from efforts to develop effective, concrete measures against terrorism.'[32] It suffices, at least, that categories of acts that are identified and condemned by the international community as forming tha acts of terrorism are domestically criminalised with the intent to prosecute or extradite the perpetrators in cooperation and with the understanding of other States.

6.3 The Meaning and Legal Implication of Jihaad in Islamic Law

[31] JM Lutz and BJ Lutz, *Global Terrorism,* 2nd edn (Routledge, London & New York, 2008), p. 14

[32] United Nations General Assembly, *Measures to Eliminate International Terrorism,* The Secretary-General's Report, A/48/267/Add.I, 21 September, 1993, p. 2

'To equate Islam and Islamic fundamentalism uncritically with extremism is to judge Islam only by those who wreak havoc.'[33] The correctness of this statement becomes interestingly relevant in view of the prevailing misunderstanding surrounding the usage of the word "*Jihaad*" in a way that makes it appear as a synonym of terrorism.[34] That is why it may be correct to assume that in Islam, the concept of *jihaad* appears to be the most misinterpreted, misused, misunderstood and often quoted out of context. As one Western author writes, though erroneously that: 'By now most Westerners know that jihad is associated with violence and is synonymous with terrorism . . . it is a powerful religious concept and dictate and is used as justification for terrorism.'[35] There is need to mention, however, that this view does not portray the general opinion of commentators from the West, not even after the attacks of September 11, 2001 when the Western press and the public appeared to put the blame at the door-step of Islam and the Muslims.[36] Otherwise, it may amount to making sweeping generalisations about what terrorism and *jihaad* connote without availing oneself the benefit of a profound research. In addition, the concept of *jihaad* in Islamic legal

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[33] JL Esposito, 'Political Islam: Beyond the Green Menace' (originally published in the journal *Current History* January, 1994) available at http://islam.uga.edu/espo.html [accessed 11 March, 2012]

[34] NA Shah, op cit., (2008), p. 13

[35] M Cappi, *A Never Ending War,* (Trafford Publishing, Victoria, 2007), p. 138. David Bukay also claims that Islam and most especially Jihaad is the root cause of terrorism as '[a]ll Muslims suicide bombers justify their actions' by referring to it. D Bukay, 'The Religious Foundations of Suicide Bombing: Islamist Ideology', (2006) XIII Middle East Quarterly, p. 27 [article online] available at http://www.meforum.org/1003/the-religious-foundations-of-suicide-bombings [accessed 14 March, 2012]

[36] SC King, *Living with Terrorism* (Authorhouse, Bloomington 2007), Pp. 70-71 Also, Robert Pape, a renowned authority on suicide terrorism, asserts that "suicide terrorism is mainly the product of foreign military occupation . . . It is not, as the conventional wisdom holds, mostly a product of religious extremism independent of political circumstances." RA Pape, 'Methods and Findings in the Study of Suicide Terrorism', (2008) 102 American Political Science Review, P. 275

system has been variously depicted to mean 'holy war' to the extent that, according to Mushkat,

> Islamic law enjoins Moslems to maintain a state of permanent belligerence with all non-believers, collectively encompassed in the *dar al-harb*, the domain of war. . . . The Moslems are, therefore, under a legal obligation to reduce non-Islamic communities to Islamic rule in order to achieve Islam's ultimate objective, namely the enforcement of God's law (the *Shari'a*) over the entire world. The instrument by which the Islamic state is to carry out that objective is called the *jihad* (popularly known as the "holy war") and is always just, if waged against the infidels and the enemies of the faith.[37]

The compatibility of Islamic law with the modern norm of international law has been a subject of deep controversy partly due to the scepticism surrounding the acceptance of the concept of *jihaad* owing to the pejorative connotations it has acquired particularly in the minds of most Westerners. A lot have been written on the concept of *jihaad* by classical and modern scholars of Islamic jurisprudence.[38] Meanwhile, there is the need to mention

[37] R Mushkat, 'Is War Ever Justifiable? A Comparative Survey', (1987) 9 Loyola L. A. Int'l & Comp. L. J., Pp. 302-303

[38] For instance, see: Abu al-Hasan al-Mawardi, *al-Ahkaam al-Sultaaniyyah wal-Wilayaat al-Diniyyah* (Dar al-Fikr Lil-Tiba'a wal-Nashr, Cairo, 1983), Pp. 32-58; Abu al-Walid Muhammad Ibn Rushd, *Bidaayat al-Mujtahid wa Nihaayat al-Muqtasid,* 2 vols. (Dar al-Ma'rifa, Beirut, 1986), Pp. 380-407; Abu Ya'la al-Farraa', *al-Ahkaam al-Sultaaniyyah,* (Matba'at Mustafaa al-Baabi al-Halabi, Cairo, 1938), Pp. 23-44; 'Alaa al-Din al-Kaasaani, *Kitaab Badaa'i al-Sanaa'i fi Tartib al-Sharaa'i,* 7 vols. (al-Matba'a al-Jamaaliyyah, Cairo, 1910), Pp. 7:97-142

that the term '*Jihaad'* is not in any way identical with the phrase 'holy war' or analogous to the concept of crusade as understood in the Western Christendom.[39] This, perhaps, explains why Peters was swift in rebutting the allegation of Khadduri that 'the jihad was equivalent to the Christian concept of the crusade'[40] when he asserts that the ''Holy War' is thus, strictly speaking, a wrong translation of *jihad,* and the reason why it is nevertheless used here is that the term has become current in Western literature.'[41] Moreover, '*Harb al-Muqaddasah*' which is the Arabic equivalent of the English phrase, '*Holy War*' is not mentioned anywhere in the Qur'an or the authentic traditions of the Prophet Muhammad (pbuh).[42] *Jihaad,* in a literal sense, is an Arabic expression derived from the verb *jahada* which, means to strive or exert oneself in doing things to the best of one's ability.'[43] It shares a similar origin with the term *ijtihaad* which refers 'to the exertion of intellectual effort in order to develop an informed opinion on a new issue or problem.'[44] Basically, the concept of *jihaad* signifies self-exertion and peaceful persuasion for the sake of God in contradistinction to violence or aggression.[45] While in the legal context, it means to 'struggle for the cause of God by all means,

[39] See HM Zawati, op cit., (2001), p. 13
[40] M Khadduri, op cit., (1966), p. 15
[41] R Peters, *Jihad in Mediaeval and Modern Islam,* (E. J. Brill, Leiden, The Netherlands, 1977) p. 4
[42] J Badawi,'Muslim/Non-Muslim Relations: An Integrative Approach', (2003) 8 J. Islamic L. & Culture, P. 38
[43] Ibid. See also HM Zawati, op cit., (2001), Pp. 13-14; S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p. 280; NA Shah, op cit., (2008), p. 14; J Rehman, 'Islamic Criminal Justice and International Terrorism: A Comparative Perspective into Modern Islamic State Practices', (2006) 2 J. Islamic St. Prac. Int'l L., p. 21; N Mohammad, 'The Doctrine of Jihad: An Introduction', (1985) 3 Journal of Law and Religion, p. 385; DA Schwartz, op cit., (1991), Pp. 641-642
[44] J Badawi, op cit., (2003), p. 39 See also P Ahmed, 'Terror in the Name of Islam-Unholy War, Not Jihad', (2007/2008) 39 Case Western Reserve Journal of International Law, p. 769
[45] J Rehman, op cit., (2006), p. 19

including speech, life and property.'[46] According to al-Kaasaani, 'jihad is used in expending ability and power in struggling in the path of *Allah* by means of life, property, words and more'[47] just as it has been expressly stated in the Qur'an that:

> O you who have believed, shall I guide you to a transaction that will save you from a painful punishment? [It is that] you believe in Allah and His Messenger and strive in the cause of Allah with your wealth and your lives. That is best for you, if you only knew.[48]

In a more general context, *jihaad* has been further defined Professor Esposito as:

> the obligation incumbent on all Muslims, individuals, and the community to follow and realize God's will: to lead a virtuous life and to spread Islam through preaching, education, example, and writing. Jihad also includes the right, indeed the obligation, to defend Islam and the Muslim community from aggression.[49]

Shah, in his explanation of the kinds of *jihaad*, views the concept of *jihaad* from two main perspectives: the internal *jihaad* and the external *jihaad*. He

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[46] S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p. 280
[47] Al-Kaasaani, op cit., vol. 7, p. 97
[48] Qur'an 61: 10-11
[49] JL Esposito, op cit. in L Richardson (ed.), *The Roots of Terrorism* (Routledge, Oxon, 2006), p. 149

stresses that the internal *jihaad*, which is a process of self-purification, 'is a search for self-satisfaction by winning the pleasure and blessing of God'.[50] While on the other hand, he considers external *jihaad* as a 'search for self-protection in several ways, including self-defense, self-determination, and the search for how to remove obstructions hindering self-protection.'[51] In essence, *jihaad* could be sum-up as a search for self- satisfaction and self-protection.[52] According to Khaddduri, he identifies four ways by which *jihaad* obligation may be fulfilled by a Muslim namely: by his heart; his tongue; his hands; and by the swords.[53] Also, the outward and inward aspects of *jihaad*, according to Ahmed,[54] have been illustrated with reference to a statement attributed to Prophet Muhammad (pbuh) when his companions were returning from a military campaign that: 'We have returned from the lesser jihad (*al-jihaad al asghar*- the physical fight against injustice) to the greater jihad (*al-jihaad al akbar*-the struggle against evil with oneself).' When asked: 'What is the great jihad?' He [Prophet Muhammad] replied: 'The jihad against the soul.'[55] The authenticity of this statement is, however, subject to vigorous debate particularly among the Sunni scholars.[56] *Jihaad*, therefore, came to be

[50]NA Shah, op cit., (2008), p. 14
[51] Ibid
[52] Ibid. See also DE Arzt, 'The Role of Compulsion in Islamic Conversion: Jihad, Dhimma and Ridda', (2002) 8 Buff. Hum. Rts. L. Rev., p. 20
[53] M Khadduri, op cit., (1955), p. 56
[54] P Ahmed, op cit., (2007-2008), p. 770
[55] See Ali b. Uthman al-Jullabi al-Hujwiri, *The Kashf al-Mahjub, (the Oldest Persian Treatise on Sufism by al-Hujwiri)* trans. RA Nicholson, (Luzac, London, 1976), p. 200. Also cited in AA An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse University Press, New York, 1990), p. 145; P Ahmed, op cit., (2007-2008), p. 770.
[56] 'Azzam vehemently criticised this narration 'which people quote on the basis that it is a hadith, is in fact a false, fabricated hadith that has no basis. It is only a saying of Ibrahim Ibn Abi 'Abalah, one of the Successors, and it contradicts textual evidence and reality.' He also quoted Ibn Taymiyyah as saying that: 'This hadith has no sources and nobody whomsoever

seen from three different positions: a) personal *jihaad,* which is also known as *jihaadun-nafs* – to strive towards emancipating oneself from all kinds of evil plots; b) verbal *jihaad* - to stand firmly and speak the truth in the face of injustice just as Prophet Muhammad (pbuh) was reported to have said that 'the best form of jihad is to speak the truth in the face of an oppressive ruler;'[57] and c) physical *jihaad* – to engage in physical force against oppression and transgression.[58] Thus, the use of force or what has been termed 'physical force' only forms an aspect of what is called *jihaad*'. Meaning that *jihaad* as a whole cannot be a synonym of violence. But then, can one really say whether this aspect of *jihaad*, in other words, the use of force, is purposely enjoined on Muslims in self-defense against persecution and aggression or for the purpose of launching offensive wars against the non-Muslims in the name of proselytisation? In answering this question, we may have to consider whether *jihaad* is indeed a defensive or an offensive war.

6.3.1 Jihaad as a Defensive War

Islamic law enjoins the Muslims to embark on the use of force as self-defense to repel all forms of aggression and oppression against the Muslim

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in the field of Islamic knowledge has narrated it.' See A 'Azzam, *Ilhaq bil Qalifah – Join the Caravan,* (1988), Pp. 26-27 available at http://www.hoor-al-ayn.com/Books/Join%20the%20Caravan.pdf [accessed 26 March, 2012]. See DE Streusand, 'What Does Jihad Mean?', (1997) IV:3 Middle East Quarterly, Pp. 9-17 available on line at http://www.meforum.org/357/what-does-jihad-mean?iframe=true&width=100%&height=100% [accessed 26 March, 2012]; A McGregor, '"Jihad and the Riffle Alone": 'Abdullah 'Azzam and the Islamic Revolution', (2003) 23:2, Journal of Conflict Studies also available at http://journals.hil.unb.ca/index.php/JCS/article/viewArticle/219/377 [accessed 26 March, 2012].

[57] Cited in AA An-Na'im, op cit., (1990), p. 145 quoting from Al-Kaya Al-Harasiy, *Ahkam al-Qur'an*, (Al-Maktaba al-'Ilmiya, Beirut, 1983)

[58] P Ahmed, op cit., (2007-2008), p. 770

community. This assertion is supported by array of Qur'anic verses coupled with historical facts. It may be argued that, in Islam, the general rule is to maintain and spread peace, while war, which is an aberration, will only be resorted to in exceptional and unavoidable conditions.[59] This argument comports with the ideological rationale behind the concept of *jihaad* which are, as stated by Ibn Taymiyyah, 'to defend Muslims against real or anticipated attacks; to guarantee and extend freedom of belief; and to defend the mission of Islam.'[60] In other words, war, according to Islamic law, will only be allowed if the sole objective is to protect the Islamic faith and to preserve the lives of the Muslims.

There are some earliest Quranic verses that were revealed to Prophet Muhammad (pbuh) shortly after his emigration (*hijrah*)[61] to Madinah emphasising the condition under which *jihaad* could be fought.[62] At that time, Madinah, being the first Islamic community to be established, was persistently under the fear of invasion from the non-Muslims.[63] These Qur'anic verses marked the genesis of armed struggle in Islam, 'with the express purpose to defend the religious belief of the Muslims and to avoid extermination at the

[59] See HM Zawati, op cit., (2001), p. 12; SS Ali and J Rehman, 'The Concept of Jihad in Islamic International Law', (2005) 10 Journal of Conflict & Security Law, p. 331
[60] Shams al-Islam Ahmad Ibn Taymiyyah, 'Qaa'ida fi Qitaal al-Kuffaar', in Muhammad Haamidal-Faqi, *Majmu'at Rasaa'il Ibn Taymiyyah,* (Matba'at al-Sunnah al-Muhammadiyyah, Cairo, 1949), Pp. 116-117
[61] That was on September 9, 622 AD when Prophet Muhammad and his followers migrated from Makkah to Madinah in order to escape from the Makkans persecution.
[62] JL Esposito, *What Everyone Needs to Know About Islam,* (OUP, Oxford, 2002), p. 120
[63] SS Ali and J Rehman, op cit.,(2005), Pp. 331-332

hands of the then dominant group [the idolatrous Arabs].'[64] It was revealed to Prophet Muhammad (pbuh) that:

> Permission [to fight] has been given to those who are being fought, because they were wronged. And indeed, Allah is competent to give them victory. [They are] those who have been evicted from their homes without right - only because they say, "Our Lord is Allah." And were it not that Allah checks the people, some by means of others, there would have been demolished monasteries, churches, synagogues, and mosques in which the name of Allah is much mentioned. And Allah will surely support those who support Him. Indeed, Allah is Powerful and Exalted in Might.[65]

The verses clearly indicate that for one to engage in *jihaad,* either individually or collectively, it must be for the purpose of redressing a wrong and in defense of the community.[66] Notable defensive *jihaads* in the more recent time include the Afghan resistance against the Russian invasion in 1979 and the Palestinian struggle against Israel.[67] The defensive nature of *jihaad* is further contextualised in another verse of the Qur'an which says:

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[64] Ibid., p. 332
[65] Qur'an 22:39-40
[66] AL Silverman, 'Just War, Jihad, and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence', (2002) 44 J. Church & St., p. 78
[67] SC Tucker (ed.), *The Encyclopaedia of Middle East Wars: The United State in the Persian Gulf, Afghanistan, and Iraq Conflicts,* vol. 1(ABC-CLIO Ltd., 2010), p. 653

> Fight in the way of Allah those who fight you but do not transgress. Indeed. Allah does not like transgressors.[68]

According to the Qur'anic commentary of Ibn Katheer (d. 1373),[69] these verses, that is Qur'an 22:39-40 and 2:190 are the first Qur'anic injunction authorising the use of physical force against the unbelievers.[70] The instruction to 'fight in the way of Allah' is not based on the non-acceptance of Islam, as 'there shall be no compulsion in [acceptance of] the religion,'[71] but rather it is purely based on the continuation of aggression and oppression. According to Badawi, he asserts that there is '[n]o single verse in the Qur'an, when placed in its proper textual and historical context, permits fighting others on the basis of their faith, ethnicity or nationality. To do so, contravene several established values and principles'[72] in the Islamic jurisprudence. Once the enemies desist from their hostile and aggressive pursuit, and opted for peace, the Muslims are also expected to immediately bring their *jihaad* to an end and embrace peace.[73] Just as it is stated in the Qur'an that: 'And if they incline to peace, then incline to it [also] and rely upon Allah. Indeed, it is He who is the Hearing, the Knowing.'[74] This verse and other similar verses of the Qur'an confirm the peaceful relationship that could exist and does exist between the

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[68] Qur'an 2:190
[69] His full name was Abu Al-Fidaa' Isma'il ibn Katheer. He was the author of the famous commentary on the Qur'an named 'Tafseer al-Qur'an al-'Azeem'
[70] Abu Fidaa' Isma'il ibn Katheer, *Tafseer al-Qur'an al-'Azeem,* Vols. 1&2 (Dar al-Marefah, Beirut, 1995), Pp. 233 & 235 respectively.
[71] Qur'an 2:256
[72] J Badawi, op cit., (2003), p. 40
[73] NA Shah, op cit., (2008), p. 17
[74] Quran 8:61

Muslims and the non-Muslims contrary to the view of some scholars who argue that 'in theory *dar al-Islam* was in state of war [permanently] with the *dar al-harb*.'[75] One may want to doubt the exactitude of this statement in view of the Qur'anic verse that states that:

> Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes - from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly.[76]

Jihaad, in the opinion of Mahmassani, is seen from an Islamic point of view as 'a defensive measure, on ground of extreme necessity, namely to protect the freedom of religion, to repel aggression, to prevent injustice and to protect social order.'

6.3.2 Can Jihaad be Offensive?

There are some Islamic scholars who contend that although the Islamic faith has to be spread peacefully, but where there are any impediments militating against the peaceful spread of Islam, then, violence or force will have to be resorted to.[77]

[75] M Khadduri, op cit., (1966), p. 13
[76] Qur'an 60:8
[77] NA Shah, op cit., (2008), p. 15

They tend to provide justification for offensive *jihaad* in Islam. In canvassing their argument, they often refer to some verses of the Qur'an that are known as the 'sword verses', claiming that these verses have abrogated the earlier Qur'anic verses (Qur'an 22:39-40 and 2:190), known as the 'peace verses' that establish the defensive nature of the Islamic *jihaad*.[78] As such, they allege that the 'sword verses' legitimise absolute offensive war against the unbelievers. For instance, Quran 9:5 says:

> And when the inviolable months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush.[79]

This verse should not and cannot be read in isolation. In fact, it should be read together with the previous and subsequent verses, that is Quran 9:1-15, in order to fully understand the textual and historical context inherent in the verse. Those verses including Qur'an 9:5 were revealed as a result of the Makkans breach of the *treaty of Hudaybiyyah* when the Banu Bakr, a tribe that was an ally to the Makkans, attacked the Banu Khuza'ah, a tribe that was in alliance with the Muslims.[80] Surprisingly, the Makkans had to surrender to the Muslims without fighting, thereby rendering the application of these verses unnecessary. Moreover, if one thoroughly considers the "sword verse" and the "peace verses", one would see that the "sword verse" appears to be

[78] JL Esposito, op cit., (2002), p. 121
[79] Qur'an 9:5
[80] M Munir, op cit., (2003) p. 375

absolute (*mutlaq*) while the "peace verses" are qualified (*muqayyad*).[81] The "peace verses" are qualified in the sense that they provide specific reasons for declaring *jihaad* against the polytheists, while the sword verse does not provide any reason for waging war. Since the "peace verses" and the "sword verse" convey the same ruling, which is the declaration of war, and the same subjects, according to the Muslim jurists, the conditions in the "peace verses" will automatically apply to the "sword verse".[82] This takes away the question of the "sword verse" abrogating the "peace verses".

Moreover, the contention of Abdur-Rahman bin Zayd bin Aslam that Qur'an 9:5 has abrogated the peace verses was considered 'not plausible' by Ibn Katheer[83] because Allah has specifically instructed the Muslims to 'fight against the disbelievers collectively as they fight against you collectively.'[84] Meaning that, in the words of Ibn Katheer, '[y]our [the Muslims] energy should be spent on fighting them [the polytheists], just as their energy is spent on fighting you, and on expelling them from the areas from which they have expelled you, as a law of equality in punishment.'[85] Esposito has rightly made a concluding remark while explaining the essence of Qur'an 9:5 that '[a]lthough this verse has been used to justify offensive jihad, it has traditionally be read as a call for peaceful relations unless there is interference

[81] See M Munir, op cit., p. 378 who also cited W Zuhayli, *Al-'Alaqaat Al-Dawliyyah fi Al-Islaam* (1984), p. 94
[82] MH Kamali, op cit., (1991), p. 111
[83] Abu Al-Fidaa' Isma'il Ibn Katheer, *Tafseer Al-Qur'an Al-'Azeem* Vol 1 (Dar Al-Ma'rifah, Beirut, Lebanon, 1995), p. 233
[84] Qur'an 9:36
[85] Abu Al-Fidaa' Isma'il Ibn Katheer, op cit., p. 233

with the freedom of Muslims.'[86] In a similar way, Sayyid Qutb, an Egyptian scholar, was very clear in his condemnation of those who erroneously interpret Qur'an 9:5 to mean an outright extermination of the unbelievers when he says that: 'Some people may feel differently, taking the order to mean that when the truce was over, the Muslims were meant to kill all unbelievers. They may quote in support of their view the next verse which states: '*When these months of grace are over, slay the idolators wherever you find them.'* (Verse 5) But this view is wrong.'[87] Obviously, the reasons for enmity between the Muslims and the polytheists were not as a result of their different beliefs, but rather due to the Makkans hostility, persecution and aggression towards the Muslims.[88]

Those who argue in support of the offensive *jihaad* theory also refer to Qur'an 9:29 to buttress their argument thus:

> Fight against those who do not believe in Allah or in the Last Day and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth [i.e., Islam] from those who were given the Scripture . . .[89]

[86] JL Esposito, op cit., (2002), p. 35
[87] Sayyid Qutb, *In the Shade of the Qur'an* Vol. VIII Surah 9 available at http://archive.org/details/InTheShadeOfTheQuranSayyidQutb [accessed 05 April, 2013]
[88] A Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, New York, 2011), p. 48
[89] Qur'an 9:29

The understanding of some Muslim scholars about this verse is that it has outrightly abrogated all the peace verses in the Qur'an; as such, it marks the final stage of Muslim-non-Muslim relations.[90] They interpreted the verse in a way that envisages a permanent and universal warfare to extinguish, through the use of offensive force, if possible, all forces of immorality and unbelief.[91] Apparently, the reasons for the revelation of Qur'an 9:29 were not, in any way, obscure. In the summer of 630 AD there was information that the Byzantine Empire, which was predominantly Christian, was getting prepared to launch an offensive attack on the Muslims. As expected, Prophet Muhammad (pbuh) set out with about 30 men with intention of stopping, in a defensive approach, the Roman soldiers from reaching Madinah.[92] On reaching Tabuk, when it was discovered that the Christian forces had already withdrawn, the Muslim forces rather than going after them, they had to retreat back to Madinah, as the expedition was not an offensive battle.[93] From the Qur'anic context, war or the use of force is only permissible in Islam for the purpose of self-defense. It will be wrong to take Qur'an 9:29 out of its specific historical context as if it has general application under Islamic law.[94] Shah rightly concludes that:

[90] See S Qutb, *Fi Zilaal al_Qur'an,* vol. 3, (Daar al-Shuruq, Cairo, 1417/1996), Pp. 1619-1650
[91] O Bakircioglu, 'A Socio-Legal Analysis of the Concept of Jihad' (2010) 59(2), International & Comparative Law Quarterly, p. 432
[92] See Ibid, p. 65. See also Abu Al-Fidaa' Isma'il Ibn Katheer, op cit., Vol 2, Pp. 360 - 361; HA Adil, *Muhammad, the Messenger of Islam: His Life and Prophecy* (Islamic Supreme Council of America, Washington, 2002), Pp. 533-537
[93] M Munir, op cit., (2003), p. 378
[94] NA Shah, op cit., (2008), p. 20

> For Muslims, it is irrelevant whether these hostile groups were Christians, Jews, or Pagans. The Prophet Muhammad fought his own tribe, Quraish, as it threatened and attempted, during the battle of Badr, to conquer Madina where Prophet Muhammad had migrated. Keeping in view the Koranic and historic contexts, the most probable interpretation is that verse 9:29 addresses those unbelievers who either were aggressors or there was a well founded fear that they would attack Muslims.[95]

While discussing the 'sword verses' that command the Muslims to fight against the non-Muslims, it has been argued that such verses cannot be interpreted to mean an indiscriminate military *jihaad* against all non-Muslims. Rather, the 'sword verses' are meant for non-Muslims who attacked or threatened to attack the Muslim community since 'wars of aggression in general, and terrorism in particular, are diametrically opposed to the very idea of the Qur'an.'[96] This statement has been reverberated by Sachedina that 'it is not unbelievers as such who are the object of force, but unbelievers who demonstrate their hostility to Islam by, for example, persecution of the Muslims.'[97] In addition, the Qur'an states that:

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[95] Ibid
[96] O Bakircioglu, op cit., (2010), p. 427
[97] AA Sachedina, 'The Development of *Jihad* in Islamic Revelation and History,' in JT Johnson and J Kelsay (eds.), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood, New York, 1990), P. 43

> Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes - from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly.[98]

The *jihaad*, according to the Sunni jurists, is generally considered as a collective duty (*fard Kifaaya*), which, if carried out by a sufficient number of Muslims, the remaining Muslims who do not participate in it will not be held accountable.[99] If the generality of the Muslims refuse to embark on the *jihaad*, when it becomes necessary, they will be considered as sinners, with the exception of women, children, disable and elderly people.[100] This view is supported by a Qur'anic verse that says:

> And it is not for the believers to go forth [to battle] all at once. For there should separate from every division of them a group [remaining] to obtain understanding in the religion and warn [i.e., advise] their people when they return to them that they might be cautious.[101]

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[98] Qur'an 60:8
[99] HM Zawati, op cit., (2001), p. 15; S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p. 281; RH Salmi et al, *Islam and Conflict Resolution: Theories and Practices,* (University Press of America, Maryland, 1998), p. 71
[100] R Peters, *Jihad in Classical and Modern Islam,* (Markus Weiner Publishers, Princeton, N.J., 1996), p. 3
[101] Qur'an 9:122

Jihaad may also become an individual duty *(fard 'ayn*) when there is an attack on the Muslim territory which makes it a duty on all the inhabitants of the attacked territory, without an exception, to fight against such occupation.[102] The Muslim jurists have cited the Qur'anic verse which says: 'Go forth, whether light or heavy, and strive with your wealth and your lives in the cause of Allah. That is better for you, if you only knew'[103] to buttress this statement.[104]

Having stated the two instances that may warrant the use of force based on the Islamic principles of *jihaad*, the next questions that need to be answered are: who declares the call for *jihaad*, is it the public or the government? What are the pre-conditions that must be fulfilled before the public could exercise their right to declare the call for *jihaad*? These questions have become necessary in view of the multiple attacks, in the form of suicide missions; killings; injuries; arsons; and kidnapping, being perpetrated particularly against diplomats and diplomatic facilities of non-Muslim countries and their allies from the Muslim countries. These attacks, which, in most cases, have been unleashed in the name of *jihaad*, have often been declared by non-state individuals or organisations. These are the issues to be considered in the preceding section.

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[102] Abu 'Abd Allah Muhammad al-Qurtubi, *al-Jami',li Ahkaam al-Qur'an,* 20 vols. (Dar al-Kutub al-'Ilmiyyah, Beirut, 1988), 8:186; al-Kaasaani, op cit., p. 98 were cited in HM Zawati, op cit., p. 15. Also see ; RH Salmi et al, op cit., (1998), p. 71

[103] Qur'an 9:41

[104] See the explanation given in respect of Qur'an 9:41 in Abu Al-Fidaa' Isma'il Ibn Katheer, op cit., Vol 2, Pp. 373-374

6.3.3. Who Declares the Call for Jihaad?

When it becomes necessary to resort to physical *jihaad* or the use of force in self-defence either due to an actual invasion or a threat of aggression on the Muslim territory, there has to be a declaration of *jihaad*. Both the classical and modern jurists are unanimous that the decision to initiate war according to Islamic jurisprudence must be taken by the legitimate authority.[105] Basically, at the earliest time in Islam, the sole legitimate authority that must declare the commencement of *jihaad* was Prophet Muhammad (pbuh) who, according to the Qur'an, was commanded to 'urge the believers to battle.'[106] The responsibility of initiating *jihaad* was placed upon Prophet Muhammad (pbuh), perhaps, due the fact that *jihaad* was then, just as it is now 'an issue of public safety.'[107] The Muslims have been advised to refer all issues concerning public safety to Prophet Muhammad (pbuh) or to those in position of authority amongst them. The Qur'an states that: 'And when there comes to them information about [public] security or fear, they spread it around. But if they had referred it back to the Messenger or to those of authority among them, then the ones who [can] draw correct conclusions from it would have known about it.'[108]

Following the demise of Prophet Muhammad (pbuh), the power to declare *jihaad* devolved upon the Imam or Caliph,[109] being the head of the Muslim

[105] A Al-Dawoody, op cit., (2011), p. 76
[106] Qur'an 8:65
[107] NA Shah, op cit., (2008), p. 22
[108] Qur'an 4:83
[109] Qur'an 4:59 says 'O you who have believed, obey Allah and obey the Messenger and those in authority among you.'

polity.[110] It is not for the individual Muslims or an organisation(s), not even the *'ulama* (Islamic jurists) to declare *jihaad* without the definite directive of the Caliph or the Islamic head of state.[111] In fact, it is an act of disobedience, according to the *Shari'ah*, to initiate *jihaad* without the authorisation of the Caliph or the head of the Muslim polity.[112] Abu Yusuf was very clear on this point when he says that 'no army marches without the permission of the Imam.'[113] Ibn Qudamah (d. 1223 AD),[114] a renowned Hanbali scholar, expresses the need for a Muslim leadership before the commencement of *jihaad* thus:

> Declaring Jihad is the responsibility of the Ruler and consists of his independent legal judgment. It is the duty of the citizens to obey whatever the Ruler regards appropriate.[115]

It was further stated by al-Jaza'iri that for *jihaad* to remain valid it must be:

> A pure intention that it is performed behind a Muslim Ruler and beneath his flag and with his permission . . . And it is not allowed

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[110] See N Muhammad, op cit., (1985), p. 390; NA Shah, op cit., (2008), p. 21-22; HM Zawati, op cit., (2001), p. 14; A Mikaberidze, *Conflict and Conquest in the Islamic World: A Historical Encyclopedia* (ABC-CLO, LLC, California, 2011), p. 827; NJ DeLong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad,* (I. B. Tauris & Co. Ltd., London, 2007), p. 203

[111] Shaykh MH Kabbani, 'Jihad in Islam' in Vincent J. Cornell (ed.), *Voices of Islam: Voices of the spirit* vol. 2(Praeger Publishers, Westport, 2007), p. 219

[112] S Saleem, 'No Jihad without a State', *Renaissance Monthly*, December 1999

[113] Abu Yusuf Ya'qub Ibn Ibraahim, *Kitaab al-Kharaaj,* (Daar al-Hadaatha, Beirut, 1990), p. 349

[114] His full name was Mawaffaq ad-Deen 'Abdullah ibn Ahmad ibn Qudamah al-Maqdisi and he was born in Palestine in the year 1147 AD.

[115] See Ibn Qudamah, *Al-Mughni,* vol. 9, p. 184

> for Muslims to fight without a Ruler because Allah says: "O ye who believe! Obey God, and obey the Messenger, and those charged with authority among you" (Qur'an 4:59).[116]

Similarly, the *Shi'ite* jurists hold a slightly different view from the *Sunni* jurists by saying that the call to *jihaad* can only be proclaimed by a rightful Imam in his capacity as a divinely appointed leader of the community.[117] Hence, since according to the *Shi'a* doctrine, the twelfth Imam who has disappeared, otherwise known as "the Hidden Imam", since 874 AD will only surface at the approach of the Last Day, it therefore means that combative *jihaad* has to continuously remain in abeyance.[118] However, they are of the opinion that in view of the absence of the Imam, the only *jihaad* that could be embarked upon has to be defensive.[119] This view, according to the opinion of some *Shi'ite* jurists is resolvable in that all legitimate forms of *jihaad* were defensive and therefore can be waged, even in the absence of the Imam.[120]

There are, of course, exceptional situations that may warrant or necessitate the declaration of *jihaad* by non-State actors (individuals or group of individuals) notwithstanding the existence of an Islamic head of State. Once

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[116] Abubakr Jaabir Al-Jazaa'iri, *Minhaj Al-Muslim*, (Maktabah Al-'Uluum Wal-Hukm, Al-Madinah Al-Munawarah, 1995), p. 292. See also, Abu'l-Hasan 'Ali Al-Mawardi, *Al-Ahkaam Al-Sultaniyyah*, 1st edn., (Daaral-Kitab Al-'Arabi, Beirut, 1990), p. 52

[117] SM Gieling, *Religion and War in Revolutionary Iran,* (I. B. Tauris & Co. Ltd., London, 1999), p. 42

[118] See JO Pearson 'Islam, Christianity and the Crusade: Rival Monotheism and Monotheistic Rivals' in John Wolffe (ed.), *Religion in History: Conflict, Conversion And Coexistence* (Manchester University Press, Manchester, 2004), p. 55. See also M Khadduri, op cit., (1955), Pp. 66-67; MG Knapp, 'The Concept and Practice of Jihad in Islam', (2003) 33:1, Parameters, U.S. War College Quarterly, p. 86

[119] JL Esposito, op cit., (2002), p. 39

[120] Ibid

there is a physical attack on a Muslim land and the Muslim leader or the Islamic head of state appears to be incapable or refuses to declare a defensive *jihaad* to protect the lives and properties of the Muslims, then the Muslims in that country will have to take up the responsibility of initiating a defensive *jihaad*.[121] The recent Afghanistan war against the Russian occupation of their land in 1979 serve as a typical example of a defensive *jihaad* declared not by the Muslim ruler, but by the consensus of Afghan Muslim religious leaders.[122] It was a *jihaad* that drew Muslims from around the world and from all works of life migrating into Afghanistan with the intention of defending 'their coreligionists and the faith and to resist aggression against the dar al-Islam (House of Islam).'[123] The defensive *jihaad* embarked upon by the Afghans, which was a kind of collective and self-defensive war against the Russian invasion, was said to be compatible with Article 51 of the Charter of the United Nations[124] which provides that: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.'[125]

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[121] See SH Hashmi, '9/11 and the Jihad Tradition' in DJ Sherman and T Nardin (eds.), *Terror, Culture, Politics: Rethinking 9/11* (Indiana University Press, Bloomington, 2006); NA Shah, op cit., p. 23

[122] NA Shah, op cit., (2008), p. 23; M Sageman, *Understanding Terror Network,* (University of Pennsylvania, 2004), p. 2; R Edward and S Zuhur, 'Jihad' in Spencer C. Tucker (ed.), The Encyclopedia of Middle East Wars: The United States in the Persian Gulf, Afghanistan, and Iraq Conflicts, vol. 1 (ABC-CLIO, LLC, California, 2010), p. 653

[123] FA Gerges, *The Far Enemy: Why Jihad Went Global* (CUP, Cambridge, 2005), p. 80

[124] NA Shah, op cit., (2008), p.23

[125] *Charter of the United Nations and Statute of the International Court of Justice*, (San Francisco, 1945), Pp. 10-11. Also available online: http://treaties.un.org/doc/Publication/CTC/uncharter.pdf [accessed 22 April, 2012]

Can individual or an organisation declare *jihaad* against other nation(s) relying on the exceptional situations given above as justification for such declaration, even though there was no actual physical attack from invader(s)? It is very much doubtful if such a declaration can ever be legitimate in Islamic law. This is because, as stated earlier, there must be an actual physical attack on the Muslim State from a non-Muslim State. In addition, the Muslim ruler must be unwilling to mount a defensive attack against the invading state. Not until then, the declaration of *jihaad* will remain the prerogative of the Islamic head of State. Reference will, for instance, be made to the two declarations of *jihaad* made by Al-Qaeda[126] in 1996[127] and 1998.[128] Usama bin Laden,[129] who was the leader of Al-Qaeda, issued out *jihaad* declarations both in 1996 and 1998 calling on all Muslims of the world 'to kill the Americans and their allies, civilians and military.'[130] The 1998 declaration further stresses that it 'is an individual duty of every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [in Jerusalem] and

[126] Al-Qaeda is generally known as an international terrorist network led and established by Usama bin Laden in 1988. See http://www.globalsecurity.org/military/world/para/al-qaida.htm [accessed 22 April, 2012]

[127] This is a fatwa released by Usama bin Laden entitled 'Declaration of War against the American Occupying the Land of the Two Holy Places' first published in Al-Quds Al-Arabi, a London-based newspaper, in August, 1996 which was substantially the same as the 1998 declaration. See *PBS Newshour,* August, 1996 http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html [accessed 23 April, 2012]

[128] This is the 1998 *jihaad* declaration by Usama bin Laden and his associates entitled 'Jihad against Jews and Crusaders World Islamic Front Statement' [23 February 1998] available at http://www.fas.org/irp/world/para/docs/980223-fatwa.htm [accessed 23 April, 2012]. The Arabic language text of this document: *World Islamic Front for Jihad Against Jews and Crusaders: Initial "Fatwa" Statement* also available at http://www.library.cornell.edu/colldev/mideast/fatw2.htm [accessed 23 April, 2012]

[129] He was shot dead by the American forces on May 2, 2011 during a raid on his hitherto secret residence in Abbottabad, Pakistan. See *The Guardian,* Monday 2 May, 2011 http://www.guardian.co.uk/world/2011/may/02/osama-bin-laden-dead-obama [accessed 23 April, 2012]

[130] The 1998 *jihaad* declaration, see footnote 128

the Holy Mosque [in Mecca] from their grip and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim.'[131] Several verses of the Qur'an were cited in the 1996 and 1998 declarations wherein the Muslims were reminded of their duty to Allah and Islam concerning waging *jihaad* against the infidels.

Most attacks that were launched against diplomats and diplomatic missions were, for instance, most likely, inspired by these two declarations of *jihaad* by Al-Qaeda,[132] prominent among which were the two attacks on the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania both of which occurred on 7 August, 1998. Not less than 200 people lost their lives in the two attacks, leaving more than 1,000 people with severe injury.[133] The 1996 and 1998 declarations of *jihaad* made by Usama bin Laden in collaboration with leaders of extremist groups in Pakistan, Egypt and Bangladesh remain inconsistent with the classical traditions of the Islamic jurisprudence. In fact, Shah rightly concludes that:

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[131] Ibid

[132] A car bomb that was detonated outside the US Consulate in Karachi, Pakistan on 15 June, 2002 which killed 11 people was linked to Al-Qaeda terrorist network. See *The Telegram*, 15 June, 2002 available at: http://www.telegraph.co.uk/news/worldnews/asia/india/1397397/Karachi-car-bomb-kills-11-outside-US-consulate.html [accessed 23 April, 2012]. The double bombing of the British Consulate in Istanbul along with the HSBC Bank on 15 November, 2003 which left at least 27 people dead including top UK diplomat, Consul-General Roger Short, was also linked to Al-Qaeda. See *BBC News*, Thursday, 20 November, 2003 available at: http://news.bbc.co.uk/1/hi/world/europe/3222608.stm [accessed 23 April, 2012]

[133] See *BBC News,* 7 August, 1998 available online: http://news.bbc.co.uk/onthisday/hi/dates/stories/august/7/newsid_3131000/3131709.stm [accessed 23 April, 2012]

> The declarations of Al-Qaeda in 1996 and 1998 have no Koranic foundation on two counts: No Muslim state was under attack requiring declaration of jihad in self-defense, and there was no situation where a Muslim land was under attack and the ruler was on the side of the invader, justifying individual declaration of jihad.[134]

Jihaad, according to Islamic jurisprudence, is to be seen and used in the last resort as a defensive mechanism and not to be used for aggressive warfare. Moreover, since *jihaad*, according to Ibn Taymiyyah, is 'a defensive war against unbelievers whenever they threatened Islam,'[135] it therefore means that peace, if desired by the non-Muslims, should ordinarily characterise the normal and permanent interaction between the Muslims and the non-Muslims.

6.3.4 Civilians and Diplomatic Envoys during Jihaad

The Islamic *jihaad* is now being executed by groups and organisations purportedly fighting for Islam, such as Al-Qaeda, as if it is a war between Muslims and non-Muslims *simpliciter. Jihaad* is now being embarked upon by members of these notorious organisations as if the killing of civilians (Muslims and non-Muslims) and those with diplomatic immunity are legitimate targets. Undoubtedly, these are Muslim groups as they always make references to Islamic sources (the Qur'an and *Sunnah*) to justify their actions, but the truth is that their actions regarding the practice and conduct of *jihaad* clearly

[134] NA Shah, op cit., (2008), p. 58
[135] See MF Sharif, 'Jihad in Ibn Taymiyyah's Thought', Vol. 49:3 The Islamic Quarterly, Pp. 183-203

contradict the rules and norms in Islamic jurisprudence.[136] Perhaps, this explains why Al-Qaeda's violent activities, in the words of Ahmed, have been found to be unacceptable to the classical norms of Islamic *jihaad* on five major grounds:

i. Individual and organizations cannot declare a *jihad,* only states can officially declare wars.
ii. Even in war, one cannot kill innocent women and children.
iii. One cannot wage war against a country in which Muslims can freely practice their religion (i.e., the United States).
iv. Prominent Muslim jurists around the world have condemned bin Laden's ideology and tactics. Their condemnation forms a consensus, known in Islamic jurisprudence as *ijma*, which has authority only next to the divine injunctions.
v. The welfare and interest of the Muslim community, known in Islamic jurisprudence as *maslaha*, is harmed by bin Laden's actions. Thus, such actions are un-Islamic.[137]

Islamic law of armed conflict is clear when it comes to determining those who are the combatants (*ahl al-qitaal*) and the non-combatants (*ghayr ahl al-qitaal*). The combatants are those who are actively engaged in war or

[136] P Ahmed, op cit., (2007-2008), p. 772
[137] Ibid., Pp. 772-770

preparing to engage in war either as military officers or volunteers.[138] The non-combatants, on the other hand, are those who do not fight and are indifferent to the effects of war. This includes children particularly those below the age of fifteen,[139] women (provided she is not Queen of the enemy),[140] the very old, the monks, the sick and the disabled persons,[141] diplomats, peasants and merchants.[142] These categories of persons are protected under Islamic law from any kind of attack in times of war, unless they are found to have compromised their immunity by partaking in the fight or by providing assistance to the enemies.[143] Surprisingly, Ibn Taymiyyah (d.1328), whose legal pronouncements on the issue of *jihaad* have often been misinterpreted or quoted out of context by some radical Muslim groups, says that non-combatants who do not participate in the war efforts either by deeds or by words, such as 'women, children, the monk, old man, the blind and the chronically ill should not be killed according to the majority of the scholars.'[144] The immunity given to non-combatants is based on the Islamic law principle that 'everything is immune from attack unless it is explicitly permitted to be attacked.'[145] The immunity granted to those who are not directly engaged in active combat or providing any kind of assistance to the enemies is

[138] See Wahba al-Zuhayli, *Athar al-harb fi al-fiqh al-Islami: diraasa muqaarana* (Dar al-Fikr, Beirut, 1981), p. 503 cited in SH Hashmi, 'Saving and Taking Life in War: Three Modern Muslim Views', (1999) Vol. LXXXIX, No. 2 The Muslim World, p. 169
[139] S Mahmassani, *Al-Qanun wa al-'Alaqat al-Dawliyyah fi al-Islam* (Dar al-Ilm lil Malayin, Beirut, 1972), p. 239
[140] A Al-Dawoody, op cit., (2011)p. 113
[141] S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), p. 301
[142] See HM Zawati, op cit., (2001), p. 44
[143] S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), Pp. 302-303
[144] Ibn Taymiyyah, *Al-Siyasa al-Shari'yyah fi Islah Al-Ra'i wa Al-Ra'iyyah* edited by Ali b. Muhammad al-Imaran (Saudi Arabia, 2008), p. 158
[145] NA Shah, *Islamic Law and the Law of Armed Conflict,* (Routledge, Abingdon, 2011), p. 47

particularly authorised in various verses of the Qur'an and specific Prophetic instructions given to Muslim fighters. When the Qur'an, for instance, says 'Fight in the way of Allah those who fight you but do not transgress,'[146] that could also mean that the Muslims are restrained from fighting those who do not fight them, otherwise it could amount to transgression (*'i'tidaa'*).[147] In other words, going by the dictate of this verse, women, children, elderly, monks, sick and the disabled should not be targeted in the course of physical *jihaad*, in fact, they are to be protected.

Similarly, Prophet Muhammad (pbuh) was reported to have issued instruction to the Muslim fighters when they were dispatched against the advancing Byzantine force that:

> In avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infants at the breast or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruits-trees and touch not the palm.[148]

[146] Qur'an 2:190
[147] See M Munir, 'The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law', Pp. 6-7 available at: http://works.bepress.com/muhammad_munir/13 [accessed 28 April, 2012]
[148] See AH Quadri, *Islamic Jurisprudence in Modern World,* (Sh. Muhammad Ashraf Sons, Lahore, 1973), p. 278

There was another incidence where Prophet Muhammad (pbuh) saw a woman that was killed in the battle of Hunayn (630 AD) and upon inquiry he was informed that the woman was killed by one of his military commanders who claimed that he killed her because she struggled to get his sword off him in order to kill him. He (the Prophet) immediately warned him that never should a woman be killed in battle as they are incapable of fighting.[149]

The companions of Prophet Muhammad (pbuh) were relentless in adhering to his instructions regarding the protection of non-combatants in the conduct of *jihaad*. The instruction given by Abu Bakr bin Abi Qahafah (d. 634 AD) to Yazid bin Abi Sufyan (d. 640 AD) while he was the commander of the Muslim army that was to confront the Roman army in Syria was that: 'I prescribe ten commandments to you: do not kill a woman, a child, or an old man, do not cut down fruitful tress, do not destroy inhabited areas, do not slaughter any sheep, cow or camel except for food, do not burn date palms nor inundate them, do not embezzle, nor be guilty of cowardliness.'[150] The instructions given by Abu Bakr, were considered by Bosworth as 'humane precepts [that] served like a code of laws of war during the career Mohammedan conquest.'[151]

[149] See hadith 9383 in Abd al-Raziq ibn Hammam al-Sana'ani, *Al-Musannf,* 2nd edn., Vol. 5 (Al-Maktab al-Islami, Beirut, 1982), p. 201
[150] This statement was related by Imam Malik. See Jalaludeen al-Sayuti, *Tanweer al-Hawalik, Sharh a'la Muwatta' Malik,* Vol. II (Al-Halabi Press, Cairo (nd)), p. 6
[151] SR Bosworth, *Mohammed and Mohammedanism* (Book Tree, India n. d.), p. 185

The diplomatic personnel have a special kind of protection in Islamic law bestowed on them by the provisions of the Qur'an,[152] numerous traditions of Prophet Muhammad (pbuh)[153] and the practice of the various Muslim States.[154] Such protections as personal inviolability, immunity from court's jurisdiction, freedom of religion and exemption from taxation are all guaranteed under Islamic diplomatic law.[155] It is trite both in the classical and modern periods of Islamic history that diplomatic envoy must not be imprisoned, maltreated, injured or killed while he or she is within the Muslim territory.[156] If Prophet Muhammad (pbuh) could not severe the heads of the two diplomatic envoys of Musaylimah (the false prophet), despite the verbal confirmation of their believe in the prophethood of Musaylimah, which was considered a culpable offence according to Islamic law, what justification would Al-Qaeda and the likes have in targeting diplomats and diplomatic facilities in their attacks. At least, it is obvious that out of all the Muslim States, none has been attacked by a non-Muslim State as at the time Usama bin Laden, Al-Qaeda and other similar organisations declared their global *jihaad* particularly against the United States of America and their allies. Even if the declaration of *jihaad* by Al-Qaeda were legitimate, without conceding, is it permissible or do they have the authority to injure or kill non-combatant civilians (women, elderly, children, religious priest etc); and non-Muslims that are protected in Muslim countries such as those enjoying diplomatic

[152] See Chapter 4 paragraph 4.4.3.1 of this dessertation
[153] Ibid., paragraph 4.4.3.2 of this dessertation
[154] Ibid., paragraph 4.4.3.3 of this dessertation
[155]See M Munir, 'Immunity or Impunity: A Critical Appraisal of the Immunity of Diplomats in International Law and Its Status in Sha'ria' (2000) XXII:35, Journal of Law and Society, Pp. 48-49. See also MC Bassiouni, op cit., (1980), 609-610
[156] See HM Zawati, op cit., (2001), p. 79

protection or those with valid entry visas which may be considered as having *aman* – safe conduct? The justification put forward by Al-Qaeda that:

> The American people should remember that they pay taxes to their government and that they voted for their president. . . The American Congress endorses all government measures and this proves that the entire America is responsible for the atrocities perpetrated against Muslims.[157]

One wonders if this justification can withstand the overwhelming authority in the main sources of Islamic law, the Qur'an and the authentic Prophetic traditions as quoted above. The fact that the Qur'an and the *Sunnah* do not endorse the killing of non-combatants and diplomatic envoys cannot be over-emphasised.

6.3.5 The Reality of the Concepts of Dar al-Islaam and Dar al-Harb

The division of the world into two belligerent camps – *dar al-Islaam* and *dar al-harb* – was formulated by majority of the Muslim jurists consisting of Imam Abu Hanifah (d. 767 AD),[158] Imam Malik (d. 795 AD)[159] and Imam Hambal (d. 855 AD),[160] in the second century after death of Prophet Muhammad (pbuh),

[157] Osama bin Laden (November 3, 2001) in B Lawrence (ed.), *Messages to the World: The Statement of Osama bin Laden* (Verso, London, 2005), Pp. 140-141

[158] His full name was Nu'aman ibn Thabit ibn Zuta ibn Marzuban and he was born in the city of Kufah in Iraq.

[159] He was born in Madinah and his full name was Malik ibn Anas ibn Malik ibn Abi 'Amir al-Asbahi

[160] His full name was Ahmad ibn Muhammad ibn Hanbal Abu 'Abdullah al-Shaybani and he was originally from Basra, Iraq

precisely, in the era of the Abbasid and Umayyad dynasties.[161] This was made possible because at that time, the Muslims were united under a single caliphate.[162] The Islamic empire later became fragmented into different autonomous caliphates, and later independent states which of course, threatened the relevance and practicability of this dichotomy. The relations between *dar al-Islaam*, as abode of peace, and *dar al-harb*, as the world of unbelievers, in the words of Tibi, 'were defined in terms of war, according to the authoritative commentaries of Islamic jurists.'[163] This division has thus, been erroneously used as the basis of a permanent State of war between the Muslim States and the non-Muslim States.

The *dar al-Islaam* and *dar al-harb* are concepts which distinguish territories that are strictly under the governance of Islamic law from those that are not so governed. Aside from the Muslim citizens, there were also non-Muslim residents of *dar al-Islaam*. These were people who had acquired the status of *dhimmi*, (those given protection) on the condition that their poll taxes, commonly referred to as *jizyah,* had to be paid.[164] Diplomatic immunity and inviolability were granted to non-Muslim foreign envoys during their visitation to the Muslim territories. *Aman* (safe-conduct) was equally granted to non-Muslim from *dar al-harb* that was visiting *dar al-Islaam* for peaceful purposes (e.g. for commercial transactions). The rest of the world that had belligerent

[161] M Munir, op cit., (2003), Pp. 403-404; O Bakircioglu, op cit., (2010), (p. 431
[162] A Al-Dawoody, op cit., (2011), p. 92
[163] B Tibi, *Political Islam, World Politics and Europe: Democratic Peace and Euro-Islam Versus Global Jihad,* (Routledge, Oxon, 2008), p. 47
[164] JE Campo, *Encyclopedia of Islam* (Infobase Publishing, New York, 2009), p. 182

relations with *dar al-Islaam* are described as *dar al-harb* [165] and most likely, with the exception of a territory referred to as *dar al-hiyad* (the abode of neutrality) which was ascribed to the people of Abyssinia (now known as Ethiopia) by Prophet Muhammad (pbuh) on the condition that they did not attack the Muslims.[166] In a nutshell, *dar al-harb* can be described as a territory which does not tolerate the freedom to practice Islam and where the lives and properties of the Muslims are not safe.

There are controversies among modern Islamic scholars regarding the meaning of *dar al-Islaam* and *dar al-harb,* most especially with '[t]he growth of Muslim communities in non-Muslim countries during the last decades of the twentieth century [which] has accentuated old dilemmas and created new ones.'[167] There are those with the most radical view who contend that *dar al-Islaam* is any country that is governed purely by the *Shari'ah.*[168] One wonders if such country exists today. Not even the Kingdom of Saudi Arabia with its monarchical system of Islamic government. It will definitely be impossible, they further argue, for the Muslims to remain under the territories of *dar al-Islaam* since all the 'Muslim countries are . . . ruled by corrupt apostate regimes.'[169] Yet, some Muslim scholars maintain the validity of the old concepts of *dar al-Islaam* and *dar al-harb* even when the prerequisites for

[165] M Munir, op cit., (2003), p.404
[166] M Khadduri, op cit.,(1966), p. 18
[167] S Bar, *Warrant for Terror: Fatwās of Radical Islam and the Duty of Jihād,* (Rowman & Littlefield Publishers, Maryland, 2006), p. 19
[168] Ibid
[169] Ibid

their application are lacking.[170] This, in particular, forms the cornerstone of the rulings on *jihaad* to them. There are some other scholars who maintain a moderate position by defining *dar al-Islaam* as any country where the Muslims have the liberty to freely practice the tenets of Islam regardless of whether the country is a secular or non-Muslim State. Boisard contends that 'a non-Muslim States which does not threaten the community of believers, respect justice, and guarantee freedom of worship, should not be considered *dar al-harb*.'[171]

It must be understood that the creation of this universal dichotomy between *dar al-Islaam* and *dar al-harb* was neither Qur'anic nor contained in any Prophetic traditions.[172] It was the creation of the medieval Islamic scholars based on their respective *ijtihaad*. If one may ask: Can the *dar al-Islaam* automatically take the rest of the world as *dar al-harb* with which *jihaad* becomes inevitable in the present world order? The likes of Al-Qaeda may want to answer this question in the affirmative. The answer, in my opinion, will be in the negative. First of all, as earlier stated, the two concepts of *dar al-Islaam* and *dar al-harb* never originated from the Qur'an or from the *Sunnah* which are the main sources of the Islamic jurisprudence. The Qur'an thus, recognises the existence of other nations beside the Muslim community. For instance, the Qur'an warns that: 'And do not be like shewho untwisted her spun thread after it was strong [by] taking your oaths as [means of]

[170] Ibid
[171] MA Boisard, *Jihad: A Commitment to Universal Peace,* (The American Trust Publication, Indianapolis, Indiana, 1988), Pp. 8-9
[172] See B Tibi, op cit., (2008), p. 47; NA Shah, op cit., (2008), Pp. 32 and 35

deceit between you because one community [nation] is more plentiful [in number or wealth] than another community [nation].'[173] Secondly, this may also be impossible because of the absence of the relevant conditions that are necessary before a territory could be defined as either *dar al-Islaam* or *dar al-harb*.

Dar al-sulh, (abode of treaty) or *Dar al-ahd* (abode of truce) which is the third category was devised by Imam Shafi'i (d. 820 AD)[174] in the second/eight century.[175] He was the founder of the Shafi'i school of law. *Dar al-Sulh* was interposed as a compromise between *dar al-Islaam* and *dar al-harb* to allow for 'peaceful coexistence based on 'armistice, diplomatic ties or peace agreements.'[176] Non-Muslim States that are at peace with the Muslim States on the basis of the existence of peace treaties between them are considered to be in *dar al-sulh*. An example could be drawn from the treaty that was concluded by Prophet Muhammad (pbuh) with the people of Najran who were Christians and likewise the people of Nawba and Armenia whom the Muslims exempted from paying tax.[177]

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[173] Qur'an 16:92

[174] He belonged to the Qurayshi clan of Makkah and his full name wss Abu 'Abdullah Muhammad ibn Idris al-Shafi'i

[175] A Al-Dawoody, op cit., (2011), p. 94; O Khalidi, 'Living as a Muslim in a Pluralistic Society and State: Theory and Experience', in ZH Bukhari et al (eds.), *Muslims' Place in the American Public Square: Hope, Fears, and Aspirations*, (AltaMira Press, Walnut Creek, 2004), p. 43

[176] J Allain, 'Acculturation through the Middle Ages: The Islamic Law of Nations and its Place in the History of International Law' in A Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law,* (Edward Elgar Publishing Limited, Cheltenham, 2011), p. 404

[177] M Munir, op cit., (2003), p. 406

The majority of the Muslim jurists consisting of Hanafi, Maliki and Hambali, however, did not accept the validity of *dar al-sulh*. They maintained that once a non-Muslim territory signs a peace treaty with the Muslims and agrees to the payment of tribute, it henceforth becomes part of *dar al-Islaam*.[178]

With the establishment of the United Nations, when all countries of the world have come together with the agreement 'to live together in peace'[179] with each other, that brought an end to 'this whole theoretical, historical, circumstantial division'[180] of the world, otherwise known as *dar al-Islaam* and *dar al-harb*. It therefore becomes doubtful if there is any country where the Muslims are not safe to profess their belief in Islam and establish regular prayers. That in itself makes the whole world come under *dar al-Islam* going by Abu Hanifah's opinion.[181]

The division of the world into *dar al-Islaam* and *dar al-harb* was, in fact, temporary and not permanent, quoting the words of Munir that presently 'Muslims are safe everywhere and can carry out their religious practices anywhere they want.'[182] He says further that 'Muslim states have signed almost every international convention, especially the UN Charter that gives

[178] Mirza Iqbal Ashraf, *Islamic Philosophy of War and Peace: Current Conflicts: Is Islam the Problem?* (iUniverse Inc., Bloomington, 2008), p. 10; M Khadduri, 'The Islamic Theory of International Relations and its Contemporary Relevance', in JH Proctor (ed.), *Islam and International Relations,* (Pall Mall Press, London, 1965) p. 26; R Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History,* (The Hague, Mouton, 1979), p. 11
[179] United Nations, *Charter of the United Nations*
[180] MH Kamali, 'Methodological Issues in Islamic Jurisprudence' (1996) 11:1 Arab Law Quarterly , p. 11
[181] A Al-Dawoody, op cit., (2011), p. 95
[182] M Munir, op cit., (2003), p. 407

equal status and sovereignty to every states.'[183] Hence, *jihaad*, according to Islamic law, cannot be based on the theoretical dichotomy of the world into *dar al-Islaam* and *dar al-harb*, which does not seem to exist anymore. Rather, *jihaad* will continue to be used, whenever the need arises, as means of protecting Muslims against oppression, and to defend the freedom of religion and social order, and to prevent aggression and injustice.[184]

Moreover, it has also become clear that this theoretical division of the world into *dar al-Islaam* and *dar al-harb* cannot be a basis for a permanent tension or state of war between the Muslim States and the non-Muslim States since Allah has enjoined the Muslims to remain 'righteous towards them (the non-Muslims) and acting justly towards them (the non-Muslims)' once the non-Muslims are not in war with them. It therefore means that in the absence of war or war-like situation, a peaceful diplomatic relations could and should be established between the Muslim States and the rest of the world.

6.3.6 How is Terrorism Considered under the Islamic Criminal Law

Modern Muslim State practices have condemned the acts of terrorism in all its manifestations and forms. In fact, there was a concordant criticism by individual Muslim States as reflected in one of the conferences of the then OIC which says that:

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[183] Ibid, Pp. 407-408

[184] S Mahmassani, op cit., in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I (*Martinus Nijhoff Publishers, 1968), 279

> Such shameful terrorist acts are opposed to tolerant divine message of Islam which spurns aggression, calls for peace, coexistence, tolerance and respect among people, highly prizes the dignity of human life and prohibits the killing of the innocent. It further rejected any attempts to allege the existence of any connection or relation between the Islamic faith and the terrorist acts, as such attempts are not in the interest of multilateral efforts to combat terrorism and further damage relations among people of the world. It stressed as well the need to undertake a joint effort to promote dialogue and create between Islamic world and the West in order to reach mutual understanding and build bridges of confidence between the two civilizations.[185]

Truly, terrorism has gone global, to the extent that it cannot be taken as a mere domestic problem. However, nationality jurisdiction of domestic laws of various States is still sustained to a large extent.[186] The current spade of terrorism, particularly in the Muslim countries, has continuously served as constant reminder of the efficacy of domestic counter-terrorism legislations which complement the various international conventions that were also created to combat terrorism. Virtually all the Muslim States are parties to most of the international conventions on terrorism. Some of these international conventions are the 1973 Convention on the Prevention of

[185] Final communique of the ninth extraordinary session of the Organization of the Islamic Conference of Foreign Ministers, held at Doha, Qatar on 10 October 2001 available at: http://www.un.org/documents/ga/docs/56/a56462.pdf [accessed 30 April, 2012]
[186] I Bantekas and S Nash, *International Criminal Law* (Cavendish Publishing Limited, London, 2003), Pp. 23-24

Crimes against Internationally Protected Persons, including Diplomatic Agents; 1979 International Convention against the Taking of Hostages; 1997 International Convention for the Suppression of Terrorist Bombings; 1999 International Convention for the Suppression of the Financing of Terrorism; and 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.[187] Different Articles in these conventions provide for the domestication of the crimes of terrorism in individual States. For instance, Article 3(1) of the 1973 Convention on the Prevention of Crimes against Internationally Protected Persons, including Diplomatic Agents provides that:

> Each State Party shall take such measure as may be necessary to establish its jurisdiction over the crimes set forth in article 2 in the following cases:
>
> (a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
>
> (b) when the alleged offender is a national of that State;
>
> (c) when the crime is committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.

[187] Article 3(1) of the 1973 Convention on the Prevention of Crimes against Internationally Protected Persons, including Diplomatic Agents; Article 2 of the 1979 International Convention against the Taking of Hostages; Article 4 of 1997 International Convention for the Suppression of Terrorist Bombings; Article 4 1999 International Convention for the Suppression of the Financing of Terrorism; and Article 5 of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism

Member States are thus conferred with the domestic jurisdiction to try offences that fall under the meaning of terrorism. This, in other words, means that States that are parties to these conventions can have local laws with the enabling jurisdiction to convict any person found guilty of the offence of terrorism.

Modern scholars of Islamic jurisprudence are of the view that the traditional meaning of *hiraabah,* which forms one of the *huduud* offences, should be extended to incorporate the act of terrorism.[188] This, to my mind, justified the argument canvassed by Crane that terrorists should be held to account under the Islamic crime of *hiraabah* in the following words:

> They [the extremists] are exhibiting the most serious crime condemned in the Qur'an, which is the root of almost all the other crimes, namely, arrogance. They are committing the crime of *hirabah*, which is the attack on the very roots of civilization, and justifying it in the name of Islam. There can be no greater evil and no greater sin. If there is to be a clash of civilizations, a major cause will be the *muharibun,* those who commit inter-civilizational *hirabah.*[189]

[188] See CS Waren, *Islamic Criminal Law,* (OUP, Oxford, 2010), p. 9; Nasir bin Ibrahim Mehemeed, 'Criminal Justice in Islamic Shari'a: Concepts and Precepts', in MA Abdel Haleem et al., *Criminal Justice in Islam: Judicial Procedure in the Sharī□a* (I. B Tauris & Co. Ltd., London, 2003), p. 41

[189] RD Crane, 'Hirabah versus Jihad' available on http://www.irfi.org/articles/articles_301_350/hirabah_versus_jihad.htm [accessed May 11, 2012]

Ibn Hazm (994 – 1064 AD), a Spanish Muslim jurist, has meticulously defined a *hiraabah* offender as:

> One who puts people in fear on the road, whether or not with a weapon, at night or day, in urban areas or in open spaces, in the palace of a caliph or a mosque, with or without accomplices, in the desert or in the village, in a large or small city, with one or more people . . . making people fear that they'll be killed . . . whether the attackers are one or many.[190]

Aside from the two countries, Saudi Arabia[191] and Iran,[192] that, most probably, embrace the classical Islamic law in their legal systems, there are some of the Muslim States such as Pakistan,[193] Sudan[194] and most of the northern States of Nigeria[195] that have recently re-introduced the Islamic criminal law into their respective legal systems.[196] According to the classical Islamic criminal law which forms part of the legal systems of these Muslim

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[190] Quoted in A Quraishi, 'An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective' in G Webb (ed.), *Windows of Faith: Muslim Women Scholar-Activists in North America,* (Syracuse University Press, New York, 2000), p. 130

[191] The Saudi Arabian legal system strictly applies the uncodified Hanbali School of law. See S Zuhur, *Saudi Arabia: Islamic Threat, Political Reform, and the Global War on Terror*, (March, 2005), p. 15 also available at: http://www.carlisle.army.mil/ssi [accessed May 10, 2012]

[192] The Islamic Republic of Iran operates a criminal justice system based on the *Twelver Shi'i* School of law. See FE Vogel, 'The Trial of Terrorists Under Classical Islamic Law' (2002) 43:1 Harvard Int'l L. J., p. 54

[193] It was during the regime of Zia-ul-Haq that the *Hudood* laws were introduced 'so as to bring it [the existing law] in conformity with the injunctions of Islam as set out in the Holy Quran and Sunnah.' See NA Shah, *op cit.,* (2006), p. 127

[194] KB Gravelle, 'Islamic Law in Sudan: A Comparative Analysis', (1999) 5 ILSA J. Int'l & Comp. L., p. 1

[195] See P Ostien, *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook,* (Spectrum Books Limited, Ibadan, 2007)

[196] FE Vogel, 'The Trial of Terrorists under Classical Islamic Law' (2002) 43:1 Harvard Int'l L. J., p. 54

countries, *hiraabah,* that is waging war against God and His Apostle and spreading corruption on the earth, being one of the *huduud* offences, has been generally argued to include the offence of terrorism. The Kingdom of Saudi Arabia stresses in one of the counter-terrorism reports it submitted to the United Nations Security Council that:

> The commission of terrorist acts and support for such acts are included among the crimes of *hirabah* in the Islamic Shariah as applied by the Kingdom. This is the category that includes the most serious crimes and those for which the severest penalties are prescribed in the *hirabah* verses of the Holy Koran [Koran 5:33]. In accordance with the statutes in force in the Kingdom, the courts have jurisdiction to decide all cases relating to terrorism and, in accordance with its Statute, the Commission for Investigation and Public Prosecution investigates such crimes and prosecutes them in the courts.[197]

The Islamic Republic of Iran also made a similar commitment to combatting terrorism by saying that '[B]ased on the sublime teachings of Islam, which

[197] A Counter-Terrorism report submitted by the Kingdom of Saudi Arabia to the UN Security Council pursuant to paragraph 6 of resolution 1373 (2001) of 28 September, 2001 also available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/722/76/PDF/N0172276.pdf?OpenElement [accessed May 14, 2012]

denounce and prohibit incitement to terrorist acts, Iran is determined to combat the culture of terrorism.'[198]

The crime of and punishment for *hiraabah* is specifically mentioned in the Qur'an thus:

> Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment, except for those who return [repenting] before you apprehend them. And know that Allah is Forgiving and Merciful.[199]

After introducing the meaning of the offence of *hiraabah*, that is, 'wag[ing] war against Allah and His Messenger and strive upon earth [to cause] corruption,' the verses then prescribe four alternative punishments ranging from death, crucifixion, amputation of the hand and foot to exile depending on the circumstances of each case. For instance, terrorizing the public without killing and taking any property is punishable with banishment, which also

[198] A Report submitted by the Islamic Republic of Iran to the UN Security Council pursuant to paragraph 6 of resolution 1373 (2001) as well as the country's response to resolution 1624 (2005) dated 13 March, 2007, p. 17 also available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/269/28/PDF/N0726928.pdf?OpenElement [accessed May 14, 2012]
[199] Qur'an 5:33-34

implies life imprisonment according to the Hanafi jusrists;[200] one that terrorizes the public by taking away their properties will have his right hand and left foot amputated; one that terrorizes by killing without taking any property will be sentenced to death by beheading; and the one that terrorizes the public by taking their properties and killing them will, of course, be beheaded and crucified thereafter.[201]

Hiraabah is considered, in Islamic criminal law, to have the severest punishment. It is also extremely detrimental, in the words of the Maliki jurist, Al-Qurtubi, who says that:

> [B]ecause it prevents people from being able to earn living. For indeed, commerce is the greatest and most common means of earning a living, and people must be able to move in order to engage in commerce . . . But when the streets are terrorized (*ukhifa*), people stop travelling and are forced to stay at home. The doors to commerce are closed and people are unable to earn a living. Thus, God instituted the severest punishment for *hirabah* as a means of humiliating and discouraging the perpetrators thereof and in order to keep the doors of business open.[202]

[200] SA Jackson, 'Domestic Terrorism in the Islamic Legal Tradition', (2001) 91 The Muslim World, p. 300
[201] FE Vogel, op cit, (2002), p. 59
[202] Al-Qurtubi, *Al-Jami' li ahkam al-Qur'an* 1 1 vols., K. Mays (ed.), (Beirut: Dar al-Fikr, 1419/1999), 3:88

According to the Saudi legal system, terrorism is considered a serious crime which, of course, attracts strict penalties. It is thus, stated that '[i]n as much as terrorist offences come under serious crimes included in the category of crimes against society (*hirabah*), the penalties imposed for them are severe, ranging up to execution. Saudi Arabia is known internationally for having the severest penalties for perpetrators of terrorist offences. The reason for this is its adherence to the provisions of the Islamic Shariah, which criminalizes all forms of terrorism.'[203] Similarly, in Sudan, the severity of the punishment for committing any act of terrorism or participating in any terrorist activities is such that, upon conviction, the person might be executed or made to serve life imprisonment.[204] It is not a surprise that those who engage in the acts of terrorism by waging illegitimate war against their own State's governments and terrorising innocent people are usually considered as '*Muhaaribun*' in Islam.[205] Therefore, if one considers the strictness in the punishments set down for the act of terrorism by the Islamic criminal jurisprudence, which cannot be compared with the conventional penalties,[206] it will, obviously, sound ridiculous to then equate Islam or the Islamic *jihaad* with terrorism.

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[203] A third report submitted by the Kingdom of Saudi Arabia to the UN Security Council pursuant to paragraph 6 of resolution 1373 (2001) of 28 September, 2001 dated 29 May, 2003 also available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/384/65/PDF/N0338465.pdf?OpenElement [accessed May 14, 2012]

[204] Articles 5 & 6 Terrorism (Combatting) Act, 2000 of Sudan See appendix VIII available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/210/61/IMG/N0221061.pdf?OpenElement [accessed May 14, 2012]

[205] AN Kobeisy, *Counseling American Muslims: Understanding the Faith and Helping the People*, (Praeger Publishers, Westport, 2004), p. 30

[206] T Winter, 'Terrorism and Islamic Theologies of Religiously-Sanctioned War' in D Fisher & B Wicker (eds.), Just War on Terror?: A Christian and Muslim Response, (Ashgate Publishing Limited, Surrey, 2010), p. 21

6.4 Conclusion

This chapter has generally found that terrorist acts that were perpetrated against diplomats and diplomatic missions under the pretext of engaging in Islamic *jihaad*, are not sanctioned under Islamic law. This is so because the Islamic *jihaad* has some laid down rules which must be present before resorting to a physical warfare. For instance, it has been stated that for *jihaad* to be legitimate it has to be declared by a legitimate authority, that is, the Muslim State. Most importantly, it has also been established that according to Islamic law principles of *jihaad,* the immunity of diplomatic envoys and non-combatants from attacks must be preserved throughout the warfare. They must not be deliberately attacked; otherwise it will amount to committing an offence, known in Islamic criminal law, as *hiraabah.* Terrorist attacks' violation of these rules and principles of the Islamic *jihaad* confirm their incompatibility with Islamic law principles as well as the principles of international law.

CHAPTER SEVEN

CONCLUSION

7.1 Forming a Bridge of Compatibility between Islamic Diplomatic Law and International Diplomatic Law

This study has advanced, through comparative analysis, the compatibility between international diplomatic law and Islamic diplomatic law and thus, established that Islamic diplomatic law complements international diplomatic law due to their compatibility. The process of achieving greater compatibility between Islamic diplomatic law and international diplomatic law was arrived at by considering the historical and analytical jurisprudential comparative approaches. That is, by (a) examining the universality of diplomatic practice amongst various ancient civilizations from an historical perspective, particularly the contribution made by Islamic civilization to modern diplomatic practice; (b) considering a theoretical comparative overview of the sources of the two legal systems; (c) evaluating different principles of diplomatic immunities and privileges and their theoretical justifications under Islamic diplomatic law and international diplomatic law; (d) critiquing some Muslim States' diplomatic practices on the basis of Islamic diplomatic law; and (e) discussing various terrorist attacks perpetrated by Muslims on diplomatic missions and their personnel in the name of the Islamic *jihaad* and how they are treated under Islamic law. These can be summed up under the following headings: i) historical compatibility; ii) compatibility in legal sources; iii) compatibility in principles; and iv) compatibility in Muslim States practices which will be discussed with recommendations.

7.2 Historical Compatibility

This study has examined, at length, diplomatic relations and diplomatic inviolability in various ancient civilisations, such as the Greek, Roman, Indian, Chinese, African and Islamic civilisations. The universalistic trend of diplomatic practice has been traced back to the times of the ancient world civilisations. The principle of diplomatic immunity, for instance, has been deeply engrained in the customary fabrics of these ancient communities. The fact that different governments have been in the habit of observing the principle of extending immunity to diplomatic envoys for many centuries confirms the universality of diplomatic relations. Ogdon was, in fact, correct when he concludes that:

> These practices of ancient peoples in different periods and under peculiar circumstances exhibit a fundamental relationship between the function of the embassy and the reason why diplomatic immunity was allowed to thrive. . . . The importance of the embassy seems in itself to have been reason enough for receiving an ambassador, for communicating with him, and for allowing him freedom to return with a message to his native camp.[1]

Hence, the phrase in the preamble of the 1961 VCDR which states that: '*Recalling* that peoples of all nations from ancient times have recognized the status of diplomatic agent' cannot be more correct.

Although, there may be some variances in the manner in which each of these ancient civilisations dispensed the principles of diplomatic immunity whenever they

[1] M Ogdon, *Juridical Bases of Diplomatic Immunity: A Study in the Origin, Growth and Purpose of the Law,* (John Byrne, 1936), Pp. 19-20

received diplomats from foreign territories, and the reception protocols that were to be observed by incoming diplomatic envoys. For instance, in ancient China, it was a requirement that once an envoy has been able to imbibe and demonstrate all the necessary protocol, including the *kotow* ritual, which portrayed nothing but subjugation, he/she henceforth, enjoyed diplomatic privileges throughout his stay within the 'Celestial Empire.' Looking at the history of diplomatic practice and diplomatic immunity in all the ancient civilisations discussed in chapter 2 of this dissertation, it may be correct to suggest that throughout Islamic history there was no reported incidence of maltreatment or killing of any diplomatic envoy, perhaps, with the exception of some isolated cases that were recorded, for instance, during the Ottoman Empire.[2] Moreover, Islamic civilisation has greatly contributed in its dealings with other nations, particularly with the Western world, to the making of what is now known as international diplomatic law. This has been made possible owing to the friendly interaction that existed between Islamic civilisation and Western civilisation, which may be due to their contemporaneous existence. All these facts have confirmed the historical compatibility between Islamic diplomatic law and international diplomatic law.

7.3 Compatibility in Legal Sources

A ground of commonality has also been found to exist between Islamic diplomatic law and international diplomatic law by examining, with clear precision, the different sources of the two legal regimes. It is quite important to stress that notwithstanding

[2] Sometime in 1439, Dubrovnik's emissaries sent to Sultan Mehmed, were imprisoned for their refusal to pay tribute until a charter was granted in 1442 imposing the annual payment of 1,000 ducats. See F Babinger, *Mehmed the Conqueror and his Time* (Princeton University Press, New Jersey, 1978), p. 155

the fact that the sources of the two legal systems are sourced from different origins, this should not be taken as forming the basis of their incompatibility. Truly, the Qur'an and the Sunnah, being the main sources of Islamic diplomatic law, are mainly divine in nature, since they are formulated in accordance with divine command. Yet, there are other non-divine legal principles and methods of Islamic law which are manifested in the form of *ijmaa'* (consensus of opinion), *qiyaas* (analogical deduction), *istihsaan* (judicial preference), *maslahah* (public interest), *'urf* (custom) constituting what is known as the legal mechanism of *ijtihaad*. While on the other hand, international diplomatic law has international treaties, international customary law, general principles of law, judicial decisions and scholarly writings as its sources which are mainly human creation having originated from Article 38 of the SICJ. In as much as the sources of the two legal systems have been found to overlap each other in many aspects, it therefore opens up the possibility of their compatibility. After all, the differences in the origin of the sources of municipal law and international law do not, necessarily, make them incomparable. The municipal law, for instance, may be considered as evidence of compliance or non-compliance with international obligations.[3] Moreover, it can thus, be asserted that Islamic law gives full respect to all the legal sources of international diplomatic law, in as much as they are in conformity with the fundamental objectives of Islamic law. It has been sufficiently shown that there is compatibility in the principles emanating from the sources of Islamic diplomatic law and international diplomatic law.

7.4 Compatibility in Principles

[3] See the case of *Certain German Interests in Polish Upper Silesia* PCIJ, Series A, No. 7, p. 19. See also Malanczuk, op cit., p. 64

The general principles of diplomatic immunity as contained in the 1961 VCDR and 1963 VCCR were highlighted and compared with the principles of diplomatic immunity as obtained under the Islamic law in Chapter 4. The study also considered all the three theoretical justifications for diplomatic inviolability (exterritoriality, representative character and functional necessity) by looking at the most prevalent ones in the two legal systems. The findings in this study strongly impugn the incompatibility theory by suggesting close relationship between the legal justifications for and the principles of diplomatic inviolability in both the Islamic and international diplomatic law. This goes to confirm the compatibility between Islamic diplomatic law and international diplomatic law in relation to their legal purposes.

The codified principles of diplomatic immunity specified in the 1961 VCDR and the 1963 VCCR representing the foundational principles in international diplomatic law have also been found to be closely related to the Islamic principles of diplomatic immunity. Such principles include personal inviolability, immunity from the court's jurisdiction, freedom of religion and exemption from taxation. Some other privileges such as freedom of movement, protection of diplomatic bags and couriers, freedom of communication, inviolability of mission's archives and inviolability of mission premises and private residence, though not explicitly mentioned, but then, they are generally covered by the Islamic law principle that whatever is not specifically prohibited either in the Qur'an or in the Sunnah should be deemed permissible.[4] Once these principles of diplomatic immunity set out in the VCDR and the VCCR are capable of serving the general interest of the Muslim community, which automatically bring them within the general contemplation of *maslahah,* the Muslim

[4] Y al-Qaradawi, op cit., (2001), p. 6

States will, therefore, be under the obligation to apply and observe them. In addition, Islamic law imposes a legal obligation on any Muslim State that enters into an agreement or treaty with another States, be it a Muslim State or a non-Muslim State, to discharge the terms of the agreement to the latter. No wonder, the Muslim States are parties to the two universally recognised conventions on diplomatic and consular relations[5] and all other related treaties. And most importantly, the two legal systems crave for a peaceful interrelations and co-existence among different States of the world.

7.5 Compatibility in Muslim States Practices

The failure of some Muslim States to strictly adhere to and observe the principles of diplomatic immunity as clearly stated in the 1961 VCDR and the 1963 VCCR, as well as their flagrant abuse of diplomatic privileges should not and cannot be blamed on the principles of Islamic law. This is so because all the principles of international diplomatic law with regards to diplomatic privileges and immunities are in conformity with the principles of Islamic law. The fact that one or two Muslim States have chosen to act differently should not be taken as implying incompatibility between the principles of Islamic diplomatic law and international diplomatic law. After all, the Anglo-American invasion of Iraq in March, 2003 was criticized by many international law commentators as illegal, since it was predicated on a fallacious ground that Iraq was in possession of Weapon of Mass Destruction (WMD).[6] Even at that, it will be incorrect to, therefore, suggest that international law has failed or that there are

[5] These are the 1961 VCDR and the 1963 VCCR
[6] Klaus Dodds, 'Geopolitics', in GH Fagan and R Munck eds., *Globalization and Security,* (ABC-CLIO, LLC, California, 2009), p. 149

some inadequacies in international law simply because the United States and United Kingdom have failed to adhere to and observe the principle of international law by respecting the sovereignty of Iraq. In the same way, it will also be erroneous to attribute the failure of the governments of the Islamic Republic of Iran[7] and Libya[8] to respect and observe the terms of the 1961 VCDR and the 1963 VCCR to some inadequacies in the Islamic diplomatic law. It has been argued that had the Islamic Republic of Iran been tried under the Islamic judicial system, it is most certain that the law would have found Iran liable for failing to discharge its diplomatic commitments to the staff and mission of the US Embassy.

Diplomatic privileges and immunities are granted to agents of foreign missions mainly for the purpose of discharging their diplomatic transactions freely and effectively without any interruption from the authority of the receiving State. Meanwhile, the diplomatic and consular agents of foreign nations, equally, owe the receiving State the duty not to disrespect its laws and regulations, and not to use their embassies in any manner incompatible with the provisions of the 1961 VCDR.[9] Of course, the act of killing innocent citizen or innocent public officer as in the case of shooting Constable Yvonne Fletcher, the British woman Police Officer, by someone from within the Libyan Peoples' Bureau cannot be justified or be seen as part of diplomatic duties that are compatible with the 1961 VCDR. The decision of the British Government to cut all diplomatic ties with the Libyan regime by declaring the Libyan diplomats as *persona non grata* was not only consistent with Article 9 of

[7] It refers to the 1979 seizure of the US Embassy by the Islamic Republic of Iran.
[8] Referring to the 1986 killing of a British woman police officer, Yvonne Fletcher, by an alleged diplomat from the Libyan Embassy, London (popularly known as Libyan People's Bureau)
[9] See Article 41 (1) and (3) of the 1961 VCDR

the VCDR, but also compatible with the principles of Islamic diplomatic law. Likewise the settlement in the Davis' case based on the provisions of Section 345 of the Pakistan Code of Criminal Procedure and Section 310 of the Pakistan Penal Code was a clear indication of how Islamic law, through the application of a portion of its Islamic criminal jurisprudence, can positively interact with international law. At least, the payment of $2.3 million by Mr. Davis as blood money – *diyah* to the relatives of the two victims, which was voluntarily accepted by them has averted what would have degenerated into diplomatic upheaval.

Similarly, the Muslim States have been unanimous in their condemnation of terrorist attacks that are unleashed on diplomats and diplomatic facilities, particularly those perpetrated by Muslims within the Muslim and non-Muslim States. This unanimous condemnation of terrorist attacks has been reached by the Muslim States not just because of their concession to the various relevant international treaties, but because it is strongly condemned as a criminal act under Islamic law. Of course, it will be wrong to equate such attacks with the Islamic concept of *jihaad*. It is a fundamental principle in the Islamic *jihaad* that diplomatic facilities and their personnel along with non-combatant should not be deliberately targeted for attacks. Definitely, *jihaad* and terrorism are two parallel lines that can never meet.

7.6 Recommendations

The findings of this study clearly show that there is much compatibility between Islamic law and international diplomatic law which may further enhance 'the development of friendly relations among nations, irrespective of their differing

constitutional and social systems.'[10] It can be recommended that this compatibility in the two legal regimes may also help in contributing to a further development of international diplomatic law so as to make it more readily acceptable to the generality of the Muslim States. This, however, does not mean that the two legal regimes do not have their differences which may be considered minimal as they do not affect the substance of the laws. In other words, what the international community needs at this present moment is a deep cross-cultural understanding of the various States so as to have a better diplomatic legal system. It is also important to point out that the fact that diplomatic missions and personnel belonging to the Western States are often targeted for terrorist attacks, mostly in the Muslim States by non-State actors, should not be taken as implying non-compatibility between the diplomatic principles in Islamic diplomatic law and international diplomatic law.

It is also very important to mention that if the universal purpose and principles entrenched in the UN Charter[11] must be achieved for the benefit of humanity, it is imperative that a meaningful dialogue among diverse civilizations be encouraged with a view to consolidating and harmonizing not just the various areas of congruency but also the perceived areas of tension. Perhaps, the appreciation of the need to engage the various civilizations of the world in a constructive dialogue must have impelled the UN General Assembly's resolution 53/22 to proclaim the year 2001 as "the United Nations Year of Dialogue among Civilizations".[12] The resolution further stresses not just the need to recognise 'the diverse civilizational

[10] See paragraph 3 of the preamble to the 1961 VCDR
[11] See Article 1(4) of the Charter of the UN http://www.un.org/en/documents/charter/chapter1.shtml [accessed on the 30/12/09]
[12] A/RES/53/22 16 November 1998, p. 2 See on line http://www.un.org/documents/r53-22.pdf [accessed on the 30/12/09]

achievements of mankind'[13] but also makes a strong reaffirmation 'that civilizational achievements constitute the collective heritage of mankind, providing a source of inspiration and progress for humanity at large'.[14]

[13] Ibid. P. 1
[14] Ibid

GLOSSARY OF SOME ARABIC TERMINOLOGIES

'Ilmul-hadith -- Science of hadith
'Umrah -- Lesser pilgrimage
'Urf -- Custom
Ahl al-qitaal -- Combatants
Ahlul-Kitaab -- Adherents to faith which have revealed scripture
Aman -- Safe-Conduct
Asl -- (pl. Usuul) Root or source
Daleel -- Proof indication or evidence
Dar al-harb -- Abode of war
Dar al-hiyad -- Abode of neutrality
Dar al-Islaam -- Abode of peace
Dar as-sulh -- Abode of treaty
Daruriyyaat -- Indispensable interests
Dhimmi -- Non-Muslim under the protection of Islamic law
Diyat -- Blood money
Faqih -- (Pl.Fuqahaa') Muslim jurist
Ghayr ahl al-qitaal -- Non-Combatants
Haajiyyaat -- Things needed for effective functioning of the community
Haraam -- Things declared prohibited in the Qur'an and Sunnah
Hijrah -- Migration of Prophet Muhammad (pbuh) from Makkah to Madinah
Hiraabah -- Highway robbery or the act of terrorism
Huduud -- Prohibitions ordained by the Qur'an and Sunnah
Hukmu -- Islamic ruling
Ijmaa' -- Consensus opinion
Ijtihaad -- Independent reasoning
Istihsaan -- Juristic preference
Istishaabul-haal -- Presumption of continuity of a rule
Jihaad -- Legal warfare according to Islamic law
Jizyah -- Poll tax levied on non-Muslims
Madhhab -- (Pl. Madhaahib) School of Islamic jurisprudence
Maqaasid al-shari'ah - Objectives of the Shari'ah
Maslahah -- Public interest
Mu'aahadaat -- Treaties or contracts between States
Mu'aamalaat -- Commercial or civil dealings in Islamic law
Mu'aamalaat -- Inter-human relations
Muhaaribun -- Those who terrorize innocent people
Mujtahid -- Qualified legal scholar
Musta'min -- non-Muslim having safety passage within an Islamic state
Muwaada'a/ Muhaadana -- Peace treaty
Nass -- An explicit statement in the Qur'an or Hadith
Qaadi al-Qudaat -- Chief Justice
Qadhf -- False accusation of unlawful sexual intercourse
Qat'ii -- Definitive texts of the Qur'an
Qisaas -- Retribution

Qiyaas -- Deduction of legal opinion from the Qur'an or Hadith by analogical reasoning
Rasul -- Messenger of Allah. Generally it means a herald
Ridda -- Apostacy
Saafir -- A diplomatic envoy
Saddudh-dharii'ah -- Blocking lawful means to an unlawful end
Sariqah -- The offence of theft
Shrub al-khamr Drinking of alcohol or any intoxicating substance
Siyar -- Generally refers to Islamic international law
Sunnah -- Prophetic tradition
Ta'azir -- Crimes that are categorised as discretionary
Tahsiniyyaat -- Complementary things to perfect community condition
Taqrir -- Tacit approval
Ummah -- Muslim community
Ustuwanaat al-Wufuud -- The pillars of embassies
Zanni -- Speculative texts of the Qur'an
Zinah -- Unlawful sexual intercourse

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