

# The Doctrine of *Amān* and Diplomatic Immunity: A Comparative Study of Contemporary International Law

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## Abstract

*The objective of this article is to compare Contemporary International Law(CIL) relating to Diplomatic Immunity with Muslim International Law (MIL). This paper investigates the theory and practice of CIL for its compatibility and viability with MIL. This paper sums up that Muslim International Law (MIL) as well as Contemporary International Law (CIL) recognize and promote diplomacy for peaceful relations among nation states. Both of the laws, to some extent, are compatible in awarding rights to diplomats in Receiving State. MIL gives protection to ambassadors on the basis of a bilateral contract of Amān, which differentiates private rights from public rights. If diplomats violate private rights of any inhabitant, in that case they will be held accountable, otherwise not. On the other hand, CIL gives limited immunity to diplomats against all criminal and civil jurisdiction of the Receiving State. Such immunity will be availed only if the laws of the Receiving State do not repugnant to the Vienna Convention. In case of conflict between the domestic law of Receiving State and Vienna Convention, the domestic law of the Receiving State shall prevail. In case of violation of domestic law, the diplomats will face the consequences of the receiving and sending states' laws.*

**Key words:** Diplomat, Contemporary International Law, Immunity

## Introduction:

In modern era, the world is considered as a global village and it is divided into different Nation States. No state is independent, each state is associated with another to build socio-economic and political

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relations. Embassies are working to make or promote bilateral relations among Nation States. The embassies along with its crew are enjoying immunity under CIL. The crew of embassies contain intelligence agencies, working as Agencies of the Sending State and other staff members. Sometime common staff members involved in activities against the Receiving State and when are traced, they claim diplomatic immunity awarded by Vienna convention. Such incidents are frequently happening especially among the states which have no friendly relationships. These incidents give birth to several questions regarding immunity of diplomats. Does CIL award absolute freedom to diplomats against all civil and criminal jurisdictions of the Receiving State? Are diplomats only bound to follow the laws of the sending state? Are diplomats above the law of the receiving state being sovereigns? Does MIL award absolute immunity just like CIL? The objective of this article is to address these questions of laws.

Contemporary International Law makes every person subject to the domestic law under two statuses. The first one is Territorial and the other is National. According to CIL, anyone who lives in a state must follow the domestic law due to its territorial jurisdiction. The second status is a person who is the national of any state must follow the domestic law within and beyond the territorial jurisdiction of that state. If state A sends ambassador to State B, the ambassador of state A is bound to follow his or her state law although he or she is beyond the territorial jurisdiction of the state A and he or she is not bound to follow the law of state B although he or she is living within the territorial Jurisdiction of the state B. This rule is known as “Immunity from Jurisdiction”.

### **Status of Diplomacy in Contemporary International Law**

Contemporary International Law considers diplomacy as a source of communication for the purpose of dialogues and negotiations amongst Nation States.<sup>2</sup> Before emergence of Vienna Conventions regarding Diplomats, international affairs of states were administered by the "Customary International Law"(CUIL). Under CUIL, Diplomats were considered immune being formal representatives and only source of inter-state communications for their states because there were no modern tools of

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<sup>2</sup>. Malcolm N. Shaw, International Law (New York: Cambridge University Press, 2008),93.

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communications like Telephone, Fax and Telegraph.<sup>3</sup> At that time, if any member of diplomats got accused by the receiving state he/she would be given the status of *persona non grata* (person not welcome) and compelled to leave such state. Moreover, the Sending State could also waive the immunity of those diplomats who violated domestic laws, to face the consequences of illegal activities in the courts of receiving state. This customary law was adopted by the Vienna Convention of Diplomatic relations in 1961. Under the Contemporary International Law, diplomats also facilitate Nations States in the field of commerce, economics, culture and religious affairs as well as especially in the maintenance of peace at international levels.<sup>4</sup> Vienna Convention highlights and formulizes the practical need of ambassador's rights and immunities to run international affairs effectively among the nation states. It also highlights the mission of diplomats appointed by Nation States and gives procedure of appointing diplomats in nation states.<sup>5</sup> The Convention also stresses on the mutual consent of the nation states for enhancing the diplomatic relations among the nation states. If any state does not want to have diplomatic relations with any other state, in such case it will not be compelled to establish diplomatic relations with the other state or states. Similarly, furnishing reasons for having not diplomatic relations with any nation state or states is also not mandatory for any state. Article 4 of the Convention states that "the 'Sending State' must make certain that the agreement of the 'Receiving State' has been given for the person it proposes to accredit as head of the mission to that State. The receiving State is not obliged to give reasons to the Sending State for a refusal of agreement"<sup>6</sup>

**Diplomatic rights and privileges in Vienna Convention on Diplomatic Relations 1961**

Under Vienna convention, diplomats appointed for the purpose of diplomacy are the nationals of Sending States.<sup>7</sup> Presence in the Receiving State will not change the legal status of the diplomats. They

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<sup>3.</sup> *Ibid.*

<sup>4.</sup> Article 3, E. of the Vienna Convention on Diplomatic Relations 1961.

<sup>5.</sup> Article 10, A.

<sup>6.</sup> Article 4 of the Convention.

<sup>7.</sup> Article 8.

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will be considered as they reside within the territorial jurisdiction of their own Sending States. They are also bound to follow the law of their own Sending States although they are living beyond the territorial jurisdiction of their Sending States. They are given some special rights and privileges while performing their official duties in Receiving State.

Personal inviolability of diplomats with their belongings

- 1- Diplomats enjoy complete immunity from all criminal, civil and administrative jurisdiction of the Receiving State.<sup>8</sup>
- 2- Diplomats enjoy freedom of movement and will not be arrested and detained by the Receiving State.
- 3- Diplomats will be treated with all respect in the Receiving State.
- 4- Receiving State is supposed to take all the necessary steps to ensure the safety and dignity of diplomats.<sup>9</sup>
- 5- Diplomats will not be obliged to testify as witness and they be keep away from all judicial process of the Receiving State.<sup>10</sup>
- 6- Official as well as personal constituency both of diplomats will be inviolable situated in the Receiving State. Vienna convention does not differentiate between personal and official constituency with reference to its immunity.<sup>11</sup>
- 7- All belongings of the diplomats either for their personal or official use, like their correspondence, property movable or immovable will enjoy inviolability.<sup>12</sup>

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<sup>8</sup>. Article 31, A.

<sup>9</sup>. "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." Article 29.

<sup>10</sup>. Article 31, 2.

<sup>11</sup>. "The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission." Article 30,1

<sup>12</sup>. Article 30,2.

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All these privileges and inviolability of diplomats will come to an end by adopting the procedure mentioned in the article 9 of the convention. This article states that Receiving State has the right to notify not to accept any member of the mission as diplomat. Furthermore, it states if Sending State does not take recall such diplomat back to his country after passing reasonable time, in such situation, such diplomat will loss the status of immunity in the Receiving State.<sup>13</sup>

Receiving State is also supposed to take all necessary measures for the security and safety of the official premises of diplomats. This premises will be given immunity from any kind of searching by the Receiving State. The official of the Receiving State will be entered with the permission of the head of the mission of the sending state.<sup>14</sup> The attached element like transport any requisition of the constituency will also be immune from searching by the Receiving State.<sup>15</sup> Diplomats are bound to respect all laws of the Receiving State and they should not interfere in any matter of the Receiving State.<sup>16</sup>

The aforementioned rights and privileges given by Vienna Convention are binding for those nation states who ratified the said Conventions otherwise not. These privileges would not be given if domestic law of any signatories' state does not recognize such rights and privileges for diplomats. It can be said that the immunity of diplomats will only be recognized if such immunity is recognized by the Receiving State

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<sup>13</sup>. "1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

2.If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the mission."

<sup>14</sup>. "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2.The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity" Article 22, 1,2.

<sup>15</sup>. "The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution" article 22, 3.

<sup>16</sup>. "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". Article 41, 1.

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otherwise not. In case of accusation of diplomats, courts of the Receiving State are bound to follow domestic law of not the Vienna Convention. Does MIL also award absolute immunity to diplomats or not if not then on which grounds it awards them protection.

### **Status of Diplomacy in Muslim International Law**

The notion of diplomacy and protection of diplomats are based on the doctrine of *Amān*. Literally the term *Amān* is contrary to fear.<sup>17</sup> Idiomatically, *Amān* is considered as a kind of protection awarded by Muslim state or Muslim individuals without gender discrimination to aliens or non-Muslims. *Amān* awarded by any Muslim individual is binding on all Muslims as well as Muslim state.<sup>18</sup> The status of diplomat is the status of *Mustā'mīn* (seeker of protection) in MIL.<sup>19</sup> The giver of *Amān* if he or she is individual must be 1-Muslim, 2-adult, 3- sane, 4- willing, 5-protected.<sup>20</sup> Second party in the contract of *Amān* is *Mustā'mīn* the one who seeks protection either from Muslim individual or Muslim state. The seeker of protection can demand it for any personal need like trade or to see the qualities of Muslims or public interest like diplomacy. If the seeker of *Amān* demands protection to know the qualities of Muslims, in such situation Muslims are bound to award *Amān*, if the demand of protection was for his personal need then *Amān* becomes optional.<sup>21</sup> Generally, no contract is concluded without proper offer and acceptance. Wording of an offer and acceptance is not much important in contract but the important thing is willingness of the contractual parties for an offer and acceptance. Similarly, in the contract of *Amān*, any wording of any language verbally or in writing expressly or impliedly indicating on the willingness of the contractual parties of *Amān* by custom and tradition, will be considered.<sup>22</sup> The time of

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17 Muhammad Bin Mukarram bin 'ali Abū al- Faḍal Jamal al-ddin Ibn Manzoor al-Afrīqī, *Lesan- al-'Arab*, vol.13 (Beirut: Dār al- Sadir, 1414), 21.

18. Al-Sarakhsī, *sharḥ al-Siyar al-Kabīr*, Vol.1, 252. Muhammad bin Muhammad al-Bābartī, *AL-'nāyah sharḥ al-hidayah*, vol.7 (Beirut: Dār al-fikar, 1988), 465.

19. Al-Sarakhsī, *al-Mabsūt*, Vol.10, 111.

20. *Al- Zūḥaylī, Athār al- Ḥarb fi Fiqh al- Islamī*, 262.

21. *Ibid.*, 277.

22. *Ibid.*, 286.

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*Amān* will be started from the acceptance by Muslim state or Muslim individual. Expiration of *Amān* is the discretion of Muslim state, it cannot be even decided by custom or the rules of reciprocity.<sup>23</sup> Usually, proof of awarding *Amān* is only required in a suspicious situation. *Amān* awarded by Muslim state is not debatable from affirmation point of view. The affirmation of Muslim state is to be considered about awarding *Amān* while rejection of Muslim state nullifies the *Amān*. In case, if *Amān* is not awarded by Muslim state and non-Muslims being claiming that they have been awarded *Amān* by Muslim individuals. In such situation the affirmation of a common Muslim for awarding *Amān* will be accepted subject to two eye witness while the affirmation of a trusted Muslim regarding the *Amān* will be considered without demanding him eye witness.<sup>24</sup> *Amān* may be dismissed by the following elements: *Amān* is a binding contract at the same time it gives authority to both parties to dismiss in their personal concern. Muslim state can dismiss if there are any dangers to national security and integrity provided with an opportunity to be given to the protected non-Muslims to shift his previous position. Protected non-Muslims can also dismiss the *Amān* by permanent living in their own state.<sup>25</sup> The contract of *Amān* may also be dismissed by the expiration of the agree fixed time. The protected non-Muslims in such a situation will be protected till reached to their state.<sup>26</sup> The contract of *Amān* will be dismissed by committing severe crimes like, adultery, killing, theft, dacoity or any other crime amounts to national security and integrity.<sup>27</sup>

### **Kinds of *Amān***

*Amān* is of two kinds:

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<sup>23</sup>. *Ibid.*,309.

<sup>24</sup>. *Ibid.*,314.

<sup>25</sup>. Abdul-Aziz bin-e-Mabrook al-aḥmadi, *Ikhtilāf al-Dārayne wa Asārhū fi al-aḥkam al-Shari'ah al-Islāmiyyah* (Madina: Malik Fahad al-wātāniā āsnā al-Nāshr, 2004), 186.

<sup>26</sup>. *Ibid.*,216.

<sup>27</sup>. *Ibid.*,217.

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1-Permanent (*Amān Mua'bbad*). Permanent *Amān* which is also known as '*Aqad al-dhimmah*. It is a permanent contract between non-Muslims and Muslim state to be peaceful citizens in lieu of paying poll tax annually.<sup>28</sup> According to *al-Kāsāni*, pagans of Arab and apostates will not be awarded with this kind of citizenship by Muslim state because they have only one option of embracing Islam.<sup>29</sup>

2-Temporary (*Amān Mu'aqqat*). Temporary *Amān* is further divided into two kinds:

1.Armistice Contract. Armistice contract (*Al-Mūwād'ā or al-Hudnah*). It is a peace contract between Muslim state and group of aliens or alien state on the suspension of war.<sup>30</sup>

2. Guarantee Contract (*Amān*). Guarantee Contract is contract of peace awarded by Muslim individuals or Muslim state to aliens or non-Muslims for staying in Muslim state to observe the good qualities of Islam or for other reasons of national or personal interests. According to the most classical Muslim jurists, *Amān* is a general phenomenon of war and peace. It may be awarded to aliens during war by their demand. Similarly, it may also be awarded in lieu of logistic assistance required by Muslim army. *Amān* can be awarded by the declaration of Muslim state after conquering the territory of aliens likewise, awarded by the Prophet (peace be up him) after conquering Makkah. It may also be awarded during peace like diplomats, traders and tourists either to observe the qualities of Islam or for any other personal interests.<sup>31</sup>

The contract of *Amān* with reference to its impact is similar to the contract of peace treaty and contract of *al-dhimmah*. While with reference to parties to the contract, a contract of *Amān* is different from peace contract and contract of *al-dhimmah*. Peace treaty is usually made between Muslim state and aliens that may be a group of aliens or in the form of alien states while the contract of *Amān* may be conducted between Muslim individuals and non-Muslims. The contract of *al-dhimmah* may also be

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<sup>28</sup>. Muhammad bin Abī Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: *Dār al- Ma'rifah*, 1993), 78.

<sup>29</sup>. 'Alā al-ddin Abu bakar bin Masood bin Ahmad al-Kasānī al-Ḥnafi, *Bdā'e al-Sānā'e* vol.7 (Beruit: Dār al-Ktub al-'Imiyyah,1986), 110-111.

<sup>30</sup>. 'Alā al-ddin Abu bakar bin Masood bin Ahmad al-Kasānī al-Ḥnafi, *Bdā'e al-Sānā'e* vol.7 (Beruit: Dār al-Ktub al-'Imiyyah,1986), 108.

<sup>31</sup>. "If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure. That is because they are men without knowledge" Al-Qur'ān: 09,06.



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conducted between Muslim state and non- Muslims. Peace treaty and *al-dhimmah* may be executed with due process while the contract of *Amān* needs not such formal execution it may also be contracted verbally or by means making some specific gestures or responses by both the parties.

### **Preventing Muslim individuals from awarding *Amān***

The authority of awarding *Amān* by Muslim can be deprived by Muslim state or not. Muslim jurists have different opinions regarding the issue of banning the Muslim authority of awarding *Amān*. Some of them like *Zūhaylī* and *Zaydān* are of the view that Muslim state is considered the representative of Muslims and the issue of *Amān* is linked to Muslim integrity and security so due to this reasons, Muslim state can deprive the authority of Muslim individual or at least it must be ratified by Muslim state. Muslim state is supposed to declare publically not to award *Amān* to specific aliens or in general.<sup>32</sup> The other view point of *Shaybānī*, regarding this issue is that Muslim state can ban awarding *Amān* but it will be having no legal impact. He is of the view if any Muslim individual awards *Amān* despite of preventing by Muslim state, such *Amān* will be considered valid.<sup>33</sup> Reason to this rule of law is that Muslim state has no authority to snatch the right of Muslim individual which given by Al mighty Allah. He is of the view that the disobedience committed by Muslim individual in the aforementioned situation, will be asked either for physical or financial punishment. Here the physical punishment is not suitable to be inflicted on the individual or group of individuals. Such individual or group of individuals may be made liable to accommodate the non-Muslims to whom the *Amān* is awarded by them with their own expenses and will be made responsible for any wrong the non-Muslims do in future against the Muslim state. Or the Muslim can also demand for the compensation of the damages done to the public interests of Muslims in the result of awarding a wrongful *Amān*. The punishment of the *Amān* giver in this connection may vary as per space and time. According to *Shaybānī*, if such *Amān* is found beneficial for Muslims, then Muslim state cannot punish the individuals for disobeying the order of Muslim state. The

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<sup>32</sup>. Wahbah al Zūhaylī, *Athār al- Ḥarb fi Fiqh al- Islāmī*, (Bruit: Dārul Fikar, 1998), 276. Zaydan, *Aḥkam al-dhimyyina wa al-Müstā'minina fi al-Islam*, 50.

<sup>33</sup>. Muhammad bin Abī Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.2 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),576.

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logic for this rule of law is that Muslim International Law has already authorized every Muslim for awarding *Amān* and has recognized it as a right of every Muslim which cannot be taken away by issuing a simple order by Muslim state. Another reason to this rule of law is the unawareness of non-Muslims about the prevention of *Amān* by Muslim state. If Muslim state dismisses such *Amān* then it will result to perfidy by the Muslim guarantors and Muslim state.<sup>34</sup> So to avoid a major evil, minor evil is allowed to be adopted under Muslim International Law for not dismissing such *Amān*. According to *Imam Mālik*, such *Amān* will not be considered valid.<sup>35</sup> The logic for this rule of law is that obeying the order of Muslim state is the foremost obligation of the citizens of Muslim state after obeying Allah and the Prophet of Allah. Head of Muslim state has similar rights to Allah and the Prophet (Peace be upon him). So Head of Muslim state can dismiss any *Amān* awarded in conflict with the general interests of Muslims and Muslim state. Awarding *Amān* is a sensitive and public matter which is directly linked with the security of Muslims and Muslim state so it can only be exercised by a Muslim not by Muslim individuals because they do not know the exact meaning of national and international security of Muslim state. A Muslim state can safeguard its citizens better than a Muslim individual or group of individual. A Muslim individual or group of individuals may be guardian of their own interests and may not be the custodians of the general interests of Muslims and Muslim state. Only Imam or leader of the Muslim state can exercise such powers.<sup>36</sup>

### **Protection of Diplomats under the Notion of *Amān***

As earlier discussed that MIL considers diplomats protected on the basis of *Amān* diplomats are considered protected even without seeking proper *Amān* of Muslim state. According to *Shaybānī*, non-Muslims visit to Muslim state being claiming as diplomats will be considered as Protected persons by

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<sup>34</sup>. Muhammad bin Abī Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.2 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971),576

<sup>35</sup>. Muhammad bin Abdullah AL-kharshi al-Mālikī, *Shāḥ Mūkhtāsar Khalil lil kharshi.vol.3*(Bairūt: Dār al-fikar,d.n.),124.

<sup>36</sup>. *Ibid.*,124.

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showing an appointment letter from their states. By showing any fake document as an ambassador will not be declared as protected person in Muslim state.<sup>37</sup>

According to *Qaḍi Abū Yūsuf*, only sufficient proofs like an official appointment letter or gifts from their state for the head of Muslim state, claiming as an ambassadors, they will be declared as an ambassadors.<sup>38</sup> According to Sarakhsī, ambassadors' protection is important for maintaining peace order among nation states or for declaring war against any state. Due to their importance, they have right to visit Muslim state even without seeking formal guarantee.<sup>39</sup> *Al-Ghazālī* is of the view that only visit of Muslim state by non-Muslims for examining the qualities and advantages of Islam or for diplomacy make them protected persons without due processing of *Amān*. According to him other motives of non-Muslims, cannot make them protected persons if they did not formally process their protection. In such cases they will be enslaved by Muslim state and will be treated accordingly. He is of the view that *Amān* other than two aforementioned kinds, will be awarded as per international rules, values and norms by Muslims or Muslim state.<sup>40</sup> According to *Abū al-Abbas al-Mālikī*, the intention of diplomacy can make any non-Muslims as protected persons if they visit Muslim state even without seeking any formal *Amān* from Muslims or Muslim state.<sup>41</sup> According to *Sulaimān bin 'Umar Al-Shāfi'ī*, diplomats can visit Muslim state without the contract of *Amān* and even they will not be demanded any proofs of formal Protection.<sup>42</sup> According to *Shaybānī* no person can visit Muslims or Muslim state without showing formal documents of guarantee. According to him, the intention cannot alter the visitors' status of alien-

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<sup>37</sup>. Muhammad bin Abī Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: *Dār- Ma'rifah*, 1993), 92.

<sup>38</sup>. Abū yousuf Yaqaob bin Ibrahim, *Al- Khārāj*, (Qāhirah: Māktābāh al-Azhāriyya Litūrāth,n.d),206.

<sup>39</sup>. Muhammad bin Abī Sahl al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: *Dār- Ma'rifah*, 1993), 92.

<sup>40</sup>. Abū Ḥamid Muhammad bin Muhammad al-Ghazali al-tūsi, *Al-wasīt fi al-Madhhab*, vol.7 (Egypt: Dār-Ssalām,4117),44.

<sup>41</sup>. Abu al-abbas Shahab udin ahmad bin Idrees bin abd ur rehman al-Maliki al-Shaheer bil Qarrafi, *Al-Zakheerah* vol.3 (Beirut: Dār-Gharb al-Islami,1994),446.

<sup>42</sup>. Sulaiman bin Umar bin Mansor al-a'jeeli al-Azhari, *Futuḥat al-Wahab be Taiwdheeh Sharḥ Minhaj al-Tullab* vol.5 (Bairut: Dār-Fikar,n.d),212.

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ship. In the current scenario of the behavior of nation states, the view point of Shaybānī is considerable but the clear text of the Qur'ān in this connection defies the view point of Shaybānī. Which clearly award the right of visiting for observing Islam and the qualities of the organization of Muslim state.<sup>43</sup> The viewpoint of *Al-Ghazālī*, *Sulaiman bin 'Umar Al- Shāfi'ī* and *Abū al-Abbas al-Mālikī* are similar with reference to the protection of diplomats which is to be preferred based on these arguments:

- 1- The *Qur'ānic* verse has given the right to non- Muslims to visit Muslim state.<sup>44</sup>
- 2- Islam promotes peace at every cost it is possible through diplomacy to establish good relations with other nations and nation states.
- 3- The ambassadors of *Musailma Kadhāb* were declared protected by the Prophet (peace be up him) even they did not process formally their protection.
- 4- *Sulaimān A.S* had also considered the diplomats of *Balqīs* protected when they had presented gifts to *Sulaimān*. Although *Sulaimān* did not accept the gifts but treated them as protected persons and they did not seek proper protection.<sup>45</sup>
- 5- *Abū sufyan* was also given protection when he came to *Madinah al-Munawwarah* for renewal of peace treaty of *Hudaybiyyah* and he did not seek any protection to enter into *Madinah*.<sup>46</sup>

### **Diplomats with reference to their liability**

As discussed in the preceding section of this study that diplomats are given protection based on the notion of *Amān*. Muslim jurists discuss the liability of diplomats under discussion of protection

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43" If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah. and then escort him to where he can be secure. That is because they are men without knowledge. "Al- Qur'ān: 09,06.

44. Al-Qur'ān: 09,06.

45. "But I am going to send him a present, and [wait] to see with what [answer] return [my] ambassadors.". Now when [the embassy] came to Solomon, he said: "Will ye give me abundance in wealth? But that which Allah has given me is better than that which He has given you! Nay it is ye who rejoice in your gift! ."Go back to them, and be sure we shall come to them with such hosts as they will never be able to meet: We shall expel them from there in disgrace, and they will feel humbled [indeed]." Al-Qur'ān: 27, 35,36,37.

46. Mushtaq Ahmad, *jihad, Muzahmat aor Baghawat*, 301.

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persons (*Mustā'min*). The right of protection to diplomats is based on reciprocity, it means that diplomats are supposed not to violate any right of the inhabitants of the Receiving State otherwise their protection will be come to an end. According to Shaybānī, diplomats are protection in Muslim state but their protection will be come to an end if they violate personal right of the citizens.<sup>47</sup> He is of the view that in case of violation of public right by diplomats their protection will also be terminated in a sense that court will punish them penalty (*Tāzīr*). According to him, Ḥad punishment will not be given to them in case of accusation of *Ḥdūd* except *Ḥade Qadhaf* because personal right is dominant in Qadhaf.<sup>48</sup> *Al-Shāfi'ī* and *Al-Māwardī* also differentiate between public and private rights. In case of violation of public rights, the diplomats will not be held accountable for *Ḥudūd* punishments like adultery and apostasy. They are of the view that if diplomats do sexual intercourse with other diplomats they will be advised that Muslim state does not allow such kind of vulgarity in its territory. If sexual intercourse was done with non-Muslim citizen, they will be required to be repented otherwise their protection will be terminated. If sexual intercourse was done with Muslim citizens, their protection will be terminated if it was mutually agreed during making the contract of *Amān*. If such stipulation was not mentioned in the contract of *Amān* then such diplomats will be required to make repentance otherwise the protection will be terminated. In case of violation of private rights, the diplomats will be held accountable. In case of theft (which is combination of private and public rights) *al-Māwardī* is of the view, that if the stolen property belongs to another diplomat, in such case the accused will not be held accountable neither for damages nor for imputation of hand rather they will be warned not to repeat the same crime otherwise the protection will be terminated. If the stolen property belongs to Muslims or non-Muslim citizen, the criminal will pay damages for it. *Al-Māwardī* has two opinions about imputation of the hand of thief:

- 1- Hand will not be imputed due the violation of public right for which protection persons will not be held accountable.

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<sup>47</sup>. Muhammad bin Abī Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shārqiyya lil ilanāt, 1971), 306.

<sup>48</sup>. *Ibid.*, 307.

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2- Hand of the guilty person will be imputed because it is necessary for the protection of property like retaliation is to be imposed for the protection life of humans.<sup>49</sup>

According to *Mansūr al-Ḥanbalī*, diplomats will not be held accountable for the violation of public rights like *Zina*. He is of the view that if guaranteed persons do sexual intercourse with Muslim females, they will be given death punishment due to the violation of the contract of *Amān*. According to him if diplomats do sexual intercourse with non-Muslim citizens for which they will not be punished for *Ḥadde Zina*.<sup>50</sup> According to *Imam Abū Ḥanīfah* and Shaybānī, diplomats may be made subject to pay the damages in case of any violation of personal and some public rights like consensual sexual intercourse and theft.<sup>51</sup> *Shams al-ddin Al-Shāfi'ī* has endorsed the viewpoint of *Abū Ḥanīfah* and Shaybānī.<sup>52</sup> According to Malik and *Abū Yūsuf* all *Hudūd* punishments are equally applied to diplomats and such violation may terminate the protection of violators.<sup>53</sup> According to *al-Awzā'ī*, public rights are equally applied to all the inhabitants of Muslim state. In case of violation all the criminals will be treated equally for penalties.<sup>54</sup> In the discussion, the view point of *Imam al-Awzā'ī* can be preferred. According to him, it is important to stop violation of public and private rights, guilty persons should be punished as equal to Muslims without discrimination based on protection or citizenship of non-Muslims. The view point

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<sup>49.</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.7 (Bairut: Dār-Marifah, 1990),378. Abu al- Hassan Ali bin Muhammad bin Muhammad bin Habib al- Basri al- Shaheer bil Mawardi, *Al- Havi al- Kabir fi Fiqh Madh al- Imam al- Shāfi'ī*,vol.13 (Beirut: Dār- Kutb al- Elmiyyah, 1999), 329-330.

<sup>50.</sup> Mansoor bin younas bin Salah Uddin al-Ḥanbali, *Kashāf al-Qin a' a'an Mtn al-Iqna'a* vol.6 (Beirut: Dār-Kutub al- 'Imiyyah,n.d),91.

<sup>51.</sup> Muhammad bin Abī Sahl al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1 (Al-Qāhirāh: al-Shārikāh al-Shāriyya lil ilanāt, 1971), 326.

<sup>52.</sup> Shams ul-din Muhammad bin aḥmad al-Khatīb al-Sharbīni al-Shāfi'īMughni al-Muḥtaj ila Ma'rifat Ma'ni al-fāz al- Minhaj vol.5 (Bairūt: Dār al-Kutub al- 'Imiyyah,1994),447.

<sup>53.</sup> Abu al-abbas Shahab udin ahmad bin Idrees bin abd ur rehman al-Maliki al-Shaheer bil Qarrafi, *Al-Zakheerah* vol.3 (Beirut: Dār-Gharb al-Islami,1994),447.

<sup>54.</sup> Abu Abdullah Muhammad bin Idrees Al-Shāfi'ī, *Al-Umm*, vol.7 (Bairut: Dār-Marifah, 1990),378. Abu al- Hassan Ali bin Muhammad bin Muhammad bin Habib al- Basri al- Shaheer bil Mawardi, *Al- Havi al- Kabir fi Fiqh Madh al- Imam al- Shāfi'ī*vol.14 (Beirut: Dār- Kutb al- Elmiyyah, 1999), 190.

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off *Al-Awzā'ī* can help us to make Muslim state and Muslim societies free from capital crimes. The rest of the opinions give relaxation to diplomats on different grounds to be encouraged for doing crimes and violating the public of the citizens of Muslims. It is also a matter of injustice to equalize diplomats for getting benefits being the inhabitants of Muslim state with Muslims and not Muslims and to let them relax in violating the rights of the citizen of Muslim state.

This discussion may be concluded that MIL awards reciprocal protection to diplomats on the basis of *Amān*. *Amān* is a bilateral contract, not only the giver of *Amān* but all Muslims along with Muslim state are bound to protect all the rights of diplomats not only from enteral as well as from external threat. On the other hand, Diplomats are also supposed not to violate any law of the Receiving State otherwise their protection will come to an end in a sense that court will be having jurisdiction to punish them. Courts of the Receiving State has jurisdiction to hear cases against diplomats in following situations:

In case of violation of private right, diplomats will be held accountable as others citizens of the Receiving State. For instance, if diplomats attack on inhabitant of the Receiving State, the aggrieved person has the right of defense against the diplomats as he has against any attacker. In case of violation of *Ḥdūd*, diplomats will be only be exempted from *Ḥad* punishment while *Ta'azīr* punishment will be given to them. In case of *Hadd Qadhaf*, they will be given *Ḥad* punishment because the right of human is predominant in *Qadhaf*. The punishment of retaliation will also be given to diplomats due to the predominance of the private right .<sup>55</sup>

In case of violation against the Receiving State, like spying, aggression, training of a group having weapons or providing them weapons against the Receiving State in such situation, diplomats will lose their right of protection and they would be punished as the Receiving State thinks fit. If there is any specific agreement between the receiving and sending state, in such situation, the agreement shall

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<sup>55</sup>. Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 306.

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prevail.<sup>56</sup> Violation of any law of the Receiving State by diplomats under the umbrella of immunity would be considered perfidy and perfidy is not only crime in Contemporary International Law but also crime in MIL.<sup>57</sup> The protection of diplomats may not be terminated only by suspicion, it must be confirmed in order to avoid perfidy from the Receiving State because all Nation States have signed Vienna Convention in the form of treaty among the signatories. MIL considers that any international treaty made by Muslim state which is not contrary to the spirit of Qur'ān and Sunnah will be observed at any cost. The observance of Qur'ān and Sunnah is based on the legality and prohibition of the general rules of MIL. For instance, mutilation and treachery are prohibited by Qur'ān and Sunnah, it cannot be allowed by mutual consent of the contractual states or on the basis of reciprocity. The Prophet (peace be up him) said in this connection that all conditions stipulated by Muslims in the formation of the contract must be fulfilled except those which affect prohibitions and permissions.<sup>58</sup> It means the aforementioned *Hadith* confines Muslim state not to violate the spirit of the Qur'ān and Sunnah in making any international treaty or contract. All Muslim states in current era are the member of UN and they unanimously signed the Vienna conventions related to diplomatic privileges and inviolability. They all of them bound to fulfill their agreements as the Prophet (peace be up him) did in the case *Abū Basīr* RA after concluded treaty of *Ḥudaybiyyah*. All Muslim states must participate in the formation of any international treaty in UN level if there is any element repugnant to the injunction of Qur'ān and Sunnah or the interest of Muslim *ummah*, they must follow the process of reservation to eliminate the contrary elements of international treaty.

## CONCLUSION

The research article concludes that CIL gives limited immunity to diplomats from all jurisdiction of criminal and civil cases from the Receiving State. It stresses that diplomats are supposed to follow the

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<sup>56</sup>. Al-Sarakhsī, *al-Mabsūt*, Vol.10 (Bairūt: *Dār- Ma'rifah*, 1993), 96.

<sup>57</sup>. Al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, Vol.1, 265.

<sup>58</sup>. "Abu Dawūd Sulaiman bin al-ashās al-Shabistāni, *Sunan-e-Abi Dawūd*, vol.3 (Riyadh: *Dār-al-Salam*, 2008), 354.



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laws of the Sending States as well as the laws of the Receiving States. Immunity awarded by CIL does not mean to violate the laws of the Receiving States intentionally, it awards only limited immunity to diplomats in order to perform their diplomatic duties peacefully. According to CIL, if diplomats violate the laws of the Receiving States in such situation, the courts of the Receiving States has the right of jurisdiction to sue the diplomats if the domestic laws are contrary to the Vienna Convention. Similarly, the Receiving State has also right of *persona non granta*, if any diplomats found guilty. On the other hand, MIL awards protection to diplomats on the bases of *Amān*. Under MIL, Diplomats are supposed not to violate the right of any inhabitant of the Receiving State otherwise their protection will come to an end. MIL differentiates between public and private right. If a private right is violated by diplomats their right of protection will be terminated in a sense that courts of the Receiving State have the jurisdiction to punish them accordingly. If public right is violated by diplomats, then courts of Muslim state will also have the jurisdiction to punish them *Tazīr. Ḥad Qadhaf* and retaliation will also be imposed if diplomats are found guilty of that because private right is predominant in the aforementioned cases.