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The diplomatic immunities and privileges between the internal and the external sovereignty of the states

Dr. Omar Hamdan Al-Hadrami

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ملخص

لقد مثلت مسألة الحصانات والامتيازات الدبلوماسية المنطلق الأكثر جدلا في معالجة سيادة الدولة وأمنها واستقلالها، وقضية العلاقات الدولية القائمة على أساس بناء التعاون والسلم والأمن بين الدول. وقد تعددت الدراسات التي قاربت هذا الموضوع إلا أن معظمها قد حدد نفسه بمعني الحصانات والامتيازات الدبلوماسية من حيث مصدرها وسندها القانوني والمجالات التي تغطيها والأشخاص المشمولين بها.

ولقد وجد الباحث ندرة أو غيابا في الدراسات التي تتحدث عن تنازع القوانين الداخلية والدولية حول هذا الموضوع، وبالتالي معرفة درجة السمو بينها.

لذلك فقد عالج الباحث كغيره سؤالا مهما وهو هل هناك سيادة مطلقة للدولة وبالتالي لا يمكن تحديها أو تقييدها، أم أن السيادة نسبية ومحدودة، خاصة ما تعلق بالسيادة الخارجية التي تفرض عل ى الدولة، حتى تستطيع أن تعايش استحقاقات المجتمع الدولي، أن تتنازل عن جزء من هذه السيادة.

وحتى يمكن فحص هذه الفرضية والإجابة عن التساؤلات حولها فقد أخذ الباحث بمجموعة من المناهج البحثية كالمنهج التاريخي ومنهج النظم ونظرية السيادة والمنهج القانوني.

وقد جاء البحث في أربعة أجزاء؛ إطار نظري ثم الإطار القانوني الذي تحدث عن الأسانيد القانونية للحصانات والامتيازات الدبلوماسية وبعدها جاء الحديث عن امتدادات الحصانات والامتيازات الدبلوماسية وأخيرا سيادة الدولة والقانون الدولي وعن موقع هذه الحصانات في سجال القانون الدولي والقانون العام.

كلية الدراسات الدولية، الجامعة الأردنية.

Abstract

The question of diplomatic immunities and privileges has represented the most controversial subject in dealing with the sovereignty, security and independence of the state, as well as the issue of the international relations that are based on cooperation, peace and security among states. The studies that have addressed this subject have been varied. Yet most of them have limited themselves to the meaning of the diplomatic immunities and privileges regarding their source, legal foundation, the areas that they cover, and the persons included in them. The researcher found scarcity or an absence of the studies that speak of the conflict of the internal and the international laws regarding this subject, and consequently, the knowledge concerning the degree of the supremacy among them.

The researcher, like others, has posed an important question: is there an absolute sovereignty for the state which cannot be challenged or restrained? Or is sovereignty a relative and limited one? Especially in respect of the external sovereignty that is imposed on the state so that it can live with the obligations of the international community, or relinquish part of this sovereignty. And in order to examine this assumption and answer the queries around it, the researcher has adopted a group of the research methodologies, like the historical discourse, the systems approach, the theory of sovereignty and the legal course. The research is divided into four parts: a theoretical framework, then the legal framework that spoke about the legal references for the diplomatic immunities and privileges, followed by the talk about the extensions of the diplomatic immunities and privileges, and finally the sovereignty of the state and the international law, and the position of these immunities within the contexts of the international law and the public law.

Key words: diplomatic immunities and privileges, Diplomatic official, International law, Sovereignty, state security.

Introduction:

The theory of the diplomatic immunities and privileges is based on the sovereignty of the "state", and its right to impose its internal law on all the "people" who reside on its territory within its internationally – recognized borders. The word "people" here means the individuals and the groups who enjoy its care as citizens or its protection as resident foreigners. These are legally binding whether it was an internal law (on the subjects) or an international public or private (the non-subjects residents). But the question of the diplomatic immunities and privileges is the exception to this rule on the basis of the diplomatic and the consular theory that was regulated by the public international law among the states. The term "diplomatic immunities and privileges" means the non-submission of some individuals (other than the subjects), who reside in a certain state, to the principles and the rules of the internal law of that state.

This creates at first a conflict between the international public law and the internal law of the state, which means that there exists two concepts for sovereignty: one that is applied on the subjects and another that is applied on the foreigners (people with special status since they are international officials). Thus the internal law (in most of its parts) is not applied on the international officials. This indicates the supremacy of the international law over the internal law, though there are many international norms that stress the necessity of the compliance of those officials with the traditions, principles and laws that regulate the life of the state to which they are accredited. This, however, does not mean they are under legal obligation, as much as being under a moral obligation, since the sending state is keen on having its officials portrays a good image of their states. On the other side, the receiving states are keen on providing all facilities to the international officials accredited to them on the bases of international cooperation, reciprocity, and the bolstering of the international relations. Accordingly, the study of the points of contact between the internal and the external sovereignties and the internal and the international laws regarding the diplomatic immunities seems important to both: the sending and the receiving states. It also becomes important for clarifying the components of the conflict between these two laws, so that the diplomatic envoys understand their rights and limits in order to avoid the rise of problems among states.

The research importance:

The importance of this discourse emanates from the probability of the existence of a conflict between the international law and the internal law which some people, and even so states, assume to exist regarding the diplomatic immunities and privileges. Thus the question arises: why does the international law supersede the internal law, while the nature of things stipulates that the state is sovereign and that there is no sovereignty above its sovereignty.

The Vienna Convention of 1961 on Diplomatic Relations affirmed the necessity of the exemption of the receiving state of the diplomatic envoys of many of the rules of its laws, owing to reasons and motives that will be stated later in the discourse.

Accordingly, the importance of this research emanates from the fact that it is one of the very few approaches that addressed, in a direct and definite manner, the question of the conflict of the laws concerning the question of the international immunities and privileges.

Research problem:

The problem of the research is confined to one main question: what is the impact of the diplomatic immunities and privileges, which the diplomatic officials enjoy, on the concept of the sovereignty of the state over all those residing on its territory-subjects or foreigners? Does this exception mean an encroachment on the internal law of the state, and consequently, on its sovereignty? And if those diplomatic officials who enjoy immunities and privileges that render them “above the internal law” under the international law, do this mean the supremacy of the international law over the domestic law? And do this mean a conflict of laws between the public international law and the internal law?

Research assumption

The assumption of the research is based on the fact that each state enjoys a sovereignty with no sovereignty above it. The international law does not allow a states to interfere in the internal affairs of another state. Yet there are international facts that allow “by law” the state to concede some of its sovereignty, but within certain conditions and situations that are dictated by the necessity of building cooperation and good relations between this state and the other states.

Research questions:

The researcher will strive to answer the following questions:

1- Do diplomatic immunities and privileges constitute a violation of, and an overstepping on the internal law?

2- Where did the theory of the diplomatic immunities and privileges come from? What was its legal foundation?

3- Do a conflict of laws exist between the internal law and the international law regarding the diplomatic envoys?

4- Do diplomatic immunities and privileges carry within their folds an encroachment on the sovereignty of the states?

5- Which one supercede the other, the public international law or the internal law? What are the reasons for this supremacy?

Research methodology:

The nature of the research requires engaging a number of the scientific research methodologies and its related approaches in the political sciences and diplomatic studies. Among these are the following:

1- The historical approach where the researcher finds himself forced to study the history of the concept of the diplomatic immunities and privileges within the study of the history of the diplomatic relations.

2- The approaches system through which the researcher investigates the concept of the sovereignty of the state and some theories that relate to the state in general like: reciprocity, international cooperation, commitment to the international treaties, conventions, the provisions of the public international law and the theory of the functional necessity. Both of these approaches will be subject to analysis and shall constitute the main access to the methodology that the researcher will follow. It will be possible through them to test the assumption and thus arrive at answers to some of their related questions.

3- The legal approach which constitutes the main approach of this research, since the handling will mainly focus on the idea of the conflict of the laws.

4-

Terms definition:

☙ Diplomatic official:

He is the person who is tasked with taking part in running the relations of his country with the other states. This is done under the supervision of the organs of his state, and in accordance with the international charters, treaties and conventions.

☙ Diplomacy:

It is the mechanism of regulating and administering the foreign relations of the states in a manner consistent with their national interests.

☙ Diplomatic immunities and privileges:

The total legal measures that are applied in particular over the members of the diplomatic missions in order to protect the members of these missions. They are excepted by these measures from the law of the receiving state, and exempted from all fees, taxes and fines. They are provided with all assistance to facilitate their work. All of this was determined in the Vienna conventions of 1961 and 1963 as well as the other conventions, within the context of the concept of reciprocal treatment.

☙ International law:

The set of the rules, principles, customs that govern and regulate the relations among the states.

☙ Internal law:

The set of the rules and the principles that govern the relations of the individuals with the authority and the relation of the latter with them, as well as the relations of the individuals with each other.

☙ The concept of sovereignty:

The concept of sovereignty appeared with the rise of the modern national state. It is derived from the Latin word “superanus”, meaning “the higher”. The French scholar, Baudin, defined sovereignty in his book, “the republic” to mean (that is sovereignty) the right of the state to exercise its internal jurisdictions and manage its international relations with the other states in complete freedom and without being subject to any foreign authority. The internal sovereignty means the right of the state in affecting the measures, procedures, deciding and implementation within its territorial borders.

Consequently, sovereignty becomes the capable force that realizes the political unity of the state. Externally, it means the non-submission of the state to any pressing authority or pressures from the other state, except those imposed by the principles and rules of the international law.

Difficulty of the research:

The main difficulty of this research lies in the scant political and legal literature that addressed the question of the conflict between the international and the internal laws, concerning the diplomatic immunities and privileges. Thus the researcher will resort to analysis and the creation of the necessary comparisons.

Literature review:

The libraries have been full with the publications that speak of diplomacy. All of them have dedicated full chapters to the question of diplomatic immunities and privileges, and discussed in detail the history and concept of diplomacy, and interpreted the theories of the diplomatic immunities and privileges, as well as the persons and the areas that they cover in the judicial, legal and financial aspects, as well as the types and purposes of these.

Among those who wrote on the subject of diplomacy in general are:

1- Dr. Mahmoud Khalaf: “The Diplomatic Theory and Practice”.

2- Dr. Nadim Abdul Wahid Al-Jasour: “The Bases of the Rules of the Diplomatic and Consular Relations”.

3- Dr. Khalid Hasan Al-Shaikh: “Diplomacy and the Diplomatic law”.

4- Dr. Ibraheem Ahmad Khaleefah: “The International Diplomatic and Consular law”.

5- Seif Ahmad El-Wady Romahi,: “Studies in Internatioanl Law and Diplomatic practice”.

6- John R. Wood and Jean Serres,: “Diplomatic ceremonial and protocol”.

Despite this wide and comprehensive coverage, yet these studies have neglected to approach, in a specialized manner, the relationship of the diplomatic immunities and privileges with the sovereignty of the states.

Consequently, they did not clarify the question of the exception that is granted to the diplomats by exempting them of some of the requirements of the internal law of the state, which appears to be an incapacitation of the domestic law. Thus the importance of this discourse becomes clear since it sheds light on the question: does there exist a conflict between the international public law and the internal law regarding the diplomatic immunities and privileges? And does the public international law supersede the internal law of the states?

• Structure of the research:

The first discourse

The diplomatic immunities and privileges: concept and origion

- First requirement: An overview of the concept of the diplomatic immunities and privileges.
- Second requirement: The historical evolution of the concept of the diplomatic immunities and privileges.
- Third requirement: The sources of the diplomatic immunities and privileges.

The second Discourse

The legal attributions and the diplomatic immunities and privileges

- First requirement: the system of safety in Islam.
- Second requirement: the theory of the representative capacity.
- The third requirement: the theory of extraterritoriality.
- Fourth requirement: the functional theory.
- Fifth requirement: the theory of reciprocity.

The third discourse

The extensions of the diplomatic immunities and privileges

- First requirement: the immunity of the location and its annexes.
- Second requirement: judicial immunity.

The fourth discourse

The diplomatic immunities and privileges and the sovereignty of the state and the international law

- First requirement: sovereignty and the diplomatic immunities and privileges.
- Second requirement: the security of the state and the diplomatic immunities.

Conclusion

Footnotes

References

The first discourse

The diplomatic immunities and privileges: the concept and the origins

_ The first requirement: an overview of the concept.

Immunity in Arabic is derived from the root (Hosn) and (Hasanah) meaning immunity against infection, and the prohibition of litigation. In the European languages (especially the French language) it is derived from the Latin word (Immunitas) whose root is Munus. It means exemption from certain burdens… an exemption from a burden, or a privilege that is legally granted to a certain category of persons. It started as a privilege that is granted by the king to a large property owner or a church institution, who grant the dispensation of the conduct of the royal agents in the field of this large owner. The term immunity, in its foreign languages derivation means the exemption from the financial or tax burdens, or the municipal burdens or corvee (unpaid labour). Among this was the granting of exemption from taxes for a period of ten years to those who cultivate the desert lands in Italy.(1)

Maybe the first to benefit from the right of immunities at a later date was the National Assembly (the French house of representatives) which was given-as an assembly and not as representatives-a privilege so as not to impede the progress of its work. This was in the decision of the Assembly on 23 June 1789 that stated that "Each representative person has his own inviolability" as a member of the Assembly. The successive French constitutions restored this principle. Article (26) of the constitution of (24) October 1958 consecrated this principle, when the parliamentary immunity was given two different guarantees: the inviolability and the non-liability, which means the protection of the representative from all pursuits related to the exercise of his mandate. This was so when the said article stated that "no pursuit, or search or detention or a judgment be made against any member of the parliamentary council as a result of the opinion he expresses or his voting in the exercise of his functions". (2)

In recent times, the international law went beyond the question of the concept of immunities. Accordingly, the term "immunity" includes judicial immunity. This means that the states cannot submit against their will to the

judiciary of another state. On the other side, the states, in their mutual relations, consider the financial immunity as being contrary to the principle of equality. The privilege of actual imposition of fees expresses an unequal relationship for the benefit of the one who exercises it". This is so, since any financial decision is one for the public authority. And, in application of the principle of the equality of the states, the states refuse to submit to the other states in the area of imposing fees".(3)

The concept of privileges in itself is linguistically derived in the Arabic language from the word "distinguished" which means separating the thing from another… preferring it above everything else. In the European languages, the word "privileges" is derived from the Latin word (privilegium) which means excellence. Legally it means preference, which is a particularity that is granted to an individual, or a group of individuals, with the possibility of enjoying it outside the framework of the general law. Historically, it means "the honorary or beneficial rights and preferences which some persons own as a result of their lineage (the nobility) or offices or their involvement in some bodies (like the clergy, judges, and members of the various crafts) or some areas or provinces in the state. (4)

International jurists say that "privileges are sublimation and distinction, and immunities are their guarantees". Immunities are a system in which some persons are exempted from some internal legal obligations whose violations necessitate the imposition of a punishment of the violator, whereas privileges assume the compatibility of the internal law of the state with the external law which is applied to the diplomatic officials only. (5)

The word "prerogative" which is synonymous with the word "privilege" is derived from the Latin word "prevogative" that means "an honorary privilege or a status or a right. It is an exclusive authority that is owned by an individual or group, and is associated with the exercise of a certain office… by belonging to a social class or a legal position. (6)

The word taxes is derived in the French language from the verb "imposer" and the Latin origin "impositum" which means the "deduction that the state makes on the resources of the individuals to help in covering the public burdens". The word "inviolable" is also derived from the Latin "inviolabilis", which means "a thing that is susceptible to violation or that it is impossible to violate". It touches the word "intangible" which means "untouchable". When we address the two concepts of immunities and privileges in the modern diplomacy, we find that they are tied with the term "diplomacy" since they fall within the context of the international relations, and the circle of sovereignty and the authority of the state, in particular.

The aim is to preserve the continuity of the common international work and the continued contact among the states on the basis of cooperation, without encroaching on the obligations towards the others. Originally, the two concepts aimed to protect the principle of the protection of the diplomatic envoy, and not impinge on his person or possessions so that he fulfills his mission. The two terms came also as being synonyms without differentiation among them, though it has been noted that there is a trend among the states to limit the number of the diplomats accredited to them, though this maybe done in indirect way. Some writers has drawn a similarity between the privileges and the veneration of the state. They also associated immunities with "veneration", whereas some others considered that "there exist immunities when the person is not subject to an internal legal rule, or parts of this rule. There are also privileges when a special internal legal rule substitutes an ordinary rule". Others believed that the "aim of the immunities is to exempt the persons who enjoy it from the duty to which the other people of the country are subjected to, whereas privileges appear through granting a special and more appropriate treatment to the diplomatic envoys". There are others who were of the view that it is useless to differentiate between immunities and privileges. (7)

The second requirement:

Despite the general perception that views immunities and privileges as being tied, as a concept, with diplomacy, the reality indicates that the rules of diplomacy-as an art of propriety and negotiation – fall within the circle of immunities and privileges on whose bases the other rules of diplomatic practice are established. Even if we reviewed the practices and the relations that were prevailing in the old societies, we find that the contacts have been founded on recognizing these immunities and granting them. Thus the protection of the envoy and ensuring his life were considered the fundamentals of diplomacy. The personal inviolability was among the first rules that were affirmed through the adoption of immunities… as if a state of sanctity was bestowed on the messengers and the envoys. During their development, the first human communities witnessed exiting the individual circle towards the circles surrounding them. This took place after the rise of the groups and the entities that formed the first nucleus of the political life of the people. Since there was a need for cooperation, and that the human being is civil in nature, he found himself forced to exchange the temporary messengers and envoys that must enjoy some immunities and privileges which became necessities to realize the diplomatic mission. (8)

This exchange necessitated the enjoyment of the envoys of immunities so as to perform their missions. "The murder of the ambassador or harming

or insulting him was among the reasons of the initiation of fighting by his tribe.
Some tribes used to pass the death sentence against anyone who kills or insults an envoy coming to them". This was known by the Roman Empire.(9) In Greece, the person of the envoy was immune, and encroaching on It was met by legal punishment.(10) Islam also granted safety to the envoy provided he did not engage in illegitimate acts, like spying, buying weapons,(11) interference in the affairs of the state or abetting the enemy.

The Messenger (peace be upon him) has laid down this rule, when he addressed the two envoys of Musailamah the liar (who claimed prophet hood) saying: "if it wasn`t for the fact that envoys are not to be killed, I would have beheaded you". (12)

With the development of the international relations, the importance of the immunities and the privileges began to rise, after being recognized as such by all peoples and states. This was for the purpose of facilitating the establishment of contacts and cooperation among the states. This meant that the exercise of diplomatic work imposes the protection, respect and assistance of the envoys. This proves that the "state" is not only committed to the stipulations of the international law, but also is keen on receiving the same respect from the other states. It was noted that the thinkers have tended to lay down the bases for a theory on which immunities and privileges must be founded. This is especially so after the development of the diplomatic practice which has moved from the phase of the "temporary envoy" to the phase of the "permanent envoy". The states began issuing legislations and laws to regulate the rules of these immunities and the justifications for granting them. The Republic of Venice was the first one to issue such legislations in the year (1554), followed by Holland (1651), Britain and France. We have an example of this in the case of the incident of the Russian Ambassador to Britain. The year (1708) during the nineteenth century(13), the states began to lay down provisions and rules concerning diplomatic envoys (14) in which more than two states took part. Among this was the agreement that was concluded between the states of Latin America in the year 1928 in Havana, Cuba. This question developed further until we reached the 1961 Vienna convention that has determined all aspects of the diplomatic immunities and privileges. The agreement came as a result of the deliberations of the Vienna Conference that was attended by the representatives of (81) states and many observers from the international organizations. It was crowned on 18/4/1961 by an international agreement that came to be known as "the Vienna Convention on diplomatic relations".

It contains articles that comprise all the rules of the diplomatic action, including the international immunities and privileges.(15) It was followed in 1963 by the "Vienna convention for consular relations".

The third requirement: the sources of the diplomatic immunities and privileges

The diplomatic immunities and privileges are based on several points of reference, theories and sources. The following are some of them:

1- International customs:

In their essence, these mean the public practices that are acceptable by the individuals (as groups), the states and the international communities, like the acceptance of a law. The constituent statute of the International Court of Justice has defined, in its thirty eighth article, the international custom as being "the considered international customs that are considered as a law that has been proven through recurrence and usage". The immunities and privileges were maintained within this rule, even among all the primitive and uncivilized communities.

The protection of the ambassadors was based on religious beliefs, to the point that the first groups have stressed that any breach of this protection calls for the anger and revenge of the gods.

With the development of the human communities, these rules and references moved from the circle of religion to the circle of the worldly provisions when laws were laid down to regulate them. Yet some practices remained governed by the customs, norms and traditions. This was affirmed by the preamble of the 1961 Vienna conventions on diplomatic relations(16) which came as a reflection to constitute a general international norm that determined the landmarks of the many rules dealing with diplomatic representation. Among these were the diplomatic immunities and privileges which reached the point of commitment, though some of them remained within the scope of courtesy that the states follow on the basis of reciprocity.

2- The international treaties and conventions:

The codification of the provisions concerning the diplomatic envoys did not start except during the nineteenth century.(17) But this came in the form of bilateral treaties (as stated before), and later developed to become international treaties that entered the rules of the international public law, foremost among which is the 1961 Vienna Convention.

3- The national legislations and laws:

The states paid attention to the question of the diplomatic immunities and privileges, since it found it a very important and successful method of realizing the goals of mutual cooperation and respect among the states. Thus the states and their legal jurists annexed to their national legislations clear provisions in which they determined in them the immunities and the privileges which the diplomatic envoys accredited to them enjoy. The importance of these national legislations becomes clear in uncovering legal rules that are valid for application at the international level. And in order to avoid falling into contradiction with the provisions of the international law, they made these legislations fully consistent with these provisions.(18)

Thus we see that the immunities and the privileges came to fulfill the needs of the states in establishing sound relations among them that are based on cooperation and the dissemination of trust and respect, and the mutuality of keenness on the security of the dealing among them.

It is obvious that the immunities and the privileges were known since the rise of the relations between the human societies and entities. Religions have enhanced (as we have stated earlier) especially the concept of the system of safety in Islam, which came as the basis for the Arab and Islamic diplomatic immunities and privileges. It seems that the modern state-that seeks to develop formulations for the principles of the international law-has assigned increased importance to this question. It found that as much as they respect them, it will receive respect from the other states on the basis of the principle of reciprocity. And in order to fathom this, the researcher will dedicate the following discourse to the question of the legal support for the diplomatic immunities and privileges.

The second discourse

The legal support for the diplomatic immunities and privileges

It is agreed that the basis on which the international immunities and privileges stand is the sovereignty of the state on its territory, and the exception of the diplomats accredited to it from submission to the authority of the territory. This is so since the diplomat, especially the ambassador, is originally the envoy of the head of his state. Accordingly, he is considered as if he is in his country. On the other side, this rule extends to the application of the diplomatic law that dictates the maintenance of the state

of reciprocal treatment among states. This is in addition to the satisfaction of the states with the international conventions that were concluded among them regarding the diplomatic and consular relations, resulting in signing on, and committing to them, like the 1961 Vienna Convention for diplomatic relations and the 1963 Vienna Convention on consular relations(19). Upon the heading of states towards adopting quiet diplomacy and the policies that reject violence and war, they adopted the approach of the peaceful methods that are based on cooperation among them.

Accordingly, they conceded some of their sovereignties, resulting in the immunities and privileges for the diplomats accredited to them, in return of the relinquishment of the opposite side – the receiving state - of the diplomats accredited to them. What the state relinquishes on its territories, it gains it in form of the relinquishment of the other states of their sovereignties in order to protect its diplomats. Thus the immunities and the privileges came in order to enable the diplomats to discharge their functions as required, especially after diplomacy rose above being suspected of spying and interference in the affairs of the others, and the obliging of the sending state of its diplomats not to conduct any action that infringe on the security of the receiving state or jeopardize the purposes for which they were sent for. The theory of the immunities and privileges started from legal concepts and supports. The researcher will address these, tied with the title of the research… that is the possibility of the existence of a conflict between the public international law and the internal law of the states regarding these immunities and privileges, especially as relates to the sovereignty.

First: the system of safety in Islam:

The concept of safety in Islam means immunity and invincibility. It is the power that prevents anyone who intends to commit harm. This included many non-Muslim persons and groups that benefit from its provisions upon entering the Dar Al-Islam (the Islamic lands). This came according to the principle of reciprocity. The safety came along several forms. Some was associated with support and permanence that benefit Ahl Al-Dimmah (free Non-Muslims enjoying Muslim protection), the people of the covenant and those of the fort. This is the diplomatic safety. Others were customary, normal, official and private safety. Accordingly, the system of safety is considered the theoretical basis for the approval of, and granting the international and diplomatic immunity.(20)

Islam has affirmed the concept of the people of invincibility and the people of the fort. They are the group of the diplomatic messengers and envoys who enjoy a permanent system of safety. The Messenger (peace be upon

him) was the first one to apply the principle of safety and personal invincibility for the ambassadors or the envoys, even if their mission was marred with suspicions and deviation from the purposes to which they were sent for. We have previously referred to this. The Righteous Caliphs followed him along this line.(21)

The Islamic jurisprudence stated, ahead of the modern diplomatic jurisprudence, that if the messengers were not safe, they cannot deliver the message. Safety for them is unconditional, but if a condition was written, then it is more precautionary. Messengers (diplomatic envoys) are exempt from taxes and fees,(22) which are considered – in addition to their financial yield, being a basic factor in forming the revenues of the state – from a political point of view as a reflection of a political statement that is associated with the principle of submission to the political authority of the state.

Accordingly, Islam was the first in proposing the theoretical rules and foundations that interpret the granting of the diplomatic immunities and privileges after directly tying them with the concept of the mandate, caliphate and state. Thus the opinions of the Arab and Moslim jurists were completely consistent with the then prevailing concepts regarding international relations and the concept of sovereignty. During the eighth century (A.D.), which witnessed developments in dealing and exchanging, the preliminary rules of the theory of the representative capacity were affirmed, along the bases of the functional concept regarding immunity.(23)This will be the subject of the following paragraph of the discourse.

Here we realize that the Islamic jurisprudence did not find any problem in coupling between the immunities and the privileges, on one side, and the Sharia rules on which Islam is based, since most of the foundations of these immunities and privileges have agreed with the principles of the Islamic faith.

Second: the representative capacity:

The principles of the sovereignty, independence, equality and full respect of the state are embodied, in most cases, in the ruler, in his capacity as the person who embodies its will. These principles are embodied through his will at the level of the international relations. It is established, as rule, that the law that is issued by a master or a ruler cannot be applied on another master or ruler. This resulted in the saying of the "independence" that is embodied in the person of the ruler. Since the

diplomatic envoy is considered an extension of this ruling master, the envoy becomes immune from accountability in the receiving country, and outside the context of the application of the law that is issued by the master of that country.

Though modern concepts has assigned the capacity of representation to the representation of the state and not its governor, yet the concept of sovereignty remained for a long time confused and oscillating between the sovereignty of the state and the sovereignty of the person of the ruler. This did not end except when lately the concept of the absolute sovereignty of the independent states became paramount. The representative capacity then came into existence and was tied with the right of representing the state only. Thus the diplomatic envoy began to enjoy diplomatic immunities and privileges in his capacity as the representative of an independent state.(24) The origions of this theory maybe based on the formulation that Montisquieu proposed in his book "the spirit of the laws", when he said that "the diplomatic envoy is the voice of the prince who sends him, and this voice must be free, and there should be no obstacle that may impede him from performing his work". (25)

This means that any insult to the envoy is considered an insult that is directed to the person of his head, and vice – versa.(26) Thus the diplomatic envoy must enjoy safety and protection as long as he remains representing his president and state. Otherwise, he may be exposed to unjust insult or judicial proceedings, unless the intention lies in insulting those whom the represents.(27)

The concept of this theory has retreated after it became clear that a structural dysfunction impairs it that caused many criticisms. The most important of these is that it is centered on the representative capacity without an accurate determination of the person to be represented. Sometimes this maybe the president of the state, while at other times it maybe the state and its sovereignty only, in which light the diplomat is granted some of the immunities that are not associated with the immunities of the state in general. This gives the impression that this immunity falls under a level that contravenes the level of the immunity of the state, which is basically its first source. In addition there is a dualism in the capacity of the diplomatic envoy. On one side, he represents the president of the state, which cause the immunities to be determined or occur at the level of the international courtesy, more than at the level of the concepts of sovereignty and independence on which the immunities of the state rest, and on the level of reciprocity to some extent – especially on the level of the necessity of the establishment of international relations, and the necessity of ensuring

that the envoy is safe in conducting the tasks that he was charged with.(28) Taking these aspects into consideration it maybe said that this theory lacks some logical bases. The state whose representative benefits from the diplomatic immunities, and sends him to represent her unto a foreign state, is considered at the same time a receiving state for the envoy of this foreign state who should benefit from the diplomatic immunities. Shall these immunities be granted on the basis of the relinquishment of some rights of the sovereign states to each other? Doesn't this relinquishment contravene the principle of the equality of the fully sovereign states? Finally, why this state or that must relinquish? (29)

Since the terms "authority" and "force majeure" are absent at the international level, the theory of the representative capacity is rendered incapable of providing the answer to the above – mentioned two questions. In addition, this theory did not explain the immunities and the privileges which the diplomats enjoy in their personal capacity, or those that the states provide out of courtesy.(30)It is also incapable of explaining "the submission of the diplomats to the security and order measures in the host state, if they actually threaten its security and sovereignty.(31) It did not also refer to the extent or the manner of the enjoyment of the immunities in the territories of a third state in which he has no representation capacity.(32)

This theory also fell short of answering the question relating to the enjoyment of the members of the family of the diplomat of diplomatic immunities and privileges, though they have no representative capacity. Finally this theory was unable to clarify the justifications for granting immunities and privileges to the other persons of the international law like the international and regional organizations.

Some international law jurists have concluded – on the basis of the reports submitted by the specialized legal committees – that the theory of representation capacity was unable to explain many of the situations in force, like the immunities which the diplomatic envoy enjoys during his passage or presence in a third state in which he has no representative capacity (as mentioned earlier), and when he submits to some measures – which the receiving state to which he is accredited – imposes for the public benefit, like the importation of certain things, or curfew or prevention from passing through a certain road, and the subjugation of this real estate properties to the laws in which these exist, and the consideration that his exemption from customs duty on his imports for personal use … Are out of courtesy and reciprocity only.(33)

Here another case of the conflict between the internal laws and the international public law arises. Accordingly, the jurists took to searching for a more appropriate theory that is more capable of interpretation. Among this is the territoriality theory or the theory of the extension of the territory.

Third: the theory of the extension of the territory

With the spread of the international public law during the eighteenth and nineteenth centuries, and the entrenchment of its effectiveness, a number of interpretations by the jurist and the legal scholars came out. Among these interpretations were the rules regarding the bases and norms of diplomacy, foremost among which the question of the immunities and the privileges.(34) The theory was based on the illusion of the assumption that the diplomatic envoy and the diplomatic mission are both considered as being an extension to the territory of the sending state.(35) Thus they must be treated, together with the headquarter, as if they were non-residing in the territory of the receiving state. Accordingly, the crimes and the action that occur inside the embassy (mission) are considered to have occurred in a foreign territory (the sending state) and are governed by the law of that territory.(36) Consequently, the envoys are exempt from any liability that the law of the receiving state imposes. The authorities of this state are prohibited from storming the headquarters of the mission.(37) An example of this was the famous incident that occurred in the year 1865 at the house of the Ruessian embassy in Paris, which showed a clear conflict between the international and the domestic laws. A Russian national committed the crime of attempted murder (an assassination attempt). In response to the pleas for help by the persons inside the sanctuary of the embassy, the French policeman entered the building of the embassy, arrested the person, put him in prison and brought him before the French judiciary. The Russian ambassador demanded that the defendant be handed to him. Firstly, because the offense has occurred inside the embassy… on presumed Russian territories. Secondly, this person is Russian. The French authorities justified their action and the refusal of the demand of the ambassador under the pretext that the immunity of the embassy does not extend to cover the entry of a person to this house for the purpose of committing a crime. Thus the Russian ambassador depended in his demand on the theory of the extension of the territory (international public law), and the French government refused this on the consideration that its courts have jurisdiction (internal law).(38)

This theory, like its predecessor, was exposed to shakiness since both have, in one way or another, touched on the question of the sovereignty of the state which has developed at the beginning of the twentieth century to become an absolute sovereignty. Thus the states differed regarding the

concept of the two theories, at the level of jurisprudence and the judiciary, which means the continuation of the international conflicts.

This theory, like its predecessor, was exposed to several criticisms. Maybe the most important of these was that it stands contrary to the reality, thus marketing an absolutely unacceptable solutions and results.(39) In reality, the diplomatic envoy has an obligation to abide by the laws of the state to which he is accredited, especially if he engages in real estate activities for his personal account, without this having any relationship with his official work. Here we can see the conflict in the laws. How can that which he owns be an extension to the territory of his country, whereas the general rules dictate that the law of the receiving state applies to the established properties and real estates in it. In addition, the place is governed by the contract, and the offense is subject to the local law.

Fourth: the theory of functionality:

The collective, bilateral and special diplomatic agreements that have been concluded since the 1928 Havana Convention, that was supported by the Institute of the International Law in its meeting in New York in the year 1929… and ending with the last diplomatic convention that was issued by the United Nations Organization in the year 1975… all of them have adopted the functional concept in order to approve the diplomatic immunities. This was based on the rejection of the theory of the extension of the territory which called for the non-submission of the diplomatic envoy to the local law, since this means, by necessity, that this envoy does not need the diplomatic immunities and privileges. And in order to get out from the intricacy that the theories of extraterritoriality and the representative capacity caused in their inability to explain granting immunities to non – states international persons, especially the granting of these immunities to all persons of the international law-like the international organizations that have no territory, and their staff have no representation capacity – the trend began to search towards a new theory. This came in the form of the functional standard. Thus it was possible to explain the question of the immunity of the headquarter and the other immunities that aim to establish the tranquility that the diplomatic envoy needs to perform his duties,(40) and ensure his legitimate success and freedom.

This theory states that the envoy cannot be summoned before the judiciary, not because he is sacred, but because he cannot be subjected to the judiciary of the state to which he is accredited, so that he can enjoy full

independence, away from any pressure, attack or threat that impact negatively on his work.(41)

Despite the continued adoption of the representative capacity, an amendment was introduced to it that stipulated that the standard of the representative capacity must be based on the fact that the mission conducts its work in its capacity as being a representative of the states, and not on a personal basis for the diplomat.(42)

Thus the standards of the office, the sovereignty and reciprocity come together to explain the reasons for granting the diplomatic immunities and privileges. It is to be noted that the theories that tried to lay foundations for the question of the diplomatic immunities and privileges has faced the paradox of the conflict between the rules of the internal law of the states (sovereignty) and the principles of the international law. Accordingly, the search was mounted to come out with a theory that avoids this conflict, which came finally to the reliance on the functional theory or the functional concept of the diplomat.

Mentellf Ogdon states in his book that was issued in Washington in the year 1936 under the title "the legal bases for the diplomatic immunity" that "… to know if the measure that the state takes against the envoy accredited to it is legal, we have to look if this measure encroaches on the tranquility that the envoy needs to perform his official duties in his capacity as a diplomatic representative of a foreign state".(43) This points out to the protection that surrounds the diplomatic office as forming the core of the law and the standard of its provisions, in this respect.

The fifth requirement: the theory of reciprocity (reciprocal treatment):

What distinguishes the theory of reciprocity is its accompaniment of the diplomatic theory and practice since its formulation. It will continue to do so despite the developments and the justifications that has accompanied the diplomatic guarantees at certain and limited stages. The principle of reciprocal treatment is based on psychological foundations and justifications that dominate all forms of the social human relations and the international relations, especially those relating to the diplomatic immunities and privileges. Through international instinct, the state grants or prevents these immunities and privileges, in some way, to the envois of the state according to the dealing of this state or that with its diplomats. Thus we find that the state ignores the legal rule or the equality – when exercising its authority and taking its decisions – but in a manner that does not harm the base and the pillars … seeking to push the other states to treat

its representative in an identical manner to its treatment of the diplomats accredited to it.

Yet we have to caution against a negative aspect in this context. It is customary for states to engage in "revenge" or "retaliation" against the bad treatment of a state to the diplomats … by expelling them or declaring them personae non grata, without any legitimate reason, and without their commitment of a mistake or an action that threatens the security and the law of the state to which they are credited.

The pretext to this lies in the protestation of the national dignity and sovereignty.(44) Due to this apprehension, article(47) of the 1961 Vienna Convention pointed out that the accreditating states must not discriminate in treatment among states, and the state must try to treat the other states in a manner that is better than that which the Convention stipulates.(45)

Thus we see that the question of the diplomatic immunities and privileges has assumed an important place in the legal and political jurisprudence that concerns the freedom of the diplomats and assisting them in discharging their assigned tasks in a free and safe manner. And in order to fathom this question, the researcher finds it necessary to address the extensions of the diplomatic immunities and privileges.

The third discourse

Immunities and privileges between sovereignty and the international law

For the diplomat to perform his mission in the best possible manner, he must be free from all the restraints – that limit his movement and impede his work – including the intrusion of the authorities of the receiving state into his actions that affect his ability to represent his country.

Accordingly, it was decided legally and on the basis of the international norms, - foremost among which are the courtesy and the reciprocity – to grant the diplomatic envoy a group of the immunities, privileges and exemptions that afford him a special and comfortable situation that enables him to undertake his job and guarantee him freedom and tranquility.

The points of view of the jurists of the international law differed regarding the determination of the terms "immunities" and "privileges," as

well as the theoretical and the legal basis on which these privileges stand. Some were of the opinion of not distinguishing between the two terms, sufficing themselves to distinguish between that which is necessary for the diplomatic activity and that which is unnecessary. The second team headed towards distinguishing between immunities and privileges on the basis that the first are directly founded on the international law and their violation are considered an attack on the sovereignty of the sending state. Privileges, on the other hand, are directly related to the internal law of the receiving state, which has the complete authority to grant or deny them. It also has the freedom to widen or narrow them. The third team did not see any difference between the two terms, since they are equal and based, through similarity, on the international law only.(46)

Differences also arose among the jurists regarding the purposes of the immunities and the privileges that are stipulated in the 1961 Vienna Convention. Some said that its intention was directed to the members of the mission more than being directed to the mission itself. Their evidence was based on the fact that the judicial immunities did not include the mission as an entity in itself, but included its members only. The immunity of the mission touches, closely and directly, the immunity of the state. And in order to avoid this touching the Convention was silent regarding the discussion of the judicial immunity.(47)But in addressing the judicial immunity of diplomatic envoy, it had talked about the immunity of the mission which does not exist except in the presence of this envoy. In addition, this immunity is for the benefit of the sending state, and not for the benefit of the individuals.(48)

The extensions of the diplomatic immunities and privileges include two main parts: the immunities that are given to the mission and the envoys, among which the immunity of the site and the immunity of the archives, documents, correspondence, communications and the diplomatic pouch. The envoys enjoy judicial immunity, and are given financial privileges that exempt them and exempt the mission from taxes, fees and fines. In addition the inviolability of the person of the envoy and the inviolability of his residence, documents and funds are also preserved. And due to the nature of this research and the specialization of its subject, the extension of the immunities and the privileges will be, as far as the judicial immunities and the financial privileges, as follows: 1- <u>The immunity of the site and its annexes:</u>

The site is the location that the mission uses in exercising its activities, tasks, communications and contacts with the host country and the other diplomatic missions and international organizations. This site includes the

buildings, parts of the buildings and the lands attached to tem – irrespective of the owner – that are used for the purposes of the mission, including the residence of the head of the mission,(49)and the diplomatic envoys. It also includes any other offices that form a part of the mission which are established in the other places in which the emission was established, with the approval of the receiving state.(50) These sites can be rented or owned by the sending state. The host state is duty bound to facilitate the acquisition of the adequate sites and houses for the members of the mission when needed. (51)

Though the mandate of the internal law (sovereignty) of the state covers all parts of its territory, yet these sites enjoy great personal inviolability and special protection. This inviolability prohibits interfering in these locations no matter the reasons. They also cannot be entered except with the approval of the head of the mission. The house, furniture, funds, transportation means of the mission are exempt from the measures of inspection, importation, detention or implementation.(52)

It is to be noted that this immunity raised an intricacy during the 1961 Vienna conference. The discussions centered on whether the immunities are to be absolute or relative, and whether they are in response to the theory of the extension of the territoriality, when they become absolute immunities, or are in response to the theory of the necessity of the function. The committee that was charged with the study – and the treaty – concluded by adopting the concept of the absolute and the relative immunity.(53)

Accordingly, it was permitted to use the internal law (the sovereignty of the state over all its territories) in the process of entry to the site of the mission or the residences of the envoys in exceptional circumstances of the principle of inviolability, like the break of a fire, or removing impending dangers on the life of the persons and the properties, or health of the residents, or the protection of the security of the host state… especially if it was not possible to reach the head of the mission or contact him to get his approval for the entry.(54) This justification was included in the text of the 1961 Vienna Convention, which stated that "those who enjoy the immunities and privileges – without violating them – must respect the laws and regulations of the state to which they are accredited. They also must not interfere in its internal affairs", "and the sites of the mission must not be used in any way in a manner that is incompatible with the functions of the mission".(55) Thus a balance has been achieved between the international and the internal laws regarding the immunity of the sites that are occupied by the mission or its diplomatic envoys.(56) This immunity

extends to include the archives, documents, diplomatic pouch and the official papers, correspondence and contacts.(57)

In view of the development of the means of communications, the reality of the immunity has become susceptible to penetration without the receiving state being aware of this, though the Vienna Convention has stipulated the approval of the receiving state when the mission wishes to install or use the communications sets. (58)

And if a conflict of laws should occur upon the discovery of the receiving state of unallowable materials in the diplomatic pouch, or any other means of transporting, this state has the right to demand the recall of the pouch or take precautionary measure against the means of the transport until contacts are made with the head of the mission, and the protocol department in the foreign ministry, or ask to be returned to its source.(59)

The question of the use of some political refugees of the diplomatic embassies and missions as a refuge for themselves has raised many legal and juristic differences. Those who are of the view of the extension of the territory have emphasized the necessity of the respect of the host state to the inviolability of the site. Others were of the view – which has been settled so far until an agreement is adopted in this respect – that the diplomatic mission should obtain the approval of the host state regarding the acceptance of this person. Should it refuse, then the problem should be solved amicably. But under no circumstances shall the embassy be stormed and detaining this politician.(60)

2- The judicial immunity:

Though the 1961 Vienna Convention did not codify or regulate the judicial immunity of the diplomatic envoys, yet, it (the immunity) came as being associated, by necessity, with the immunity of the state that appears as a result of its personal jurisdictions and those connected with the public utility that the states exercise outside their territories in the face of the large international jurisdictions that exclude the persons and the public utilities who possess diplomatic capacity or international office from submission to the personal jurisdiction of the state (the internal law).(61) Here we have to differentiate between the immunity of the mission and the immunity of the person. The first results from the immunity of the sending state, whereas the second is granted due to the conducting of the diplomat of his job on behalf of the state, and in his capacity as a member of the mission. Thus

many international law jurists differentiated between the legal immunity of the official and the immunity of the mission, though the 1961 Vienna Convention did not determine accurately the relationship between the two immunities. The diplomatic law has stated that which governs the rules concerning the mission differ from those that govern the diplomatic official of the mission. This is because the establishment of the mission is the result of measures that differ from the measures of the appointment of the diplomatic representative. In addition, the mission enjoys special rights and privileges that are separate from its officials. Finally, the legal bases and measures for the departure or the expulsion of a member of the mission differ from the bases and the measures of the closing of the mission.(62)

Despite the existence of this distinction and difference, the judicial immunity is considered to be a kind of the non-submission of the mission to the authority of the receiving state. Accordingly, this mission cannot be sued as long as it did not relinquish its immunity. This highlights the clear conflict between the international public law and the internal law of the independent state. It is not permitted to sue the members of the mission regarding all the actions they undertake, which include the functions of representation, protection, negotiation, exploration of the conditions in a legal manner, the enhancement of the relations between the two states, conducting consular functions and taking care of the interests of its subjects. (63)

Thus, the judicial immunity is a "special treatment" that is granted to the diplomats to allow them to do their job in full freedom. Accordingly, they are exempted from the penalties of the internal law of the receiving state. This does not mean the non – accountability of the diplomatic official if he exercised an illegitimate or an illegal action against the state to which he is accredited. But this question is handled by the international law (an international law) and not the internal law (a national court). This means the non-jurisdiction of the internal judiciary, and not the question of the judicial immunity.(64) In addition, there are actions that the diplomatic mission undertakes that relate to the internal law of the receiving state which cannot be viewed before the courts of the receiving state… like the expulsion of a member of the mission. The courts of the receiving state cannot consider this case since they do not have the right of control. In addition, the courts are not allowed to accept a suit that is filed by any official of their nationality who works in the mission, not even accept any objection to the decision of the mission by an official who belongs to the nationality of a third state. Thus, viewing such cases cannot be judged except in the courts of the sending state.(65)

As for the dispute relating to some administrative matters (like the conclusion of a maintenance contract for the building or the properties, or the purchase of any supplies), the local courts do not present themselves. What is recalled is knowing whether the diplomatic mission – in its capacity as the body of the sending state – enjoys or does not enjoy judicial immunity. In this case the judicial immunity of the state is resorted to, and the treatment falls within the framework of the international law.(66)

This means that the diplomatic mission enjoys not only an absolute immunity and personal inviolability, but also a judicial immunity concerning all the actions it undertakes.(67)This judicial immunity includes the punitive, civil and administrative ones. This means that the size of the disablement of the internal law is large. This is in addition to the enjoyment of the diplomatic official of an absolute judicial punitive immunity without him enjoying absolute civil or administrative immunity, except those relating to the actions which he performs on behalf of his state.(68)

Accordingly, the absolute judicial immunity that is granted to the diplomatic mission (the disablement of the internal law and the supremacy of the international law) can be considered to emanate from the necessity of not encroaching on the dignity of the mission and its security, owing to the intentions of the international public law. If the mission commits an action that contravenes the rules of the public international law, the receiving state can be able to file the case in front of the international courts. As for some violations and obligations towards ordinary persons or private companies, the litigation against the mission before the national courts remains impossible. The matter is dealt with through those people and companies addressing the foreign ministry of their country, which addresses the mission, or even addresses its mission at the sending state to address the foreign ministry of the country to which it is accredited.

Thus the conflict of the laws becomes evident in the question of the diplomatic immunities, where the international public law rules paramount in most, if not all cases. In addition, the diplomatic privileges that used to be granted on the bases of courtesy and reciprocity, have come to be granted on the basis that they constitute obligatory rules on the states, like the rules of the immunities, and that their violation results in an international responsibility against the violating state.(69) Even some intentions of the international law prohibit and criminalize any judicial accountability against the diplomatic envoy, even if the violation was a criminal one. This was looked at in some societies as exceeding the reasonable and acceptable limit, on the basis that the judicial immunities are considered as an intrusion into the authority of the judiciary and damaging to justice that states that no one is above the law, even the head

of the state. Thus we see the keenness of all states on stressing to their diplomat the necessity of respecting the internal law of the states to which they are accredited, and not to interfere in their internal affairs, since these fall within the orders of the international public law. The source of this keenness lies in the apprehension of the states regarding their international reputation and international relations as well the entrenchment of the principles of courtesy, cooperation and reciprocity. And in order to complete the study, the researcher will dedicate the following discourse to the rooting of the position of the diplomatic immunities and privileges within the course of the sovereignty of the state.

The fourth discourse

The diplomatic immunities and privileges and the sovereignty of the state

The jurist gave sovereignty an absolute concept, and tried to make its authorities the highest authorities. John Boudin, the French thinker, (15301596) was the first one to refer to sovereignty in this meaning, when the defined it as being "the authority of ordering and prohibiting without being commanded or forced by anyone on earth". Thus Boudin gave sovereignty an absolute concept.(70) Carre de Malberg has defined it as being "the authority that does not admit an authority that is higher than it or equal to it" that rises in the state.(71)

A. Esmein defined sovereignty as being "the authority that does not admit an authority that is higher to its authority, or an authority that is equal to its authority. It has two faces: an internal one that includes the right of the state to control all the citizens who constitute the nation, and even all those residing on its territory, and an external one which is summarized by the right of the state to represent the nation and commit her in its relations with all nations".(72)

All the definitions that have clarified the concept of the sovereignty have described it as being absolute. It is the higher unlimited authority which makes the state the owner and the monopolize of all jurisdictions and authorities and gives it international immunities. The legal jurisprudence points to this. But the reality states something different; since

it emphasizes that the relation between the state and the sovereignty is a relative relationship, and not an absolute one. This means that no state enjoys an absolute sovereignty. Thus, this jurisprudence headed towards tying sovereignty with independence and equality at the international level. This is because the adoption of the absolute sovereignty in its general concept allows the state to attack and usurp the sovereignty of other states, thus the law among states comes to an end, and we resort back to the law of the jungle. Accordingly, and out of the logic of the co- existence of states, the sovereignty becomes relative, not absolute. The absolute sovereignty falls only within the concept that the state be independent, equal to other states and enjoys all rights and obigations that the international community imposes. Thus the state becomes one of an independent legal personality, but its sovereignty is a relative one… that is restrained, and limited by the sovereignty of the other states.

The first requirement: the sovereignty of the state and the diplomatic immunities and privileges:

In addition to the existence of the people and territory, the existence of the state has dictated that a governing body be established to administer the affairs of the members of the people, regulate the relations among them, take care of their interests, and defend the entity of the state and the entity of the people against the other similar groups. This authority is expressed in the language of the international law as being "the sovereignty". The sovereignty represents the authority of the state over its territory: land, natural resources and persons. Accordingly, it represents the main aspect of this possession in which the state faces the individuals inside its territory, and faces the other states outside. Among the requirements of this authority is the stipulation that the point of reference of the actions of the state in all its affairs be out of its own will alone. But the legal jurisprudence and the realities headed towards the existence of an accord necessitating that the sovereignty of the state be curbed and limited, otherwise serious consequences will ensue that will destroy the whole rules of the international law. Due to this, the considerations of the development of the collective life in the international arena tended to mitigate gradually the intensity of the idea of sovereignty in order to facilitate the necessary cooperation among states which allows them to discharge the humanitarian tasks with which they are charged… foremost among which the maintenance of international peace and security. And in order to achieve this, they have included in their charters restraints concerning the going out of the states of the rules of the international law. These charters considered that the commitment of the state to these rules does not derogate of its sovereignty, since they are common and apply to all states and for their

benefits, and that these states have accepted the mandate of these rules out of their own choice with their own sovereignty over their decisions.(73)

The development of the concept of sovereignty caused the state to exercise some jurisdictions and authorities on the international level that were tied basically with the principle of the immunities, and the enjoyment of the state with these jurisdictions that are derived from the concepts of independence and equality. This gained her an independent legal personality that refuses to submit to another sovereignty based on equality. Thus the international law has viewed the authorities of the state from two interconnected angles. The first relates to the authorities that the state exercises inside its territory (the territorial sovereignty) which the international law approves. This exercise includes the protection of the state, and the submission of all the persons residing on its territory to this sovereignty. The second angle deals with the jurisdictions that the state exercises outside its territory which is less, in extension and power, than the first. This is so since the place in which these jurisdictions are exercised is connected with another territorial sovereignty.(74)

Here we find our self inside a definite approach which deals with the relationship between the international law and the internal law, due to the existence of the overlapping between the two laws which touches, directly or indirectly, the question of the sovereignty, and consequently, the question of the diplomatic immunities and privileges. The jurisprudence was of two schools of thought in this connection.

The first spoke of the unity of the two laws, while another called for the separation of each from the other. The first made the rules of the international public law and the rules of the internal law as one legal bloc. This is based on the consideration that the international law constitutes a part of the law of the state that coordinates its relations with the other states. Its authority – as far as the internal bodies of the state – is similar to the internal law, since it restrains them regarding the questions in which its provisions address. Some of the jurists even considered the international law as being the supreme law, and if a rule in the internal legislation contravened an international rule, the judge must adopt the international rule, not that.(75)In affirmation of this, the holders of this opinion say that all the constitutions and basic laws of the states stipulate the commitment of these states to the international charters, treaties and conventions. The second school of thought states that each of the international public law and the internal law are separate systems from each other, due to the different sources of each one, the different bodies that are tasked with the application of each one of them, and the different sanctions that protect the rules of

each of them. In addition, each one of them has originated independent of each other. The international law was established by the wills of the free states without imposition, whereas the internal law has been imposed by the sovereign authority on all the parts and the components of the state. The judge cannot implement except the law that is issued by his state, whereas his application of the rules of the international law cannot be made except within the limits that his national law allows.(76)

It is to be noted that it is difficult to prefer one school of thought over the other. Despite the admission of the separation of both laws, yet the theory of contact remains standing although both laws do not constitute one legal bloc. It seems that what is acceptable originally is the fully sovereign state as a person of the persons of the international law, and its accession to it comes out of its sovereign independent decision. Since modern states find themselves unable to live in isolation from the international community, we find that they restrain themselves to the rules of the international public law, which, in turn, takes into consideration the sovereignty and independence of the states.

Thus we see that the diplomatic immunities and privileges which were imposed by the rules of the international law were consistent with the school of thought that does not recognize the full separation or the absolute conflict between the international public law (the external sovereignty of the state) and the internal law (the internal sovereignty of the state)… together with the recognition that sovereignty has two concept, one of which is legal that is based on the legal independence in facing any other sovereignty, and the second is one of political and social concept that means the real ability of the state to emphasize itself in the international sphere in full freedom, but within the aims of the international law and the international relations.

The second requirement: the security of the state and the diplomatic immunities and privileges:

In building their national security, the states depend on the rule of the protection of their subjects through establishing the political, economic, military and intellectual stability. And in order to assure this, it was necessary to establish the organizations, establishments and authorities that it views as being the guarantees for realizing the national security not only for its subjects inside, but also guarantees its sound relations with the other states. The question of the political and the diplomatic relations – that include the diplomatic immunities and privileges – falls within this context.

It is agreed that the states, irrespective of their sizes, powers and capabilities, strive to achieve and maintain security as one of the elements of their existence. Security has become one of the elements of the formation of the state, in addition to the people, the territory and the ruling body. National security means the employment of all powers of the state to the fullest political, economic, military, social limits, in order to serve the goals that the state seeks.(77) Among these is the protection of its sovereignty, followed by the realization of the higher objectives of the state like comprehensive development and the accompaniment of the whole international positive transformations.

No matter the concept of the security that the state adopts, it continuously remains connected generally with the theory of the sovereignty of the state, and the political security as one of the organs of the national security which is meant to treat with it the roots of the social complaining and political polarization through direct political contact through credible, respectful and effective conduits and institutions.(78) The persons and the institutions that are tasked with the administration of the political security system are supposed to be of special caliber and highly qualified and politically aware – especially concerning the question of the international immunities and privileges – so that they can be capable of proper dealing with the categories that enjoy them. What is more important than this is the avoidance of any wrong conduct towards these categories which reflects negatively on the foreign relations of the state, and impacts on its representatives in the other states which will apply the principle of reciprocity. It is to be cautioned here that the state is under an obligation to maintain a state of equilibrium between preserving its internal security and sovereignty, on one side, and the establishment of relations of cooperation, friendship and partnership with the other states, on the other side. It needs them, and it cannot ignore or harm them. This may seem to collide with the role of the political security apparatus, as a branch of the branches of the public security in the state which is charged with observing the diplomatic, consular and international missions, and following – up the movements of the diplomatic, consular and international envoys, either covertly or overtly.(79)

The practices of the diplomacy that threaten the security and the sovereignty of the states to which they are accredited can be confined to the following:

1- Intelligence activities, when the diplomats collect – often through illegitimate means – information about the state to which they are accredited. Among these is spying, either directly, or through the

recruitment of individuals to perform this task. This practice has caused a lot of disputes among the states. Thus the international community saw fit to differentiate between pure diplomatic work (conducting the job) and the diplomatic work whose major part rests on collecting information (spying which violates all international laws and rules). It is to be admitted here that it is difficult to monitor this without encroaching on the diplomatic immunities and privileges.

2- Technological spying activities. This phenomenon became clearly active following the Second World War, when the world witnessed huge technological and scientific developments in the area of communications and the manufacturing of the nuclear and strategic weapons. Thus the competing states sought to use the sites of their missions for spying and acquiring the information relating technology and the scientists who are engaged in this sphere.(80)
3- Sabotage operations: these are among the most dangerous aspects and activities that harm the national security of the state, and abuse its sovereignty and stability. The acts of sabotage arose and took hold during the ideological struggle between the Eastern and the Western camps. Accordingly, states were keen on combating such operations, but were confronted sometimes with the rules of the international law that seek to give the diplomatic immunities and privileges,(81) a special and respectful importance.

The conclusion

This research has addressed a group of principles and bases that govern the question of the diplomatic immunities and privileges, not only regarding their history, legal references, constituents and scopes, but also through monitoring the conflict between the two laws: the internal (the internal sovereignty of the state) and the international (the external sovereignty of the state) ones. This was due to the fact that these immunities and privileges have created, since the beginning of calling for them, differences and disputes among the legal jurists, the sciences scholars and the ruling bodies in the states. This research has shown that the international community witnesses contradicting trends at sometimes and disturbed ones at another's regarding the spaces in which the diplomatic envoy is allowed to move within.

Accordingly, huge controversy erupted between the judicial and the personal immunities, the immunities of the location, the immunity of the properties and the diplomatic pouch, and between the question of the security and safety, and ultimately, the sovereignty of the state. And due to the serious overstepping that many diplomatic envoys commit, and the repeated objections that are expressed by the receiving states, a case of collision arose between the international public law and the internal law. The state pushes toward confronting these practices, while the envoys, on their part, push towards the question of the diplomatic immunities and privileges which they have misused their interpretation, depending on the power of their states… not on the principles, rules and purposes of the international public law. And in order to fathom this serious issue that has led to a lot of tension in the relations between the states, and the consideration of many diplomats as personae non grata the research compiled four parts. The first was a theoretical framework that determined the concept of the immunities and the privileges, and its development and sources. The second part addressed the legal references of the diplomatic immunities and privileges. The third part dealt with the extensions of diplomatic immunities and privileges. The fourth part revolved around the sovereignty and security of the state and the diplomatic immunities and privileges.

Due to the importance of this subject whose chapters we began to see since the beginning of first stages of the establishment of the diplomatic relations among the states, the researcher is of the view that it is necessary to formulate a new questioning regarding the concept of the diplomatic immunities and privileges that accords with the requirements of the

sovereignty of the states and their national security, while guaranteeing the enjoyment of the diplomatic envoys of these immunities and privileges… thus putting an end to the overstepping of both sides. This is especially so due to the many attempts which those envoys try these days to interfere into the affairs of the states to which they are accredited, taking advantage of the guarantees, immunities and protection which the public international law provides for them. But the researcher, after discussing many aspects of this issue, is of the view that when the conduct of the diplomatic envoy constitutes a direct threat to the security of the state, or a flagrant intervention in its affairs, the state has the right to push away this danger, without sufficing itself with the "expulsion" of this diplomat and considering him a persona non grata… but to go beyond this and allow the state whose sovereignty was breached to sue the sending state and consider her directly responsible for the practices of her envoys. This is not only due to the considerations of the conditioned necessity of non arbitrariness, but also for the considerations of preserving the diplomatic relations between the states and the maintenance of more respect and cooperation among them … especially since there is too much deficiency in controlling the operations of overstepping and attack at the sovereignty and authorities of the states.

The phenomenon of the contradiction and disparity between the theory, and between what it allows in application, has exceeded the limits, and has become a prominent feature in the actions of several states, especially the powerful ones, when they depend on their practices on their power and ability to overstep the international public law. We began to see the supremacy of the "law of force" over the "force of the law", despite the realization of all states of the seriousness of breaching the concept of the diplomatic immunities and privileges. This was caused by some states, especially the major ones, who advanced the theory of the security necessity and the maintenance of their own interests … and their right to act as they wish without heeding any international or internal norms or laws. And in their feverish defense of their sovereignty, many states call for the necessity of making new international agreements, and the imposition of restraints on the illegal transgressions, after it became established that the downgrading measures of the level and size of the diplomatic exchange, or the expulsion of the diplomats, or the restraining of their contacts and monitoring, or even the severance of the diplomatic relations among the states are all insufficient practices for preventing the wrongful practices that the diplomatic envoys conduct. The researcher is of the view that a call must be made to convene an international conference for the international legislators to discuss the laying down of an exact concept for the meaning and the limits of the diplomatic immunities and privileges, and take into

consideration the sovereignty of the states and the prerequisites of their national security, and the opening of the ways in front of strict international litigation to hold to account the states that go outside the law, and the reaffirmation of the necessity of guaranteeing the security and the safety of the diplomatic envoys, and providing them with all assistance so that they perform the duties that they are shouldered with.

The footnotes

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4- Ibid, Same page.

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- Dr. Ali Hussein Al-Shami, op. cit, p. 419.

7- Among those: Hammarskjold, Perrenound, Maresca.Ibid, p. 422.

8- Dr. Izzideen Foudah (1961) "The diplomatic systems, first book, Dar AlFikr Al-Arabi, Cairo, pp 22-23.

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12- Sobhi Mahmasani (1982) "the law and the international relations in Islam", second imprint, Beirut, Dar El-Ilm Lil Maalayeen, p. 132.

13- For details regarding the view of Islam of the concept of the diplomatic immunities and privileges, refer to: Dr. Ali Hussein Al-Shami, op. cit, pp 431-442.

14- Dr. Ali Sadiq Abu Haif (1975), "The diplomatic law", Alexandria, Monshaat Al-Maarif, P. 92.

15- The Treaty that was concluded between Portugal and Britain in the year 1809, and between Britain and turkey in the same year, and between France and Ecuador and other states in Latin America in the year 1843, and the French – Iranian Treaty in the year 1855, and the Havana convention in the year 1928, and the agreement that was signed between France and Iran in the year 1929, and the America – Philippine agreement in the year 1946, and between the Philippine and France in year 1947.

- Ibid, pp. 87-88.

- Abdul Azeez Serhan (1974) "The law of the diplomatic and consular relations", Cairo, Ain Shams University press, p. 164.

- Dr. Khalid Hasan Al-Shaikh (1999) "The diplomacy and the diplomatic law", D.N., PP, 110-111.

16- Dr. Ali Sadiq Abo Haif, the diplomatic law, op.cit, p. 93.

17- The last paragraph of the preamble stated: "it affirms (the states parties to this convention) the continuation of the rules of the customary international law in regulating the questions that were not regulated explicitly by the provisions of this convention".

- Dr. Zayed Obaid Allah Misbah (1999) "Diplomacy", Beirut, Dar AlJaleel and Tarablus Al-Gharb, Dar Al-Rowwad, pp. 158 – 160.

18- Ali Sadeq Abo haif, op. cit, p. 87.

19- Dr. Zayed Obaid Allah Misbah, Diplomacy, op. cit, pp 159-160.

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24- Dr. Ali Hussein Al-Shami, "diplomacy", op.cit. pp 439-40.

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25- Mahmoud Khalaf (1997) "The diplomatic theory and practice", second imprint, Amman, Dar Zahran for publishing, p. 240.

26- Atef Fahd Al-Maghareez (2010) "The diplomacy between the theory and the practice", Amman, Dar Al-Thaqafah for publishing and distribution, pp. 54-55.

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28- Ali Sadeq Abo haif, "The diplomatic law", op. cit, p. 124.

29- Dr. Ali Hussein Al-Shami, "The diplomacy" op. cit, pp 448-449.

30- Ibid, p. 4.

31- Aysha Ratib (1963) "The diplomatic and consular organization", Cairo, Dar al-Nahdah Al-Arabiah, p. 133.

32- Ibraheem Mohammad Al-Anani, "the public international law, op. cit, p. 220.

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35- Yasser Nayef Qutaishat (2001), "The danger of the international privileges and immunitie on the national security", un published master degree thesis, the university of Jordan, p. 10.

36- Atef Fahd Al-Maghareez, "Diplomacy between the theory and the practice", op. cit, p. 56.

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37- Dr. Fadi Al-Mallah (1993) "The security authorities and the diplomatic privileges and immunities", Alexandria, Dar Al-Maatboat Al-Jamiyah, p. 26.

38- On 18.3.1973, the higher court of justice in Jordan issued a judgement stating" the suit against any of the accredited embassies in Jordan will not be considered due to lack of jurisdiction, on the basis that the embassy is a part of the country of the envoy". The bar association review, 1974 volume, p. 330.

39- Dr. Ali Hussein Al-Shami, op.cit, p. 451.

40- This was stated in the report of sandstorm before the international law committee (1956).

- Dr. Ali Hussein Al-Shami, "The diplomacy", op. cit. pp. 454-455.

41- Mentell Ogden (1936), "Judicial cases of diplomatic immunity, Washington, D.C., John Byrne and Co., p. 175.

42- Article five of the 1946 United Nations convention stated that" the privileges and the immunities are given to the officials for the interest of the United Nations, and not to their personal interest". The same was stipulated by the preamble of the 1961 Vienna convention, and the 1969 special missions convention that was adopted by the general assembly of the United Nations on 8.12.1969.

43- Dr. Khalid Hasan Al-Shaikh, "Diplomacy and diplomatic law", op. cit, p. 313.

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44- Dr. Alaa Abo Amir, "The diplomatic office", op. cit, p. 212.

45- Dr. Mahmoud Khalaf, "The diplomatic theory and practice", op. cit, p. 244.

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47- N. Quoc Dinh, P. Dailier, Droit international public, 2nd, L.G., D.J. Paris, pp. 692-684. N.D.

48- P. Cahier (1962), Le Droit diplomatique contemporain, publication De L`institut universitaire De Hautes Etudes internationales, No. 4, Geneve, Paris, pp. 233-241.

49- Refer to the introduction of the Vienna convention (1961) and the article
(25) of it.

50- Paragraph (6) of the first article of the 1961 Vienna convention.

51- Article (12) of the 1961 Vienna convention.

52- Article (21) of the 1961 Vienna convention.

53- Article (22) of the 1961 Vienna convention.

54- Article (31) of the 1961 Vienna convention.

55- Ali Sadiq Abo Haif, "the diplomatic law", op. cit, pp. 142-145.

56- Articles (26) and (41) of the 1961 Vienna convention.

57- There are many examples regarding the question since hundreds of cases of interference have occurred. Maybe the most notorious one was the storming of the American embassy in Teheran on 4.11.1979. The demonstrators detained around fifty persons; twenty eight of them enjoys diplomatic immunity. A great conflict of laws occurred in this case, when the Americans and the international court of justice (15.12.1979) cited the involvement of the embassy in espionage, and assisting the shah and his supporters. Another large problem arose in November 2011, regarding the claim of lebanse quarters of the discovery

of serious practices that are led by special offices of the American central agency (C.I.A.).

58- Articles (24) and (27) of the 1961 Vienna convention.

59- First paragraph of article (27) of the 1961 Vienna convention.

60- The Soviet Union severed its diplomatic relations with Cuba in the year 1952 due to the insistence of the Cuban authorities on preventing the American diplomatic pouch couriers from entering Havana before the opening and the inspection of the diplomatic pouch.

61- Her we recall the ruling of the international court of justice on 20.11.1950 regarding the lodging of the embassy of Colombia in Lima (the capital of Peru) of the leader of the coup d'état "Hiyadi Latori" which the authorities of peru were pursuing as apolitical criminal. The legal opinion stated… "The granting of the diplomatic asylum contains a departure on the rule of the territorial sovereignty, and must not be granted sovereignty, and must not be granted unless it was humanely founded, like fearing an attack on the political criminal by some irresponsible elements of the population… and that the granting of the asylum does not lead to the prevention of the application of the judicial jurisdiction or the rules of the local laws". On 13.6.1951, the court issued an advisory opinion that obligated Colombia to end the asylum that its embassy in Lima granted to Hiyadi Latori, but without obliging her to deliver the refugee to the government of Peru.

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- Dr. Khalid Hasan Al-Shaikh, "The diplomacy and the diplomatic law", op. cit, pp. 330-335.

62- Dr. Ali Hussein Al-Shami, Diplomacy, op. cit, p. (512).

63- Dr. Adnan Al-Bakri, "Diplomatic and consular relations", op. cit, pp. 6869.

64- Articles (45) and (46) of the 1961 Vienna convention.

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67- P. Cahier, le droit diplomatique contemporain, op.cit, pp 238-240.

68- The 1961 Vienna convention has adopted the functional principle for the diplomatic immunities and privileges.

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- Dr. Khalid Hasan Al-Shaikh, "Diplomacy and diplomatic law", op.cit, pp. 345-360.

70- The 1961 Vienna convention included (19) articles regarding the diplomatic privileges. Eight of these relates to the privileges of the mission, and elven deals with the privileges of the members of the mission.

- Ibid, pp. 59-61.

71- Dr. Edmon Rabbat (1971), "The intermediary in the public constitutional law", second part, Beirut, Dar Il-Ilm Lil Maalayeen, pp. 307-337.

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72- Ibid, pp. 329-331.

73- Ibid, p. 330.

74- Dr. Ali Sadiq Abo Haif (1975), "The public international law", eleventh imprint, Alexandria, monshaat Al-Maarif, pp. 120-124.

75- Dr. Ali Hussein Al-Shami, "Diplomacy", op. cit, pp. 382-389.

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76- Dr. Ali Sadiq Abo Haif, "The international public law", op. cit, pp. 92-93.

77- Ibid, p. 94.

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