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**THE INTERNATIONAL RESPONSIBILITY OF HOST
STATES TO PROTECT DIPLOMATS DURING
INTERNAL CONFLICTS AND DISTURBANCES: A
CASE STUDY OF LIBYA**

ZAINAB WAHEED DAHHAM

A thesis submitted to the University of Huddersfield in partial fulfilment of the requirements
for the degree of Doctor of Philosophy

The University of Huddersfield

December 2016

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Abstract

The primary mechanism used to resolve breaches of diplomatic protection is to accord states responsibility for due protection. This Public International Law approach works in the majority of cases except for very few cases such as in Libya, when incumbent governments struggle to maintain control over the national territory of their own states.

This thesis investigates problems with the current approach and proposes solutions through virtual diplomacy, to safeguard diplomats from imminent attacks while enabling diplomatic functions to continue using modern communications. In other words, a preventative approach. However, in the absence of virtual diplomacy, if diplomats are attacked or injured by non-state parties in a conflict environment such as Libya in the post- Gaddafi period, the question of reparations and punishment of offenders becomes a difficult process to achieve because of the political and security situation in the country. The starting point will still be the principle of state responsibility in terms of payment of reparations to the sending state of the injured diplomats or their families. The punishment of offenders will be for criminal law. This thesis contends that TJ can play a supporting or complementary role to state responsibility and criminal law. TJ can play role in terms of facilitating state responsibility for the protection of diplomats, fact finding, enabling the gathering of evidence and maybe even the assessment of reparations to be paid by armed rebel groups' offenders such as Ansar al-Sharia in Libya whose actions have caused injury to foreign diplomats.

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Dedication

This thesis is dedicated with all my love and thanks to:

My Mother ... who always been my supporter during the difficult and trying times.

My Brother... I would not be who I am today without the love and support of my brother Mohammed.

My Sisters ... I have always been surrounded with the love and support of my sisters Elham and Rana.

List of Abbreviations

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977
ECHR	European Convention on Human Rights
EU	Europe
Geneva Convention I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.
Geneva Convention II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949.
Geneva Convention III	Geneva Convention relative to the Treatment of Prisoners of War 1949
Geneva Convention IV	Geneva Convention relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
HR	Human Rights
IACRTHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights 1966.
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination 1969.
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
OHCHR	Office of the High Commissioner for Human Rights
Rome Statute	Rome Statute of the International Criminal Court
TJ	Transitional Justice
UN	United Nation
UNCHR	United Nation Commission on Human Rights
UNDSS	United Nation Department of Safety and Security
UNGA	United Nation General Assembly
UNHRC	United Nation Human Rights Council
UNSC	United Nation Security Council
US	United States
VCCR	Vienna Convention on Consular Relations 1963.
VCDR	Vienna Convention on Diplomatic Relation 1961.

Chapter 1: General Introduction and Background

1.1 The Duty to Protect Diplomats under Public International Law

The protection of diplomats has always been an essential duty of all states, and diplomats have special protection according to international law. While this is partly a matter of protocol, as diplomats essentially represent the sending state, it is also a matter of expediency, as diplomatic personnel and premises are generally targeted in response to adverse international events. Diplomatic premises are places where diplomats perform their diplomatic function, requiring diplomatic status and appropriate protection. In modern politics, diplomats are a prime target of terrorist groups aiming to injure symbolic targets, to attract and affect public opinion, or to extort concessions by taking diplomatic agents hostage or threatening their lives.¹

The international community considers the problem of terrorist targeting of diplomats both in terms of the human aspect of protecting their persons, and the functional reason for the importance of diplomats, who continue to play a unique and essential role in the field of international relations between states (despite the communications revolution of recent years). This is why states universally affirm the importance of protecting diplomatic privileges and immunity. Moreover, according to the preamble of the Vienna Convention on Diplomatic Relations 1961 (VCDR) privileges and immunities ‘...would contribute to the development of friendly relations among nations, ...such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States’.²

Furthermore, international law provides a special duty of receiving states to protect diplomats and their premises,³ based on the important duties of diplomats in representing their states in receiving states and promoting the relationships between these states.⁴ VCDR grants diplomatic agents privileges and immunities, rendering them generally inviolable according to several articles.⁵ Furthermore, the Convention states that upholding this inviolability is the duty of receiving states, who have a duty to protect the diplomats from any attack. Article 29 of the VCDR confirms that

¹ Christos L. Rozakis, ‘Terrorism and the Internationally Protected Persons in the Light of the ILC’s Draft Articles’ [1974] 23 *The International and Comparative Law Quarterly*, 32

² Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

³ J. Craig Barker, *The Protection of Diplomatic Personnel*, (Ash gate 2006) 1-2.

⁴ Art 3 of the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, entered into force 24 April 1964.

⁵ Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

the receiving 'State... shall take all appropriate steps to prevent any attack on his person, freedom or dignity'.⁶

International law has played a significant role in regulating relationships between states. For example, the 53 articles of the VCDR outline the foundations of the organization of diplomatic relations between the states in terms of how to start this relationship, provide the immunities and privileges, and even the way to end this relationship. On the other hand, the Vienna Convention on Consular Relations (VCCR, 1963), which is considered complementary to the VCDR in the area of consular immunities, contains 79 articles.⁷ Both the VCDR and VCCR provide institutional and organizational structure for the management of modern international relations to achieve the principle of equality of States, and the organization of the right of national sovereignty of States, in the interests of international peace and security, and the development of friendly relations. Although the VCDR has many articles to confirm the importance of having relationships between states, sometimes political tension might arise between states, which can result in the targeting diplomatic missions (which in any case play a major role in the progress of such tensions).

The VCDR provides special protection not only to diplomatic personnel but also to the diplomatic premises. Article 22 provides for the inviolability of diplomatic premises,⁸ while Article 29 confirms the inviolability of diplomatic personnel in that '... He shall not be liable to any form of arrest or detention'.⁹

This ensures that such protection is the responsibility of receiving states.¹⁰

This inviolability includes also the archives, documents kept on the diplomatic premises,¹¹ and diplomatic correspondence.¹² Moreover, the private residence of diplomatic personnel and private

⁶ Ibid.

⁷ Vienna Convention on Consular Relations (signed 24 April 1963, entered into force 1967) UNTS vol 596 p 26.

⁸ '1. The premises of the mission shall be inviolable... 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution'.

⁹ Vienna Convention on Consular Relations (signed 24 April 1963, entered into force 1967) UNTS vol 596 p 26.

¹⁰ Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964) stated that 'The receiving State... shall take all appropriate steps to prevent any attack on his person, freedom or dignity'.

¹¹ Article 24, Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964) stated that 'The archives and documents of the mission shall be inviolable at any time and wherever they may be'.

¹² Article 27, Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

correspondence shall be inviolable.¹³ Article 22(2) of the VCDR states that ‘The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission...’¹⁴

To this extent, it is true to say that the protection of diplomatic premises and diplomatic personnel require from receiving states not only to not obstruct the diplomats from doing their function but also to prevent others within its territory from such obstruction.¹⁵ This duty in the circumstances of peace or active relations between states is easily achieved, but in the case of internal disturbances, tensions, and time of internal conflict, especially when the host state loses control over its territory, this duty becomes more difficult. Hence, the receiving state is under responsibility to protect the diplomatic personnel when the suspicion of wrongful action against diplomatic personnel might occur.

The receiving state in these specific circumstance must intensify its efforts to protect diplomats, proving beyond reasonable doubt that diplomats enjoy full material protection. Consequently, the family of diplomatic personnel and members of the administrative and technical staff of the mission and their families are under the protection of host states unless they are the nationals of the receiving state or permanent residents in it.¹⁶ Article 37 of the VCDR extends this protection to the members of the family of diplomatic agents, members of the administrative and technical staff of the mission, and members of their families.¹⁷ However, the VCCR does not extend consular protection to family members, according to Article 40. This protection may not apply to a situation where the diplomats are only passing through this state or they are informal visitors. For this law to be applicable in this situation, the state of transit has to be given prior notice before the arrival of the diplomats.¹⁸

¹³ Article 40, Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

¹⁴ Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

¹⁵ Barker (n 3) 2.

¹⁶ Amanda M. Castro ‘Abuse of Diplomatic Immunity in Family Courts: There’s Nothing Diplomatic about Domestic Immunity’ (2014) XLVII (353) Suffolk University Law Review 353.

¹⁷ ‘1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36. 2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or 12 permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 29 to 35 ... 3. Members of the service staff of the mission who are not nationals of or permanently resident in the receiving States ... Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving State...’.

¹⁸ Robert Jennings and Arthur Watts, *Oppenheim’s International Law*, (9th ed, Longman 1996) 114- 115; Kenneth K Mwenda, *Public International Law and the Regulation of Diplomatic Immunity in the Fight against Corruption* (Pretoria University Law Press 2011) 12; Rozakis (n 1) 32.

It is clear from the above that the VCDR clearly establishes diplomatic immunity and privileges, but despite the adoption of this Convention since 1961, diplomats have often been targeted over the decades.¹⁹ Diplomats were killed in a civil conflict in 1968 in Guatemala;²⁰ Rebel Armed Forces (a leftist guerrilla organization) killed John Gordon Mein, the American ambassador, after a failed abduction attempt.²¹ Similarly, the October 8th Revolutionary Movement (a Marxist paramilitary organization) kidnapped Charles Burke Elbrick, the US Ambassador to Brazil, in 1969; he was subsequently released when the demands of the hostage takers were met,²² including the release of 129 political prisoners.²³

Although international law provides for crimes against diplomats, the duty of states to protect diplomats has become a real problem requiring intensive efforts and cooperation. The UN General Assembly specifically condemn attacks against diplomats such as the Security Council resolution condemning the murder of nine Iranian diplomats in Afghanistan.²⁴ Further efforts were made by the UN to ensure certain protection for diplomats. In 1973 the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents was adopted;²⁵ this Convention acknowledges the need for more efforts by states to prevent and prosecute crimes against diplomats in domestic law.²⁶ In accordance with this Convention, Libya enacted the Libyan Transitional Justice Law, 2014, which is explored in greater depth later in this study. Transitional justice historically played a significant role in achieving the justice in post-conflict situations. The researcher will discuss this role in Chapter 4 of this thesis to show the importance of such justice to guarantee the remedies to diplomats as victims. Libya also adopted an anti-terrorism law that specifically considers crimes against diplomats.

The duty of receiving states to adopt local legislations to protect diplomats might not be enough, and further efforts may be needed, with inter-state cooperation. The state is under responsibility to prosecute the offenders or extradite them in case it finds itself unable to prosecute.²⁷ Such cooperation between states is needed not only for the protection of the diplomats themselves but

¹⁹ Barker (n 3) 3.

²⁰ Ibid 3.

²¹ Ibid 3.

²² Ibid 3.

²³ Ibid 3.

²⁴ UNGA Sixth Committee (13th & 14th Meetings (AM & PM)) 'Responsibility of States to Ensure Protection of Diplomatic Personnel, Premises Is Reviewed by Assembly's Legal Committee' (18 October 2010) UN Doc GA/L/3394.

²⁵ Convention on the Prevention and Punishment of Crimes against internationally protected persons, including Diplomatic Agents (signed 1973, entered into force 20 February 1977) V 1035 p 167.

²⁶ Ibid.

²⁷ Malcolm N. Shaw, *International Law* (6th ed, University of Cambridge Press 2008) 764-765.

is also significant for international security.²⁸

The adopting of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), was a result of the rapid increase in hostilities against the interest of the international community of states. The inadequacy of this Convention is due to the challenges it faces. For instance, not all states treat this law as a general law, nor is it seen as a custom but rather relies on specific international treaties. Also, it does not specify a precise measure to which these diplomats should be protected in the receiving state.

Furthermore, these measures may not be able to deal with all circumstances surrounding attacks on diplomatic agents.

These efforts of the international community did not detract from violence against diplomats and risk surrounding them. Violence has continued and breaches of international obligations have increased. A high-profile case that highlights the situation since the 2000s was the siege of the US Embassy in Iran (1979-1981). The International Court of Justice in the case of *United States v. Iran* stated the responsibility of Iran for this violence, regarding it as serious breach of Article 29 of the VCDR of 1961, which obliged the receiving State (Iran) to take appropriate steps to protect diplomats.²⁹ The recent attacks on diplomats confirm that there still needs to be more effort from the receiving state to ensure that there is no targeting of diplomats. Receiving States should understand that no attack on diplomatic and consular missions or their staff could be justified under any circumstances. The 5th & 16th Meetings of the UN General Assembly in 2014 regarding attacks on diplomats confirmed growing concern about the targeting of diplomats.

This meeting reviewed the number of attacks that happened in recent years. These attacks include the attack on the Indian Consulate in western Afghanistan in 2014 and the Turkish Consulate in Mosul in the same year, as well as the abduction in Yemen of an Iranian Embassy staff member in 2013 and the risk face by the diplomatic and consular missions and their staff in Syria. Furthermore, the representative of Costa Rica, speaking for the Community of Latin American and Caribbean States (CELAC), noted that the dramatic events that had taken place in recent years served as a reminder that the role of representing one's country implied a risk to those who

²⁸ UN 'Responsibility of States to Ensure Protection of Diplomatic Personnel, Premises Is Reviewed by Assembly's Legal Committee' (18 October 2010), 13th & 14th The Sixth Committee (Legal) Meetings (AM & PM) UN Doc GA/L/3394.

²⁹ Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

performed it. There were also new challenges, including the impact that State surveillance and interception of communications might have on the inviolability of diplomatic and consular archives and documents.³⁰

1.2 Recent Breaches of International Law Regarding Diplomatic Protection

A core component of diplomacy is diplomats. The importance of protection for diplomats has become more necessary because of the important role that they play, particularly in the very circumstances in which they are targeted (i.e. deteriorating relations between states and conflict situations). This section does not seek to provide a comprehensive history of such events, but to present an overview of such incidents in the Middle East and North Africa (MENA). This is in light of the current international security situation where there is a pervasive danger of the storming of diplomatic premises by protesters and armed groups, damage to property and risking the lives of diplomats, as well as detaining or holding them hostage. One of the latest major attacks against a diplomat is the shooting (and killing) of Andrei Karlov, the Russian ambassador to Turkey, on 19th of December 2016.³¹ This is a clear breach of the international obligation of receiving states (in this instance Turkey) to protect diplomats. The difference in this attack from other attacks against diplomats in MENA is that the killer is an organ of state - a Turkish police officer.³² The state is responsible for the activities of all its organs, such as the police,³³ as will be explained in details in Chapter 5 of this thesis. This attack sends a clear signal to the international community that the lives of diplomats are at risk. Although scholars are researching for new mechanisms to protect diplomats, the researcher believes intensive international efforts are required in order to resolve the accumulated political crisis in the MENA region and to prevent the intervention of foreign countries in internal affairs (legitimately or illegitimately), unless there is a real need to protect the security of the region and its citizens. What is desperately needed is political reconciliation and a united international community instead of internal division within states with foreign countries supporting one side against the other. In the meantime diplomats themselves could play important

³⁰ UN 'Compliance with Vienna Conventions Critical in Protection of Diplomatic, Consular Missions, Personnel, Legal Committee Hears as Debate Begins' (21 October 2014) 69th session 15th & 16th Meetings UN Doc GA/L/3484.

³¹ BBC News 'Russian ambassador to Turkey Andrei Karlov shot dead in Ankara' BBC News (London 19 Dec 2016). Available at <<http://www.bbc.co.uk/news/world-europe-38369962>> Accessed 20 Dec 2016.

³² Ibid.

³³ Martin Dixon, Textbook on International Law, (6th ed, Oxford University Press 2007) 248.

roles in changing the political situation and tensions in these regions.

1.2.1 Iran

The storming of the Saudi Embassy in Tehran and its Consulate in Mashhad by Iranian demonstrators in 2016 is a challenge to the VCDR and the VCCR and threatens the foundations upon which these treaties rely to build international relations and maintain international peace and security.³⁴ The storming of these Saudi diplomatic properties is likely a conscious imitation of the occupation of the US Embassy in Tehran in

1979.³⁵ However, in 1979 the new (post-revolutionary) Iranian government was not able to actively honour the obligation to protect diplomats. In the case of the Saudi embassy Iranian security forces intervened and ended the occupation, and the government took serious steps to punish those who did not prevent the attack. For example, Tehran Province's Deputy Governor General for Security Affairs was removed from his position because of his handling of the storming of the Saudi embassy in the capital.³⁶ This was despite the very tense international situation and Iranian hostility to Saudi Arabia itself; the demonstrations emerged in response to Saudi Arabia's execution of the Shia cleric Sheikh Nimr Al-Nimr and 46 others convicted of terror-related offenses.³⁷ While the tension between Saudi Arabia and Iran is as old as the sectarian divide between Sunni and Shia, the tensions have intensified since the outbreak of the Arab Spring in 2011. This resulted in increasing persecution of the Shia minorities in Saudi Arabia and Yemen and the Shia majority in Bahrain by Saudi military forces, with the Saudi judicial system collaborating in this political project.³⁸

In October 2015, Saudi Arabia's Supreme Court rejected an appeal against the death sentence passed earlier for Al-Nimr, who had called for pro-democracy demonstrations and whose arrest in 2012 sparked protests in which three people died. Al-Nimr had long been regarded as the most vocal Shia leader in the eastern Saudi province of Qatif, willing to publicly criticize the ruling Al-Saud family and call for elections. The Saudi Interior Ministry blamed Al-Nimr, a long-time

³⁴ James B. Smith 'Former US Ambassador: What the Saudi Arabia-Iran Conflict Means for Stability' Time (London, 5 Jan 2016).

³⁵ Nayef Al-Rasheed 'Saudi Arabia Severs Diplomatic Ties with "Iranian Terrorism"' Middle East (Saudi, 4 January, 2016) Available at <<http://english.aawsat.com/2016/01/article55346171/55346171>> accessed 2 May 2016.

³⁶ Haaretz 'Iranian Official Sacked Over Storming of Saudi Embassy' Middle East News (Saudi, 10 Jan 2016). Available at <<http://www.haaretz.com/middle-east-news/1.695260>> accessed 6 July 2016.

³⁷ BBC News 'UN condemns attack on Saudi embassy in Iran' BBC News (London, 5 January 2016). Available at <<http://www.bbc.co.uk/news/world-middle-east-35229385>> accessed 2 May 2016.

³⁸ Ibid.

advocate of peaceful protest, of organising attacks on police, alongside a group of other suspects working as fifth-column agents of Iran.³⁹

On 4th January 2016, Saudi Arabia broke off diplomatic ties with Iran and gave all personnel of Iranian diplomatic missions and consular staff 48 hours to leave the country.⁴⁰ This severance of relationships affected economic as well as political prospects, immediately affecting trade routes and air traffic.⁴¹ If Iranian diplomats remained in Saudi Arabia after the 48-hour period of grace, they would lose their diplomatic immunity under the VCDR and be liable to criminal, judicial or even political prosecution. This action of Saudi Arabia is compliant with Article 9(2) of the VCDR, which states that ‘If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission’.

As for Saudi Arabia’s satellite states and allies, Bahrain and Sudan dutifully severed relations with Iran, with Bahrain also giving Iranian diplomats 48 hours to leave the country, while the UAE merely reduced the number of its diplomatic team in Iran, while maintaining the trade relationship between them.⁴² While both Saudi Arabia and Iran interfere in each other’s affairs, and the affairs of the whole MENA region, diplomatic personnel and Shia minorities bear the brunt of these schemes. This is most vividly demonstrated in the case of Iraq, which since 2003 has been the main battleground in the proxy war between Saudi Arabia and Iran. Having restored diplomatic relations with Iran for the first time since the Gulf War (1990-1991), the new Saudi ambassador to Iraq in 2016 interfered by calling for the government to intervene to disband the Al-Hashad Al-Shabi militia. His argument was that Saudi Arabia reserved the right to support Sunni paramilitary organizations in Iraq if Iran was to be allowed to support Shia groups.⁴³ While there is undoubtedly a deep and intractable sectarian problem in Iraq, the Saudi ambassador’s comments were designed to fan the flames in the interests of domestic propaganda in Saudi Arabia, and not to genuinely help Sunnis in Iraq or to ameliorate the problematic regional situation.

³⁹ The Guardian ‘Saudi Arabia executes 47 people in one day including Shia cleric’ The Guardian (London, 2 January 2016). Available at <<https://www.theguardian.com/world/2016/jan/02/saudi-arabia-executes-47-people-in-one-day-including-iran-ian-cleric>> accessed 3 August 2016.

⁴⁰ BBC News ‘Saudi Arabia’s allies Bahrain, Sudan and UAE act against Iran’ BBC News (London, 4 January 2016). Available at <<http://www.bbc.co.uk/news/world-middle-east-35222365>> accessed 3 September 2016.

⁴¹ Ibid.

⁴² Ibid.

⁴³ The New Arab ‘Iraq summons Saudi ambassador over criticism of Iran-backed militias’ The New Arab (Dubai, 24 January 2016). Available at <<https://www.alaraby.co.uk/english/news/2016/1/24/iraq-summons-saudi-ambassador-over-criticism-of-iran-backed-militias>> accessed 3 April 2016.

Beyond regional tensions, Iran expelled the UK ambassador in Tehran in November 2011 in retaliation for British support for tougher sanctions on Tehran over its nuclear programme; two days later hundreds of protesters stormed the embassy compound, smashing windows, torching cars and burning union jacks. The UK responded by closing the Iranian embassy in London later on. In June 2014 the British embassy in Tehran reopened.⁴⁴

1.2.2 Yemen

Yemen has a record number of attacks on diplomats. In 2012, Abdullah Al-Khalidi Saudi Arabia's Deputy Consul in the southern Yemeni city of Aden, was abducted by gunmen. Aden is the city closest to Yemen's Abyan Province where government forces have been struggling to contain militant groups linked to Al-Qaeda. Such groups had consolidated their control over several towns and villages in the region;⁴⁵ however, Al-Khalidi was released in March 2015. It is unclear whether the demanded ransom was paid,⁴⁶ but the Yemeni government declares that it neither negotiates with terrorists nor pays ransoms to them. The Yemen government believes that ransoms being paid to terrorists motivates them to conduct more kidnappings. If a ransom was paid,⁴⁷ it was likely funded by Saudi Arabia.

In July 2013, Nour Ahmad Nikbakht, an Iranian diplomat to Yemen, was held hostage, before being released after 18 months in March 2015.⁴⁸ In January 2014 in the capital, Sana'a, another Iranian diplomat, the economic attaché Ali Asghar, was shot dead after resisting a kidnapping attempt.⁴⁹ In December 2014, there was a bomb attack by AQAP militants on the Iranian ambassador's residence in the capital.⁵⁰

Kidnappings of foreigners is common in Yemen with tribes or militants affiliated with Al-Qaeda often demanding a ransom for their release or using them as a bargaining chip in their dealings with the central government. While poverty has traditionally been a major factor in such crimes

⁴⁴ BBC News 'British embassy in Tehran reopens four years after closure' BBC News (London, 23 August 2015). Available at <<http://www.bbc.co.uk/news/uk-34031615>> accessed 3 August 2016.

⁴⁵ BBC News 'Saudi diplomat kidnapped in Yemen' BBC News (London, 28 March 2012). Available at <<http://www.bbc.co.uk/news/world-17534644>> accessed 4 July 2016.

⁴⁶ BBC News 'Iranian 'operation' in Yemen frees kidnapped diplomat' BBC News (London, 5 March 2015). Available at <<http://www.bbc.co.uk/news/world-middle-east-31744613>> accessed 3 June 2016.

⁴⁷ Hakim Alasmari 'Saudi diplomat in Yemen freed by al Qaeda' CNN (London, 3 March 2015). Available at <<http://edition.cnn.com/2015/03/03/world/yemen-Saudi-diplomat-al-Qaeda/>> accessed 2 June 2016.

⁴⁸ BBC News 'Iranian 'operation' in Yemen frees kidnapped diplomat' BBC News (London, 5 March 2015). Available at <<http://www.bbc.co.uk/news/world-middle-east-31744613>> accessed 2 May 2016.

⁴⁹ BBC News 'Iranian 'operation' in Yemen frees kidnapped diplomat' BBC News (London, 5 March 2015). Available at <<http://www.bbc.co.uk/news/world-middle-east-31744613>> accessed 3 December 2015.

⁵⁰ Ibid.

(as with Somali piracy in the Red Sea and Gulf of Aden), Al-Qaeda and its political ideology is believed to have been behind most kidnappings since 2012.⁵¹

1.2.3 Iraq

Following the US-led 2003 invasion of Iraq, the country became a more dangerous place for the lives of diplomats. Iraq became a ripe environment for the kidnapping of diplomatic personnel from regional and other states;⁵² the root problem is that the new Iraqi government did not have effective control over large swathes of national territory and was thus unable to protect foreign diplomats.⁵³ Neither the army nor police developed active solutions to safeguard the safety of citizens, let alone the diplomatic missions in Iraq.⁵⁴ Also, armed militias have specifically targeted diplomats with threats, kidnapping and assassinations.⁵⁵ Naturally US diplomats have been particularly targeted, especially throughout the period 2003-2012.⁵⁶ This problem was transposed to other countries engaged in conflict after the Arab Spring, notably Libya and Syria.⁵⁷ On the other hand, attacks on and abductions of diplomats in Iraq during the period 2003-2014 abated during the second term of former Prime Minister Nouri Al-Maliki (2010-2014). Since 2014 (contemporaneous with the emergence of ISIS as a major phenomenon), kidnappings strongly re-emerged.⁵⁸

In 2004, unidentified militants and the Islamic Army kidnapped Egyptian and Iranian diplomats; these diplomats were later released.⁵⁹ In July 2005, three high profile cases emerged. First, the Egyptian ambassador Ihab Al-Sherif was killed five days after being kidnapped by the Abu-Musab Al-Zarqawi militant group.⁶⁰ Then in the same year gunmen hurt Bahrain's envoy to Baghdad in an attack;⁶¹ the Pakistani envoy to Iraq escaped unhurt after gunmen attacked his vehicle;⁶² and two Algerian diplomats were abducted and killed - the charge d'affaires Ali Belaroussi and his deputy

⁵¹ Almasmari (n 47).

⁵² Omar Al-Jaffal, Translator Sami-Joe Abboud 'Who's to blame for recent kidnappings in Iraq?' AL monitor (Iraq, 29 January 2016). Available at <<http://www.al-monitor.com/pulse/originals/2016/01/iraq-wave-abductions-foreigners-accusations.html>> accessed 2 February 2016.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ United States Department of State Bureau of Diplomatic Security 'Significant Attacks against US Diplomatic Facilities and Personnel: 1998-2012' Available at <<http://www.state.gov/documents/organization/211361.pdf>> accessed 20 April 2016.

⁵⁷ Al-Jaffal (n 52).

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ BBC News 'Captors kill Egypt envoy to Iraq' BBC News (London, 8 July 2005). Available at <http://news.bbc.co.uk/1/hi/world/middle_east/4660909.stm> accessed 3 June 2016.

⁶¹ Ibid.

⁶² Ibid.

Azzedine Belkadi.⁶³ In October of the same year, two Moroccan embassy employees were kidnapped on the highway from Amman to Baghdad.

Another wave came in November, 2005 when Al-Qa'ida in Iraq posted a statement on a website saying that Abdel Karim el-Mohsfidi, a Moroccan diplomat, and Abderrahim Boualem, his driver, would be executed as an example for others challenging the 'mujahidin'.⁶⁴ A Sudanese diplomat, Taha Mohammed Ahmed, was hit by a stray bullet while walking in the garden of the Sudanese Embassy in Baghdad,⁶⁵ and Hammouda Ahmed Adam, a Sudanese Embassy employee, was killed by unknown gunmen while driving in the Mansour district of Baghdad. On November 12, 2005, armed groups attacked the Omani Embassy in Baghdad, killing an Iraqi police officer and an embassy employee. The international dimension of the Iraqi situation also affects Russia; in June 2006, in Baghdad, a Russian diplomat was killed and four diplomatic employees were kidnapped by armed groups called the Mujahideen Shura Council, which released a video showing two of the diplomats being killed. The group had demanded that Russia leave Chechnya and release Muslim prisoners.⁶⁶

However, the most serious development in Iraq since 2003 was the emergence of ISIS as the controlling militia in swathes of northern Iraq, particularly after they captured Mosul in 2014, establishing authority over the surrounding region of Nineveh and areas of Kirkuk and Salah-Eddin province as well as Tikrit city, less than 100 miles north of the capital, Baghdad. Upon seizing Mosul, ISIS took over the Turkish Consulate in Mosul (which has been the bastion of Turkish influence in Iraq since the Ottoman era) and kidnapped the head of the diplomatic mission along with 24 staff members.⁶⁷

1.2.4 Other Countries

The fundamental reason for non-state actors such as terrorist groups targeting diplomats in Iraq was that they viewed the establishment of diplomacy with the Iraqi government as legitimization

⁶³ BBC News 'Press fury at killing of Algerians' BBC News (London, 28 July 2005). Available at <http://news.bbc.co.uk/1/hi/world/middle_east/4724323.stm> accessed 4 July 2016.

⁶⁴ Anthony H. Cordesman 'Iraq's Evolving Insurgency: The Nature of Attacks and Patterns and Cycles in the Conflict' (2006) Centre for Strategic and International Studies Available at <http://csis.org/files/media/csis/pubs/060203_iraqicombattrends.pdf> accessed 20 June 2016

⁶⁵ Cordesman (n 64).

⁶⁶ BBC news 'Russia 'to kill Iraq kidnappers' BBC News (London, 28 June 2006). Available at <http://news.bbc.co.uk/1/hi/world/middle_east/5125416.stm> accessed 3 April 2015.

⁶⁷ Fazel Hawramy 'ISIS militants kidnap Turkish diplomats after seizing consulate in Mosul' The Guardian (London, 11 June 2014). Available at <<https://www.theguardian.com/world/2014/jun/11/isis-militants-kidnap-turkish-diplomats-consulate-mosul-iraq>> accessed 2 November 2016.

of the US occupation (i.e. by legitimizing the government and state of Iraq).⁶⁸ With the escalation and proliferation of terrorism throughout MENA after 2003, such incidents spilled over into other states, such as Algerian diplomats being kidnapped in northern Mali in 2012 (they were ultimately released in 2014). These diplomats had warned their government of the danger but they were ignored, and although the ‘Tawhid and Jihad Movement’ released two diplomats, another died in captivity. Furthermore, in 2013 three out of seven Algerian diplomats kidnapped in Gao in northern Mali were executed due to the Algerian government refusing to release one of the movement’s leaders held on terrorism charges. The other diplomats were released under secret terms, similar to the release of the Mauritanian businessman Moustapha Ould Imam Shafii, who himself had brokered earlier liberation of European hostages from the grip of Al-Qaeda in the

Islamic Maghreb. Both Algeria and Morocco have been increasingly drawn into terrorist actions against diplomats in North Africa.⁶⁹

Jordan has been the exception with the lack of attacks on diplomats, representing the eye of the Middle Eastern storm. The only recorded example was the assassination of the US diplomat Larry Foley in Amman in October 2002 by radical Islamic groups.⁷⁰

1.3 Arab Spring Revolutions and the Breaches of International Law Regarding Protection of Diplomats

From late 2010 numerous Arab countries witnessed wave of mass protests and in some cases revolutions and civil conflicts that came to be known as the Arab Spring, which was accompanied by a concomitant wave of breaches of international law, including attacks on diplomats. This study focuses on Libya in particular, which has had a particularly notable Arab Spring experience (transforming it from a moribund though stable dictatorial backwater into a civil conflict scenario of tentative political transition and the proliferation of armed militias). Libya has had a serious problem of attacks on diplomats including the case of the assassination of the US Ambassador

⁶⁸ Middle East News Paper, International condemnation of the killing of a large Algerian diplomats in Iraq, Middle East News Paper (29 July, 2005). Available at <http://news.bbc.co.uk/1/hi/world/middle_east/4724323.stm> accessed 3 October 2016.

⁶⁹ Hisham Muwaffaq, ‘The scenes of the kidnapping edit Algerian diplomats in Mali’ Al Jazeera news. (United Emirate, April 2012). Available at <<http://www.aljazeera.com/news/Africa/2012/09/201292153136133412.html>> accessed 2 June 2016.

⁷⁰ BBC News ‘US diplomat shot dead in Jordan’ BBC News (London, 28 October 2002). Available at <http://news.bbc.co.uk/1/hi/world/middle_east/2367311.stm> accessed 3 September 2015.

(Steven) after the US helped Libyan rebels overthrow the former regime.

1.3.1 Background to the Killing of the US Ambassador to Libya

In 2012 Libyans revolted against the authoritarian dictatorship of the Gaddafi regime, and brought down his government with the assistance of NATO military forces and financing from the GCC. Latent civil conflicts and interference by other states has ensured continued instability during the post-revolutionary period, with both the government and opposition groups committing serious violations of human rights along with breaches of international law.⁷¹

The murder of US Ambassador Stevens in Libya in September 2012 was the first murder of a US Ambassador since 1979. Having earned the disapprobation of the whole Islamic world after the invasion and occupation of Iraq from 2003, which by 2011 was accompanied by massive discontent within the US, the US support of the intervention in Libya on humanitarian grounds was supposed to herald a new dawn of US support for democracy throughout MENA, after its lacklustre condemnation of its allies Zine El Abidine Ben Ali in Tunisia and Hosni Mubarak in Egypt. The US had formerly freed Libya from Italian colonization following WWII, but it had consistently opposed Gaddafi. Thus Ambassador Stevens personified the US commitment to a free and democratic Libya.⁷²

Furthermore, Stevens was an exceptional practitioner of modern diplomacy, with knowledge of the Arabic language, broad appeal to all sectors of the population, and an extensive number of friends and allies in Libya, particularly in Benghazi, where he was a major figure in the US Special Mission in Benghazi, and a Special Envoy to the rebel-led government that eventually toppled Gaddafi. The Special Mission bolstered US support for Libya's democratic transition through engagement with eastern Libya, where the revolution against Gaddafi was catalysed, and a regional power centre.⁷³

Initially, the attack on Ambassador Steven was thought to be perpetrated by an angry mob responding to a video made in the United States that mocked Islam and the Prophet Muhammad but it is later determined to be a terrorist attack.⁷⁴

⁷¹ El-Gamaty, G. (2017). 'Qatar, the UAE and the Libya connection'. Aljazeera. Available at: <http://www.aljazeera.com/indepth/opinion/2017/06/Qatar-Libya-connection-170612080219306>. Html [last accessed 3 Jan 2018].

⁷² US Department of State 'Accountability Review Board (ARB) Report' (Unclassified) <<http://www.state.gov/documents/organization/202446.pdf>> accessed 27 July 2015.

⁷³ Ibid.

⁷⁴ CNN Library 'Benghazi Mission Attack Fast Facts' CNN Library (US, 30 August, 2017). Available at <http://edition.cnn.com/2013/09/10/world/benghazi-consulate-attack-fast-facts/index.html> Accessed 4

US embassies throughout the Muslim world were subject to demonstrations or attacks in protest against a vulgar propaganda film made in the US that mocked the Prophet Muhammad as part of the surge of anti-US sentiment that followed, Stevens and others were killed by armed groups.⁷⁵ Contemporaneously, in Yemen, demonstrators briefly stormed the grounds of the US Embassy in Sana'a and burnt the US flag before being driven back by security forces. In Egypt, 224 people were injured in protests outside the US Embassy in Cairo, with some demonstrators demanding the expulsion of the ambassador. Smaller protests were reported in Bangladesh, Iraq, Morocco, Sudan and Tunisia.⁷⁶

The killing of the US Ambassador in Libya whilst on duty, was the first time this had happened since 1979, creating political mayhem in the US. Many blamed the White House for instructing security forces to hold back when the attacks were already happening, and they claimed that President Obama whilst avoiding calling the attacks "terrorist", had led to the incident occurring. This was denied by him when this became a key issue in the 2012 presidential campaign. Republicans also accused Hillary Clinton's State Department of a failure to provide appropriate security and equipment prior to the attacks, which may have prevented them. Accusations were made that the Department of State failed to provide proper security beforehand and as a result, four Americans died that day. This put the Democrats in a highly precarious position. According to some resources this lack of security has seen bureaucratic inefficiencies taking the blame. According to the sources, Clinton did not approve nor deny requests for additional security.⁷⁷

However, analysing the issue objectively, away from the hysteria of US political discourse, the US never formally committed ground troops to Libya or occupied the country, unlike in Afghanistan after 2001 and Iraq after 2003. Thus the extensive security forces that were deployed in Libya were far in excess of conventional deployments allotted to protect diplomats in foreign states (indeed, critics of US foreign policy frequently opine that despite the official position of 'no boots on the ground', the US *de facto* invaded Libya with massive deployments of special forces and advisers). Logistically, the lack of security was considered a problem on the confusing status of

October 2017.

⁷⁵ BBC 'US confirms its Libya ambassador killed in Benghazi' BBC News (London, 12 September 2012). Available at <<http://www.bbc.co.uk/news/world-africa-19570254>> accessed 2 May 2015.

⁷⁶ Jeremy Bowen, Libya makes arrests over deadly US Embassy attack, BBC News, (14 September 2012). Available at <<http://www.bbc.co.uk/news/world-middle-east-19595237>> accessed 4 January 2014.

⁷⁷ Clark Mindock 'What Really Happened In Benghazi? The Facts around Hillary Clinton's Handling Of the 2012 Attacks in Libya That Killed 4 Americans' International Business Time (October 2015, US). Available at <<http://www.ibtimes.com/what-really-happened-benghazi-facts-around-hillary-clintons-handling-2012-attacks-2152398>> Accessed 2 May 2017.

the compound; since it was neither an embassy nor official consulate, it was not considered in budgetary terms in the same way as it would have been if it were a more traditional diplomatic post.⁷⁸ The deficient security resources in Libya and the loss of territorial control in Libya by its ostensible government authorities led the researcher to research on mechanisms that could have saved the lives of the ambassador and three other American staff during the armed conflicts.

The most appropriate solution was identified as the virtual embassy, as explained in detail in Chapter 3.

The motives of the armed group that attacked Ambassador Stevens are still uncertain. Their actions were probably driven in response to what other militants did in Cairo contemporaneously.⁷⁹ Some may have been motivated by the call by Ayman Al-Zawahiri - the leader of Al-Qaeda thought to be operating in Pakistan - made a day before the event to Libyans to avenge the killing of a senior Al-Qaeda leader of Libyan origins in Pakistan. Although American analysts have never said that this video played a role in the Benghazi attacks,⁸⁰ Ahmed Abu Khattala (hereinafter 'Khattala'), a terrorist leader and perhaps one of the leaders of the attacks, said he was influenced by the video. Khattala is now imprisoned by the US under indictment for the role he played in the attack.⁸¹ The US captured Khattala without prior notification to the Libya authorities outside Benghazi for the part he played in the American mission's attack in Libya and the murder of the American ambassador alongside three other American staff.⁸²

Neither civilian nor military casualties were reported in the extraction of Khattala. Twenty four Delta Force commandos plus a few FBI Hostage Rescue Team agents arrived shortly after midnight at Khattala's home in Benghazi and, using subterfuge, grabbed hold of him pushing him into a vehicle then sped away into the night. Khattala was charged in August 2013 for leading attacks which led to four Americans losing their lives. The Libyan authorities took this raid that captured Khattala as an attack on Libya's sovereignty, and as such sought for him to face trial in Libya for his crimes. However, the US justified the raid as self-defence, as Khattala was planning

⁷⁸ Ibid.

⁷⁹ CNN Library 'Benghazi Mission Attack Fast Facts' CNN Library (US, 30 August 2017) Available at <http://edition.cnn.com/2013/09/10/world/benghazi-consulate-attack-fast-facts/index.html> Accessed 5 October 2017.

⁸⁰ Michael Morell, *ISIS the Great War of Our Time: The CIA's Fight against Terrorism*, From al Qaida to ISIS (Twelve, New York publisher 2015) 341

⁸¹ Ibid 341.

⁸² Michael Zennie and James Nye 'Libyan government demands US RETURN Benghazi 'mastermind' and calls Delta Force raid that captured him a 'an attack on our sovereignty' Mail online (18 June 2014). Available at <<http://www.dailymail.co.uk/news/article-2661576/Libyan-government-demands-U-S-RETURN-Benghazi-mastermind-calls-Delta-Force-raid-captured-attack-Sovereignty.html#ixzz4hnd8USHZ>> accessed 22 May 2017.

on more attacks. Khattala could be facing the death penalty. TJ would have been a better solution to the unilateral action taken by the US, as their action was in fact a clear breach of international law.⁸³

There is no evidence to suggest that the attackers intended to target the Ambassador or US officials specifically when they started any of the fires that night.⁸⁴ They were a group of individuals entering the building and the attack was not organized; rather it was a flash mob planning to enter the compound to see how much harm they could inflict. They did not appear to be looking for Americans to harm them with malicious forethought, but seemed intent on looting and vandalism. It was clear that these mobs were looting and generally vandalising and destroying the compound, and the associated deaths were tragic consequences of this attack. Nevertheless, they were a mob, made up of a group of individuals, some of whom were Islamist extremists.⁸⁵ However, Al-Qaeda claims that Stevens died of a lethal injection while they were trying to kidnap him in a planned operation in the attack on the US Consulate in Benghazi.⁸⁶ In view of all the confusion as to who was involved and their motive, perhaps the best way of finding answers to these questions and bring clarity and closure would be through a TJ process.

One of the accusations made against Stevens by militants was interference in the internal matters of Libya. Stevens personally served as the representative of America to the Libyan National Transitional Council in Benghazi during the Revolution and then as Ambassador to Libya. Immediately upon assuming his duties he expressed his great pleasure in witnessing the people of Libya revolting over the rule of the former Libyan regime and he claimed to be proud of his participation in the renaissance of a modern Libya on its way to freedom and democracy. He expressed his desire to build a strong relationship between the US and Libya, and his aspiration to see a new Libya run under strong government institutions.⁸⁷ Albeit the implicit extensive engagement of the US in internal state-building within Libya was presented on humanitarian grounds, the declarations of the US Ambassador could be interpreted as a violation of Art 41(1) of the VCDR, whereby diplomats are prevented from interference in internal affairs of the hosting

⁸³ Ibid.

⁸⁴ Morell (n 80) 341.

⁸⁵ Ibid 341.

⁸⁶ Bill Gertz 'Al Qaeda weapons expert: US ambassador to Libya killed by lethal injection' The Washington Time, (June 4, 2013) Available at <<http://www.washingtontimes.com/news/2013/jun/4/al-qaeda-weapons-expert-us-ambassador-libya-Killed/>> accessed 27 May 2017.

⁸⁷ Al Arabiya 'US Ambassador killed in a consular attack in Libya' Al Arabiya (Saudi Arabia, 11 Sep 2012). Available at <<https://www.alarabiya.net/articles/2012/09/11/237447.html>> Accessed 2 Nov 2017.

state.⁸⁸

Clearly these non-state actors hold the US responsible for the perceived crimes of individual citizens; this is the corollary of the doctrine of Al-Qaeda that individual citizens (i.e. civilians) in democratic states are legitimate targets due to their culpability in the perceived crimes of their state (by which they attempt to abrogate the staunch protections of civilians in Islamic rules of warfare). Regardless of the motivations for these crimes, international law holds the receiving state responsible to protect diplomats from any attacks, as explained previously. The International Court of Justice (ICJ) also specifically clarified that attacks on diplomats can never be justified as punitive actions against the sending state. In the Iran hostage crisis, the ICJ stated that the crimes of the sending states did not allow the receiving state to violate the embassy of the sending state, noting that although the 'Iranian Minister for Foreign Affairs had alleged in his two letters to the Court that the United States had carried out criminal activities in Iran' these 'alleged activities' do 'not constitute a defence to the United States' claims, since the Diplomatic Law provides the possibility of breaking off diplomatic relations, or of declaring *persona non grata* members of diplomatic or consular missions who may be carrying on illicit activities'.⁸⁹

However, breaking off diplomatic relations in retaliation for perceived affronts or abuses is counterproductive, as it is in such scenarios that the role of diplomats is galvanised and most important in promoting relationships between states. According to Arts 40–41 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, (2001), where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created.⁹⁰

This meets the requirements of the ICJ in its decision of the case concerning the Iran Hostage Crisis which stated that: 'the parties should take speedy action and make maximum efforts to dispel tension and mistrust, and in this a third-party initiative may be important'.⁹¹ Nevertheless,

⁸⁸ Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

⁸⁹ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America)*

⁹⁰ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

⁹¹ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America)*

the breaking of diplomatic relations is often adopted by states, especially when the receiving State fails to meet its duty of protecting the foreign diplomats of the sending state. Historical cases include the West German government forcefully condemning the failure of Guatemala to protect its ambassador Von Spreti in 1970, who was kidnapped and held to ransom; when the demands were not met and no alternative was found, he was murdered.⁹²

The breaking of diplomatic relationships between receiving and sending states is not a new form of reflection of their discontent for unacceptable actions taken by other states. However, such actions have traditionally been governed by custom and protocol since time immemorial. For example, the custom in ancient Mesopotamia was for a host to provide troops to escort foreign envoys; the lawgiver Hammurabi once refused a return escort upon being dissatisfied with the message brought by the envoy of Elam, which was understood to be tantamount to breaking relationships with the latter.⁹³

1.3.2 The Legal Qualification of the Libyan Situation

Libya has been facing a prolonged political crisis since the outbreak of armed conflict in 2011. Two governments claim legitimacy at a time when effective control over most of the geographical expanse of Libya has been assumed by powerful armed groups, with all sides committing violations of International Human Rights Law as well as conventional domestic law, emboldened by impunity due to the lack of any real prospect of punishment.⁹⁴ The judicial system, which is itself in flux, no longer works in parts of the country, with a notable shortfall in technical assistance. However, some state institutions and civil society organizations still work to varying degrees.⁹⁵

As a result of the last waves of attack on diplomats during the Arab Spring revolution, the Sixth Committee of the General Assembly confirmed the responsibility of host states to protect diplomats according to international law with reference to attacks on US and other envoys in Libya, Sudan, Egypt, Tunisia, Pakistan and Yemen, sending a clear signal of the need to intensify efforts and cooperation among states to prevent such assaults.⁹⁶

v Iran] [1980] ICJ Rep 3.

⁹² Barker (n3) 4-5.

⁹³ Linda S. Frey and Marsha L. Frey, *the History of Diplomatic Immunity* (Columbus: Ohio State University Press 1999) 105.

⁹⁴ UNHRC 'Report of the UN High Commissioner for Human Rights on the situation of human rights in Libya and the relevant technical support and capacity building needs' (12 Jan 2015) UN Doc A/HRC/28/51.

⁹⁵ Ibid.

⁹⁶ UNGA 'Legal Committee Condemns Surge of Attacks on Diplomats, Missions, Saying Host States Must Fulfil Protection Obligations' (Sixty-seventh General Assembly, Sixth Committee, 6th & 17th Meetings (AM & PM) (24 October) UN Doc GA/L/34452012.

The Libyan case of an attack on US diplomats seems to be much close to the historical attack on the case of an attack on US Embassy in Beirut in 1983, when Islamic Jihad attacked the US Embassy and that led to the killing of 63 people including 18 Americans. The embassy was bombed with 20,000 pounds of explosives. The operation was carried on by a suicide bomber.⁹⁷ Lebanon witnessed major violence during religious and political internal conflict from 1975 to 1990, with armed groups controlling many areas as in modern Libya; the salient difference between the two cases is that the Libyan conflict is a form of tribal conflict (in the absence of religious or ethnic differences)

With regard to international law, in the case of Lebanon and Libya the state government was basically too weak to protect the diplomats in question in the face of powerful non-state military actors. Conversely, state complicity was implied in the attack on the US Embassy in Tehran in 1979, during which six people were killed and the US Ambassador to Tehran along with 70 other people were held hostage.⁹⁸

While this conflict is often described as the first encounter between the US and political Islam, the US in fact has a long and extensive history of normal relations with Islamic states. The Kingdom of Morocco was the first nation to recognise the independence of the US in 1777,⁹⁹ and in more recent history it leveraged the political Islamism bequeathed it by the British to oust the latter from the Arabian Peninsula after WWII, after which British imperialism in the Middle East was largely confined to its de facto control over Persia and Mesopotamia.¹⁰⁰ The problem of the US with the spiritual movement led by Ayatollah Khomeini that installed an Islamic theocracy in Iran, replacing the pro-Western secularist monarchy of the Shah, was not that it was Islamist, but that it was rabidly anti-Western and anti-colonial. The US was viewed as the ‘Great Satan‘ by the new Iranian government, and Iranians blamed it for its role in placing and keeping the Shah in power (after overthrowing the democratically elected leader Mosaddegh in 1953, one of whose political heroes was Thomas Jefferson).

After the Islamic Revolution, general anti-colonial hatred of the US was galvanised by the spiritual significance accorded to such sentiments by the theocratic Iranian regime. The Ayatollah himself blessed the hostage taking at the US Embassy, further fuelling the government’s hard line against

⁹⁷ Barker (n3) 9.

⁹⁸ Ibid 76.

⁹⁹ White House (2013). Joint Statement by the United States of America and the Kingdom of Morocco. Office of the Press Secretary. Available at: <https://obama.whitehouse.archives.gov/the-press-office/2013/11/22/joint-statement-united-states-america-and-kingdom-morocco> [last accessed 3 Jan 2018].

the US.¹⁰⁰ The position in Tehran was a tense one and the leader of the diplomatic mission at the US Embassy in Tehran had sent several messages to Washington.¹⁰¹ These all said that if the Shah left Iran for medical treatment in the US, the Embassy would fall. President Jimmy Carter agreed to the Shah being allowed entry for treatment although with much hesitation. This then enraged the Iranian people who saw this as nothing more than a smokescreen to bring the Shah to the US and from there plot his return to lead Iran. This was only a matter of weeks before the embassy was attacked.¹⁰²

The embassy in Tehran is these days an Islamic cultural centre as well as a museum, preserved from earlier days when it was an infamous jail in 1979. It is a symbol of the Iranian revolution, and is known regionally as the "'den of spies'." Old artefacts from this time such as typewriters, communication equipment, and prints of old visa photos, are displayed. Every year on the anniversary of the hostage incident, the Iranian government hold rallies and chant 'Death to America', just as happened in 1979.¹⁰³

The ICJ determined Iran to be more than negligent in these circumstances.¹⁰⁴ They had, on 1 March 1979, claimed to be making arrangements to prevent the United States embassy from any takeovers or attacks; however, many Iranian authorities approved of the takeover and the Foreign Minister claimed the US was responsible for the event. Iran deliberately ignored requests for any release of hostages and should, for these reasons, make reparation for their actions.¹⁰⁵

The ICJ examined the seizure and detention of US diplomats and members of their staff by a group of militants (students) in Tehran in accordance with international law. However, Iran adopted Sharia and changed its Constitution in 1979; while Libya has never had any Islamic aspirations, being nominally socialist since the Green Revolution of 1969. The post-2011 political militias in Libya generally claim that they apply Sharia, according to which diplomats have immunity from prosecution, freedom from arbitrary arrest and detention and the insurance of proper care and treatment. Also, the diplomats enjoyed freedom of religion, as explained in Chapter 2 of this thesis.

¹⁰⁰ Francis Owtram. *A Modern History of Oman: Formation of the State since 1920* (IB. Tauris 2004) 91.

¹⁰¹ Susan Chun 'Six Things you didn't Know about the Iran Hostage Crisis' CNN (July 16, 2015). Available at <<http://edition.cnn.com/2014/10/27/world/ac-six-things-you-didnt-know-about-the-iran-hostage-crisis/index.html>> accessed 5 July 2017.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, paras 69-79.

¹⁰⁵ Ibid, paras 69-79.

Only under extraordinary circumstances might envoys be detained and imprisoned, and that would be in the form of specific reprisals in kind. A case in point is the Prophet Muhammad's detention, without physical harm, of the envoys of Mecca during the negotiations on the Treaty of Huddaibiya, because the Meccans had detained his emissaries. The practice of the Prophet Muhammad embeds within Sharia respect for the customary rules and protocols of international relations. The Prophet granted immunity to foreign diplomats, their families, staff and servants, and dealt with foreign diplomats the same as he dealt with Muslim diplomats.¹⁰⁶

This practice was continued by Muslim states in modern day international relations in their acceptance of the VCDR 1961 and VCCR 1963 on diplomatic and consular relations.¹⁰⁷

The foundations of Sharia are the Quran and the sayings (hadith) of the Prophet Muhammad. Various schools of Islamic jurisprudence interpret Sharia in light of these and the practice of *Al-Khulafa Al-Rashidun* (the 'Rightly Guided Caliphs' who succeeded the Prophet, c. 632-661 AD), the opinions of the Companions of the Prophet, and the consensus of jurists; the Jafari school (i.e. Shia Muslims) attribute greater authority to the verdicts of Imams (i.e. Ayatollahs), while Sunni legal thought is more codified according to recognised precedents and precepts. According to Sharia, the Head of the State (the caliph) is permitted to enter treaties.¹⁰⁸

Iran and Libya as signatories of the VCDR 1961 and VCCR 1963 are therefore obligated to abide to the terms of these treaties. According to prophetic injunction, Muslims are obliged to apply conventions and abide by their obligations unless these clearly contradict Sharia (e.g. a Muslim community would be obliged to honour a military pact of defence, but not one of aggressive conquest for worldly purposes). Consequently, Sharia obliges ostensibly Islamic states like Iran and Libya to be bound by the treaties of 1961 and 1963,¹⁰⁹ as explained in the next chapter.

However, the non-state Islamist militias who claim responsibility for murdering the US Ambassador to Libya in 2012 might claim that any agreements made by Gaddafi are null and void and that it is not incumbent upon them to honour treaties made by Gaddafi as a non-Muslim leader (according to their understanding).

¹⁰⁶ Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the Clash of Civilisations in the New World Order*, (H.A.R.T Publishing 2005) 119.

¹⁰⁷ Cherif Bassouni 'Protection of Diplomats under Islamic Law' (1980) 74 *The American Journal of International Law* 609. Available at <http://www.jstor.org.libaccess.hud.ac.uk/stable/pdf/2201651.pdf?refreqid=excelsior%3Ab0f7f61ced23bfe65356d08a79fe4203> Accessed 3 August 2017.

¹⁰⁸ *Ibid* 609.

¹⁰⁹ Bassouni (n107) 609.

Returning to the practical implications in the case of Iran, the ICJ stated that ‘the Iranian security personnel are reported to have simply disappeared from the scene; at all events, it is established that they made no apparent effort to deter or prevent the demonstrator from seizing the embassy’s premises’.¹¹⁰

Although Iran had undertaken to protect the US Embassy, the guards disappeared during the takeover and the government did not attempt to stop it or rescue the hostages. The US arranged to meet with Iranian authorities to discuss the release of the hostages; however, Ayatollah Khomeini forbade the latter to meet the US representatives. The US subsequently ceased relations with Iran, applied a trade embargo (including oil imports from Iran), and blocked Iranian assets, despite the militants not acting on behalf of the state of Iran; thus these punitive measures were purely because Iran had not upheld its responsibility to protect US nationals and diplomatic personnel. One of the demands of the hostage-takers was the return of the former Shah (to face trial); he was receiving medical treatment in the US.¹¹¹

The case of Libya in 2012 is similar to the Iranian hostage crisis in 1979 in that in both instances the state government was a post-revolutionary regime that failed to protect diplomats and their premises, in a context of massive public outrage against the US and its imperialist and Western associations. Iran was found to have made no efforts to protect diplomats, which was a major violation of Article 22(2) of the VCDR, which obliges states to make efforts to protect the diplomats: ‘The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity’.

Furthermore, Iran continued its violation by not taking any further steps to protect the diplomats even after the decision was made the ICJ in its Court’s Order of 15 December 1979 which ask them to release the hostages: ‘the Government of Iran must immediately release the United States nationals held as hostages and place the premises of the Embassy in the hands of the protecting power’.¹¹² However, the decision of the ICJ was rejected by Iran. The Ayatollah declared that ‘The detention of the hostages would continue until the new Iranian parliament had taken a decision

¹¹⁰ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, paras 69-79.

¹¹¹ *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, paras 69-79.

¹¹² *Ibid.*

as to their fate'.¹¹³ Conversely, the Libyan government did take genuine if ineffectual measures to try and protect diplomatic personnel, and has since taken real steps to avoid any further acts of that kind, reforming its local legislation and enacting anti-terrorism laws that unequivocally regard wrongful acts against diplomats as terrorism (and thus as more serious offences than conventional criminal categories).

While this research is mainly concerned with attacks on diplomatic personnel and their premises in MENA, this is not the only region to witness such violence; for example, in 1999 a NATO bomb struck the Chinese embassy in the Yugoslav capital, Belgrade.¹¹⁴

Furthermore, in 2001, the Canadian and Italian embassies in London were attacked by 150 anti-globalization protesters, who smashed windows and damaged a car. However, no key incidents or injuries were recounted. In response to the killing of a rioter by Italian security forces at the Group of Eight (G8) summit in Genoa, a protest outside the Italian embassy included a tiny number of rockets being thrown by protesters, causing minor damage to a building near the Italian embassy. The protests moved later on toward the Canadian embassy where windows were smashed and a car was damaged.¹¹⁵

In January 2014, the Russian embassy in Ukraine was attacked by Ukrainian protesters hurling eggs and paint at the building, and more seriously a petrol bomb; windows were smashed and flags torn down. Some protesters wearing balaclavas overturned cars with diplomatic plates.¹¹⁶

Given that such events are becoming the norm, the traditional assumptions of diplomatic relationships seem to be under mortal threat, consequently threatening the entire MENA region and the security and peace of the whole world. The international community needs to work together to tackle these serious attacks against diplomats if diplomatic relationships between states are to be maintained.

In states with a situation of internal tension, political disturbance, or civil war, diplomatic personnel and premises are more vulnerable to direct threats, because of the weakness of the state security to control prevailing conditions, and the corresponding strengthening of non-state groups.

¹¹³ Ibid.

¹¹⁴ BBC News 'World: Europe the Chinese embassy strike in quotes' BBC News (London, May 1999). Available at <<http://news.bbc.co.uk/1/hi/world/europe/338923.stm>> accessed 3 June 2015.

¹¹⁵ Reuters 'Protesters attack Canadian embassy' The Globe and Mail (London, 23 July 2011).

¹¹⁶ BBC News 'Ukraine crisis: Russian anger over embassy attack' BBC News (London, 15 Jan 2014). Available at <<http://www.bbc.co.uk/news/world-europe-27856624>> accessed 9 May 2015.

1.3.3 Applicable Law for Justice for Diplomats in the Time of an Internal Armed Conflict – The Example of Libya

The question arises as to what laws are applicable during internal armed conflict for the protection of diplomats. Although the VCDR is the customary international law that would apply, this Convention does not set out the punishment for offenders; it merely mentions the possibility of suitable punishment being set out in the internal laws of the state parties. This is why this research examines the internal laws of Libya, to find what is applicable in the case of the killing of Ambassador Stevens. During internal armed conflicts and the times of tension and disturbance, the Libyan authorities suspended all other laws and applied the state of emergency laws. By critically examining these laws and their applications, this research determines whether the mechanisms for finding justice for the diplomats in Libya are adequate.

Under international law, Libya was obliged to exercise due diligence to prevent any attacks against diplomats and, if these measures failed to prevent attacks, to find justice for those diplomats. This might require the enactment of internal laws in this regard. For example, during the attack against the US Embassy the Libyan authorities failed to protect the US Ambassador, but they declared a state of emergency and enacted anti-terrorism law, as explained in the next section.

1.3.3.1 State of Emergency

States often declare a state of emergency under circumstances of extreme tensions and internal conflict.¹¹⁷ One of emergency characteristics is the rescue of diplomats and the protection of foreign diplomatic premises along with host state government buildings during times of internal armed conflict and political tensions, which is what happened in Libya in response to the attack against the US Ambassador. By declaring emergency status the Libyan authorities exercised due diligence to avoid more attacks.¹¹⁸

However, the new Libyan government lost control of its armed forces and as a result could not protect diplomats. Armed militias with *de facto* authority were known to have established their own

¹¹⁷Draft Constitutional Charter for the Transitional Stage, the Constitutional Declaration. (2011).

¹¹⁸ Elraaed News 'Declaration of the state of emergency in Libya and battles in Sabha with armed groups' Elraaed News (Libya Sep 2012) Available at <<http://elraaed.com/ara/maghreb/39283->> Accessed 3 October 2017; Sauder's News 'Egyptian authorities decide to apply all provisions of the Emergency law to maintain security' Sauder's News (Egypt 11 Sep 2011) Available at <<https://www.sudaress.com/sudansafari/14135>> Accessed 3 Oct 2017.

illegal tribunals and prisons. Libyan authorities have no control on armed militias and cannot charge them for any crimes committed by them.¹¹⁹ This contributed to its inability to arrest anyone for the attacks in Benghazi in 2012.

The judicial system is still weak and vulnerable, and in some areas of Libya it no longer works. The armed militias in effect have total impunity, and do not view themselves as being subject to international or national law.¹²⁰

Furthermore, Libya was already under the status of emergency from the beginning of the political tensions and internal armed conflict in Libya even before the fall of the Gaddafi regime, and long before the attack on US diplomats; the declaration of an emergency was thus a reaffirmation of an on-going chaotic situation with incoherent authority and order. The state of emergency in Libya is an unsuccessful system for preventing diplomatic attacks and is unable to address instability.

According to international law, diplomats are duty bound to respect laws of a hosting state; however, emergency orders might restrict diplomats from movement, as confirmed by Article 41(1) of the VCDR (1961), which is generally against their customary rights, privileges and immunities and which is thus justified on the grounds of protecting the diplomats themselves.¹²¹ Although the Libyan Emergency Law did not explicitly restrict the movement of the diplomats, the state of emergency sometimes restricts the movement of diplomats when states explicitly set it out, which severely limits their ability to conduct diplomatic relations within the country.¹²² An alternative could be to leave the country and engage in e-diplomacy during the state of emergency, as discussed in Chapter 3 of this thesis.

1.3.3.2 Anti-Terrorism Law

Libya has tried to seek a solution to adhere to its international duties to protect both diplomats and

¹¹⁹ United States Department of State, 'The weakness of the state and the control of the militias' Annual Report of the Organization of the victims of human rights in Libya in 2013, 3-4. Available at <<http://www.quryanew.com/58596>> accessed 25 Mar 2015.

¹²⁰ Ibid 3.

¹²¹ '1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State'. Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

¹²² Al-Shahab News 'The state of emergency in Ethiopia restricts the movement of diplomats' Al-Shahab News (Kuwait October 2016). Available at <http://www.alshahed.net/index.php?option=com_content&view=article&id=159001%3A%2016-10-16-15-37-29&catid=478%3A%2016-10-16-15-37-29&Itemid=371> Accessed 3 October 2017.

embassies, which gave rise to Law No. 3 Anti- Terrorism Act of 2014. This Law specifies prohibited attempting to capture, prevent or impede the work of diplomatic missions.

When the Gaddafi regime came to an end, the first full prosecutions carried out by the incoming Transitional Council were cases against previous officials accused of sabotaging diplomatic missions and structures. Article 12 of the Anti-Terrorism Act prevented the kidnapping, arrest and detention of diplomats.¹²³ Article 14 of this law prevents forceful enter in to the premises of any diplomatic mission in Libya.¹²⁴

Although these are worthy laws set out by the Libyan legislature to guarantee that such acts are not committed with impunity, it is effectively a gesture with little practical import, and it was enacted without serious prospect of application in the current political and security reality. The Libyan government lacks executive power to ensure enforcement of this law, rendering it without validity. This comes from government's total lack of control over Libya's security.¹²⁵ However, despite the enactment of this law, the reality remains that attacks (planned or executed) against diplomats continue in Libya.¹²⁶

The question arises as to whether this law can even be applied with the resumption of a normal state; in such a scenario, could the US ambassador to Libya's murder in 2012 be prosecutable under the Anti-Terrorism Act? It is a general and accepted practice that laws do not apply retrospectively. The Libyan Criminal and Penal Law in article 1 states that "there is no crime and punishment without relevant articles", and Article 2 of the same says that the basis for punishment of crimes is the written law at the point the alleged crime happened.¹²⁷ Although law can apply to previous events if it states that it can apply retrospectively, however, the Anti-Terrorism Act of (2014) did not allow this, mainly because the government was desperate to seek rapprochement with militias that would inevitably be targeted by the legislation. This is in the interests of national

¹²³ 'Shall be punished by imprisonment for a term of 20 years each of intentionally committing one of the following offenses, 1. Kidnapping of an internationally protected person. 2. Arrest of an internationally protected person or suspension or imprisoned or detained without legal permission. 3. Damaging the official premises or private residential places, transportation of organs or persons enjoying international protection that would put their lives and their freedom or lives of people living with them at risk. 4. arrested person or suspension or detention without legal permission ...'

¹²⁴ 'shall be sentenced to life in each of intentionally committing one of the following actions

1. Entering premises a diplomatic mission or consulate or premises one of the international or regional organizations in Libya or forcibly resist the competent authorities in order to commit a terrorist act in them...'

¹²⁵ Hisham Shalawi 'Libya: the law of 'Anti-Terrorism" Without Claws', Al Arabia Al – Jadeed (Jerusalem, 20 September 2014).

¹²⁶ AL Jazeera 'Guards die in attack on S Korean embassy in Libya' Al Jazeera (Qatar 12 Apr 2015). Available at <<http://www.aljazeera.com/news/2015/04/guards-die-attack-korean-embassy-libya-150412090449233.html>> Accessed 3 Oct 2017.

¹²⁷ Criminal and Penal Law 1953, Amended 1956 (Selected provisions Related to Women).

unity. It does though state in the introduction that one reason it was drafted was in response to what happened to the US Embassy along with their Ambassador in 2012, and the law has a specific aim to protect embassies and consulates in Libya.

From the above it is clear that the Libyan authorities have tried different methods to protect diplomats and find justice for them, but they have been practically unsuccessful. The Libyan government has no authority to apply these laws because of the de facto jurisdiction of armed groups over much of Libya. Therefore, this research finds that the exercise of diplomatic relations with Libya through e-diplomacy might be a more practical solution to avoid attacks against diplomats during times of armed conflict and disturbance, when state governments lose effective control over their customary territories.

1.4 Overview of the Research Problem

The obligation of the receiving state to protect diplomats is a considerable challenge, especially when there is a situation of internal disturbances and tensions and internal armed conflict. In such cases, a state may lose its control over the whole or part of its territory. For example, the Libyan Government lost such control during the internal armed conflict and was thus unable to provide sufficient protection to prevent attacks on US diplomats. Such cases raise uneasy questions concerning state responsibility. The question is whether the receiving state still has the responsibility to protect diplomats despite losing effective control over territory; this question is particularly topical given the spate of attacks on diplomats throughout MENA over many decades, escalating since 2003, and given a fillip by the Arab Spring since 2011. The recent events raised important and normative issues about state responsibility during internal conflict, disturbances and tensions.

Furthermore, despite the prevalence of internal tensions over the past few decades, the responsibility of non-state actors, particularly rebel militias, has been neglected in international law. This research considers such issues of law in times of tension and disturbance. Article 1 of Additional Protocol II states that its rules do not govern tensions and disturbance as these do not comprise armed conflict according to international law,¹²⁸ as explained in Chapter 3; in most cases, internal law deals with such situations. Such tensions and disturbances include riots, isolated and

¹²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Adopted on 8 June, entry into force 7 December 1978, in accordance with Article 23).

sporadic acts of violence generally covered by conventional domestic (criminal) law, but conflict parties (including states or governments) are also required to respect applicable International Human Rights Law.

Justice and remedy for diplomats who suffer during this internal armed conflict and or in times of tension and political disturbance is the main concern of this research.

Several states have tried to deal with reparation for victims in the period during and after conflicts by enacting Transitional Justice Law, however this does not refer directly to diplomats as victims nor consider their special status and diplomatic protection and the duty of host states to protect them.

In this respect, this research will seek to:

1. Determine the responsibility of Libya under international law for attacks on diplomats.
2. Determine whether Libya effectively took all appropriate steps to protect diplomats during the period of tensions and disturbances and internal conflict, as stipulated under international law.
3. Find effective ways of improving the law on diplomatic protection during internal disturbances and tensions and internal armed conflict.

The above aims will be achieved through the following research objectives:

1. To critically analyse the cases related to attack on diplomats and any other circumstances posing a threat to them.
2. To critically review the measures taken by host states before, during and after the attacks.
3. To determine the responsibility of the receiving state regarding the protection of diplomats.
4. To critically analyse the elements of the receiving state's responsibility for attacks on diplomats.

Accordingly, the research questions are:

1. Can receiving states under international law be held responsible for the attacks on diplomats during the internal disturbances and tensions and internal conflict when

- host state loses control?
2. How effective is the current legal framework for the protection of diplomats in times of internal disturbances and tensions and internal conflict?
 3. What is the nature of the current conceptual framework for the protection of diplomats under international law?
 4. Is the current system of redress under international law adequate enough to remedy the violent acts against diplomats?
 5. Can non-state entities be held responsible for reparations under international law?

1.5 Scope of the Study

This thesis focuses on the responsibility of the state for the protection of diplomats during the time of tension, disturbance and internal conflict when the state loses control over territory. It should be reiterated that this study is limited to the case of diplomats, and not consuls or ancillary diplomatic personnel; diplomats are political functionaries' representative of their state, while consular officers have no such function.¹²⁹ This is why consular institutions are of less importance (e.g. in implying recognition of states) compared to embassies, and immunities granted to ambassadors are markedly different from those granted to consuls.¹³⁰

The researcher chose both times of internal disturbance and political tensions and internal armed conflict because it is difficult to distinguish between these two times or situations, and also because of the ambiguity of the term non-international armed conflicts and unclear boundaries between it and internal disturbance and political tensions.

1.6 Literature Review

1.6.1 Existing Studies

The intention of this literature review is to make use of earlier published material regarding the subject and to tap into an authoritative knowledge base. Primarily, this review makes it possible to congregate extended knowledge regarding the protection of diplomats and secondly the contribution of this review is to give people a better view about the responsibilities of the receiving

¹²⁹ Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (The Banks law publishing co 1915) 436; Annemarieke Künzli, 'Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance' (2006) 66 *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*, 321 Available at <http://www.zaoerv.de/66_2006/66_2006_2_a_321_350.pdf> accessed 10 July 2015.

¹³⁰ Künzli (n129) 321.

state for protection of diplomats in time of tension and disturbance and internal armed conflict, especially when the state loses control over the territory.

Several secondary and primary resources have focused on the protection of diplomats, however this chapter reviews only the most important books and articles on this topic. It is important to mention here that the most of articles or books written in relation to the protection of diplomats focused on one of the important issues that faced the host or sending state within their task or obligation to protect diplomats: kidnapping. Diplomats are prime targets for kidnappers seeking ransom or symbolic victories (sometimes including executions). Some diplomatic kidnap victims are released as a result of negotiations, often secret, by either their own government or the receiving state.

In 'The Diplomatic Kidnappings: A Revolutionary Tactic of Urban Terrorism', Baumann discussed the responsibilities of states regarding attacks on diplomats, exploring diplomatic kidnappings in its political and legal aspects, explaining the responsibility of state and private individuals in time of civil war and disorder. However, his discussion does not include the situation of the loss of effective control by the receiving state in times of disturbance and internal armed conflict. Also, this work is less relevant to the other issues that might face diplomats, including killing, and it is mainly concerned with cases in Latin America and Canada.

This book analyses the international debate, action by the Organization of American States, and Congressional committee hearings within the context of urban guerrilla terrorism, international legal norms, and world diplomatic practice. The book sets the phenomenon of diplomatic kidnapping within the context of urban terrorism, and dealt with real case studies of recent kidnappings and some policy problems created by them for diplomats and governments concerned. Furthermore, legal precepts and political realities were explored in an attempt to incite from them some positive policy recommendations for future governmental action.¹³¹

Baumann stated that the problem of kidnapping diplomats must be analysed through the legal and political aspects. This approach might require a comparable examination of international law, international organizations and international politics. There is also a need for some attention to each of these aspects of diplomacy and the ways in which they relate to the others and to the diplomatic kidnappings themselves.

Chapter 1 of Baumann's (1973) book deals with kidnappings within boundaries of revolutionary

¹³¹ Carol Edler Baumann, *The Diplomatic Kidnappings: A Revolutionary Tactic of Urban Terrorism*, (Martinis Nijhoff 1973).

terrorism. The kidnappings also have serious legal ramifications as well as just political ones in the area of global diplomacy. Chapter 2 examines diplomatic inviolability and the diplomat as a victim, examining the history of diplomatic immunity and the importance of diplomatic immunity and privileges. Chapter 3 considers the responsibility of the state to protect diplomats, determining when the state has responsibility for protection of diplomats may arise. The state has either direct responsibility for the actions against the diplomats (for its own acts) or indirectly (for the acts of others). The state is responsible for direct or indirect action whether this action was by commission or omission. Chapter 4 practically explains the kidnapping of diplomats in Latin America, and the reasons behind such kidnappings, and the right of extra-territorial asylum. Chapter 5 deals with the problem of kidnap attempts and ransom as an alternative to the release of diplomats.

Chapter 6 examines several cases of “successful” ‘diplonappings’ where the kidnappers’ had their demands fully met, and some situations where supposed kidnapping attempts were made but failed, and at least two cases of kidnappings where hostages were let go even though the host governments refused to accede to kidnappers’ demands. The host state, because of its international obligations, in most cases has met the kidnappers’ requirements to release the diplomats, which encourages kidnappers to increase their targeting of diplomats, creating a major dilemma. Chapter 7 continues on the kidnapping of diplomats, showing that it is not limited to Latin America but also extends to North America. This chapter reviews terrorists’ technique of using innocent victims as negotiating tools of political blackmail and persuasion. The reason for targeting diplomats or politicians is that in such cases kidnappers’ demands are considered more seriously and are more likely to be met.

Barker also dealt with the problem of the kidnapping of diplomatic personnel, showing historical perspectives on protection and fighting against terrorism; ‘The Protection of Diplomatic Personnel’¹³² is a useful addition to the growing literature on the topic of protection of diplomatic personnel, consular and other representatives of states and high ranking state officials. It is an important resource for any researcher looking to research on diplomatic protection staff. This book also links between the past and modern attack on diplomats to show how diplomats have been targeted by terrorists throughout history, for the same rationale though using different tactics. However, what was missing from Barker’s book was a demonstration of the role of diplomats and diplomatic ways to mediate conflicts between states throughout history, without which contextual background the significance of violence against diplomats is unclear, as the importance of the protection of diplomatic personnel is not justified without grasping their political (i.e.

¹³² Barker (n 3).

diplomatic) function.

Barker analyses the practice of abuse of the duty of protection of diplomatic personnel and their premises from the ancient times to the present, studying the immunity of the diplomatic personnel from both historical and legal aspects based on the functional necessity theory to justify the rationale of the immunity and privileges of diplomatic personnel.

The chapters of this book are not organized as article-by-article commentaries, but in terms of subject matter and legal framework issues.

Chapter 1 explains in detail the problem of the development in terrorist attacks against the diplomats and consular officials since the early 1960s. The writer focuses particularly on the problem of kidnapping. Barker states that although the VCDR and the VCCR are the foundation of diplomatic and consul law, state recognition of these conventions does not help solve the problem of the targeting of diplomatic personnel by non-state actors. Chapter 2 examines the framework of the study and the terms of diplomacy and the persons who conduct diplomatic mission.

Chapter 3 focuses on the historical and theoretical aspect, with notably good material in this regard showing how the issue of attacks on diplomats has developed, despite the efforts of the international community to protect diplomats. Chapter 4 explains the legal aspect of the problem of diplomatic personnel kidnapping and how international law, including the VCDR and VCCR, the Inman Report, Omnibus Diplomatic and Anti-Terrorism Act of 1986 and the Crowe Report in the US; and the ICJ opinion have dealt with this problem and conceptualised state responsibility, with particular exploration of the Tehran Hostage Crisis or *case concerning United States Diplomatic and Consular Staff in Tehran*.¹³³

The punishment of crimes committed against diplomatic personnel is widely discussed by Barker in the fifth chapter, showing the challenges facing the enactment of the 1973 UN Convention on the Prevention and Punishment against Internationally Protected Persons, including Diplomatic Agents.¹³⁴ He highlighted the historical issue of targeting diplomats and provided very important cases to show how these issues are going on, explaining very clearly the scope of the problem.

¹³³ (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

¹³⁴ (Adopted by the General Assembly of the UN on 14 December 1973, entered into force on 20 February 1977) UNTS, vol. 1035, and p. 167.

Chapter 6 deals with the problem of kidnapping from the approach of adopting a multi-faceted approach to resolving the problem of attacks on diplomatic personnel. In the Tehran Hostage Crisis, Barker analysed state responsibility for the protection of diplomats with regard to the Vienna Conventions of 1961 and 1963. While noting that these Conventions undoubtedly provide an important view of the issues dealt with, the ICJ depended on several other laws to confirm state responsibility ‘...Optional Protocols to the two Vienna Conventions of 1961 and 1963 on, respectively, Diplomatic and Consular Relations, 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran...’¹³⁵ The ICJ found that Iran was responsible for the attack on the US Embassy in Tehran under Articles 22(2), 24-27 and 29 of the VCDR, and Articles 5 and 36 of the VCCR, and of Article 11(4) of the 1955 Treaty,¹³⁶ and the applicable rules of general international law.

Barker presents a very coherent analysis of states with regard to applicable law, and in many occasions refers to the attack on diplomats during the civil conflict or revolution. However, Barker’s discussion does not extend to the responsibility of the state, individuals and armed groups in extraordinary conditions such as the time of political tensions and internal disturbance and internal armed conflict, especially when the state loses territorial control. There is a gap in international humanitarian law where it fails to cover. Therefore, deeper study of this issue is needed.

Barker suggests that states need to follow the example of the United States in protecting their own diplomats alongside the local protection provided by the receiving states (especially in developing countries) to diplomatic personnel and their premises. However, contrary to Barker’s opinion, the US itself failed to protect its own personnel in numerous instances, as in September 2012 in Benghazi and Cairo in the same year and as such a new mechanism needs to be developed.

Barker did make some key theoretical contributions, most obviously in the study’s heavy dependence on ‘functional necessity’ and evidence from the ICJ and the UN General Assembly. One of the most in depth histories of diplomatic immunity and practice was written by Frey and Frey,¹³⁷ exploring both Western and non-Western traditions as well as the history of European

¹³⁵ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3. Paras. 45-55.

¹³⁶ Treaty of Amity Economic Relations and Consular Rights between the United States and Iran, 284 U.N.T.S. 93 (signed in 15 August 1955, entered into force 16 June 1957; Ratification advised by the Senate of the United States of America July 11, 1956; Ratified by the President of the United States of America September 14, 1956; Ratified by Iran April 30, 1957; Ratifications exchanged at Tehran May 16, 1957; Proclaimed by the President of the United States of America June 27, 1957; Entered into force June 16, 1957.

¹³⁷ Frey and Frey (n93).

international law, examining how different countries and cultures dealt with the immunities and privileges of diplomatic personnel, and how precedents became established.

The authors' focus was not limited to the history of the diplomatic immunities aspect, but also the political and legal aspects, as well as the influence of certain judicial decisions in order to find justification for such privileges. This study was based on three theories: personnel representative theory, extraterritorial theory, and functional theory. These theories might be useful for understanding the roots of the diplomatic immunity from different aspects and solve any issue facing these immunities.

The authors drew a very important and clear trace for scholars aiming to expand this study in accordance with their failed from different areas (history, international law, international relations, politics and culture). This study is important for those aiming to argue the necessity of diplomatic privilege.¹³⁸

The study of diplomacy from different aspects was the approach of several scholars. Krommie also mixed between history and law in term of granting diplomats' immunity and privileges.¹³⁹ This work relies on literature review and interviews. The focus of this study is limited to the current realities of crimes against diplomats in Suriname. Krommie focused on the way policy regarding the protection of diplomats is made and applied.

Krommie also recommended actual policy measures to address the issue of protection of diplomats. The results of this paper may help policymakers to formulate effective rules and regulations regarding this issue and offer them a possibility for a better way of organizing the security of diplomats of sending states. Krommie linked between the stability of State and the risk against diplomats, finding a relationship between a low- risk level and the security of diplomats. That the diplomats in Suriname were a low- risk level in this regard compared with other states was because the government is generally politically stable. Krommie agreed with Barker in that states should take care of their own effective security system for diplomatic premises and residences.

Furthermore, Krommie found that receiving and sending states need to cooperate and consult to find appropriate steps with regard to a particular situation. The research found that this cooperation

¹³⁸ Ibid 79.

¹³⁹ Claudine H. Krommie, 'The Protection of Diplomats in Suriname A co-responsibility of the sending and receiving State?' (LLM Dissertation, F.H.R. Lim A Po Institute for Social Studies 2006).

is easy when the relationships between the sending and receiving states are normalized. However, problems arise in times of international tensions or a generally deteriorating security situation in the receiving state, such as the encroachment of armed groups. Krommie recommends the Liaison Bureau to provide embassies with guidelines regarding security, and that 'there should not be any difference in the information and security measures to be taken'. This suggestion may sound good in terms of theory but in practice it is difficult to apply, and Krommie did not take into account the differences in power and the situation of developed countries such as America and the UK and developing countries such as Libya.

Indeed, stability is generally lacking in most developing countries. However, Article 29 provides a realistic and flexible legal framework within which governments may safeguard envoys in their countries to the best of their abilities, as Krommie explained. Also, Krommie suggested that the foreign mission staff in Suriname were personally responsible to protect their own lives in public and to protect their private residences and members of their households, based on the observation that the VCDR (1961) did not lay down penalties of particular severity for any attack or crime against diplomats.¹⁴⁰ However, the some writers have argued that the shortcomings of the VCDR were addressed by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973, which requested for cooperation between States and stated that the State should deal with the crimes against diplomats within their local law. This approach was reiterated by the International Convention against the Taking of Hostages (1979) and Article 5 of the International Convention for the Suppression of Terrorist Bombings (1997) which stated that 'Every State party shall adopt such measures as may be necessary, including... domestic legislation...'¹⁴¹ Article 6 of this Convention states that 'Each State party shall take such measures as may be necessary to establish its jurisdiction over the offences...'¹⁴²

Muñoz focuses on the conceptual framework of diplomatic personnel immunities to understand the concept of diplomatic immunity through critical analysis of international law, especially the VCDR (1961).¹⁴³ The study of this Convention extended to its application by analysing an ICJ case concerning diplomatic immunity. This study, however, excluded the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including

¹⁴⁰ Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, (3rd end, Oxford University Press 2008).

¹⁴¹ (Adopted by the General Assembly of the UN on 15 December 1997).

¹⁴² *Ibid.*

¹⁴³ Emelie Munoz 'Diplomatic immunity: a functioning concept in the society of today?' *Human Rights Studies course* (2013) Available at <<http://lup.lub.lu.se/student-papers/record/3358586>> accessed 2 May 2015.

Diplomatic Agents. It relied on critical analysis as well as comparative method. The writer finds that because of the confusing concept of diplomatic immunity there was no equality before the law. Because of this lack of equality in the legal system the writer believes that the 'concept of diplomatic immunity can be considered as a human right violation'.

This study found that the concept of diplomatic immunity regarding personal immunity is an unjust one because it prevents equal treatment among the persons of a population and makes an unfair distinction between persons before the law. The concept is therefore not compatible with Article 7 of Universal Declaration of Human Rights, which stated that 'All are equal before the law and are entitled without any discrimination to equal protection of the law...equal protection against any discrimination in violation of this Declaration...'¹⁴⁴

The study further assumed that this unjust concept can be considered as a form of human rights abuse in the aspect that it makes dissimilarity between diverse individuals of the population and determines that all persons are not equals before the law, but that some people stand above the law. However, this study misses the reality of reasons behind granting diplomatic personnel the immunities confirmed by the VCDR, which stated that these privileges are granted to diplomats to facilitate the discharge of their duties, which means protections are required for the complete performance of political functions, not for individuals' safety. Article 25 of the VCDR states that 'The receiving State shall accord full facilities for the performance of the functions of the mission',¹⁴⁵ Also, Article 29 of the VCDR states that 'The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention... the receiving State shall treat him with due respect...'¹⁴⁶

This article confirms the importance of that inviolable of diplomats from attack. Under the extension theory, this duty entails that the receiving state should defend foreign embassies as well as the diplomats within, who are extensions of the sovereignty of the sending state.¹⁴⁷ The important role that diplomats play in bringing conflict to an end ensures peace and security in the international community. Also, there are relationships between security and diplomatic relationships confirmed by many studies, as shown in Claudine Krommie's research on 'The Protection of Diplomats in Suriname'.¹⁴⁸ Elgavish focused on the history of diplomatic immunity in ancient nations, finding

¹⁴⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (II) (UDHR)).

¹⁴⁵ Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Krommie (n 139).

that in the ancient nations, especially in the ancient Near East, diplomats did not enjoy immunity, and messengers were subject to different kinds of symbolic abuse, including murder, assault, injury and arrest.¹⁴⁹ However, Elgavish's absolute statement that diplomatic immunity did not exist in ancient history ignores the fact that reports of egregious abuses of diplomatic personnel (i.e. messengers) implied their significance as national representatives. And thus the honour and respect they were accorded in everyday (and thus generally undocumented) protocols, and the highly advanced commercial and political relationships of the ancient world would not have been possible without reciprocal diplomacy between nations. Additionally, Elgavish did not explore what a 'messenger' was, and whether this was synonymous with the modern diplomat.¹⁵⁰ Conversely, Hamilton and Langhorne documented the existence of diplomatic privileges and immunity in the ancient world, and the active role of diplomacy in mediating conflict. However, this book is historical, and it does not consider the legal aspects in any depth.¹⁵¹

Roberts comprehensively explored historical, legal and political aspects, with details on the history of diplomacy and the performance of diplomatic missions, along with immunity and privileges, and the protection of diplomats and their premises. This book also examines the targeting of diplomats by terrorists and the deployment of diplomats in espionage and in relation to commercial security firms.¹⁵²

Denza in her book "*Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*",¹⁵³ tried to clarify ambiguities that existed in international law by making a comment on each article and interpreting the customary legal context and negotiating history. This book includes annexes with the full text of the 1961 Vienna Convention and lists. It also provides a summary on how the convention has been applied by the UK, US and other nations, and gives a comprehensive examination of contemporary problems in the field, which includes abuse of diplomatic immunity and violence by terrorists. Denza examines these abuses and explores how state authority and diplomatic immunity interact with each other, examining the methods used to establish and conduct diplomatic relations in times of physical danger, and noting higher evidence of the disregard pertaining to rules of secrecy in diplomatic communications. Denza also researches on greater latitude for diplomats to 'interfere' in matters of the receiving State. This is done in the

¹⁴⁹ David Elgavish 'Did Diplomatic Immunity Exist in the Ancient near East?' (2000) 2 *Journal of the History of International Law* 73.

¹⁵⁰ *Ibid* 73.

¹⁵¹ Keith Hamilton and Richard Langhorne, *The Practice of Diplomacy: Its Evolution, Theory, and Administration*, (2nd edn, Rutledge 2011).

¹⁵² Ivor Roberts, *Satow's Diplomatic Practice*, (6th edn, Oxford University Press 2011).

¹⁵³ Denza (n 140).

interest of human rights protection. Denza also analyses the impact of adoption and implementing of the UN Convention on Jurisdictional Immunities of States and their Property.

Denza (1976) set out many cases by making reference to state practices to try and “demystify” the use of customary international law, contributing to aiding implementation of the VCDR, and therefore it could become a major part of the Vienna Convention, as well as a good resource for both receiving and sending state, their ambassadors, academics and students. In the 4th edition, Denza (2008) confirms the increasing incidents of diplomatic targeting and also the targeting of the diplomatic missions, stating how important special protection is and recommending new methods to protect diplomatic personnel. She continues her analysis on how the Convention was applied by the UK, US and other states, and also provides a historical context. Denza (2008) completely updates the work on diplomatic law to highlight important emerging trends in applying the Convention regime. Also, due to the high risk of kidnapping and threat to lives the life of the diplomats, she examines the importance of special protections. In light of the increased security risk and the violence against diplomats and embassies, Denza suggested new methods of conducting diplomacy itself, such as virtual embassies, in order to safeguard the lives of diplomats. Denza also examines the duty of diplomats not to interfere in domestic affairs, excluding communal responsibility to “monitor and expose violations of human rights”. Also, she explores the cases which have clarified the best ways to control abuse, particularly those relating to abuse of domestic servants.¹⁵⁴

Scholars have written about TJ from numerous aspects, including the historical and legal, and some scholars tried to establish links between truth commissions and the ICC, while others focused on the risk of granting amnesty to human rights abusers and serious criminals. Consequently, there are many guides on how to apply TJ from diverse perspectives. For example, the US Institute of Peace issued the *Transitional Justice: Information Handbook*, which is a good guide for states looking to apply TJ, showing the optimum solutions for states relative to their circumstances. This guide states that every state applies a different type of TJ, dependent on the circumstances and the political situation of the state and the amount of violations or the abuse of human rights. Also, it explains the framework by which the state can choose which approach or mechanism to follow. However, this handbook does not present examples of successful or unsuccessful cases of TJ to better understand the steps states should follow.¹⁵⁵

¹⁵⁴ Eileen Denza, *Commentary on the Vienna Convention on Diplomatic Relations*, (4th end, Oxford University Press 2016).

¹⁵⁵ United States Institute of Peace ‘*Transitional Justice: Information Handbook*’ (2008). Available at <https://www.usip.org/sites/default/files/ROL/Transitional_justice_final.pdf> Accessed 2 July 2017.

Other scholars explain the history of TJ and how it emerged. Teitel shows the evolution of the conception of TJ.¹⁵⁶ Teitel distinguishing between international TJ, which emerged in response to the violations of human rights in international conflict during WWI, and internal TJ, which emerged in response to the abuse of human rights by dictatorial regimes within states. According to Teitel, the modern version of TJ emerged definitively after 1945, but the internationalism rooted in the WWI stage was only eclipsed from the 1950s onwards and throughout the Cold War. The post-Cold War was the second stage in the evolution of TJ, which was linked with the stream of democratic transitions and the modernization of the former USSR from the 1980s onwards. At the end of the last century, global politics focused on the greater use of conflict resolution and a continuing discourse of justice both in law and society. The third, or “steady-state”, phase of transitional justice has an inextricable link with contemporary conditions of persistent conflict thus laying building blocks for what has become a normalized law of violence. This research states that there is a close relationship between the type of justice pursued and relevant conditions limiting politics.¹⁵⁷ Similarly, Paige examined the history of TJ and how the concept of TJ emerged.¹⁵⁸

Several scholars have linked TJ and amnesty. Most of them see a risk in giving amnesty to perpetrators of human rights abuses and believe that impunity is a key issue to be overcome. However, there might be a need to resort to amnesty in some cases, such as when conflict-related prisoners and other detainees have to be released, demilitarized, demobilized, and helped to reintegrate in to civil society. For example, Bell in her article The “New Law” of Transitional Justice¹⁵⁹ states that the new law of TJ should not permit to resort to amnesty unless there is a real need for it and it should be conditional amnesty. Bell relies on the decisions of international law and the UN, which does not allow amnesty for international crimes.¹⁶⁰ Similarly, Megret and Vagliano try to link human rights to TJ and show how the IHRL has shaped transitional processes, together with the importance of granting amnesty when the society is in need of it. This amnesty is granted in accordance with the report presented by the truth commission with the aim of achieving reconciliation.¹⁶¹

Similarly, Dukic examined TJ mechanisms used by countries emerging from conflict to deal with

¹⁵⁶ Ruti G. Teitel ‘Transitional Justice Genealogy’ (2003) 16 Harvard Human Rights Journal 69

¹⁵⁷ Ibid 70.

¹⁵⁸ Paige Arthur ‘How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2013) 31 Human Rights Quarterly 321.

¹⁵⁹ Christine Bell ‘The “New Law” of Transitional Justice’ in Kai Ambos, Judith Large, and Marieke Wierda (eds.), Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development (Springer 2009) 105.

¹⁶⁰ Ibid 105.

¹⁶¹ Frederic Megret and Raphael Vagliano ‘Transitional Justice and Human Rights’ in Dov Jacobs and Luke Moffett, Research Handbook on Transitional Justice (Edward Elgar, 2016) 10.

previous human rights violations. This study examines the possibility of granting amnesty to violators of human rights. Dukic studies the extent to which truth commissions and criminal processes can be conducted in a complementary manner through the analysis of Article 53 of the Rome Statute. Dukic states that truth commissions and criminal proceedings can be a *fait accompli* if the truth commission committees are accompanied by amnesty processes. Dukic tries to interpret article 53 of the Rome Statute and the conditions of trial in accordance with the procedure followed by the Rome Statute, finding that article 53 is not appropriate to reconcile the work of truth commissions and amnesty.¹⁶²

Likewise, Rubin linked human rights and TJ,¹⁶³ focusing on the case of Afghanistan. The researcher reviews the contribution of the Soviet occupiers as well as rural resistance fighters. Islamist parties and the Taliban movement along with Pakistani volunteers and Al-Qaeda members and then onto “power-seeking warlords”, and the anti-Taliban coalition to measure the litany of abuses they have carried out since 1978. This research stated that demobilizing and reintegrating many thousands of irregular militia, and the creation of new security forces, are vital conditions to add to the peace-building agenda. The researcher also confirmed the importance of documenting the scale of abuses, emphasising victim suffering and not the perpetrators’ guilt, to gradually provide support for the Afghan debate on how society can be reconcile to its history.¹⁶⁴

Lambourne established a link between TJ and peace-building, examining how conflict participants view TJ in the context of peace-building when high levels of violence have occurred.¹⁶⁵ This research tried to develop a model of transformative justice to support sustainable peace-building. Also, the researcher stated that the concept of ‘transition’ to provide an interim process linking the future and the past together should instead be considered as a ‘transformation’ process, implying long-term, sustainable processes embedded in society and the adoption of psychosocial, political, economic and legal perspectives on justice. This could help in supporting peace-building. This stage of transition requires a long period of change in social, economic and political structures as well as internal and external relationships. It should also deal with different needs and the requirements of the society at this stage. This research refutes the statement that the process of TJ is inevitably messy and lacks adequacy when dealing with the enormous psychological and

¹⁶² Drazaan Dukic ‘Transitional Justice and the International Criminal Court – in ‘the interests of Justice’?’ (2007) 89 (867) International Review of Red Cross Available at <<https://www.icrc.org/eng/assets/files/other/irrc-867-dukic.pdf>> accessed 4 July 2017.

¹⁶³ Barnett R. Rubin ‘Transitional Justice and Human Rights in Afghanistan’ (2003) 79 International Affairs 567.

¹⁶⁴ Ibid 567.

¹⁶⁵ Wendy Lambourne ‘Transitional Justice and Peacebuilding after Mass Violence’ (2009) 3 (1) The International Journal of Transitional Justice 28. Available at <https://doi.org/10.1093/ijtj/ijn037>.

physical pain following the destruction of war and indeed any act of mass violence. Lambourne analysed justice, reconciliation and peace-building relationships to explain the purpose of TJ. Lambourne also explained the importance of taking into account the needs, expectations and experiences of all participants involved in a conflict – these are perpetrators as well as victims, survivors and any others from a society who were directly affected by the violence, but who are a part of the peace-building process – finding that TJ by dealing with the past violation of human rights provides a link between the past and future. The study was aimed at developing a model of TJ that supports sustainable peace building.¹⁶⁶

Scholars have also tried to focus on the relationships between the truth commission and the ICC. Fischer examined international criminal justice and truth commissions and highlighted the boundaries of these approaches in terms of strength and limits, assessing the practical approaches that stem from transitional justice and reconciliation from the point of view of their relevance in conflict transformation and peace-building.¹⁶⁷

Similarly, Flory examined the relationship between international criminal justice and truth commissions and found possible cooperation building between them and the ICC. Flory showed how the international criminal justice and truth commissions' complementary nature could be nuanced to preserve specific points inherent to these mechanisms' nature, explaining the models of cooperation between international criminal justice and truth commissions and finding that TJ and international criminal justice have close yet conflicting relationships. Flory showed how some states resort to amnesty when applying TJ and the strong example it shows of a successful transition without prosecutions in South Africa.¹⁶⁸

Likewise, Joseph examined the relationship between retributive justice which basically refers to prosecutions and restorative justice which is related to truth commissions to clarify the link and complementarity between trials and truth commissions. Joseph showed how states apply different approaches to TJ according to their culture and political situations, and even the interests of states. This explains why some states resort to amnesty despite the existence of established truth commissions. However, a challenge faced by societies when applying TJ is the clash between non-punitive approaches to major and systematic violations of human rights and the requirements

¹⁶⁶ Ibid 28.

¹⁶⁷ Martina Fischer and Olivera Simic, *Transitional Justice and Reconciliation: Theory and Practice*, (Routledge 2015).

¹⁶⁸ Philippe Flory 'International Criminal Justice and Truth Commissions: From Strangers to Partners?' 13 (1) (2015) *Journal of International Criminal Justice* 19. Available at <DOI: <https://doi.org/10.1093/jicj/mqu094>> Accessed 4 July 2017.

of a fully working criminal justice system.¹⁶⁹

There are several case studies that focus on TJ in states in order to understand the factors that lead to a successful or unsuccessful experience. For example, the Northern Ireland Human Rights Commission tried to identify what worked in the application of TJ and what did not work. The report explained what Northern Ireland went through and what led to these events, and examined the successful initiatives put in place up until the date the report was written in 2013, including initiatives accomplished even before the Belfast (Good Friday) Agreement (1998) was adopted. For example, the establishment of the Housing Executive, the passing of the Fair Employment and Treatment Law, and the Community Relations Council had already begun their essential work. Furthermore, the role of the national human rights institutions (e.g. the Human Rights Commission) was explained, and other agreements that supported the transformation of the society were discussed. For example, the Weston Park Agreement (2001) which was made between the governments of the UK and Ireland was an attempt to fill certain gaps identified in the Belfast (Good Friday) Agreement. The Hillsborough Agreement (2010) between the Democratic Unionist Party (DUP) and Sinn Fein gave rise to the possibility to devolve policing and justice powers to the Northern Ireland Executive. While these agreements did not in detail address past human rights abuses, at the same time they did not exclude the possibility of developing such policies independently.¹⁷⁰

Several scholars have focused on the case of Libya as a failed experience of a transition to peace, with some describing the experience of Libya as a *transition without peace*. Kersten examined the TJ in Libya and the procedure of justice since the defeat of Gaddafi focused on three TJ mechanisms. These were

1. retributive criminal justice;
2. banishing under Libya's Political Isolation Law, and;
3. The amnesty granted to revolutionaries under Law 38 (2012).

This research explains the defeat of Gaddafi and the civil war, examining obstacles to TJ and

¹⁶⁹ Yav Katshung Joseph 'the relationship between the International Criminal Court and Truth Commissions: Some Thoughts on How to Build a Bridge across Retributive and Restorative Justices, (Transitional Justice and Human Security Conference organised at the Lord Charles Hotel South Africa 28 March-1 April 2005) the International Centre for Transitional Justice.

¹⁷⁰ North Ireland Human Rights Commission 'Dealing with Northern Ireland's Past towards a Transitional Justice Approach' (2013). Available at <http://www.nihrc.org/uploads/publications/NIHRC_Transitional_Justice_Report.pdf> Accessed 4 June 2017.

peace in Libya.¹⁷¹

Sharqieh tried to determine the important factors behind Libya's unsuccessful TJ experience, giving a clear understanding of why Libya could not move towards democracy or peace.¹⁷² The researcher was not only critical of the application of TJ but also provided an alternative for these initiatives which led to the bad experience. For example, the researcher stated the importance of the comprehensive TJ law and dealing with criminals in strict accordance with the rule of law instead of collective punishment, adding that instead of the two governments, the official one and the revolutionary, the latter should join the government, national institutions or other NGO-run programmes made available to them. The research also examined challenges faced by reconciliation attempts that include the misunderstanding of the definition of reconciliation as defined by the Libyan society, and their concern about losing their right of getting the truth if criminals are offered forgiveness.¹⁷³ Noah focused on the mechanisms followed by the Libyan government to promote the role of TJ in ending the conflict and ensuring the stability of the state, and analysed the articles of the Draft Libyan Constitution related to TJ and the measures to which the State was committed. Bouhramra also analysed the Draft Libyan Constitution and confirmed the importance of applying TJ and not ignoring the past violation of human rights. TJ is important to achieve peace in post conflict. This research examines the obstacles to the success of Libyan TJ and peaceful transition after the defeat of Gaddafi, finding that selective justice was a major reason for the failure of TJ.¹⁷⁴ TJ is important to achieve peace in post conflict. This research examines the obstacles to the success of Libyan transitional justice and peaceful transition after the defeat of Gaddafi. Selective justice was a main reason for the failure of transitional justice.

Several Arab scholars and academics have contributed to the dialogue and documentation on TJ in MENA, such as Sabah Al-Mukhtar, Abdul Hussein Shaaban and Ahmed Shawky Benyoub, who examined the challenges to TJ in MENA.¹⁷⁵ Shaaban explored the meaning of TJ to answer

¹⁷¹ Mark Kersten 'Transitional Justice without a Peaceful Transition—The Case of Post Gaddafi Libya' (2015) CRPD Working Paper No. 38 Centre for Research on Peace and Development (CRPD) Available at <https://soc.kuleuven.be/crpd/files/working-papers/working-paper-kersten.pdf> accessed 4 July 2017.

¹⁷² Ibrahim Sharqieh 'Reconstructing Libya: Stability through National Reconciliation' (2013) Reconciliation Brookings Doah Centre Analysis. Available at <<https://www.brookings.edu/wp-content/uploads/2016/06/Libya-National-Reconciliation-English.pdf>> accessed 2 June 2017.

¹⁷³ Marach Noah 'Transitional Justice in the Libyan Constitution Draft' Libya Future News (Libya February 2017). Available at <<http://www.libya-al-mostakbal.org/95/15656/>> Accessed 2 July 2017.

¹⁷⁴ Hedi Bouhramra 'Notes on the amended Transitional Justice Bill' (2013) Libyan Women's Platform for Peace. Available at <<http://www.caus.org.lb/Attachments/Transitional%20Justice.pdf>> accessed 3 July 2017.

¹⁷⁵ Sabah al – Mukhtar, Abdul Hussein Shaaban and Ahmed Shawky Benyoub. 'Transitional Justice: Concept, emergence and experience' 413 the Arab Future Journal 99. Available at <<http://www.caus.org.lb/Attachments/Transitional%20Justice.pdf>> accessed 3 July 2017.

¹⁷⁶ Ibid 99.

the question of whether it was private justice or justice for the transition period, and discussed the international experiences of TJ in order to show how other states could benefit from these experiences, looking at their advantages and disadvantages.¹⁷⁶ However, Shaaban stated that it is impossible to copy the experiences of others because every state has different circumstances, thus attempting to transpose experiences from one context to another could waste time, effort and money. However, Shaaban does suggest that Arab countries should have an Arabic document of TJ representing a common denominator (i.e. a blueprint) for Arab countries, due to their broadly similar political and social configuration and the potential for instability in the MENA region.

Benyoub explained the practical implications of truth commissions, in the context of the establishment and characterization of TJ bodies, potential benefits of establishing truth commissions, and their importance. Also, Benyoub examined the necessity of TJ and its function. These studies comprise very useful investigations of TJ in MENA and how regional countries have experienced TJ. This knowledge could be a good resource for policymakers to benefit from the experiences of different approaches applied in different countries. This thesis focuses on TJ in MENA and European countries to identify factors in which determines success or failure.¹⁷⁷

1.6.2 Research Gaps and Expected Contribution

The focus of this study is limited to the policy regarding the protection of diplomats in Libya, particularly in the period of internal conflict and political tensions and disturbances when states lose control over territory.

Several scholars have investigated the protection of diplomats, as explained above. However, the study have been limited to exploring the responsibility of receiving states during political tensions and internal tension as well as internal armed conflict when states lose control over territory. Although many scholars have also tried to prove the importance of holding the armed groups responsible for reparation to victims in the aftermath of conflicts, there is no written law so far it concerns dealing with the problem to guarantee remedies for victims. Normally, domestic law applies in these circumstances. In this regard, TJ law, however, has not included diplomats as victims during or after the conflicts. This research intends to show a link between international responsibility and TJ as a way to guarantee effective remedies for victims, including diplomats. Traditionally, states have responsibility under international law to protect diplomats, which is reflected in two ways. The first is a domestic obligation by which the state prosecutes the people

¹⁷⁶ Ibid 99.

¹⁷⁷ Ibid 99.

suspected of committing crimes against diplomats. Second, the international law principle of state responsibility holds states liable for failure to protect diplomats. However, as seen in the case of Libya, state responsibility may not be a reasonable expectation in times of internal conflict, particularly when the state itself is near to collapse, with no functioning institutions or effective government. The main contribution of this research is to look for alternatives to state responsibility. In doing this the researcher suggests more pro-active use of technology (i.e. in e-diplomacy) to enable states to conduct their diplomatic relationships during times of armed conflict and civil unrest, reducing the burden on the receiving state and absolving it from the heavy burden of responsibility for the failure to protect diplomats during armed conflicts when the state loses control, or the ability to subsequently charge offenders. It also reduces the cost borne by the state to provide extensive security and military protection to diplomats, when such resources are critically required elsewhere. If all else fails and harm is done to diplomats, another proposed remedy could be TJ if national institutions are not functioning and a diplomatic or international judicial solution cannot be found between the sending and the receiving country – for example, if the receiving country refuses to submit to the jurisdiction of the ICJ in a case brought against it by the sending country.

1.7 Theoretical Bases for Diplomatic Immunity

1.7.1 Exterritorial Theory

Given the premise that diplomatic missions are outside the territory of the receiving state, and represent a kind of extension of the territory of the sending state, the ambassador who represents by function the actual person of his sovereign must be regarded by a further function as being outside the territory of the power to which he is accredited.¹⁷⁸ This theory has been criticized as impractical and failing to provide sufficient basis for the extension of exemption that would follow from this doctrine, which has never been accepted in practice, as both the mission and the diplomatic agents come within the jurisdiction of receiving state for certain purposes. In most cases diplomats are considered subject to the law of the receiving state as well as their own state; consequently, crimes committed inside diplomatic premises are normally prosecuted under the local law of the receiving state. Furthermore, pertaining to diplomatic agents' personal (non-diplomatic) affairs, such as business transactions, the use of diplomatic immunities and privileges would generally be tantamount to the abuse of public office.¹⁷⁹

¹⁷⁸ Biswanath Sen, *A Diplomat's Handbook of International Law and Practice*, (Springer 2012) 80-81.

¹⁷⁹ *Ibid* 81.

1.7.2 Representative Character Theory

The representative character theory was the first theoretical justification of diplomatic immunity based on the theory of personal representation, whereby diplomats acting on behalf of the sovereign (i.e. the monarch in European tradition) of a sending state represent the person of that sovereign,¹⁸⁰ thus diplomats are considered above the local jurisdiction, and any attack on diplomats comprises an affront to the personal dignity of their sending sovereign, and the receiving state must also accord the diplomat all due honour.¹⁸¹

A sovereign seeking to promote the interest of his or her country with a foreign authority through the medium a person whom he has selected cannot intend to subject his minister in any degree for this authority, and consequently consensus to receive him or her entails an understanding that he or she will have those privileges which his or her principal intended he or she must obtain. The representative also retains privileges and immunities that are basically necessary to the dignity of his or her sovereignty, and to the responsibilities he or she has to complete.¹⁸²

Critics found that diplomats cannot have the same degree of immunity as the sending state itself, as this would give extraordinary liberty to diplomatic personnel in the receiving state that they would not enjoy in their own sending state. Furthermore, the decline of the traditional powerful monarch in European tradition and the evolution of democratic rule has undermined the whole premise of such arguments, thus making it unclear who exactly the diplomat represents. Furthermore, the theory extends no basis for protecting diplomats from the consequences of their private actions.¹⁸³

1.7.3 Functional Necessity Theory

Another theory which justifies the basis of grants to diplomats of immunities and privileges is functional necessity theory, which is the modern tendency,¹⁸⁴ being the most widely accepted current justification of diplomatic immunity.¹⁸⁵ This basically utilitarian and pragmatic rationale

¹⁸⁰ Mitchell S. Ross 'Rethinking Diplomatic Immunity: A Review of Remedial Approaches to Address the Abuses of Diplomatic Privileges and Immunities' (2011) 40 *American University International Law Review* 173.

¹⁸¹ Sen (n121) 81; Ali M. Farahm 'Diplomatic Immunity and Diplomatic Crime: A Legislative Proposal to Curtail Abuses; Note' (1990) 16 *Journal of Legislation* 89.

¹⁸² Sen (n178) 82.

¹⁸³ Ross (n180) 173.

¹⁸⁴ Sen (n178) 82.

¹⁸⁵ Ross (n180) 173.

states that the diplomat is not subject to the jurisdiction of local courts because this would obstruct the functions of diplomatic relations.¹⁸⁶ This theory renders diplomats immune to the extent that they can perform their diplomatic duties unhindered, with all corresponding privileges and immunities.

Granting diplomats this minimum standard of privileges enables them to perform their duties without hindrance or interference in the receiving states.¹⁸⁷ The assumptions of this theory comply with the Draft Articles as well as the VCDR, which affirm that these immunities are not for the diplomats as individuals, but rather to enable them to perform their diplomatic (political) functions.¹⁸⁸

If a diplomat acts outside of the normal sphere of conducting international relations (i.e. the performance of their protected diplomatic role), the question arises as to whether immunity still applies. Current administrative and judicial construction of diplomatic immunity illustrates that diplomats themselves are immune from prosecution even when committing criminal or tortious acts outside of their prescribed functions. A critique of this construction of the functional necessity theory distinguishes the treatment of the individual diplomat from that of the diplomatic process. In theory, diplomatic immunity originated to protect the process of furthering relations between nation states: the focus on immunity on the individual diplomat is not appropriate. Granted that the diplomats can only function officially when they are on immunity means that the diplomats are allowed to break the law of the receiving state in order to conduct international relations. 'Therefore, the current construction, providing diplomatic immunity to the individual, is inconsistent with the theoretical basis that accords protection only to the diplomatic'.¹⁸⁹

Regardless of whether diplomats are subject to the local law of the receiving state, diplomats are certainly given immunities in order to perform their duties completely, as confirmed by the VCDR, which stated that the host state must '... accord full facilities for the performance of the functions of the mission'.¹⁹⁰

1.8 Methodology

International law has always made special provision for the protection of diplomats. The issue is

¹⁸⁶ Ibid 173.

¹⁸⁷ Sen (n 178) 82.

¹⁸⁸ Ibid 82.

¹⁸⁹ Ross (n180) 173.

¹⁹⁰ Art 25 of the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

currently topical because of the increased targeting of diplomats in MENA following the Arab Spring. Political instability renders the work of diplomats more important than in normal circumstances, while correspondingly placing them at greater risk, particularly when host states lose control (i.e. when conventional governance and law and order break down). Despite the critical importance of this issue, scholars are yet to determine an appropriate research philosophy and theoretical perspective to adopt when considering it.

This applied research study is conducted to apply the outcomes to resolve specific problems (i.e. to find a convenient solution to a current specific issue).¹⁹¹ This research is trying to find the solution for the current problem of attacks on diplomats during internal disturbances and tensions and internal conflict when states lose control (using Libya as a case study). The outcome of this research may be applied in other states having similar circumstances.

This research is qualitative, aiming to understand the reality of social life. While quantitative method generally relies on numerical data, the qualitative method usually deals with words. In other words, if the purpose of research is to answer 'how', 'what' and 'why' questions, qualitative approach is the most suitable. Conversely, if the nature of research is to answer the question of 'how many' or 'how much', a quantitative approach will be a more appropriate method.¹⁹²

This research does not include statistics or numerical data, therefore it does not require quantitative methods. The research is rather based on a case study which is qualitative in nature. The research aims to solve the problem of attacks on diplomats during political tensions and internal conflict, when the government loses control over situations in the host state, by obtaining and analysing deep knowledge about such situations. This situation in the context of Libya may be different in other states, although other states which have the same situation as the research case study (Libya), such as other countries in MENA, may benefit from the findings of this research.

As mentioned previously, Libya is used as case study in this research. Case study can be defined as 'research strategy that involves an empirical investigation of a particular contemporary phenomenon within its real-life context using multiple methods of data collection'.¹⁹³ It aims to collect the information about specific situations and studies this situation from more than one angle

¹⁹¹ Uma Sekaran and Roger Bougie, *Research Methods for Business: A Skill-Building Approach*, (6th end, John Wiley & Sons Ltd 2013) 103.

¹⁹² Nandish Patel, 'Research Methods and Methodologies for Studying Organisational Learning' (European and Mediterranean Conference on Information Systems, Izmir, July 2009).

¹⁹³ Patton (n 192) 103.

to examine the real life in order to understand the problem.¹⁹⁴

A case study is a tool not only to describe and explain the problem but also to understand in depth the complexity of the case and the research subject. This character of case study may be incompatible within experimental and survey research, but it can give the researcher more information about real life situations in terms of ‘how and why’ issues.¹⁹⁵

Case study is essentially qualitative in nature.¹⁹⁶ This method is a more popular method in social science studies. It has been used by several scholars to understand complex issues in depth, overcoming the limitations of purely quantitative approaches in providing complete and in-depth clarifications of the social and behavioural problems.¹⁹⁷ Case study approach can help to understand complex issues identified by literature review.

Case study method has been utilized to consider prominent issues regarding diplomacy, international responsibility, and transitional justice¹⁹⁸ Lundy and McGovern applied case study as an important method to explore problems in depth.¹⁹⁹ They also recommended applying participatory theory as ‘knowledge available in development studies and participatory theory may be applied more clearly in debates and approaches in transitional justice’.²⁰⁰ However, the case study in the context of this research is used in an abstract sense and not as a scientific method.

Critical literature review will be applied in this thesis. One of the important purposes of doing literature review is that it identifies the need for the research being conducted, as well as drawing on the existing body of knowledge.

One of the important points to conduct scientific research and build on the current level of understanding of the research problem is based on critical analysis of existing studies and outcomes achieved so far. This thesis is inductive research, thus literature review is important to develop theory and investigate data. This aspect of the research relies on library resources,

¹⁹⁴ Ibid 103.

¹⁹⁵ Ibid 104.

¹⁹⁶ Sekaran and Bougi (n191) 109

¹⁹⁷ Zaidah Zainal ‘Case study as a research method’ (2007) 9 *Journal Kemanusiaan* bill 1.

¹⁹⁸ Patricia Lundy and Mark McGovern ‘Whose Justice? Rethinking transitional justice from the bottom up’ (2008) 35 *Journal of the Law and Society* 26; Barker (n3); Moffett Luke ‘Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda

(June 2013), In N. Gal-Or, C. Ryngaert, and M. Noortmann (eds.) *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (Brill 2015).

¹⁹⁹ Lundy and McGovern (n198) 265.

²⁰⁰ Ibid 265.

including books, journals, cases, scholarly opinions, laws, and conventions. This approach is called 'black-letter law' or doctrinal legal research, the purpose of which is to analyse laws.²⁰¹

1.9 Conclusion

The researcher in this thesis critically analyses internal legal rules and international laws of international responsibility, particularly the International Law Commission Draft Articles on the Responsibility of States (2001), as well as the VCDR (1961) and ICJ decisions in order to investigate the extent to which a host state is liable to protect diplomats in situations not described as armed conflicts, in addition to international legal articles regarding the responsibility of states for the protection of diplomats.

²⁰¹ Paul Chynoweth 'Legal research' In Andrew Knight, Les Ruddock (eds.), *Advanced Research Methods in the Built Environment*, (Wiley Blackwell 2008) 28.

Chapter 2: The History of Diplomacy and Diplomatic Protection

2.1 Introduction

International law is ‘the law between sovereign nation-states, hereinafter, states, especially within the context of the laws of war, peace and security, and protection of territories’.²⁰² This definition implies that law organizes the relationships between states in times of peace and war, which has clear implications for the sovereignty of states, which is one of the most important principles of international law. The system of contact between sovereign states is known as diplomacy, represented by negotiations between the agents of those states;²⁰³ a diplomatic agent is defined by the VCDR as ‘the head of the mission or a member of the diplomatic staff of the mission’.²⁰⁴

There are apparent relationships between international law and diplomacy. The latter has an essential in international relations because foreign relations are established between states through diplomacy. Diplomacy is based on reconciling the conflicting interests of states in order to resolve differences that might undermine these relationships, and through diplomacy, states can play an important role in interacting with the international community.

Due to the importance of foreign relationships in international law and practice in the international community, it is universally acknowledged that diplomats should be protected, and has always been so (theoretically). However, numerous characteristics of modern diplomacy distinguish it from traditional models. Nevertheless, diplomacy and international relationships are organically and inseparably interlinked. Diplomacy is communication between two or more states, enabled by diplomats, who represent their states and who may be based at home or in the state with whom the relationship is held.²⁰⁵

Due to their importance of inter-state relations, diplomats are generally assiduously protected by states (i.e. governments), and correspondingly they are often targeted by non-state actors such as militias and paramilitary organisations. In order to address this problem of targeting the diplomats, the researcher suggests applying TJ to achieve justice for diplomats. TJ has historically

²⁰² Kelly Vinopal ‘Researching Public International Law’ (2013) American Society of International Law 3.

²⁰³ Shaw (n 27) 751.

²⁰⁴ Article 1(e) of the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

²⁰⁵ G.R. Berridge and Lorna Lloyd, Dictionary of Diplomacy, (3rd end, Palgrave Macmillan, 2012) 97.

played a significant role in achieving justice in post-conflict periods. The role of TJ is discussed separately in Chapter 4 of this thesis to show the importance of such justice to guarantee remedy for diplomatic victims of armed conflict.

Several changes in elements of diplomacy over the history indicate the importance of diplomacy, such as in terms of language, the number of people conducting diplomatic procedures, and the purpose of diplomacy.²⁰⁶

In addition, the personnel conducting diplomacy has extended beyond professional (typically legal) professionals due to improvements in communications during the 20th century. Now the head of state can directly engage in international diplomacy with other heads of state without recourse to intermediary diplomatic agents (i.e. the head of state can become a diplomatic agent), which would be impossible prior to modern communication methods. Another distinguishing characteristic of modern states is that traditional diplomacy was conducted between states on parity as equal partners, and typically this involved powerful states (e.g. the Berlin Conference of 1884 was an intra-European diplomatic conference on the division of Africa among those powers, with no consideration of African states or diplomats).²⁰⁷ Now states involved in diplomacy no longer hold equality as a priority, and they often act the basis of economic interest in close collaboration with a corporate power mainly, although this has been a phenomenon for centuries.²⁰⁸

Kurizaki states that the history of diplomacy is important as it can show the development of diplomatic establishment as a result of leaders' response to the political situations.²⁰⁹ He added that it shows that 'means and forms are self-enforce as political leaders and rulers have kept and copied them for fairly a long time'.²¹⁰ It can also demonstrate the role of diplomacy in resolving international disputes and the problems and how it transformed complex issues to simple ones.²¹¹

This research compares between the old diplomacy and the new in order to determine what has

²⁰⁶ Christer Jönsson and Martin Hall 'Communication: An Essential Aspect of Diplomacy' (2003) 4 *International Studies Perspectives* 195.

²⁰⁷ Patrick Brantlinger 'Victorians and Africans: The Genealogy of the Myth of the Dark Continent' (1985) 12 *Chicago Journal* 166.

²⁰⁸ Carl Parrini 'Anglo-American Corporatism and the Economic Diplomacy of Stabilization in the 1920s' (1978) 6 *Reviews in American History* 379.

²⁰⁹ Shuhei Kurizaki, *The Logic of Diplomacy in International Disputes* (UMI, US, 2008) 21.

²¹⁰ *Ibid* 20-23.

²¹¹ *Ibid* 20-23.

changed in terms of new areas of diplomatic action, growing shared interests between states and international interests, improved working conditions for diplomats and the participation of women in diplomatic activities. Furthermore, there were different reasons for conducting diplomatic relationships in the past, as this chapter will show. This research observed that international public opinions and media, which has precipitated the emergence of public diplomacy, alongside and interrelated with important developments in transportation and communication systems, influence diplomacy.

This research explores the concept of diplomacy, its roots, its developments and its transformations, bringing to mind a number of questions, for example:

- What is the concept of diplomacy?
- Is the meaning of this concept stable or has been changed?
- What are the different historical stages of diplomatic policy?
- What is the relationship between history and diplomacy?

This chapter explores the phenomenon of diplomacy in the ancient world and assesses its impact. It additionally traces its continuous influences after the demise of the ancient societies from where it emerged. This research affirms that the practice of diplomacy represents a continuum, and not a spontaneous institution to meet the incidental needs of states.

Indeed, historians regard diplomacy as a continuous practice stemming from the most ancient states, and it was already present with modern contours by the ancient Egyptian, Mesopotamian and Chinese civilization; however, it emerged with *states* and not communities – in other words, it was not present in primitive communities. Its most well documented ancient manifestations were in the Mediterranean civilizations (i.e. Egyptian and Greece-Roman), although Mesopotamia, India and China also have a long history of diplomacy.²¹² However, it can be argued that the diplomacy of these ancient states was much less efficient in the regulation of international relations compared to modern diplomacy, particularly if judged according to the struggle for peace and friendship between nations.

This chapter deals firstly with the definitions of terms, including the meaning of diplomacy, diplomatic agents and diplomats, and then the exchange of diplomats in ancient times is explained. The characteristics of the diplomatic corps in the past, as well as the doctrine of the immunity of

²¹² Nicole Brisch and others, *Religion and Power: Divine Kingship in the Ancient World and Beyond* (The University of Chicago 2008) 7.

diplomatic personnel, are analysed. The actual practice of diplomacy in the ancient world is then outlined with regard to the ancient Near East (the Egyptian, Babylonian and Hittite civilizations, c. 1400-1150 BCE), the Greeks (c. 500-338 BCE), the Roman Empire (c. 358-168 BCE), Ancient India and China, and diplomacy in Islamic States. The ancient diplomacy is then compared and contrasted with diplomacy in the 21st century.

This study does not propose to narrate a comprehensive history of diplomacy, rather it uses illustrative cases (e.g. the Arab-Islamic States) for comparative purposes with the 21st century, to explore the importance and characteristics of diplomacy and diplomats over history. The most obvious historical lesson is that diplomacy and its special status is as old as human civilization, along with violations of this accepted norm by attacking diplomats. The understanding of the importance of old or modern diplomacy for the security of the international community and the important role of the diplomats as people who bring a conflict to an end informs the fundamental rationale for beginning this study with a historical overview of diplomacy.

2.2 Definitions

2.2.1 Diplomacy

The word diplomacy is derived from the Greek verb *diploun* (to double) or from the noun *diploma*.²¹³

Diplomacy is commonly understood as the practice of building and maintaining relationships between independent states, a process undertaken by representatives of those states. It's most critical form is when mediating conflicts and negotiating international arrangements at the internal, regional or global levels.²¹⁴ Hence, the role of diplomats comes into play when a state notifies another state about its desire to establish a political relationship, and negotiation begins by sending an envoy that represents his or her state. Article 2 of the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes stated that 'The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent'.²¹⁵ Cull defined diplomacy as 'the mechanisms short of war deployed by an international actor to manage

²¹³ Costas M. Constantinou, *On the Way to Diplomacy*, (University of Minnesota Press 1996) 77.

²¹⁴ Berridge and Lloyd (n 207) 97.

²¹⁵ Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, 1961, (Entered into force with respect to the United States of America December 13, 1972).

the international environment; traditional diplomacy is international actor's attempt to manage the international environment through engagement with another international actor'.²¹⁶ In this way, states improve and protect their foreign policies without recourse to exploitation and war.²¹⁷ In a sense, these definitions of diplomacy focus on the following: the aim of diplomacy in dealing with international problems peacefully, the people who act in the delicate procedure (diplomats), represent states which have intentions to improve their foreign relations or using negotiation to manage foreign relations (particularly antagonistic ones).

However, although these essential components of diplomacy are timeless, their relative importance has changed through history. For instance, in the 19th century, diplomacy was narrowly defined as negotiations between sovereign states aimed at managing their relations.²¹⁸ Although ancient diplomacy was limited to relations between sovereign states, diplomacy in its modern concept expands to include 'civil society actors—including nongovernmental organizations (NGOs), citizen journalists, and the broad public'.²¹⁹

The purpose of diplomacy in the ancient world was to keep good relations among states. However, diplomacy has developed to include the management of the business between the states and other international actors.²²⁰ Such relationships whatever their purpose, begins when one state notifies another about its desire to start a political relationship, and negotiates to send a diplomat to represent the state.²²¹ The inherent necessity of such relationships and professional personnel for their achievement was recognized by ancient states,²²² which is why diplomacy is sometimes called the 'second oldest profession'.²²³ Hence, states have always needed to have channels to deal with each other.²²⁴ Diplomacy is a system of managing the contact between the states and is represented by negotiations between agents of states. It is a tradition arrangement which is governed by

²¹⁶ Nicholas J. Cull, *Public Diplomacy: Lessons from the Past*, (Figueroa Press 2009) 12.

²¹⁷ G.R. Berridge, *Diplomacy Theory and Practice* (4th end, Palgrave Macmillan, 2010)1.

²¹⁸ 218Rene Albrecht-Carrie, *A Diplomatic History of Europe since the Congress of Vienna* (Harper & Row 1958) 20.

²¹⁹ Shanthi Kalathil, *Diplomacy Development and Security in the Information Age* (Institution for the Study of Diplomacy 2013) 4; Mohamed Osman Akasha 'Evolution of Diplomacy' (2012)5. Available at: <SSRN: <http://ssrn.com/abstract=2220467> or <http://dx.doi.org/10.2139/ssrn.2220467> > accessed 20 December 2013.

²²⁰ Jan Melissen 'The New Public Diplomacy: Between Theory and Practice. In J. Melissen (ed.), *The New Public Diplomacy; Soft Power in International Relations* (Palgrave Macmillan 2005) 5.

²²¹ Adam Watson, *Diplomacy: The Dialogue between States*, (Rutledge 2005)7.

²²² Robert Jennings and Arthur Watts, *Oppenheim's International Law*, Vol 1, Part (2-4) (Long Man 1993) 1054.

²²³ Janice Gross Stein and Colin Robertson, *Diplomacy in the Digital Age: Essays in Honour of Ambassador Allan Gotlieb*, (McClelland & Stewart Ltd 2011) 193

²²⁴ Dietrich Kappeler, 'The Birth and Evolution of Diplomatic culture' in Hannah Slavik (ed), *Intercultural Communication and Diplomacy*, (Diplo Foundation 2004)353.

International Law.²²⁵ Jennings and Watts, however, stated that the international law has no role in the usage of diplomacy, although ‘there is some legal importance, as they [diplomatic activities] may occasionally grow into customary rules of International Law’.²²⁶

Unlike modern ambassadors and envoys, who are charged with myriad duties concerning political relations as well as economic and social areas of interest, ancient diplomats were dispatched for specific (usually political) tasks; once they finished this task they had to return immediately. This was largely because of the nature of diplomatic work, requiring intelligence, cultural sensitivity and interpersonal skills, and the sensitivity of information in such contexts in the ancient world; essentially, the ruler of a country required deep and specific information from an envoy regarding important matter, which could not be trusted to primitive communication systems and couriers.

Modern diplomacy, and its association with international economic relations (and the arrangement of dynastic marriages), can be traced to the states of Northern Italy during the early Renaissance, where the first embassies were established in the 13th century. Examples of the practice of diplomacy in that era were the presentation of an ambassador’s credentials to the head of the receiving state and greetings from the dispatching sovereign, and proposals of marriage accompanied by portraits of the intended suitor or bride (as in the famous instance of Holbein’s portrait of Anne of Cleves, which induced Henry VIII to marry her).²²⁷

However, some scholars believe that the concept of diplomacy is relatively recent; Jennings and Watts are of the opinion that the terms *diplomacy* and *diplomats* were not recognized until the end of the 18th century,²²⁸ while Bederman stated that the ancient states conducted diplomacy;²²⁹ consequently this research explores diplomacy in the ancient epoch in detail in the following points.

2.2.2 Diplomatic Agents

After the research explained in previous point the definition of the diplomacy, it is important to define the person who conducted this diplomacy.

The Vienna Convention on Diplomatic Relations, 1961(VCDR) defined clearly the diplomatic

²²⁵ Shaw (n 27) 751.

²²⁶ Jennings and Watts (n 18) 1054.

²²⁷ Ibid 5.

²²⁸Jennings and Watts (n 18) 1054.

²²⁹David J. Bederman ‘International Law in the Ancient World’ (2008) 32 Emory Public Law Research 1. Available at <SSRN: <http://ssrn.com/abstract=1092442> or <http://dx.doi.org/10.2139/ssrn.1092442> > accessed 5 October 2014.

agents. That diplomatic agent 'is the head of mission or a member of the diplomatic staff of the mission'.²³⁰ Then this Convention 1961 gave the definition of both the head of mission and the diplomatic staff of mission. Hence, the head of the mission defined by the Art 1(a) is 'the person charged by the sending State with the duty of acting in that capacity'.²³¹ Whereas according to Art 1(d) the members of the diplomatic staff are 'the members of the staff of the mission having diplomatic rank'.²³²

According to Barker diplomatic agents are the individuals who 'performing the diplomatic function as a principle and not an incidental part of their duty'.²³³ This could include the legal advisor, part-time diplomats, attaches, counsellors, ministers, ambassadors, secretary to the mission.²³⁴ Barker adds that 'the members of special missions may be considered to be diplomatic personnel'.²³⁵ Diplomatic agents then seem to be a very wide term and might including many of individuals who work in embassies and consulate or anyone represent his or her country in another state.

Similarly, another scholar has defined diplomatic agent as 'the term for ambassadors and the other diplomatic officers who generally have the function of dealing directly with host country officials'.²³⁶

The term diplomatic agent means diplomat. Hence, it refers to a representative who lacks diplomatic status. The question might arise as to who then constitute non-diplomatic agents? This term could be used to refer to secret agents.²³⁷

It is important to note that this study is particularly concerned with ambassadors or diplomats, as defined below.

2.2.3 Diplomats

²³⁰ 231 Article 1(e) of Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

²³¹ Ibid.

²³² Ibid.

²³³ Barker (n 3) 17.

²³⁴ Ibid 17.

²³⁵ Ibid 19.

²³⁶ United States Department of State Office of Foreign Missions, Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities, (United States Department of State Office of Foreign Missions 2014) 7 Available at <<http://www.state.gov/documents/organization/150546.Pdf>> accessed 8 Jan 2015.

²³⁷ Berridge and Lloyd (n 153) 4-5.

Jangam stated that the ‘diplomats’ is a general concept which refers to the ‘all members of the foreign service of the Nationals’.²³⁸ Berridge and Lloyd also defined the diplomats or ambassadors as persons who represent their states in other states (e.g. diplomatic agents or officials in a foreign ministry).²³⁹ Bjola and Holmes define diplomats more generally as ‘individuals who conduct social relationships’.²⁴⁰ This definition is wide and could include any person who conducts or promote the relationships between the sending and receiving countries. According to Art. 3 of the Vienna Convention 1961, the function of the diplomat is to represent State and to protect its interests and the interests of its citizens and to ensure the promotion of friendly relations between the two countries (sending and receiving).²⁴¹ Due to the role of the diplomat, the international community unanimously rejects the concept of targeting diplomatic agents, but the ability of states in times of political disturbance, tension and conflict may prevent states from protecting them. Due to the particularly acute breakdown of diplomatic conventions in the case of Libya it was initially the main focus of this study, but the dissemination of this problem in other states broadened the scope to Iraq and other countries, as explained in Chapter 1.

The research defines diplomats as personnel who mediate relationships between sending and receiving countries, to promote security and stability. The question arises of the extent to which the word ‘envoy’ or ‘messenger’ used in the ancient world to denote a *sacred* office is analogous to the modern ‘diplomat’ and the legal protections pertaining to that position. As noted by Berridge and Lloyd, ‘envoy’ is synonymous with ‘diplomat’,²⁴² but Chatterjee stated that the former, ‘accredited to the head of State, is not considered to be personal representatives of their sovereign’.²⁴³ This means that the envoy does not have the same status as the ambassador, as manifest in protocols such as the former not being empowered to request an audience with the receiving head of state. Furthermore, the envoy does not render significant services on behalf of their State. However, the researcher believes that the envoy is essentially an ambassador. In some historical books the word ‘messenger’ was synonymous with ‘ambassador’, as in Hebrew.²⁴⁴ Another question that arises is what the difference is between ‘diplomat’ and ‘consul’. Jangam

²³⁸ R. T. Jangam, *An Outline of International Politics*, (Revised Second Edition, Allied Publishers Limited 1981) 81.

²³⁹ Berridge and Lloyd (n 205) 63.

²⁴⁰ Corneliu Bjola and Marcus Holmes, *Digital Diplomacy: Theory and Practice*, (Routledge New Diplomacy Studies 2015) 4.

²⁴¹ Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

²⁴² Berridge and Lloyd (n 205) 83.

²⁴³ Charles Chatterjee, *International Law and Diplomacy*, (1st edn, Routledge 2007) 10.

²⁴⁴ Kalicharan M. L, *Diplomatic Immunities and Privileges Critical Study with Special Reference to Contemporary International Law*, (University of Mysore 2015) 37.

defined diplomats are any people working in diplomatic services with the duty of representation and negotiation, while consuls are dedicated to consular services, with the duty of protecting the interests of nationals of the sending state. However, the function of the diplomatic service is complementary to consular services,²⁴⁵ and consular officials might perform the diplomatic duty along with their consular duty.²⁴⁶ This means that the consul is appointed to perform for the commercial interests of the sending state in the hosting state, as well as to help the nationals in the latter. As a result of consuls assuming more roles analogous to traditional diplomats, the distinction between them has become 'much less clear cut than formerly'²⁴⁷

Whatever the definition of diplomats, it is imperative that the diplomat possess negotiation skills, an understanding of the law (of the receiving state) and politics and a clear aim of promoting the relationships with the hosting states. Diplomats need these skills and knowledge to qualify for their positions and to enable the carrying out of their important duty of strengthening relationships between the receiving and sending states, as explained in the following section.

2.3 History of Diplomatic Relations

2.3.1 The Exchange of Diplomats in the Ancient States

Given the debate about the provenance of diplomacy in the modern sense, it is important to consider how ancient peoples dealt with diplomacy and diplomats. This research particularly focuses on the difficulties faced by diplomats (i.e. real or potential personal harms inflicted on them), exploring how states dealt with such problems. Diplomatic relations are forged by diplomats, Jennings and Watts stated that when the permanent legations had become a general institution, the term diplomatic envoy was invented.²⁴⁸ However, this focus on terminology is essentially etymological and lexical, and does not help in understanding the reality of diplomacy in history.

In ancient Greece, diplomats were considered holy, and there was a religious dimension to the envoy's role traced to the concept of Hermes as the messenger of the gods; however, Hermes was also associated with deceptive charm, trickery, cunning and deceit, reflecting the Greek understanding of the archetypal envoy. Envoys in this period were labelled as deceitful,²⁴⁹ as

²⁴⁵ Jangam (n 239) 81.

²⁴⁶ Ibid 87.

²⁴⁷ Berridge and Lloyd (n 205) 47.

²⁴⁸ Jennings and Watts (n 18) 1062.

²⁴⁹ Ibid 1062; Bederman (n 230) 1.

one author puts it, the envoy was ‘an honest man sent abroad to lie for his country’.²⁵⁰ This understanding seems to have continued to the present, and the recent Wiki -leaks scandals expose the widespread wiretapping of diplomatic missions and embassies. However, this does not mean that diplomats are associated with being malevolent people; diplomacy has been ascribed both negative and positive roles.²⁵¹

To perform their role effectively, diplomats need to have essential skills, modes of conduct and procedures of diplomacy; Kappeler confirms that the most of these requirements have not changed from the ancient world to the present. These requirements are very important for ensuring successful negotiation with other states.²⁵² However, these skills and the relative importance attached to them vary between states according to their nature, their socio-cultural legacy and the particular context.

International law has no role in such matters. However, some qualifications are required. For example, knowledge and training is an important requirement for a permanent diplomatic appointee.²⁵³ The position of diplomats as a representative of the state is a very sensitive position, requiring numerous skills and attributes. In ancient states an envoy was typically chosen from among the ruling family or oligarchy so that the rulers had confidence in the loyalty and abilities of that person, which conferred legitimacy upon them in the eyes of their own and foreign states.²⁵⁴ Even today, the head of a mission is more important (albeit usually more symbolic) than ancillary staff who actually perform the diplomatic work.

The sending state appoints the head of mission. Such an appointment is subject to the some formalities. Hence, the sending state needs to inform the receiving state about the appointment of the head of mission. In addition, the sending state gives the head of mission credentials. The latter has to hand in a copy of his credentials to the ministry of foreign affairs of the receiving state once he or she arrives. Such formalities are not required for supporting staff of the mission. The state describes its desire to start diplomatic relationships via the exchange of envoys.²⁵⁵

²⁵⁰ Afzal Iqbal, *Diplomacy in Islam: An Essay on the Art of Negotiations as Conceived and Developed by the Prophet of Islam*, With a Forward by S. A.Rahman, (3rd end, Institute of Islamic Culture 1977) 28.

²⁵¹ Kappeler (n 224) 353.

²⁵² *Ibid* 353.

²⁵³ Jenings and Watts (n 18) 1062.

²⁵⁴ Mark McDowell ‘Public Diplomacy at the Crossroads: Definitions and Challenges in an ‘Open Source’ Era’ (2008) 32, 7.

²⁵⁵ Jenings and Watts (n 18)1062.

Although states frequently appoint different heads of mission to different states, they can appoint the same person to cover more than one state. However, the approval of receiving states is required.²⁵⁶

In both ancient and contemporary times, the sending states often send more than one permanent diplomatic mission to the receiving state. In the ancient period the right of a hosting state to accept or reject the diplomatic representative or envoy of another state was subject to the agreement of both states. This right is reflected in Article 4 of the 1961 Vienna Convention on Diplomatic Relations.²⁵⁷ The sending state who desires to start diplomatic relationships with the receiving state has no right to force the host state to accept its envoy. Furthermore, several receiving states sometimes refused to accept the representative of sending states. Such refusal may put the sending state in an embarrassing situation. Thus, sending states have now developed a mechanism that ensures that their envoys are accepted by the receiving states even before such appointment.²⁵⁸

Every state has the right to send and receive diplomatic envoys, called the right of legation, comprising active and passive right; the former refers to the right of sending the envoys to other states while the latter means the right of receiving the envoys. This right is necessary to states in terms of respect for their sovereignty (i.e. a fundamental right), although some states regard it as being a condition only.²⁵⁹ The right to appoint or receive envoy is a prerogative of the Head of State (*de jure*). As a result, only states with full sovereignty have the right to conduct diplomatic relations. For example, a revolutionary who may build informal relationships with other states cannot send diplomatic envoys to them unless the latter recognise the authority of that revolutionary as a legitimate Head of State. In addition, states under the protection of other states also have no right of legation. On the other hand, the constitution of federal states determines whether they have the right of legation. For instance, while the German Empire before the First World War gave this right to the federal states, the USA did not.²⁶⁰

Envoys duties are less exclusively political in modern diplomatic practice, although early modern functionary tasks remain the responsibility of embassies (e.g. attending state occasions such as coronations, wedding ceremonies, funerals and jubilees).²⁶¹ Another fundamental change is that diplomatic envoys can be women in the modern world; historically, it was not a significant issue

²⁵⁶ Ibid 1062.

²⁵⁷ '1. The sending State must make certain that the agreement of the receiving State has been given for the person it proposes to accredit as head of the mission to that State. 2. The receiving State is not obliged to give reasons to the sending State for a refusal of agreement'.

²⁵⁸ Jennings and Watts (n 18) 1064.

²⁵⁹ Ibid 1064.

²⁶⁰ Jennings and Watts (n18)1065-1058.

²⁶¹ Ibid 1065-1058.

for a woman to be Head of State, particularly in dynastic societies (e.g. Elizabeth I), but women were almost never included in diplomatic missions except as the wives of male envoys.²⁶²

2.3.2 The Characteristics of the Historical Diplomatic Corps

The characteristics of the diplomatic corps have not changed much for several centuries.²⁶³ Although now seen as a professional career (rather than a gentlemanly task to be discharged on behalf of one's sovereign), diplomatic appointments (particularly at senior levels) remain dominated by the socio-economic elite. Most of the qualities diplomats require now remain the same as they were in the ancient world. Essential qualities required of diplomats include:²⁶⁴

- 1 Privileged socio-economic background.
- 2 Sound academic knowledge of subjects related to diplomacy, such as the arts, history and law.
- 3 Personal charisma and refined etiquette.
- 4 Proficiency in multiple languages (e.g. historically Latin and French in the European tradition, Persian and Arabic in Indian).

The historical requirement that the diplomat has the financial ability to cover all expenses, including properties and payments of personnel, is no longer valid in the case of modern nation states, although this was expected in traditional societies. It should also be noted that the same characteristics are required for the spouse (historically, the wife) of the diplomat.²⁶⁶

These qualities enabled diplomats to adapt easily to the affairs of the host state, spending several years there. However, the drawback of this was the fact that the diplomats became ignorant of the affairs of their home country. Hence, the formation of the ad hoc diplomatic team as a special task force in critical scenarios may have resulted from this drawback. Diplomats have played a major role in bringing peace to conflicting parties through a series of negotiations (e.g. The Peace of Westphalia in 1648); however, these logical negotiations took a very long time to attain completion. By the time of the First World War diplomats were blamed by many due to their inability to avert the catastrophe, and although diplomats played a significant role during the Second World War and its aftermath, this was with dependence on the advice of other ministries, thus 'whereas diplomatic culture has changed and keeps changing, it is by no means dead, and it should not be

²⁶² Ibid 1062-1063.

²⁶³ Kappeler (n 224) 353.

²⁶⁴ Ibid 353.

allowed to die!'.²⁶⁵

Although, the requirement that a diplomat possess the necessary skills is very important, and this has been reflected in history, recently, however,²⁶⁶ most of developing countries have not taken this seriously or seem to have other aims or agendas in their appointment of diplomats sent to other States. For example, Saudi Arabia in 2016 resumed its diplomatic ties with Iraq after a long period where diplomatic ties were cut off (since 1990). It has been alleged that the Saudi diplomat, Sabhan does not have the required skills to enable him to strengthen the relationships between these two countries. The only skill he seems to possess is his military skills (he holds a bachelor's degree in military science).²⁶⁷ The only skill he seems to possess is his military skills (he holds a bachelor's degree in military science). Saudi authorities responded that their diplomat is the most suitable person for the job for when and where he has been sent because of his military skills, further failing to acknowledge his lack of the required skill set.²⁶⁸ Another example is that in Iraq, the appointment of a diplomat is not based on the skills or knowledge he possesses, rather it depends mainly on party quotas and patronage.²⁶⁹

2.3.3 Immunity of Diplomatic Personnel

The absence of diplomatic immunity would lead to many risks to the lives of envoys due to the vagaries of international affairs, which is why the international community affords diplomats many privileges and immunities related to the establishment of embassies.²⁷⁰ Attacks on diplomats can be traced back to the ancient world, when envoys were subjected to all kind of maltreatments in ancient societies, which often constituted a *casus belli* (i.e. because an envoy represented a state, mistreatment of the envoy constituted an insult to a whole state).²⁷¹ Bederman stated that all ancient societies were thus concerned with the protection of diplomatic personnel. The host nations have the responsibility for the protection of diplomats, by providing safeguard mechanisms. For example, in Mesopotamia, the lawgiver Hammurabi (d. c. 1750 BCE),²⁷² to

²⁶⁵ Ibid 353.

²⁶⁶ Kappeler (n 224) 353.

²⁶⁷ Arabi 21, 'What is Behind an Appointment of Saudi Arabia a Military Person as an Ambassador in Iraq?' Arabi 21 (Egypt, 9 Mar 2016). Available at <<http://arabi21.com/>> accessed 8 May 2016

²⁶⁸ Ibrahim Ahmed Bet Ali Suleiman 'The Lesson from Sabhan a diplomat to Iraq' Alaraby (2 February 2016). Available at <https://www.alaraby.co.uk/opinion/2016/2/1/> accessed 2 May 2016.

²⁶⁹ Mustafa Al-Obeidi 'Sectarian basis of the distribution of 21 independent bodies on the Iraqi political forces' Al-Quads Al-Arabia (Baghdad, March 15 2015). Available at <<http://www.alqds.co.uk/?p=311052>> accessed 3 April 2016.

²⁷⁰ Kalathil (n 219) 95.

²⁷¹ Hamilton and Langhorne (n 151) 63; Kurizaki (n 209) 96.

²⁷² Bederman (n 230) 1.

whom the eponymous codex is attributed, was an able administrator and an adroit diplomat. One of the important safeguards he legislated was to provide troops to escort diplomats. However, he refused to practice this mechanism with Elam's envoy,²⁷³ and was recorded as having violated the spirit of diplomatic immunity by refusing to provide safe passage for the return trip of foreign envoys who brought him a message he did not like. This diplomatic affront and breach of this customary law caused the breakdown of relations with Elam.²⁷⁴

However, although the lives of envoys were generally considered sacred, it was because of this that they were often murdered as a deliberate act of provocation, particularly if negotiations failed. Historical examples include envoys being killed as a result of the failure of peace negotiations between the Egyptians and the Persians, and when King Darius of Persia refused to kill two Spartan nobles in retaliation for the murder of two Persian envoys in 491 BCE it was taken as an example of his benevolence.²⁷⁵

During the course of history, the concept of diplomatic immunity has not changed much. There are two principles that govern immunity; reciprocity and personal inviolability. Personal inviolability is the first and the oldest principle (as violated by Hammurabi, above). This principle states that diplomats are inherently untouchable, which requires the willingness of the host state to observe this condition. This concept was aided by the sacred association of envoys – as mentioned previously, the Greeks viewed envoys in the context of the divine messenger Hermes, and in the Christian era the envoys of kings and the papacy were regarded as representatives of the Vicar of Christ (i.e. the pope or king), and thus representatives of God.²⁷⁶

2.4 Diplomacy Practice in the Ancient States

2.4.1 Ancient Near East

There is evidence that the first documented diplomatic practice was the Amarna letters, which were found in the ancient Near East. The letters are clay tablets bearing correspondence between the

²⁷³ Elam is one of the oldest human civilizations; the ancient Elam territory is 'the west and southwest parts of the modern day Iran. Elamite civilization is the most ancient civilization that was formed inside the present borders of Iran. It had dominated large parts of the Western and South-western Iran, since the late fourth millennium till the mid-first millennium B.C. Like other ancient civilizations, Elamite civilization has been established based on religion and its people's beliefs'. See Nooraddin Mehdi Ghaempanah, Reza Mehr Afarin and Malake Heydari, 'Mythological Scenes from Ancient Mesopotamia on Elamite Cylinder Seals' (2014) 2 *Journal of Anthropology and Archaeology* 129.

²⁷⁴ Bederman (n 30) 107; Paul Kriwaczek, *Babylon: Mesopotamia and the Birth of Civilization*, (1st end, Atlantic Books Ltd 2010) 10.

²⁷⁵ Bederman (n 230) 113.

²⁷⁶ Robert A. Bauslaugh, *The Concept of Neutrality in Classical Greece* (University of California Press Ltd 1991) 37-38; Peter Karavites 'Diplomatic Envoys in the Homeric World (ii)'. (1987). Available at <<http://local.droit.ulg.ac.be/sa/rida/file/1987/04.%20Karavites.pdf>> accessed 27 July 2015.

pharaohs of the eighteenth dynasty, which governed Egypt in the 15th to 14th centuries BCE, and the kings of Babylon and the Hittites (and peripheral polities in the Levant). They are mostly written in Babylonian. These documents were evidence that Egypt had relationships with its neighbours and more remote entities in the period 1460-1220 BCE.²⁷⁷

The letters reveal that diplomatic concerns of the Egyptians concerned a variety of inter-relationships and foreign relationships. The letters are particularly informative about the history of the armed conflict between two kingdoms of Kadsh in 1274 BCE.

The Amarna letters comment that although this armed conflict did not produce a recognized winner, the peace treaty was an important watershed in the hostility between Muwatallis and Ramesses II. Relationships were also cemented by the marriage of a daughter of Muwatallis to Ramesses II.²⁷⁸ These diplomatic documents are a clear testimony to the cognisance of diplomacy among the most ancient human civilizations. Extensive communications existed between the major polities of the Near East at this time in terms of trade, peace and war and dynastic interrelations.²⁷⁹

An obvious exception to the general concept of diplomatic immunity was evident in war practices. While the torture and mutilation of prisoners are not surprising, the fact that high-ranking (and in the ancient context, *diplomatic*) personnel were subject to such humiliating treatment is surprising (e.g. Egyptian monuments boast how the corpses of noblemen were castrated).²⁸⁰ Palestine provides the solitary example of relatively humane rules of war (concerning besieged cities).²⁸¹

Two kinds of diplomacy are recognised by modern analysts: traditional or old diplomacy and new diplomacy. Old diplomacy was mainly concerned with managing foreign relationships with other states. This concept was developed to mean the conduct of the relationships in all aspects of life. The example includes managing the interest of the two states' military, economic, cultural, foreign and political affairs, and other national interests. The function of diplomacy, the task of diplomats, the means of communication, the meaning of diplomacy all were subjected to a significant shift.²⁸²

²⁷⁷ Jean Allain, 'Acculturation through the middle Ages: The Islamic Law of Nations and its place in the History of International Law' (2011) Queen's University Belfast 1. Available at <SSRN: <http://ssrn.com/abstract=1941775>> accessed 5 July 2014.

²⁷⁸ Kurizaki (209) 56.

²⁷⁹ Amos S. Hershey, 'The History of International Relations during Antiquity and the Middle Ages' (1911) 5 The American Journal of International Law 901.

²⁸⁰ Ibid 901.

²⁸¹ Ibid 901.

²⁸² Aksha (n 219)1.

This change required more efforts and skills from diplomats, particularly solving complex issues in an autonomous manner. Diplomacy is closely interrelated (although not synonymous with) negotiation. Diplomats need to be experienced in negotiation to ensure the successful management of foreign relationships. In addition, it is important for the modern diplomat to engage with the media and public relations in order to prevent misrepresentation²⁸³

Amid the barbarity exhibited by available evidence concerning Egypt, like Syria, Babylonia and the Hebrews, the Persians were idiosyncratically recognized for their hospitality.²⁸⁴ A ministry was created in the Persian court charged with the care and entertainment of guests (particularly foreign diplomats).²⁸⁵ However, in terms of strategy, the Egyptians were notable for their use of diplomacy to avoid war. Of the 350 Ammran letters, 50 narrate the foreign diplomatic policy of Egypt with others in ancient the Near East region in cuneiform.²⁸⁶ They suggest that ‘the yoke of Egypt was much lighter than that of Assyria, Carthage, or even Rome’, and that these empires were more closely interlinked than was previously thought.²⁸⁷

The letters deal with different matters including legal issues, the conduct of diplomatic (dynastic) marriages (as explained previously), trade and other co-operative matters between the kings of Egypt, Mitani, Assyria, Babylonia and the Hittites.²⁸⁸ The conclusion of the wars between Ramesses II and Muwatallis was a peace agreement that included ‘the exchange of political refugees and asylum seekers, mutual military assistance, the mutual territorial inviolability, and the inter-dynastic marriage of a daughter of Muwatallis and Ramesses II’.²⁸⁹

However, Hershey stated that the international relation in the ancient world ‘wholly based upon force’.²⁹⁰ He added that ‘the nations of antiquity are usually described as living in a state, either of almost complete isolation or of perpetual warfare with one other’.²⁹¹

The monuments of Egypt attest the bloody ceremonies, sometimes observed by the Pharaohs, to mutilate foreigners (as explained previously); Hershey states that ‘the bodies of the slain were often mutilated, and rebel captives were impaled and subjected to the most horrible tortures. Those who

²⁸³ Chatterjee (n244)8.

²⁸⁴ Peter Stein, *Roman law in European History*, (Cambridge University Press 1999) 40.

²⁸⁵ *Ibid* 40.

²⁸⁶ Hamilton and Langhorne (n 151) 8; Kurizak (n 209) 65.

²⁸⁷ Hershey (n 201) 901.

²⁸⁸ Kurizak (n 209) 70.

²⁸⁹ *Ibid* 72.

²⁹⁰ Hershey (n 282) 901.

²⁹¹ *Ibid* 901.

escaped such punishment were chained and enslaved'.²⁹² Hershey add that women and children were sometimes treated better and their lives were safer than men, presumably because men posed a military threat, as reflected in the Biblical narration that the Pharaoh ordered the infanticide of male Hebrew babies.²⁹³

The Mosaic code was a self-consciously humane law that contrasted with the ruthless and bloodthirsty practices of the great contemporaneous civilizations. Albeit the narrations of the Israelite kings are often a catalogue of bloodbaths, The Law represents a different story, including the prohibition of destroying trees and the prohibition of sacking cities that surrender. Although the mandates for the slaughter of men are liberal, the Torah treats women, children and livestock more gently.²⁹⁴

Although, the researcher agrees with the scholar that force was used rather than the diplomacy especially between strong nations and weak nation, however, these strong countries still realise the importance of restoring relations especially to facilitate trade, as the thesis will explain later when it explores the diplomacy in ancient Rome.

2.4.2 Ancient Greece

As with most political concepts, diplomacy took a noticeably modern form under the Greeks. However, contemporary diplomacy differs from the Greek in many ways.²⁹⁵ For example, resident representatives and permanent embassies were not recognized in ancient Greek diplomacy. Furthermore, there was no established conduct of diplomacy, and differences in the manner of choosing envoys. The best orators were often chosen in order to conduct foreign policy, and the Greeks believe that this kind of person (i.e. a skilled raconteur) could resolve serious international problems with other countries; however, they did prefer to send a mission comprising a group of men rather than a single representative.²⁹⁶ Historians generally agree that the ancient Greeks were the first to develop an appropriate diplomatic communications system.

The word diploma derives from Greek from word *diploûn* which means 'to double', and some have suggested that Greek diplomats had completed two courses of study.²⁹⁷

²⁹² Hershey (n 282) 901(909).

²⁹³ Ibid 901.

²⁹⁴ Ibid 901.

²⁹⁵ Claude Eilers, *Diplomats and Diplomacy in the Roman World* (Leiden 2009) 6.

²⁹⁶ Ibid 15-17.

²⁹⁷ Constantinou (n213)77.

The most archaic Greek understanding of the diplomat is the envoy Hermes, as mentioned previously, but by the 5th century BCE the ancient Grecians had developed the meaning of foreign relations in terms of declaring war, granting asylum and exchanging envoys.²⁹⁸ The Grecian diplomats were prohibited from accepting gifts from the host state (to avoid bribery), on pain of death. The Ancient Grecians also practiced an important principle of diplomatic law: the principle of non- interference.²⁹⁹

Article 40 (1) of the VCDR refrains the diplomats from interference in internal affairs of the receiving state but fails to define diplomatic interference. This lack of definition could be confusing to an ambassador as without knowing what it means, it makes it practically difficult to know when they have crossed the line while carrying out their duties of protecting the interest of their State. However, this study posits that the definition of diplomatic interference is not important, and a legislator does not need to set out every single definition. The receiving State can determine whether actions or statements made by a diplomat are prejudicial to its sovereignty.³⁰⁰

A large number of peace agreements were established between the Greeks and other entities. However, frequent conflicts erupted regarding land proprietorship and rights of access to land. Thus Greek diplomacy mainly concerned possessions in the Mediterranean and Asia Minor, thus their main diplomatic relations were with each other (between the Greek city-states), and with the Egyptians, Phoenicians (later Carthaginians), Persians, Etruscans and (later) Romans. Such relations often concerned the formation of leagues (alliances) in preparation for impending wars.³⁰¹ For example, in 431-404 BCE the Athenians and Spartans were in the alliance during the Peloponnesian War. Indeed, the historical evidence shows that Greek diplomacy was more than just a separation of allies and enemies but acknowledged varying degrees of power relationships and the concept of neutrality with the point of abstention from conflict defined clearly to provide protection against belligerent hostility.³⁰²

However, ancient Greek diplomacy was not formally instituted, and was rolled out on an ad-hoc basis, with no resident representatives and permanent embassies. Furthermore, it should be noted that different Greek states appointed diplomats by different means (e.g. Athenian citizens – all adult

²⁹⁸ Bederman (n 230) 96.

²⁹⁹ Ibid 95.

³⁰⁰ Article 41(1) stated that ‘Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities not to interfere in the internal affairs of that State’..

³⁰¹ Bederman (n 230) 35.

³⁰² Ibid 35.

freemen – would elect the best orators to plea the city’s case in foreign relations.³⁰³

There were no formal obligations to foreign diplomats except the general religious obligations to all foreign citizens to provide hospitality during the most archaic period. However, diplomats did have clear importance to the Greeks, reflecting their efforts to build relationships with others, and they were generally successful; unfortunately, history is only concerned with their failures (i.e. wars and major crises).³⁰⁴

The Greeks recognized arbitration ‘an agreement beforehand to submit disputes to judicial decision’³⁰⁵ and deployed it in the treaties in several cases. For example, it was used to sort out the ‘disputes touching religion, commerce, boundaries and the possession of contested territories, especially the numerous islands scattered among the Grecian seas’.³⁰⁶

Natural Law guaranteed the inviolability of envoys by the classical Greek period, and the Customs of the Hellenes organized the relationships between the Greeks and foreigners, including the ‘inviolability of messengers and envoys, the right of asylum or sanctuary and truces for the burial of the dead’; furthermore, some ethical precepts were applied to international law regarding war (e.g. Athenians agreed deferment of conflicts for religious purposes, and avoiding injuring temples).³⁰⁷

2.4.3 Ancient Rome

Unlike the Greeks and Carthaginians, the Romans had overwhelming military superiority and thus had little practical need for international diplomacy. Diplomacy for Rome was not an essential means to conduct negotiations with other states under normal circumstances.³⁰⁸ Thus the Romans had few qualms about the maltreatment of envoys, and they were sometimes held as hostages, imprisoned or killed.³⁰⁹ However, relationships with other states were important to Rome, mostly in order to conduct trade. The Romans thus felt the necessity to institute laws to protect the life of

³⁰³ Manuel Duran ‘Sub-State Diplomacy as a Motor of Reterritorialization? The Case of the Mediterranean Region’ (PhD thesis, University of Antwerpen 2013)139.

³⁰⁴ Hershey (n 282) 901.

³⁰⁵ Ibid 916.

³⁰⁶ Ibid 916.

³⁰⁷ Ibid 914.

³⁰⁸ Brian Campbell ‘Diplomacy in the Roman World, (c.500 BC-AD 235) (2001) 12 *Diplomacy & Statecraft*, 1. Available at <<http://www.tandfonline.com/action/showCitFormats?doi=10.1080/09592290108406185>>. Accessed 20 November 2013.

³⁰⁹ Watson (n221)140.

envoys.³¹⁰

The sending and receiving of an ambassador, is one of the important elements for international relations. Furthermore, the relationships between a host and guest in Rome were respected.³¹¹ It was the principle of benevolence to guests and self-prestige that generally ensured the respectful treatment of foreign diplomats under the Romans, backed by notions of filial piety. Furthermore, the Romans had a superior ability for administration and organization than the Greeks. Thus, they were more able to provide such hospitality and protection than the ad-hoc, rough-and-ready Greek states.³¹²

Diplomacy is now an essential and institutionalised way of conducting and managing relationships between states in order to cooperate in trade; however, the Romans did not have such institutionalisation for foreign affairs or an expert diplomatic corps, and other states did not send diplomatic representatives to Rome on a permanent basis. This was partly because the Romans ultimately assimilated all of the Mediterranean civilizations, and the only serious neighbouring power during the classical Roman period (after the fall of Carthage in 146 BCE) was the Persian Empire.³¹³

In ancient Rome, the word diplomacy meant a travel document that a person needed to travel across the Roman Empire. They then started to use this word to refer to other significant documents, for instance negotiations with barbarian tribes.³¹⁴

In the history of international politics the antique Roman civilization marks a turning point in several respects, most notably in that overwhelming military superiority was demonstrated to decisively override the flimsy protections of diplomacy: The Romans rely on force in all their undertakings, and consider that having set themselves a task they are bound to carry it through.³¹⁵ However, although diplomacy becomes a secondary concern in international relations, it did not disappear entirely.³¹⁶

Diplomats were chosen based on their character as honest, responsible and capable Roman men.

³¹⁰ R. C. Blockley, *Easter Roman Foreign Policy* (Francis Cairns Publications Ltd, 1992) 28; Stein (n 287) 40; Kappeler (n 226) 353.

³¹¹ Bederman (n 230) 45-46.

³¹² Hershey (n 282) 901.

³¹³ Eilers (n 296) 45-46.

³¹⁴ Kurizaki (n 209) 58.

³¹⁵ Polybius (Author), Ian Scott-Kilvert (Tr), F. W. Walbank (Introduction), *The Rise of the Roman Empire*, (Penguin Books 1980) 41.

³¹⁶ Kurizaki (n 209) 66.

As such, thus they were typically from the patrician class, and little skill was required from them as any Roman international affairs were backed by the guarantee of superior force. This also enabled them to disregard customary courtesies in dealing with foreign envoys. For example, in 197 BCE, in order to pressure the Macedonian envoy to agree their negotiation within sixty days, they notified him that they would regard him as a spy and strip him of his immunity if the negotiations failed within this limited time.³¹⁷ The Romans could also take hostages (typically noblemen, often the heirs of foreign kingdoms) who then functioned as humiliated and subservient diplomatic representatives; the Romans developed the practice of including the hostage clause in treaties as a commitment device. The Romans demanded that hostages be delivered from conquered tribes and nations at the conclusion of surrender agreements. If the terms were violated, the hostages were immediately arrested and treated as prisoners of war.³¹⁸

Although the Romans inherited academic knowledge and the mechanisms of negotiation from the Grecians, they ultimately depended on their military force.³¹⁹ However, “The Law of Nations” was devised to govern international relations. This law is similar to diplomatic law, including the principle and approach that the envoys should practice in doing their duties, such as declaring war and making peace and treaties; this Law reaffirms the privileges and immunities of envoys,³²⁰ and it became a source of international law in the Middle Ages, ultimately informing the modern international rules created by European powers and the US during the 20th century, including the doctrine of diplomatic immunity.³²¹

2.4.4 Ancient India

The Indus Valley Civilization (c. 3300-1300 BCE) had extensive trade relations (and presumably diplomatic ones) with Mesopotamia, as affirmed by Sumerian and Babylonian seals. More well-documented diplomacy can be traced from the 7th century CE, when Indian kingdoms had diplomatic relations with Persia and China, as well as with each other.

Hindu philosophy devised a special system of managing foreign relations, dividing relationships with neighbours into four sections: enemies, friends, mediators and neutrals.³²²

³¹⁷ Eilers (n 298) 58-59.

³¹⁸ Kurizaki (n 209) 68.

³¹⁹ Watson (n 221) 30.

³²⁰ Blockley (n 311) 28.

³²¹ Mark W. Janis and Carolyn Maree Evans, *Religion and International Law* (Martinus Nijhoff Publishers 1999)135.

³²² Mohinder Kaur, ‘Political and administrative ideas of Manu and Kautilya: a comparative study’ (PhD Thesis, Punjabi University 2012) 119.

Ancient Indian relations were extensive, with documentary support for relations with 'Antiochos Theos of Syria, Ptolemy Philadelphos of Egypt, Antigonos Gonatas of Macedon, Magas of Gyrene, and Alexander II of Epirus'.³²³ In addition, they were interested in keeping such relationships. That is why they sent ambassadors to other states. For example, 'Seleukos Nikator, sent Megasthenes as ambassador to the Court of Chandragupta, and Deimachos and Dionysios were attached to the Court of Bindusara Amitraghata as ambassadors from Antiochus Soter, King of Syria, and Ptolemy Philadelphos, King of Egypt'.³²⁴ The envoys were enjoyed immunity and privileges. Diplomatic personnel were enjoying kind of sanctity in ancient India. The envoy should not be subject to murder.³²⁵ These immunities and privileges were granted to diplomats because of his or her great responsibility. One of important duty was to represent the State in negotiation with the enemy, and he or she has to resolve the disputes with the enemy. Special qualities required from diplomats included tact, intelligence, forgiveness and forbearance.³²⁶ It is clear that the immunities and privileges granted in ancient India to diplomats were based on functional necessity theory, despite this theory not formally existing at this time.

There was clearly some cognisance of a continuous diplomatic community from the Greek and Carthaginian colonies in the Western Mediterranean to the Chinese Empire, via the intermediaries of Persia and India. When Alexander the Great (d. 323 BCE) marched east of Persia with his Macedonians to invade India he was not a Cortés entering terra incognita.

The Indian diplomatic relationships were sometimes rooted in the policies of the fathers and grandfathers of incumbent rulers. Such relationships were considered noble, faithful and eternal, based on protecting life and property.

Furthermore, there was a mediator king. This king was ready to help both fighting sides, the king and his wicked enemies. Such king, his territory was placed near to both of them. However, the ruler who his territory was in between the two fighting territories need to be impartial. The latter ruler is different from the former one in that the former one had an important role in the reconciliation between the disputing parties, while the latter had no role more than stayed passive to both sides. The other neighbours of the king might be classified to the; the rearward enemy, an ally of rearward enemy, rearward friend, and ally of a rearward friend.³²⁷

³²³ Ibid 113.

³²⁴ Pramathanath Banerjea, *Public Administration in Ancient Indi*, (Macmillan 1916) 186-187.

³²⁵ Ibid 194.

³²⁶ Ibid 194-195.

³²⁷ Banerjea (n 325)100.

Foreign diplomacy was understood in terms of six dimensions: peace, strong relationships, war, preparedness for war and neutrality. The situation of making peace or war with other neighbours depended on the power of the state. Hence, if the state was militarily superior might resort to war, while peace was sought if the state was weak; in other words, ancient Indian foreign relations were based on expediency and pragmatism, whatever their pretensions to Hindu philosophy.³²⁸

Many techniques of diplomacy are documented, such as exchanging gifts, reconciliation, sowing dissension and punishment. Alliances were sought by states for different purposes, one of the most important of which was the fear of invasion by other powers. Such mutual assistance agreements were often invoked and put into effect due to the monarch's word of honour or the pressure of sages (holy men or Brahmins) on the government to do so. However, states often required guarantees such as taking hostages or swearing by fire or water, which was considered to be more binding in Hindu ideology.³²⁹

Furthermore, diplomatic agents were the main agents in international communication. There were several kinds of diplomatic agents in this time, including plenipotentiaries' ambassadors and *charge d'affaires* and simple couriers of messages between royal courts. Plenipotentiaries had more important responsibilities such as declaring a state of emergency or war, restoring peace, claiming the observance of agreements, and questioning ultimatums in emergency cases.³³⁰

The ambassador who managed foreign relationships had to inform his state about the activities of the foreign court. This information essentially comprised espionage, including discovering the strong and weak points of states, particularly in terms of military capabilities, for which reason the exchange of envoys has always been a gesture of tentative trust. The *charge d'affaires* were lower in rank and had limited power, usually sent abroad to perform specific duties. Envoys representing their state outside enjoyed a number of immunities and privileges because of their important tasks; furthermore, they had intrinsic rights and responsibilities as members of the Kshatriyah and Brahmin castes.³³¹

Classical Indian philosophy identified three kinds of war: open, concealed and silent. Each had its own characteristics. Open war was manifestly overt hostility and fighting at specific times in (then) conventional battles, while the concealed war was guerrilla warfare. The silent war was with

³²⁸ Abul Fazal Allami, H. Blochmann and (tr.) Ain-i-Akbari Vol. I, (Calcutta, The Asiatic Society, 1927, Reprint 1993) 497; Kaur (n 271) 119-120.

³²⁹ Allain (n 329) 480.

³³⁰ Ibid 480.

³³¹ Ibid 480.

other kingdoms whereby activities were conducted in secret (i.e. assassinations and espionage, including creating divisions between the ministers and classes, and the dissemination of misinformation and disinformation).³³²

Diplomatic immunity of envoys as messengers and representatives (though not as spies) was approved in ancient India and Hindu thought. The envoys could not be killed, but they might face several kinds of violence. For example, a messenger could be punished, branded, maimed, disfigured or imprisoned. The rights of envoys, as well as their duties or restrictions, were identified and codified in state laws.³³³ The envoys also had several duties. For example, they had to remain in communication with their rulers, negotiate treaties aptly and observe the implementation of their terms, engage in intrigues, spy, suborn, and bribe officials of the enemy and win the allies. Indeed, envoys could be required to kidnap foreign notables or provide reconnaissance for troops and secret agents, as in China.³³⁴ Although Bederman states the Indian diplomacy was largely internal,³³⁵ there were relationships with China concerning commercial concerns.³³⁶

2.4.5 Ancient China

Of all the ancient civilizations, China perhaps had the most developed administrative and governmental systems, based on Confucian ethics of absolute obedience to the ruler and the supremacy of the Middle Kingdom (China) and its centrality in the world. However, the stasis of Chinese civilization often degenerated into civil war, and envoys played a crucial role in conducting negotiations between warring states; diplomats played a significant role in this regard, which is why diplomacy is a major concern of Chinese philosophy (e.g. Confucian and Daoist texts). Envoys were understood to be exercising the all-important filial piety, to their own parents and ancestors, their ruler and to the state.³³⁷

One notable feature of Chinese diplomacy is that the envoy was not considered to represent the persona of the sovereign; he represented the authority of the emperor as did any government official, and was thus venerated by the masses, but the emperor's the person was on a different plane. Furthermore, foreign states were regarded as tributary vassals at best and uncouth barbarians at worst. Thus envoys had to observe assiduously the protocols of appearing in the

³³² Ibid 480.

³³³ M. L (n 245) 36.

³³⁴ Ibid 36.

³³⁵ Bederman (n 230) 4.

³³⁶ Anant Sadashiv Altekar, *State and Government in Ancient India* (Motilal Banasidass 2002) 300.

³³⁷ Victoria Tin-bor Hui, *War and State Formation in Ancient China and Early Modern Europe* (Cambridge University Press 2005)5.

presence of the emperor; on two occasions' foreign ambassadors refused to prostrate themselves to the "Son of Heaven" and thus caused diplomatic incidents in China (the refusal of the Arab-Islamic envoys sent by Qutaybah bin Muslim c. 715 and the British Macartney Embassy in 1793).³³⁸

Classical Chinese civilization, whose governance was permeated with the ideals of Confucianism, viewed diplomacy as sacred (as manifest in the *Analects of Confucius*) and also granted diplomats immunity based on the theory of reciprocity between states prior to the unification of China by the Qin dynasty in the 3rd century BCE, after which foreign states were viewed as vassals. Consequently, all ambassadors to China were viewed as subordinate representatives of vassal states who duly gave obeisance. However, the gradual dissemination of Buddhist culture and ethics in China injected a certain commonality with other Hindu-Buddhist cultures in South and Southeast Asia (i.e. between India, Ceylon, Java, Sumatra, Indochina and China). Angelskär stated that the Chinese historically relied on religion in their relationships with others to make honest friendships.³³⁹ Hence China displayed its responsibility, trustworthiness, benevolence and superiority to others in the discourse of religion and ethics.³⁴⁰ However, as mentioned previously, the Chinese state ideology of supremacy caused it to disparage (and underestimate) foreign powers, with the result that Cranmer-Byng questioned whether Chinese relations could even be understood as being "diplomatic".³⁴¹

However, Western observers have often been insensitive to the Chinese case. What are today considered perfectly legitimate rights of states (e.g. refusing to allow the sale of opium to its citizens, levying taxes on imports and exercising inspection of import goods) were regarded as intolerable and backward obstructions to European "free trade".³⁴²

Furthermore, Chinese court scholars were ever aware of the painful civil wars that had intermittently destroyed Chinese civilization, thus the diplomatic practices that had caused the unification of China (e.g. exchanging gifts, crafting treaties, paying tributes and fighting rebellions)

³³⁸ JL Cranmer-Byng, *An Embassy to China Being the Journal Kept by Lord McCartney during his Embassy to the Emperor Chi'en-lung 1793-1794* (Folio Society 2000) 145; Muhammad-Basheer. A. Ismail, *Islamic Law and Transnational Diplomatic Law: A Quest for Complementarity in Divergent Legal Theories* (Palgrave Macmillan 2016) 157.

³³⁹ Trine Angelskär 'China's Buddhist Diplomacy' Norwegian Peace Building Resource Centre (March 2013) 3-6. Available at <http://peacebuilding.no/var/ezflow_site/storage/original/application/280b5bde8e7864209c33d01737fd2db0.pdf> accessed 2 May 2015.

³⁴⁰ *Ibid* 3-6.

³⁴¹ Byng (n 339) 145.

³⁴² *Ibid* 145.

were regarded as the means to promote peace and harmony; this paradigm was later extended to include international states,³⁴³ and the Chinese were aware of the great boon that access to the Chinese market afforded foreigners, thus they expected some recompense in return for granting such access.³⁴⁴ The Chinese had successfully extended their diplomatic engagements and trade by the time of the Sung dynasty with the Arab World, Persia, India and South-East Asia. The only breakdown of their diplomacy arose when they refused to allow the European powers a free hand within China.

One of the important tasks of the envoys was to collect the information about the other countries. That is why the envoy was taken through training to have such skills, and they were succeeding in their task. Hence, Chinese envoys often returned to their country with worthy intelligence. Furthermore, they exchanged the gifts with others as well as merchandized illegitimately in the foreign lands they invested.³⁴⁵

2.5 Diplomacy in Islam and Historical Islamic States

2.5.1 Overview of Sharia Position and the Aberrancy of Modern Islamists

It should be noted from the outset for the benefit of scholars unfamiliar with the concept of law and the state in Islam, or with normative traditions of religious law in general, that Sharia represents a coherent and well-established body of jurisprudence that was used as the normative civil law for numerous sophisticated civilizations in history, as well as many modern states. While different methodologies are applied by different schools of jurisprudence, Sharia – as with any legal system – is not open to individual and unqualified interpretations such as those that form the ideological foundation for the steps taken by modern Islamist groups and other non-state actors. In Islamic legal tradition it is forbidden for the uninitiated members of the public such as Osama bin Laden (those who do not have an official *ijazah* or authorisation from recognised institutions to issue verdicts) to issue public pronouncements and opinions, particularly concerning matters of state. Islam has recognised the authority of the state (regardless of its ideological foundation) since its inception (i.e. the early Muslims dealt with the pagan and Christian states of Arabia, Africa and the Levant, and the Zoroastrian state of Persia).

Christianity developed as a set of doctrinal concepts and religious practices among a persecuted

³⁴³ Morris Rossabi, *China among Equals: The Middle Kingdom and Its Neighbours, 10th-14th Centuries* (University of California Press 1992) 18.

³⁴⁴ *Ibid* 1.

³⁴⁵ Rossabi (n 344) 9.

minority, but as the official religion of the Roman Empire it provided the basis of modern Western law, stemming from the *Codex Justinianus* (c. 540 AD); just as a lone wolf attack by a far-right ultra-Christian extremist on a minority community centre in Europe of the US has no connection with Christian law, it must be acknowledged for severe academic purposes that Islamist terrorism in terms of indiscriminately murdering civilians is not intrinsic to Islam or Sharia *per se*; this is explained in more detail below.

Unlike Christianity, Islam was from its formative period embodied in a sophisticated political community.³⁴⁶ The Islamic state (or Caliphate) was equivalent to the contemporary Roman (Byzantine) state and thus it is generally similar to the modern concept of a state in its bureaucratic functions, but as the Byzantine Empire, its animating principle was faith, which is an alien concept to most European states as they have developed since the French Revolution. Just as pre-modern Europe perceived itself to be Christendom, classical Islamic political theory split the world into the *Daar Al-Islam* (‘Abode of Islam’), where Islam was sovereign, and the *Daar Al-Harb* (the ‘Abode of War’), where it was not.³⁴⁷ Despite the connotations of the latter, aggressive war was not incumbent on the Muslim state except where foreign powers did not allow the free practice of Islam; in practice, Muslim polities often used religious justifications for worldly wars, just as Christian kingdoms (and indeed modern secular states) were wont to do.

Islamic diplomacy pre-dates the Islamic state which originated in Madinah in 622 CE. Ja’far ibn Abi Talib was given the job of representing Muslim refugees in Abyssinia in 616 CE. After the Islamic state was established, the Charter of Madinah gave rights and responsibilities to Muslims and non-Muslims alike. These included a “dispute resolution, a tax system to provide for defence and the requirements for loyalty to the State”.³⁴⁸ It gave rise to a reconciliation system similar to the one used in most contemporary states to end the conflict between nations. The Treaty of Najran, negotiated to establish diplomatic guidelines was agreed between the Muslims and Christian tribes of that area.³⁴⁹ These new conventions from the early Islamic period accorded diplomats immunity and privileges which had their roots in reciprocity and assumption of good faith, and not acting to undermine a receiving state by using espionage or indeed any other sabotage. Diplomats became key players in declarations of war, “exchange of prisoners and arrangement of

³⁴⁶Muḥammad ibn Al-Ḥasan Shaybānī, *The Islamic Law of Nations*, Shaybani’s *Siyar* (The Johns Hopkins Press 1996) 10.

³⁴⁷ Frey and Frey (n93) 395; Allain (n 278) 230.

³⁴⁸ Hamilton and Langhorne (n 151) 26.

³⁴⁹ *Ibid* 26.

truces”.³⁵⁰

In conjunction with other Abrahamic-based religions i.e. Judaism and Christianity, Islam espouses ethical principles and laws covering all the different aspects of life. Because of the individual context of Islamic messages, which gave rise to the formation of a historical state within a generation of its beginnings, Sharia is more codified and extensive none more so than with regard to statecraft. Several “rules of war” laws and diplomatic measures took influence from Islamic principles. These cover disposing of war dead, the introduction of flags of peace, treatment of enemy property, uniforms and some other prohibited actions).³⁵¹

The role of Islam and its contribution to the immunity and privileges of diplomats was confirmed by the ICJ decision in the Iran hostage case 1979, which states that: ‘The principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established regime, to the evolution of which the traditions of Islam made a substantial contribution’.³⁵²

The ICJ emphasized the contribution of Islam to diplomatic and consular law and has agreed that Islam has played an important role in the establishment of trends and procedures of diplomatic law. With regard to the Iran hostage crisis in 1979-1980, the ICJ observed that the doctrine that people with diplomatic mandates should not be abused as a rule owes much to Islamic tradition.³⁵³ The ICJ’s stance is that Sharia is based on certain principles regarding the protection of religion, protection of life, how to deal with property, the protection of honour. Islamic jurisprudence is taken from these aspects; for example, there is an order of importance in Islamic jurisprudence. The preservation of life comes above saving property, and if one steals to stay alive, any punishment may be waived (NB stealing remains prohibited, but begging is allowed in this case). Diplomacy is majorly important under Sharia as a way to protect life and prevent war, and betrayal and/or breach of treaties are highly offensive in Islamic texts due to their wider implications (e.g. contributing to warfare) as well as in and of themselves.

Islamic legislation is very clear in terms of protecting envoys. Explicit texts and deeds of the Prophet indicate that diplomats cannot be killed in any way. They also ensure that the freedom of belief and the conduct of diplomacy are fully free.³⁵⁴

³⁵⁰ Hamilton and Langhorne (n 151) 26.

³⁵¹ Ibid 1.

³⁵² *Case Concerning US Diplomatic and Consular Staff in Tehran* (1980) ICJ Rep.at para. 86, p. 40

³⁵³ ICJ reports, 1980: 40, para. 86.

³⁵⁴ Ibn Hazm, *Al-Mahaly Bi Al-Athar*, (Dar Al Fikr 2010) 307.

Although some scholars stated that a state of war was regarded as a usual relationship between Islam and other nations (i.e. *Daar Al-Harb*), historical evidence indicates that Islamic states have often sent diplomatic missions and envoys on peaceful missions also. This was particularly the case when conducting inter-state relations among Islamic political units which are shown by the exchange of envoys between central Asian monarchs like Babar and the Shah of Persia in the early 1500's. Even regarding medieval India, instances of exchange of envoys have been documented between Islamic and non-Islamic states for peaceful purposes when they were seeking friendship and/or alliance or even military assistance before a war. For example, Rana Sanga sent emissaries to Babur to seek to have the latter agree to form an alliance against Ibrahim Lodi just before the 1527 battle of Sikri.³⁵⁵

Before Islam, tribal warfare was very common among the indigenous people of central and western Arabia, to the point where negotiation as a concept was unknown in their interactions except in a small number of limited situations. The 'sword' was the ultimate language among the tribes in that area. However, the birth of Islam introduced diplomatic relations in the Arabian Peninsula as a way of settling disputes, thus replacing brute force as the arbiter of inter-tribal relations. Islam became the most important source of protecting diplomats throughout MENA and much of Asia in the subsequent centuries.³⁵⁶

As explained previously, the main sources of Sharia are the Quran and Sunnah and practices of the early Caliphs, all of which reiterate privileges and immunities of diplomats. Also, the consistent practice of Muslim caliphs and governors clearly established the privileges and immunities of diplomats in Sharia in practice, as this research explains.³⁵⁷ This study shows how Islam deals with non-Muslims by depending on Sharia resources (the Quran and Sunnah) and the practice of Islamic states with diplomats on a daily basis.

Given the general impetus to venerate and protect envoys in Islamic scripture and doctrine, the question arises of why some of the most egregious attacks against diplomats are committed by Islamist movements. It is beyond the scope of this study to present a Sharia-based critique of modern Islamist and terrorist movements such as ISIS, but in general, it is well-known among Islamic experts that modern political Islamism – and by extension Islamist terrorism – arises

³⁵⁵ Majid Khadduri, *War and Peace in Law of Islam*, (The law Book Exchange 2006) 454.

³⁵⁶ Hossein Rahmanizadeh 'Contribution of Islam to the Development of Diplomacy and Consular Law' (2015) 3(2) *Journal of Current Research in Science* 42. Available at <<http://www.jcrs010.com/Data/Default/2015/Issue%202/7.pdf>> accessed 14 June 2017.

³⁵⁷ Bassouni (n107)609.

from the trends of political development in MENA as a whole. Prior to the 1980s, the prevailing model was conservative Arab-Islamic monarchies (e.g. in the GCC) versus quasi-socialist anticolonial movements of the pan-Arab nationalist type, of which Nasser in Egypt, Gaddafi in Libya and the Ba'athist Party in Iraq and Syria are examples; non-state variants of this trend were already committed to terrorist actions targeting civilians (e.g. Palestinian terrorist movements of the 1960s and 1970s), analogous to their equivalents in Europe – the Red Brigades in Italy and Red Army Faction which was based in West Germany. During this time, Western powers supported quasi-Islamic movements fighting against socialist state forces, alongside conservative Arab monarchies in the GCC; a later manifestation of this was the US-facilitated establishment and support for Al-Qaeda fighting the USSR in Afghanistan during the 1980s.

Militant Islamism is widely utilised in global great power politics, it is rooted in modern, secular political ideologies and not in classical Islamic tradition. For centuries the institutions of classical Islamic learning have in most cases been systematically undermined and starved of funding, while money has poured into the coffers of the ideologues of Islamism and (by extension) violence and terrorism, with the result that Osama bin Laden – the product of a secular education specialising in engineering is perversely seen as a representative of the Islamic faith, which despite all of its diversity, cosmopolitanism and sophistication is primarily associated in modern political discourse with suicidal attacks on innocent civilians.³⁵⁸

Despite their lack of Islamic learning and the fact that their practices are often blatantly contrary to Sharia (e.g. suicide is unequivocally prohibited in Sharia, never mind suicide bombing), Islamist movements have succeeded in some countries in attracting small but dedicated bands of followers, generally from depressed socio-economic conditions with undeveloped civil societies such as in Libya and Iraq, who perpetrate Islamist violence, including against diplomats. The attack on Stevens in Libya is generally attributed to Ansar Al-Sharia ('Helpers of Sharia'), usually considered a branch of Al-Qaeda. Al-Qaeda ideology is based on the assumptions whereby both close and distant enemies of Islam had to be fought, and armed warfare was the only way to make political change. According to O'Bagy, they reject the Modern Western state and seek to establish an Islamic caliphate based on Sharia law.³⁵⁹

Furthermore, they believe in militant, aggressive jihad as a way in achieving their vision of an Islamic state, with no regard for the existence of de facto Muslim or non-Muslim states, contrary

³⁵⁸Muhammad Al-Yaqoubi, *Refuting ISIS*, (2nd edn, Sacred 2016) 45.

³⁵⁹Elizabeth O'Bagy, *Jihad in Syria* Volume 6 of Middle East security report, (Institute for the Study of War 2012) 18.

to the foundations of Sharia; their primary targets are thus the regimes of the modern Middle East, whom they regard as stooges of Western imperialism (stemming from their intellectual pedigree as leftist anticolonial movements, as explained previously); thus their attacks on Western interests are in fact targeted at local regimes.³⁶⁰

2.5.2 Diplomacy and Protection of Diplomats in the Quran

The Quran enjoins peace making and the establishment of friendship and peace with foreigners in international relations. Islam appreciates the need of the people to debate and discuss their ideological differences in a peaceful way and with mutual understanding.³⁶¹

Inter-state relationships between states were significant in Islamic tradition, and the Quran describes the differences between peoples and their formation of societies as part of the divine cosmology.³⁶²

The call for Islam was one of the diplomatic purposes of the Islamic state. The Quranic version orders people to call for friendly and wise ways.³⁶³

The role of diplomats was not limited to the time of war. The diplomat's role was based on the Quranic verse³⁶⁴ That God makes a link between the good words that bind the heart of the people with a blessed tree that bears fruit that benefits people.³⁶⁵

With the revelation for the new faith, the diplomatic conduct was the first task commissioned to the Prophet Muhammad, which Muslims believe he achieved based on honest, truthful wisdom and prudent policy, not subterfuge, deception and aggression.³⁶⁶ However, evidently groups such as Al-Qaeda and ISIS have no respect for those they regard as non-Muslims (including the vast

³⁶⁰Sudhanshu Sarangi and David Canter 'The rhetorical foundation of militant jihad' in David V. Canter, *The Faces of Terrorism: Multidisciplinary Perspectives*, (Wiley• Blackwell 2009) 35.

³⁶¹ Rahmanizadeh (n 357) 42.

³⁶² Quran (Al-Hujurat 49:13). 'O mankind, indeed we have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted'

³⁶³ Quran (An-Namel 125) 'Invite to the way of your Lord with wisdom and good instruction, and argue with them in a way that is best'

³⁶⁴Quran (Ibrahim 14:21-27). 'Have you not considered how Allah presents an example, making a good word like a good tree, whose root is firmly fixed and its branches [high] in the sky?'

³⁶⁵ Almutairi Husain Jeez, Alias Bin Azhar, Mohammad Zaki Bin Ahmad and Alhejaili Hanan Abdurhman 'Importance of Diplomatic Immunities in Islamic Law (Shari'ah) (2016) *Journal of Civil & Legal Sciences* 1. Available at <<https://www.omicsonline.org/peer-reviewed/importance-of-diplomatic-immunities-in-islamic-law-shariah-84562.html>> accessed 2 June 2017

³⁶⁶ Mirza Iqbal Ashraf, *Islamic Philosophy of War and Peace*, (Bloomington 2008) 124.

majority of Muslims themselves), and they do not see the need to be trustworthy or honest.

The Quran makes many references to the term *aman* or safe conduct, which has become an important part of diplomatic immunity. Diplomats and refugees are the main beneficiaries of *aman*. A legally binding privilege that obligated the state to protect the diplomats until his departure from territory. The state may revoke *aman* and it may expel a diplomat, but it cannot violate it. While in the view of commentators there is an exception of the absolute immunity for diplomats if they are found guilty of a *hudud* crime (e.g. murder),³⁶⁷ there is no specific statement in the Quran or Sunna for this exception.³⁶⁸

According to Sharia nothing prevents immunity by treaty.³⁶⁹ That means Libya is obliged to protect diplomats in accordance with its international obligation (under VCDR 1961) in accordance to Sharia. The Quran and Hadith forbid the betrayal of a covenant, particularly a guarantee of protection for a protected person such as a non-Muslim. The Quran further prohibits murder in itself (outside the context of an officially authorised war, which brings into effects its own rules and regulations prohibiting the murder or mistreatment of non-combatants, livestock and property etc.): "And do not kill the soul which Allah has forbidden, except by right".³⁷⁰ The Quran goes further by regarding the killing of a person equal to killing all people, emphasising the importance of the right to life.³⁷¹

The armed groups who targeted diplomats whether in Libya or other places are clearly aberrant and un-representative of Islamic religion and normative civilization. Nevertheless they pose a threat that must be dealt with. While the Islamic state is not allowed to attack non-Muslims not hostile to Islam, including those "who do not oppress Muslims, nor try to convert Muslims by force from their religion, or expel them from their lands, or wage war against them, or prepare for attacks against them",³⁷²

³⁶⁷Hudud offences are criminal behaviour against God. It is crimes against God whose punishment is clearly stipulated in the Quran and the Sunna. E.g. theft, highway robbery, drinking alcohol, unlawful sexual intercourse (and) false accusation of unchastity. See Etim E. Okon 'Hudud Punishments in Islamic Criminal Law' (2014) 10 (14) European Scientific Journal May 227.

³⁶⁸ Frey and Frey (n93)361; Barker (n3)58; Bassioun (n107) 609.

³⁶⁹ Bassiouni (n107) 609.

³⁷⁰ Quran (Al Isra 33). Except by right means '(i.e. murder is forbidden but the death penalty imposed by the state for a crime is permitted.)' Juan Cole 'Top Ten Ways Islamic Law forbids Terrorism' (2013) Informed Comment. Available at <<https://www.juancole.com/2013/04/islamic-forbids-terrorism.html>> Accessed 3 July 2017.

³⁷¹ Quran (Al-Maeda Verse No: 32). 'if anyone killed a person not in retaliation of murder, or (and) to spread mischief in the land - it would be as if he killed all mankind'

³⁷² According to several traditional scholars, 'jihad is only permitted if Muslims have been attacked. It does not justify fighting against people who are not fighting them'. See Mainstream Muslim Scholar 'ISIS (Islamic state of Iraq and Syria) Origins, Ideology, and Response' (2016) National Centre of Excellence for Islamic Studies

Terrorists in the name of Islam have enslaved minorities and indeed normal Muslims and murdered indiscriminately those traditionally granted special protection in the Quran itself, such as Christians and Jews. For instance, it is incumbent on the Muslim state to defend churches and synagogues, whose protection is a justification for the existence of war according to the Quran.³⁷³

Based on their ignorant misinterpretations, Islamist terrorists notoriously target protected minorities and desecrate their places of worship. However, if offences (i.e. attacks *against* Muslims) occur, Muslims are allowed to defend themselves and also to protect their religion, within clearly articulated parameters governing the laws of war. Muslims are not allowed to attack non-Muslims whom they have signed peace pacts with, or non-Muslims living under the Islamic State's protection.³⁷⁴ Islamist groups in some cases selectively interpret the Quran literally, without going back to the history of the verse, although in most cases their appeals are emotive and not based in scripture at all.³⁷⁵ Eager to find some scriptural grounding for their totalitarian ideas, terrorists and Islamophobias are united in their conviction that Islam itself is a violent and barbaric religion bringing death and destruction to mankind, which is belied by historical reality and abhorrent to people of sense, and which has a total disregard for textual and historical context, and reputable Islamic scholarship. For instance, they cite a phrase from a verse speaking about the Meccans who waged war against the Muslims saying, 'Slay them wherever you find them',³⁷⁶ ignoring both the immediately preceding verse: 'Fight in the cause of God only those who fight you and do not commit aggression', and the subsequent verse: 'But if they cease fighting, then let there be no hostility except against oppressors'. Their spurious interpretations and misquotations lack academic merit,³⁷⁷ but they brainwash deluded, aggrieved and dispossessed young Muslims

15. Available at

<https://static1.squarespace.com/static/55120ecae4b01593abadc441/t/58fe89feff7c5003d9acbd86/1493076481168/ISIS_Origins%2C-Ideology%2C-and-Responses-by-Mainstream-Muslim-Scholars.pdf> Accessed 4 Dec 2017.

³⁷³ Quran (Al-Hajj, 22:40). 'For had it not been that Allah checks one set of people by means of another, monasteries, churches, synagogues, and mosques, wherein the Name of Allah is mentioned much would surely, have been pulled down. Verily, Allah will help those who help His (Cause). Truly, Allah is All-Strong, All-Might'

³⁷⁴ Mainstream Muslim Scholar, 16.

³⁷⁵ The scholars have different views regarding the reasons of fighting the disbelievers. Is the cause for war their fighting or their state of unbelief? There are two famous opinions. 'The first is that the reason for war against them is their fighting and transgression against the religion and its people, and this is the opinion of the majority such as Malik, Ahmad ibn Hanbal, Abu Hanifa, and others. The second is that the reason for war against them is their unbelief itself, and this is the opinion of Ash-Shafi'ee and perhaps some of the companions of Ahmad'. See Abu Amina Elias 'Do Muslims fight jihad to punish unbelief or repel aggression?' (2013). Available at <<https://abuaminaelias.com/do-muslims-wage-jihad-to-punish-unbelief-or-repel-aggression/>> Accessed 4 July 2017.

³⁷⁶ "Qur'an, Surah Al-Baqarah (2:191)

³⁷⁷ Nazir Khan 'Forever on Trial: Islam and the Charge of Violence' (Yaqeen Institute for Islamic Research 2017) 11.

who are misguided into perpetrating suicidal, hopeless crimes as a result.

According to Islam, *aman* should be granted for foreign people (Diplomats) even if they are non-Muslims when they enter into the territory of the Islamic states with the permission of the ruler. The safety or *aman* granted to diplomats includes the inviolability of their blood (it is not permissible to kill the diplomats or assassination or bombing or be taken as a hostage), property and honour (e.g. it is forbidden to gossip about them or cast aspersions on them or their conduct unless one is bringing formal legal proceedings against them).

It is not allowed to kill the person who is a foreigner, a Christian, or any other religion, because that is treachery, and Islam forbids treason, so it cannot grant minorities safety and then sanction their murder (like Pharaonic Egypt and the Israelites). The Prophet promised severe punishment for a Muslim who violates the inviolability of the life of a minority who was given *aman*.³⁷⁸ However, the earthly punishment is a punishable sentence that requires the punishment of the offender in kind, with double the customary wergild (blood money) for murder if he intended to kill the victim, and half of that amount if it was accidental (i.e. manslaughter).³⁷⁹ However, Sheikh Khalid Al-Musheeq stated that the Muslim does not punish with death penalty for killing a *dhimmi* (a historical term referring to non-Muslims living in an Islamic state with legal protection) because the condition of the equality for the punishment is not available (according to him, a Muslim is not equal to a non-Muslim), but he should pay double money blood for killing a non-Muslim.³⁸⁰

The Muslims are obligated to fulfil the covenant with others,³⁸¹ as this research explains later in this section.

Consequently, Ansar Al-Sharia's pretensions to be following Islam by murdering the US Ambassador in Libya are ludicrous. The Quran shows that whatever the sending state situation is with the receiving state, the messenger is protected and his life is immune, and ambassadors cannot be held responsible for any acts or messages sent by their head of state.³⁸² The Quran narrates

³⁷⁸ Sahih Bukhari - Book: 88 Hadith: 7000. Abdullah bin Amr narrated that the Prophet said 'Whoever killed a Mu'ahid (a person who is granted the pledge of protection by the Muslims) shall not smell the fragrance of Paradise, though its fragrance can be smelt at a distance of forty years (of traveling)'

³⁷⁹ Ishaq Bin Mansour Al-Kosaj Al-Marwazi, The issues of Imam Ahmad bin Hanbal and Ishaq ibn Rahawiyah in the story of Ishaq ibn Mansoor Al-Kosaj Al-Marwazi (1st end, Islamic University in Madinah 2004) 335.

³⁸⁰ Mohammed bin Ahmed Al-Hassani Fassi Makki Taqi Al-Din, Al-'Iqd Al-thamīn fi tārikh Al-Balad Al-Amīn, (2nd end, Moasest Al-Rasela 1986) 254.

³⁸¹ This was confirmed by the Quranic verse: 'Fulfil the covenant of Allah when ye have covenanted, and do not break your oaths after the asseveration of it, and after you have made Allah surety over you. Lo! Allah knoweth what you do' Quran (An-Nahl / the Bee 16:91).

³⁸² Bassiouni (n107) 609.

the negotiation between the Prophet Solomon(c. 992-952 BC) and Balqis, the Queen of Sheba.³⁸³ When called upon to renounce idolatry and worship the God of the Israelites, Balqis was advised by her chiefs to fight Solomon; however, she prudently decided to send messengers to him with gifts to see his reaction,³⁸⁴ as the Quran describes:

“But verily! I am going to send him a present and see with what (answer) the messengers return”.³⁸⁵

However, Solomon considered this to be a bribe and an insult. Thus he refused the gifts and made the delegation return to the Queen.³⁸⁶ He responded

”Go back to them, and be sure we shall come to them with such haste as they will never be able to meet: we shall expel them from there in disgrace, and they will feel humiliated”.³⁸⁷

These verses can be taken to mean that emissaries were seen as ordinary and archetypal ways of diplomatic communications between all heads of state be they Muslim or non-Muslim and that the emissaries were immune from any anger of the host state thus not held responsible for acts or messages sent by their head of state. Thus, even when Solomon was offended, he did nothing to the messengers but send them back to their home land.³⁸⁸

2.5.3 Diplomacy in the Prophetic Era (570-632 AD)

The purpose of diplomacy in the time of Prophet Muhammad was to spread the message of God to the whole of mankind and to create a peaceful environment in surrounding territories.³⁸⁹

In the Muslim view, Prophet Muhammad was instructed to deliver the message of Islam through peaceful argument and rational persuasion and to call people to Islam in the light of divine revelation. Diplomacy in Islamic discipline represents a way of life and is not to be considered a professional activity is simply serving the purpose of the mission. Muslims should meet their obligation and responsibility with faith,³⁹⁰ recalling that the Muslim delegates who went to Abyssinia in the early years of Islam enjoyed immunity.³⁹¹

³⁸³ Ibid 609.

³⁸⁴ Anonymous, Three Translations of the Koran (Al-Qur'an) Side by Side, (Gutenberg 2005) 240.

³⁸⁵ Quran (27:35).

³⁸⁶ *ibid.*

³⁸⁷ Quran (27:37).

³⁸⁸ Bassouni (n107)609.

³⁸⁹ Jaeez, Azhar, Ahmad and Abdurhman (n 366) 1.

³⁹⁰ *Ibid* 126.

³⁹¹ Rahmanizadeh (n357) 42.

While, the word ‘diplomat’ was unknown in the early Islamic state, their Arabic equivalents *saafir* or *rasul* are synonymous with the words ambassador, envoy or diplomatic agent. *Saafir* (‘ambassador’) is derived from the root *safara* which means ‘conciliation’ or ‘peaceful settlement’.³⁹²

The Prophet Muhammad was successful in strengthening the relationships with other states even after battles, utmost chaos, enmity, hatred and clashes of religions, races and cultures, between the different tribes of people around him.³⁹³

In the Constitution of Madinah, for the first time in Arab history a political unit consisting of different confronting tribes and religions was diplomatically constituted, re-affirming pre-Islamic concepts not contrary to Islam while ensuring Islamic values were protected, including diplomatic protection of non-Muslim minorities, mainly, the Jews.³⁹⁴

During the early period in Madinah the Prophet refused to sanction retaliatory attacks against the Quraish of Mecca, who had brutally oppressed and ethnically cleansed the Muslim community, and only authorised *jihad* (which literally means ‘struggle’) in its military form when a verse was revealed urging the Muslims to fight against those who were persecuting them; and to stop fighting when the aggressors inclined to peace.³⁹⁵ Subsequently, the Muslims won the Battle of Badr and then lost the Battle of Uhud when the armies of the Quraish advanced on Madinah; in both cases they were guided and bound by the contemporaneous revelations of the Quran, strictly regulating and indeed censuring their conduct.³⁹⁶

Following this, in 6 AH the Prophet Muhammad led 400 Muslims on the ancient pilgrimage to Mecca, without any weapons or symbols of war according to the primordial traditions of the rite. The Quraysh prevented their entrance into Mecca, and sent delegates to Mohammad asking him to

³⁹² Yasin Istanbuli, *Diplomacy and Diplomatic Practice in the Early Islamic Era*, (Oxford University Press 2001) 124.

³⁹³ *Ibid* 124.

³⁹⁴ Bassiouni (n107) 609; Rehman (n 106) 129.

³⁹⁵ “There is no compulsion in religion” Quran Surah Al-Baqarah (2:256); Maulana Muhammad Ali, *The Religion of Islam: a comprehensive discussion of the Source, Principles and Practices of Islam*, (4th end, Al-Azhar Al-Sharif 2011) 321.

³⁹⁶ ‘Fight in the way of Allah those who fight you but do not transgress. Verily, Allah does not like transgressors’ (Quran, Surah Al-Baqarah, 2:190). ‘Do not transgress’ (2:190) means by initiating the fighting, or by fighting those protected by a peace treaty, or by fighting those who never received the call to Islam, or to commit mutilation or to kill whomever it has been forbidden to kill. Imam Al-Baydawi, *Tafsir Al-Baydawi*, (1st edn, Dar Ihya Turath Al-Arabi 2012).

Prophet believed that ‘making a generous peace was often a better remedy for aggression than annihilation of the aggressor, because it may bring about a real change of heart in the enemy’. See Maulana Muhammad Ali, *The Religion of Islam: A comprehensive discussion of the Source, Principles and Practices of Islam*, (4th end, Al-Azhar Al-Sharif 2011) 321.

return to Madinah. When Muhammed then sent an envoy back to the Quraysh, they abused him and drove him away, whereupon he sent his companion Uthman ibn Affan, a nobleman who was known for his calmness and tolerance,³⁹⁷ who related Mohammad's message to the Quraysh leaders. This was, he told them, his diplomatic mission. This well-judged diplomatic act led to the Treaty of Hudaibiyyah, which was a pivotally important peace treaty. While the Quraish appeared to have the best of the Treaty, (e.g. Muslims who renounced Islam were allowed to return to Mecca, while Meccans who became Muslim were not allowed to emigrate to Madinah). Violation of the peace by either party or their allies would render the treaty null and void. This is what happened when Bani Bakr, tribal allies of the Quraish armed by them, fought against the Khuza'a, a tribe allied with Madinah. Consequently, the Muslims advanced on Mecca from Madinah and (the fourth time the Muslims marched on an enemy) and took the city with negligible resistance and conflict, having promised security to non-combatant inhabitants beforehand. All of this was according to customary diplomatic norms as familiar to the Quraish as to the Muslims.³⁹⁸

The diplomatic practices in the foundation of Islamic legislation and warfare thus guarantee the general impunity of envoys, which led to the Quraysh stopping their pre-Islamic practice of abusing delegates.³⁹⁹ In Madinah there was a specific yearly budget allocated to hospitality for receiving missions and envoys. The Islamic state recognized that delegations, ambassadors and envoys are important to promoting successful relations with other countries and that negotiation is necessary for a peaceful environment and stability, which required special immunity for diplomats,⁴⁰⁰ enshrined in protocols of the Islamic state and under Islamic jurisdiction.⁴⁰¹ Indeed, extending ancient Arabian notions of hospitality as a sacred duty, diplomats were generally venerated and held in honour and esteem both as guests, responsibilities and agents of inter-state peace and development.⁴⁰² All governors were obliged to safeguard and facilitate diplomats in the exercise of their functions.⁴⁰³ This was the general rule, and the scenario from which Sharia positions on the subject are derived, although there were particular incidents in which diplomacy

³⁹⁷ Rahmanizadeh (n357) 42.

³⁹⁸ Mohammed bin Jarir Al-Tabari Abu Jaafar, *The Statement is Based on the Interpretation of the Qur'an*; Tafseer Al-Tabari (Ibn Taymiyyah Library 1958) 239-250; Ismail bin Omar bin Katheer Al - Dameshqi Abu Fida Imad Eddin, *Tafseer Ibn Katheer* (Dar Taiba 1999) 344-360; Mohammed bin Ismail Abu Abdullah Al - Bukhaari, *Sahih Bukhari*, (1st end , Dar Taouq Al-Najat 1999) 2734; Abu Dawood Sulaiman ibn Al-Ash'ath ibn Ishaq ibn Bashir Al-Shajad ibn Amr Al-Azzadi Al-Sijistani, *Sunan Abi Dawood*, (Modern Library, Sidon 1992) 2765.

³⁹⁹ Rahmanizadeh (n357) 42.

⁴⁰⁰ Ibid 42.

⁴⁰¹ Jaez, Azhar, Ahmad and Abdurhman(n 366) 1.

⁴⁰² Rahmanizadeh (n357) 42.

⁴⁰³ Mahmood Ahmad Gazi, *Zahir Riwaya Trans, Kitab Al-Siyar Al-Shaybani* , *The Shorter Book on Muslim International Law* (Adam Publishers and Distributors 2004) 40.

could break down and escalate into conflict, as explained previously with regard to the Quraish. Furthermore, there were some instances of tribes in Madinah failing to honour their pledges of mutual defence or paying the poor-due, and engaging in subterfuge against the commonwealth, which resulted in the treaties with them being declared null (e.g. some Jewish tribes of Madinah and the tribes who rebelled during the caliphate of Abu Bakr Al-Siddiq).⁴⁰⁴ Such instances involved parties considered to be under the auspices of Madinah, while ‘foreign’ envoys were treated according to customary regulations as protected persons in *Daar Al-Islam*.⁴⁰⁵

Indeed, clearly Sharia evidence indicates that the killing or maltreatment of diplomats is emphatically prohibited, according to the Sunnah of the Prophet Muhammad. Under the most egregious provocation, when Abu Musailama Al-Kadhab claimed prophet hood and half of Arabia,⁴⁰⁶ insulting the custodians of the Ka’abah,⁴⁰⁷ the Prophet Muhammad said he would have executed them was the killing of messengers not prohibited (in Sharia).⁴⁰⁸ It should be noted that while compatible with notions of the sovereignty of the Islamic state, courtesy, and international political pragmatism, the Sharia prohibition of harming envoys is based on the sanctity of their blood (i.e. their lives),⁴⁰⁹ and the Quranic injunction: “whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely”.⁴¹⁰

As such, harming diplomats is intrinsically prohibited, and against the Islamic principle of respecting promises and not breaking treaties with others.⁴¹¹ Furthermore, imprisoning or confining diplomats was prohibited by the Prophet.⁴¹²

These Quranic injunctions and hadiths are explicit references to the obligation to protect those given permissions to enter the Islamic state safely and who have a treaty with Islamic states, whether

⁴⁰⁴ Abu Jaafar, (n99) 239-250; Ismail bin Omar bin Katheer Al - Dameshqi Abu Fida Imad Eddin, Tafseer Ibn Katheer (Dar Taiba 1999) 344-360; Mohammed bin Ismail Abu Abdullah Al – Bukhaari, Sahih Bukhari, (1st end , Dar Taouq Al-Najat 1999) 2734; Abu Dawood Sulaiman ibn Al-Ash’ath ibn Ishaq ibn Bashir Al-Shajad ibn Amr Al-Azzadi Al-Sijistani, Sunan Abi Dawood, (Modern Library, Sidon 1992) 2765

⁴⁰⁵ Abdul Karim Zaidan, Islamic Law and Public International Law, (Rotterdam 2011) 169.

⁴⁰⁶ Abdul Malik bin Hisham bin Ayoub Al-Humeiri, Biography of the Prophet (Ibn Hisham), (Quran Science Foundation 1995) 601.

⁴⁰⁷ Al-Humeiri (n 406) 192.

⁴⁰⁸ Ibid 601.

⁴⁰⁹ Jaez, Azhar, Ahmad and Abdurhman (n 366) 1.

⁴¹⁰ Quran (Surah Al-Ma’idah 5:32).

⁴¹¹ Some scholars have argued that eternal treaties with non-Muslims are not allowed, with a portion of these specifying a maximum of 10 years, citing the example of Al-Hudaybiyah. However, Abu Hanifa (founder of the most popular Hanafi school of jurisprudence) refuted this view, stating that agreements with non-Muslims for a long term or permanent term are allowed. Ralph H. Salmi, Cesar Adib Majul, George and Kilpatrick Tanham, Islam and Conflict Resolution: Theories and Practices, (University Press of America 1998) 130-131.

⁴¹² Ashraf (n 367) 130.

they are non-Muslims resident in Islamic states or foreign people who come to visit the Islamic state and their ambassadors. Consequently, the question arises of why Islamic armed groups claim they are following Islam in their deeds and the killing of ambassadors, and whether the perpetrators of attacks on diplomats feel bound by Sharia when their victims are non-Muslims, as explored in the next section.

2.5.4 Modernist Reinterpretations ('Islamism')

As alluded to previously, the interpretations of Islamist terrorists who kill civilians and protected people are alien to the traditional Islam, and Sharia explained above. Insofar as they have a coherent ideology, they are adherents of the Wahhabi-Salafi trend of Islamic reform that rejects the historical experience of Islam and the time-honoured interpretations of the classical schools of jurisprudence.⁴¹³ This trend, which began in the desert wastes of Najd in the 18th century, was rejected by the inherited and established institutions of Islamic learning,⁴¹⁴ but it was supported and propagated by British (and later American) imperial interests to destroy the remnants of Ottoman civilization in the Middle East and later to deploy misguided Muslim fanatics in the service of great power wars against the Soviet Union. The trend of declaring historically Muslim states apostate was continued by Sayyid Qutb in the 20th century, which became the foundation of modern Islamist movements, including Al-Qaeda, wielded by Western powers as a reactionary and economically liberal club against the forces of socialism.⁴¹⁵ It is notable that Qutb's writing became popular during 1950, at the height of quasi-socialist pan-Arab nationalism under Nasser in Egypt.⁴¹⁶ According to Qutb, jihad is an *offensive* struggle: while this is not an entirely new idea, he popularized it, certainly in the modern context – for this reason he has been compared to Luther relative to Catholic civilization.⁴¹⁷

Fundamentalist Salafism (or Wahhabism) came to be known as associated with Qutb's writings in the 70's; along with the Shia equivalent pioneered by Ali Shariati during the Iranian Revolution, the concept of offensive jihad and murdering non-Muslims including diplomats – was promulgated.

⁴¹³ Samiul Hasan 'Islamic Jurisprudence: Sources and Traditions Creating Diversity in Human Relationships' In Samiul Hasan (eds), *The Muslim World in the 21st Century*. Springer, Dordrecht, (Springer 2012) 23.

⁴¹⁴ Trevor Stanley 'Understanding the Origins of Wahhabism and Salafism' (2005) 3 (14) 1.

⁴¹⁵ Ibid 1. Available at <<https://jamestown.org/program/understanding-the-origins-of-wahhabism-and-salafism/>> accessed 3 June 2017.

⁴¹⁶ 'A prominent member of the Muslim Brotherhood and regarded by many as the most important Islamist ideologue of modern times, Sayyid Qutb inspired with his writings an entire generation of jihadis including the future leaders of Al-Qa'ida' see Erich Ivierquardt and Christopher Heffelfinger, *Terrorism & Political Islam Origins, Ideologies, and Methods: A Counterterrorism Textbook* (2nd ed, Aclurm 2012) 48.

⁴¹⁷ Ibid 48.

A generation of disaffected youth in the moribund postcolonial dictatorships of the Arab world 'ardent for some distant glory' took up the idealistic clarion of this movement and were duly deployed in national and international military struggles.⁴¹⁸ Given that Qutb's writings were already considered very influential in the late fifties and sixties, the Iranian revolutionaries would have almost certainly been aware of them.⁴¹⁹ Indeed, despite the pathological hatred and intolerance of Sunni and Shia Islamists, they have a notable tolerance for Ali Shariati and Sayyid Qutb, respectively. Indeed, the current Ayatollah Khamenei translated the works of Qutb's into Persian, and is thought to be highly influenced by them.⁴²⁰ The revolutionary generation of the 1970s is now in positions of power and influence throughout the Middle East.⁴²¹

Do the perpetrators of attacks on diplomats feel bound by Sharia when their victims are non-Muslims?

The murder of Stevens and his colleagues in the US Consulate in Benghazi was a crime committed in the name of Islamic jihad against non-Muslims. However, these actions were in violation of classic norms of Islamic jihad for many reasons, most notable of which is that jihad must be declared by properly instituted and authoritative states, not by individuals or groups – clearly, if it were left to individuals to declare war society would be in chaos. Furthermore, war does not abrogate the absolute responsibility to protect diplomats – rather it underscores its importance as conducive to the ultimate eponymous goal of Islam – 'Peace'. Furthermore, it is not possible to wage war against a non-Muslim country where Muslims can freely practice their religion, as can those Muslims in the US.⁴²²

Conversely, some analysts view Islam as an inherently belligerent and terrorist religion that poses an existential threat to Western neoliberal civilization;⁴²³ such views form the mainstay of sensationalist media reportage on Islam and Middle East conflicts, and remain popular in some

⁴¹⁸ Luke Loboda, *The Thought of Sayyid Qutb, Region* (PhD thesis, University of Ohio 2009) 3; Martin Kramer 'Fundamentalist Islam at Large' in Martin Kramer (ed) *Arab Awakening and Islamic Revival*, (Transaction Publishers 1996) 37.

⁴¹⁹ Nicole B. Carroll 'What is to be done?' *Contesting Modernity in Sayyid Qutb and Ali Shariati's Islamic Revival* (2017) Senior Projects Spring 338; Al-Arabiya 'The story of a picture reveals the secret of the relationship of the "pole" of the Brotherhood and deputies of Khomeini' Al-Arabiya (Saudi Arabia 17 March 2017). Available at <http://www.alarabiya.net/ar/arab-and-world/Egypt/2017/03/16/> Accessed 3 July 2017.

⁴²⁰ Carroll (n420) 338; Erich Iviequardt and Christopher Heffelfinger, *Terrorism & Political Islam Origins, Ideologies, and Methods: A Counterterrorism Textbook* (2nd ed, Aclurm 2012) 85.

⁴²¹ Alex Alvarez and Ronet Bachman, *Violence: The Enduring Problem*, (3rd ed, Sage Publication 2017) 28; Daniel Hayes 'Does Islam Really Say It's Okay to Kill People or Is That Just One Interpretation?' (Nov 2015). Available at <http://tcat.tc/1WZsSbI> accessed 3 Oct 2017.

⁴²² Ismail, (n 341) 153-156.

⁴²³ John L. Esposito, *The Islamic Threat: Myth or Reality?* (Oxford University Press 1999) 286.

academic circles, although the heyday of this paradigm was when it was highly conducive to US foreign policy interests during the 2000s. More tempered analyses acknowledge that modern jihadism is a relatively late development and that one of the great spiritual traditions of world history is not a maniacal death cult.⁴²⁴ Furthermore, the ICJ itself acknowledged that the tradition of Islam contributes along with other religions to the broadening of rules of contemporary public international law on diplomatic and consular inviolability and immunity.⁴²⁵ Although there are ideologues of the view that law has no religion, and that Islam, in particular, should be denied any traction in legal discussions,⁴²⁶ however for pragmatic reasons it is necessary to acknowledge that Islam exists as a geopolitical force.⁴²⁷

2.6 Diplomacy in the Historical Islamic States

2.6.1 Diplomacy under the Rightly-Guided Caliphs (c. 632-661 AD)

As noted previously, the Islamic laws of war are broad yet humane considering treatment of combatants and civilians. They also cover the treatment of crops and farm stock. Modern principles of international public law in the arena of international affairs and warfare are closely resembling of traditional Sharia, and the original Arab-Islamic nation took cognisance of the principles.

The early Islamic state was well aware of duties under treaties as required under Islamic doctrine.⁴²⁸ The Caliphs Abu Bakr granted safety to, those who had a treaty with Islamic states, were told by him in his farewell speech that he had instructed Yazid ibn Abu Sufyan (one of the founders of the Umayyad dynasty) when he led a military expedition to Syria: “in case envoys of

⁴²⁴ Quran surah Al Baqarah (2:190). Indeed, elemental and unambiguous verses of the Quran deplore warfare in general: ‘Fight those in the way of God who fight you, but do not be aggressive: God does not like aggressors’

⁴²⁵ The ICJ in the Case concerning United States Diplomatic and Consular Staff in Tehran stated that ‘the principle of the inviolability of persons of diplomatic agents and the premises of diplomatic mission is one of the very foundations of this long established regime of diplomatic law to the evolution of which the tradition of Islam made a substantial contribution’ see Barker (n 3) 85 ;Mark W. Janis, Carolyn Maree Evans, Religion and International Law, (Kluwer Law International 1999) 100; Ismail, (n 399) 1.

⁴²⁶ Janis (n426) 100.

⁴²⁷ As Judge Christopher Gregory, a former judge and vice-president of the ICJ, noted with reference to the Case concerning the United States Diplomatic and Consular Staff in Tehran, non-Muslim countries need to understand Islamic attitudes regarding the war and peace, and the history and culture of Islam, as a prerequisite to engaging with Muslim countries in law and international relations. He confirms there was a lack of understanding of the Sharia among Western scholars and noted that Sharia is rich in principles regarding the treatment of foreign embassies and personnel. See Ismail, (n341) 1.

⁴²⁸ For example, the letter of Abu Bakr (the first Caliph and direct successor to the Prophet Muhammad) wrote to his soldiers ordering them not to breach their treaties, not to lie and to be faithful in everything: ‘Let there be no perfidy, no falsehood in your treaties with the enemy, be faithful in all things, proving yourselves upright and noble and maintaining your word and promises’ Ibid 9.

the adversary come to you, treat them with hospitality”⁴²⁹.

In 638 CE, when the second Caliph Umar Ibn Al-Khattab contracted a treaty with the rulers of Jerusalem, and assured safety [*aman*] for not just the lives of people of Jerusalem but also their property. They also were given the freedom to practice their religion and assured they would not face forcible conversion. Neither would their churches or crosses be harmed.⁴³⁰

This era witnessed many diplomatic meetings between the Muslim and non-Muslim states. Saad ibn Abi Waqqas (595-664 AD), who went to China, sent by the Prophet Muhammad was sent again in the year 651 AD as the head of a Muslim delegation to the Chinese Emperor, Gaozong of Tang, dispatched by Uthman Ibn ‘Affan (579- 656 AD), the third Caliph.⁴³¹

2.6.2 Diplomacy in the Abbasid Caliphate (c. 750-1258 AD)

The Umayyad state (c. 661-750) was characterised chiefly by an aggressive expansion policy with neighbours (extending the Arab-Islamic empire to Iberia in the West and Sindh in the east), but it did have conventional diplomatic relations with states further afield. For instance, it was reported that the eighth century saw over thirty missions from the Muslim state to the Chinese Empire.⁴³² However, a sea change was marked by the increasing sophistication of the Abbasid state,⁴³³ particularly with its policy of regional autonomy and decentralisation inaugurated by Harun Al-Rashid (786-809 AD), one of the influential Caliphs of the Abbasid era who wrote the book on statecraft *Al-Kharaj* (‘The Treasury’). This tome is still a valuable reference when issues of foreign relations are considered under Sharia.

During the Abbasid period, the primary purpose of the Islamic state’s relationships with other nations was to regulate peaceful commerce, as the task of defending frontiers was delegated mainly to local governors who became semi-independent dynasties (e.g. the Ghaznavids in Central Asia).⁴³⁴ The locus of Islamic civilization shifted indelibly to the East from this time.⁴³⁵ Diplomats

⁴²⁹ Arjoun, Sadiq Ibrahim, Khalid Ibn Al-Walid, (Al-Dar Alsaudiah 1981) 244.

⁴³⁰ Hamilton and Langhorne (n 151) 7.

⁴³¹ JN Lipman, Familiar Strangers: A History of Muslims in Northwest China (University of Washington Press 1997) 25-29.

⁴³² M Nasser-Eddin, Arab Chinese Relations, (PN 1989) 15.

⁴³³ Hilmi M. Zawati ‘Theory of War in Islamic and Public International Law’ (2015) International Centre for Legal Accountability and Justice 78; Syed Ameer Ali, A Short History of the Saracens: Being a Concise Account of the Rise and Decline of the Saracen Power, (Taylor & Francis 2004) 622.

⁴³⁴ Zawati (n 434) 78; Ali (n 434) 622.

⁴³⁵ Being concentrated in Greater Persia and India, although the remote outpost of Islamic Spain played an important intellectual role in science and jurisprudence, providing the bedrock for the later development of the European Renaissance. While this period saw brutal religious wars in many instances, the more common

were exchanged during this time for a variety of political, commercial and social purposes, including merely exchanging valuable gifts, such as the famous exchanges between Harun Al-Rashid and Charlemagne.⁴³⁶

The Abbasid Period witnessed an expansion of the relationships with others and enacting treaties with other states; many peace agreements were arranged, albeit this was part of the Abbasid grand strategy of isolating the Umayyads in Spain⁴³⁷ and squeezing the Byzantines in the Levant and the Mediterranean.⁴³⁸ The later Abbasids also played a dangerous diplomatic game of divide and rule in Central Asia with numerous Turkic dynasties, who in turn sent their own diplomats to Baghdad to engage in various intrigues.⁴³⁹ The subversion of diplomacy by ill will ultimately destroy these polities: attempts to deceive the Mongols by a Muslim trading mission were tolerated, but subsequently, the outrageous mistreatment of a Mongol delegation by a Khwarazmian governor in Otrar led to the Mongol invasion and destruction of classical Islamic civilization in Central Asia during the 13th century.

However, aided partly by refugees from this disaster, Islamic civilization flourished in India and Southeast Asia from this time. By the 13th century, Muslim merchants (mainly from Yemen, Kuwait and Gujarat) had established their guilds in the south eastern geographic area directing much of China's maritime trade. In fact, the Muslim population which was made up of traders from diverse ethnic backgrounds, were crucial players in the linking of China's markets to those in the Mediterranean.⁴⁴⁰

The 13th and 14th centuries were a watershed in Asian and world history. The Mongol empire's emergence in Asia and Eastern Europe, plus the forming of Islamic states in southern Asia, as well as the growth in commerce in the Indian Ocean and Mediterranean gave rise to the formation of complex political, religious, and commercial networks that linked the Far East to Europe. The significant political transformation was also taking place in southern Asia at this time.⁴⁴¹

reality was protracted peaceful contacts, particularly in the Mediterranean, after the recapture of Spain and Sicily by the Crusaders. See Ashraf (n 369) 22-24.

⁴³⁶ SA El-Wady Romahi, *Studies in International Law and Diplomatic Practice*, (Data Labo Inc 1981) 302.

⁴³⁷ Zawati (n434) 78.

⁴³⁸ Khadduri (n 356) 454.

⁴³⁹ Hamilton and Langhorne (n 151) 26.

⁴⁴⁰ Tansen Sen 'The Yuan Khanate and India: Cross -Cultural Diplomacy in the Thirteenth and Fourteenth Centuries' 19(1-2) (2006) *Academia Seneca* 299.

⁴⁴¹ *Ibid* 299.

In the 13th century, the Moroccan traveller Ibn Batuta reached the banks of the Indus River. Ibn Batuta was given a civil role and was well looked after life at the court of Muammad. Tughluq (the ruler of the Delhi Sultanate in northern India). In 1341, Ibn Batuta was appointed as an ambassador of the Delhi Sultanate, and was sent with fifteen members of the Yuan court's embassy to the Sultanate on their return trip to China accompanied with "a bounty of gifts, including slave girls, velvet cloth, musk, a jewelled robe, embroidered quivers, and swords". Ibn Batuta's account of this mission to China gives us much information about diplomatic and commercial relations between the Delhi Sultanate and China, as well as the Yuan court's maintained interest in keeping close trading ties with India, and the sheer scale of maritime trade and diplomacy between India and China in the fourteenth century. The life of the ambassadors was not safe in these times as they were at risk of being killed or taken prisoner. For example, Ibn Batuta when sent on another north Indian diplomatic mission to the Yuan court, but before the mission reached Cambay, Hindu insurgents murdered many in his mission, and Ibn Batuta himself was robbed and captured but managed to escape and reached China.⁴⁴² Ibn Batuta's journey, though a failed mission, gives us an important information about the unsafe passage of diplomats between northern India and China.⁴⁴³

In the early part of the fourteenth century, Muslim forces entered the Deccan region and southern India, initially establishing small outposts but, in 1347, established the Bahaman Sultanate (1347–1527).⁴⁴⁴

2.6.3 Diplomacy in the Ottoman Empire (c. 1260-1922 AD)

The Ottomans arose in about 1260 and ultimately survived from the middle ages to the 20th century, playing a major role in global history in the process.⁴⁴⁵ The Ottoman Empire was the most recent manifestation of a recognisably Islamic state.⁴⁴⁶

In terms of diplomatic history, the Ottomans had particular relationships and protocols with certain powers. For instance, in the 15th century, only French envoys were allowed to communicate oral information from their King to the Sultan; this included diplomatic correspondence, and the Sultan did not accept communications from other Christian states. For example, in the early 16th century

⁴⁴² Ibid 299.

⁴⁴³ Ibid 299.

⁴⁴⁴ Ibid 299.

⁴⁴⁵ Ibid 299.

⁴⁴⁶ Ibid 192.

populist fanaticism was so influential in the Papal States that the See of Rome could not conduct relations with the Sultan or send a written letter by the envoy to him.

In the 15th century and after the conquest of Constantinople the Ottoman Empire started to open to Europe and receive the European ambassadors. There were resident ambassadors from France (1535), England (1553) and the Netherlands during the 16th century, seen as preferable trading partners to the crusading Spaniards and Portuguese. These foreign ambassadors who were received by Ottomans were granted immunity and privileges. However, the Ottoman state did not send ambassadors to foreign countries until the 17th century when it sent its first residential diplomatic mission.⁴⁴⁷ The Ottoman Empire's relationships were limited to states viewed to be of equivalent status; during the 15th and 16th centuries the Ottoman Empire did not send ambassadors to Vienna, as the Austrian Emperor's status was considered lower than that of the Ottoman Sultan; clearly this hubris was detrimental to the conduct of diplomacy, which may partly explain the perpetual warfare between those states during this period.⁴⁴⁸

Beginning in the 16th century, the Muslim world saw a time of relative political consolidation. The largest and most influential Muslim empire of its time viewed from the historical path of international law was the Ottoman Empire, which had a 500-year reign in Eastern Europe and the Middle East.⁴⁴⁹ The Ottoman Empire was a crucial player in shaping the European political map in the 16th and 17th centuries and indeed was able to keep its unique diplomatic character until the end of the 18th century. Although diplomats had no formal education nor attended a specific diplomatic training institution, a more informal diplomatic protocol and tradition developed during the period.⁴⁵⁰

The lack of Ottoman residential ambassadors in major European capitals until the end of the 18th century is often cited as proof of negligence by the Ottomans when it came to diplomacy. However, it is more accurate to view Ottoman methods as a synthesis of abstract Islamic principles with "Ottoman realpolitik". In other words, they made their own diplomacy principles following Islam's

⁴⁴⁷ Thomas Naff, 'Ottoman Diplomatic Relations with Europe in the Eighteenth Century: Patterns and Trends', in Thomas Naff and Roger Owen, *Studies in Eighteenth Century Islamic History*, (Southern Illinois University Press 1977) 95.

⁴⁴⁸ Ibid 55.

⁴⁴⁹ Niaz A. Shah 'The Use of Force under Islamic Law' (2013) 24 (1), EJIL 343. Available at <doi:10.1093/ejil/cht013> accessed 1 June 2017.

⁴⁵⁰ Bitlent Arr 'Early Ottoman Diplomacy: Ad Hoc Period', in A. Nuri Yurdusev, *Ottoman Diplomacy Conventional or Unconventional?* (Palgrave Macmillan 2004).41.

pillars. They were the only medieval Muslim nation to have had the experience of close contacts with European powers, be the contacts peaceful or otherwise. Since founding a small principality, Ottomans were surrounded by Muslim and non-Muslim rivals, and they were continually confronted with Crusader attacks along with natural enemies from their own belligerence. The prohibition of forming alliances with the Ottomans promulgated by the Church diplomatically isolated Turkey from Catholic powers and this was a constant worry for Ottoman statesmen. It was for this reason, that they could not ignore the power-balance in the area and good diplomacy was deemed vital in the conduct of relations with the nations of Europe. Even at the height of Ottoman military power during the reign of Suleiman the Magnificent, they did not only rely on brute force, but cultivated allies in the Christian world, particularly France, which it leveraged against the Holy Roman Empire (the forerunner of modern Germany).⁴⁵¹

Like all aspects of the Ottoman state, Ottoman diplomacy was based on Sharia,⁴⁵² extrapolated to international relations with non-Muslims. These covered conditions of war, peace and truce.⁴⁵³ Diplomatic relations of the Ottoman Empire with other nations were generally cordial, although prior to the 18th century they were conducted on an ad hoc basis.⁴⁵⁴ Ottoman treaties were generally for limited terms and framed within the classical paradigm of *Daar Al-Harb* and *Daar Al-Islam* explained previously. From the 18th century onwards, however, the relative strength of the Ottoman Empire fell behind relative to European powers, as a result of which the empire imitated Western standards of diplomacy (as well as other things). By the 19th century, the diplomatic conduct was shaped entirely by the major European States. Following the Paris Conference in 1856, the European nations considered the Ottomans fit to benefit from their public law, but this ended the unique ‘Ottoman’ diplomacy. As Europe had its own diplomatic traditions, the Ottomans had no choice but to accept them.⁴⁵⁵

This laid the foundations for the Ottoman Empire to develop into a modern European nation state, which was manifest in increasing Turkish nationalism culminating in the ethnic cleaning of the Ottoman *dhimmi*s throughout former Ottoman provinces. This was analogous to the way nationalism was transplanted to South Asia, resulting in millions of deaths during the Partition of India in 1947. In both cases, expelling protected, covenanted minorities is in direct contradiction

⁴⁵¹Ibid 37-39.

⁴⁵² Ibid 36.

⁴⁵³ Ibid 40.

⁴⁵⁴ Ibid 36.

⁴⁵⁵ Ibid 36.

to Sharia. In addition, current Muslim states are all members of the UN, and the 1945 Charter of the UN prohibits the threat or use of force except in self-defence, a rule which has now acquired the status of customary law. Muslim states could not have adhered to this rule had Sharia required them to partake in offensive jihad.⁴⁵⁶ Even in the most expansionist phase of the Ottoman Empire, its court scholars could only attempt to justify military aggression on one of two bases identified from the Quran by Mawdudi: (a) to preserve the Muslim nation from elimination; and (b) to liberate oppressed Muslims/ people not free to practice Islam.⁴⁵⁷ The traditional dichotomy of the *Daar Al-Islam* and *Daar Al-Harb* ended with the last gasp of the Ottoman Empire in the 1920s.⁴⁵⁸

In the 19th century when the European nations adopted territorial sovereignty, the normative framework made by Muslim jurists was largely abandoned even in Muslim-majority states. However, certain ethical values of older Sharia, such as the universal brotherhood of Muslims, continued to have great emotive appeal among grassroots Muslims of the time, as seen by the existence of international Islamic organizations like the Organization of the Islamic Conference (OIC). Muslim jurists operating in the normative field of what was older Sharia, did however, make small yet essential steps in reconciling the norms of modern international law to those of pre-modern Islamic international law.⁴⁵⁹

In the mid-20th century Muslim jurists declared that *Daar Al-Harb* had no normative significance, and argued it was only an empirical category with jihad only being authorized against actively hostile non-Muslim states. The increase in international law and its institutions like the UN that claimed to guarantee the independence of all states, secure self-determination of all those previously colonised, and protect human rights, majorly changed the political world in which Muslims found themselves. This difference in the international environment, according to these jurists, meant that war and conquest was no longer the default rule in international relations but rather was it one where peace and friendship was the new the default rule. Consequently, according to this view, Islam could fulfil its global aspirations attained from international guarantees of religious freedom and commitment from non-Muslim states to keep a neutral stance with respect to Islam. In summary,

⁴⁵⁶ Shah (n 450) 343.

⁴⁵⁷ Ibid 343.

⁴⁵⁸ It was replaced by Muslim-majority postcolonial nation states that were consciously sectional; the pan-Islamism of the Ottomans gave way to a plethora of nationalisms in the former Ottoman territories (e.g. Turkish, Arab, Kurdish, Zionist, Greek, and Albanian etc.) and a spate of ethnic cleansing as a result. Mohammad Fadel 'International Law, Regional Developments: Islam' (2010) Max Planck Encyclopaedia of Public International Law, 1. Available at <https://www.law.utoronto.ca/documents/Fadel/Max_Planck_Final.pdf> accessed 22 June 2017.

⁴⁵⁹ Ibid 1.

according to the theologians and jurists, any state committing itself to provide Muslims with the freedom to practice their religion and allowed the freely accessible teaching of Islam could not be considered part of *Daar Al-Harb*.⁴⁶⁰

2.7 Diplomacy and Diplomatic Protection in the 21st Century

Attacks on diplomats were outlawed by Sharia and international norms long before they were proscribed by international law.⁴⁶¹ Over a long period of time, Islamic countries have signed agreements and treaties with non-Muslim countries. These agreements have included many obligations, rules, conditions and principles in a manner that represents an evolution of diplomacy in Islamic international law.⁴⁶² The diplomat of another state (which has a treaty with a Muslim country) who enters an Islamic state with the permission of a state should be granted *aman* (protection). However, the archaic and general term *aman* has been replaced with the clearly delineated responsibilities of ‘protection’ in the 21st century.

The vast corpus of Sharia was jettisoned by postcolonial regimes in the Muslim world, along with the Islamic principles and doctrines explained at length previously. Despite nominally regarding Sharia as a source of legislation, political entities in many Muslim countries (e.g. Iran and Libya) encourage populist Islamism and anticolonial sentiments to violate Sharia norms, which has effects ranging from the prohibited denigration of and attacks on diplomats and diplomatic premises to murder and other terrorist activities.⁴⁶³ In most Muslim-majority countries the incumbent governments are effectively pro-Western, but Iran officially adopts Sharia, and the Islamic Republic has been latently hostile to the West since its inception.⁴⁶⁴

Libya signed several international treaties binding on the protection of diplomats and the *Treaty of Amity with the US* (1796), which remains in force *de jure*.⁴⁶⁵ According to Article 11 of this Treaty, the two parties, declared that the harmony between the two countries should be interrupted because of religious views.⁴⁶⁶ The two countries agreed that no pretext arising from religious

⁴⁶⁰ Fadel (n 459) 1.

⁴⁶¹ Ismail (n 3439) 2.

⁴⁶² Shah (n 450) 343.

⁴⁶³ Suleiman Ibrahim, ‘Titutitionalising Sharia: The Challenge Facing Libya’s Constitutional Drafting Assembly’ Constitution Net (24 July 2014). Available at <<http://www.constitutionnet.org/news/constitutionalising-sharia-challenge-facing-libyas-constitutional-drafting-assembly>> Accessed 3 July 2017.

⁴⁶⁴ MashoodA. Baderin, *International Law and Islamic Law*, (Routledge 2016) 158.

⁴⁶⁵ The Barbary Treaties 1786-1816, Treaty of Peace and Friendship, Signed at Tripoli November 4, 1796.

⁴⁶⁶ “As the government of the United States of America is not in any sense founded on the Christian Religion, - as it has in itself no character of enmity against the laws, religion or tranquillity of Musselmen, - and as the said

opinions would ‘ever produce an interruption of the harmony existing between the two countries’. Also, Libya joined the Vienna Convention on Diplomatic Relations 1961, and it on 7 June 1977.⁴⁶⁷ This means that Libya has agreed to grant diplomats immunity and privileges according to international law and Sharia, as explained earlier.

The breach of the Convention and the targeting and killing of diplomats was clearly affected by popular discontent and political tension between the states, which are the underlying threats to the safety of diplomats in MENA generally. The main duty of diplomats is to strengthen the relationships between sending and receiving states, which has been rendered particularly difficult by political developments since 9/11. US foreign policy (and the powerful interests that shape it) has been anchored in facing the ‘threat’ of Islamist terrorism and by extension MENA and its people in general, which has naturally caused a reflexive suspicion and hatred of Islam, Muslims and Muslim-majority states, and a corresponding escalation in antipathy toward the US and the local regimes perceived to be its stooges.⁴⁶⁸ In the 21st century, the relationships between Islamic states (i.e. MENA) and Western countries are structured on the basis of fear and mistrust.⁴⁶⁹

This was acknowledged in 2009 by President Obama.⁴⁷⁰ In a speech delivered at Cairo University, he cited passages of the Tripoli Agreement signed by President John Adams, he noted that the history of US amity with the Muslim world had been badly damaged.⁴⁷¹ Regardless of the general political implications and reasons for this impasse, the lives of diplomats have been critically at risk since 9/11, and particularly since the US-led invasion of Iraq in 2003. As mentioned in Chapter 1 of this thesis, diplomats have faced different kinds of attacks in MENA, including murder, kidnapping and hostage taking. The particular attack on Stevens in Benghazi in 2012 was contemporaneous with the backlash against a private film made in the US gratuitously insulting the Prophet Muhammad as explained in Chapter 1, although the official US report subsequently claimed that the event was not related to this film.⁴⁷² Logistically, the attack was planned by militant groups with Al Qaeda ties.

States have never entered into any war or act of hostility against any Mehomitan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries”.

⁴⁶⁷ Available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&Lang=en> Accessed 3 May 2017.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

⁴⁷⁰ BBC Arabic ‘Obama’s speech in Cairo’ BBC Arabic (Cairo 4 June 2009). Available at <http://news.bbc.co.uk/hi/arabic/news/newsid_8084000/8084126.stm> Accessed 2 June 2017.

⁴⁷¹ BBC Arabic ‘Obama’s speech in Cairo’ BBC Arabic (Cairo 4 June 2009). Available at <http://news.bbc.co.uk/hi/arabic/news/newsid_8084000/8084126.stm> Accessed 2 June 2017.

⁴⁷² Spencer C. Tucker, *US Conflicts in the 21st Century: Afghanistan War, Iraq War, and the War on Terror*, (Greenwood Press 2015) 155.

This occurred when Libya was s⁴⁷³⁴⁷⁴ In August 2013, the US government filed numerous charges against as yet unnamed participants. In the attack and in June 2014 US Special Forces apprehended the Ansar Al-Sharia leader Khattala in Libya. He was charged with masterminding the attack, although he denies any involvement in it. In November 2014, after two years of hearings and investigation, the Republican- led House Select Committee confirmed that there was no security failure prior to the event and appropriate correspondence by the US military and CIA.⁴⁷⁴

While those who attacked the US diplomats in Libya clearly based their actions on a populist anti-American hysteria, clearly, they were acting contrary to the dictates of Islamic law; just as errant Buddhist monks, attacking Rohingya people are violating the most basic precepts of Buddhist law. Aside from the ideologues of terrorist groups, authoritative Islamic scholars in the 21st century are unanimous in outlawing attacks on diplomats, regardless of the religious ideation of those individuals or their sending states.⁴⁷⁵ They reiterated this position in a fatwa issued in direct response to the murder of Stevens in Libya, citing the Quran, Sunnah and practice of Rightly-Guided Caliphs to confirm the prohibition of killing diplomats and attacking embassies, as articulated in Ibn Al-Qayyim's rulings on the people of *dhimmah*.⁴⁷⁶ Indeed, any non-Muslim not actively engaged in militant hostility is to be safeguarded and conveyed to safety according to Sharia, particularly if any Muslim accords that person a promise of safety; this was even applied to slaves, for whom there are extensive specific regulations in Sharia.⁴⁷⁷

The intrusion of foreign embassies and harming their diplomats and employees is not permitted under any circumstances, and this is an infringement against people who have entered safety.⁴⁷⁸

⁴⁷³ Ibid 155.

⁴⁷⁴ Ibid 156.

⁴⁷⁵ Ruling (Fatwa) on killing ambassadors of kaafir states no 187875 (4 October 2012). Available at <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=187875> accessed 2 June 2017.

⁴⁷⁶ Ruling on a threat a person (diplomats) who is guardian by an illegal guardian No 187875 (4 October 2012). Available at <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=187263> accessed 20 June 2017.

⁴⁷⁷ Ruling on a threat a person (diplomats) who is guardian by an illegal guardian No 187875 (4 October 2012). Available at <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=187263> Accessed 20 June 2017.

⁴⁷⁸ Ruling on a threat a person (diplomats) who is guardian by an illegal guardian No 187875 (4 October 2012). Available at <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&Id=187263> accessed 20 June 2017.

Where there are grievances against foreign states there are particular channels whereby Muslims should lodge their protests – from verbal advice and remonstrance to the declaration of war by states – but it is absolutely forbidden for individual Muslims to take it upon themselves to violate the rights of others, particularly protected minorities and diplomats. It should be noted that Sharia is fundamentally instituted to safeguard five fundamentals of human rights: religion/ faith (*din*), life (*nafs*), lineage/ progeny (*nasl*), intellect (‘*aql*) and property (*mal*)⁴⁷⁹ ”And whatever [wrong] any human being commits rests upon himself alone, and no bearer of burdens shall be made to bear another’s burden”.⁴⁸⁰

In 2013, the Grand Mufti of The Kingdom of Saudi Arabia and head of the Supreme Council of Scholars, Sheikh Abdul-Aziz Al-Sheikh, issued a lengthy statement to warn against the danger of the method of atonement, and he warned against the killing of diplomats.⁴⁸¹ Furthermore, the Supreme Council of Scholars in Saudi Arabia condemns the ‘assassination of ambassadors’ and described it as a major sin.⁴⁸²

Muslim scholars warning Muslims from joining militant Islamist groups and agreed to the prohibition of their behaviour, convictions and seriousness.⁴⁸³ These groups are conventionally referred to as ‘*takfiri*’ in Arabic, which means they declare mainstream Muslims to be apostate. This is the core of the problem, as for the deluded fanatics who join these groups for numerous complex socioeconomic, psychological and personal reasons, the mainstream scholars of Islam (and the governments they often represent) are apostates, and they reject normative Islam itself as inherited from traditional Islamic civilizations as a corruption of an imagined pristine and puritanical form of archetypal Islam.

Islamic principles, Sharia, and international law unanimously affirm the protection of diplomats and forbid terrorism in general, which is why most Muslim states are signatories to the Vienna

⁴⁷⁹ Ibid.

⁴⁸⁰ Quran Al-An ‘am (The Cattle) - 6:164

⁴⁸¹ Al-Arabia ‘Mufti of Saudi Arabia: No to atonement and Kill the People under Covenant with Muslim and the People of Dhimmi’ Al-Arabia (17 September 2013). Available at <http://archive.arabic.cnn.com/2013/middle_east/9/17/mufti_saudi/index_x.html> Accessed 27 May 2017.

⁴⁸² [I]t is not permissible under any pretext to kill the foreign people (meaning diplomats), and it is forbidden to celebrate this killing... [it] is more sinful if the targeted ambassador represents his state in the Muslim countries. The safety of the diplomats is one of the strongest types of security in Islam. The legalization of the guarantees of diplomatic immunity is based on firm rules of legality that are valid for all time and place, based on the inviolability of blood in Islam]. See RT ‘the Supreme Council of Scholars in Saudi Arabia denies the "assassination of ambassadors" and describes it as the biggest sin’ RT (22 December 2016) Available at <<https://arabic.rt.com/news/855545>> Accessed 4 June 2017.

⁴⁸³ Ibid.

Convention as well as conventional international agreements in line with the UN. This has often involved renewed interpretations of Islamic principles on the protection of diplomats and aligning them with the modern international law, as seen in the various statements from Muslim leaders and scholars.

Furthermore, in the 21st century there are changes in the way of conducting diplomacy between states, with the increasing capabilities of modern communications technology offering great and largely untapped sources of diplomatic activity. Technology can play an important role in facilitating the tasks of diplomats and strengthening relationships between states. Developed countries successfully embodied the technology in diplomatic relationships while developing countries such as Libya still have insufficient experience and understanding of how to embody technology in the diplomatic field. An increasing role for e-diplomacy in redrawing the relations between states cannot be avoided, including safeguarding the lives of diplomats, as explained in detail in the next chapter.

2.8 Conclusion

Diplomacy has been manifest in many different forms over the years, but it has always existed since the first human civilizations in the ancient Near East, India and China. It has changed in terms of meaning, language, function, purpose, a method of appointing envoys, and mechanisms for conduct.

The inviolability of diplomats remains important. Such inviolability is governed by two principles. There is the principle of reciprocity and that of personal inviolability. The latter regarded a diplomat as a holy person. This idea was taken from religion. The former principle meant that an envoy would be safe if nothing happened to his counterpart, given that such personnel were typically from the ruling oligarchy, and sometimes from the royal family (although usually when compelled, in a hostage scenario of international relations).

The sacred nature of the diplomat has undergone a change in rationale but not in substance. The ancient Greeks regarded the envoy as a sacred person because of his associated with Hermes, but in the modern world the diplomat is sacred because he represents the state, which in turn represents the markets. Thus ordinary citizens may be considered collateral damage, but the envoy remains a sacred cow in the modern international system; the reason why the life of a soldier is basically considered fair game while that of an ambassador representing a combatant nation or arms companies is sacrosanct is a question for moral philosophers, but it certainly shows that the

fundamental importance of the diplomat has not changed, although his (or her) role has.

Modern diplomacy remains a continuation of that practised in ancient states, if for no other reason than that states have historically needed to communicate with each other. Although they fundamentally sought self-preservation and peace, the international system of diplomacy has often failed, claiming many millions of lives in the process; however, although the failures of diplomacy are spectacular in magnitude and horror (e.g. WWII), the everyday successes of diplomacy in averting war and destruction have gone unsung.

The meaning of diplomacy has developed from being limited to states only to include non-state organizations. Furthermore, the languages of diplomacy have changed (e.g. since the 18th century French and Persian have faded in importance and prestige in diplomacy while English has become hegemonic). In addition, the number of people who conduct diplomacy has increased; a diplomatic mission typically includes a ceremonial figurehead – often a Secretary of State or a member of a royal family – with a cohort of professional diplomats conducting the real legal work of diplomacy behind the scenes. As governments have become more responsive to markets (and correspondingly number to the influences of tradition, monarchy and religion), so diplomacy has correspondingly come to be much more heavily affected by economic concerns and less by ideological considerations.

The fundamental change in diplomacy since the Second World War has been due to technology, which has made communication immeasurably simpler, and which has reduced the need for diplomats in fundamental and overt communications between states. Due to its association with refined etiquette and procedures, diplomatic corps and activities are a bastion of traditional forms and modes of conduct; thus complex legal arrangements in international treaties made by lawyers are symbolised by Presidents or Ministers signing international diplomatic agreements with fountain pens in leather-bound ledgers.

However, the real and immediate need for diplomacy has always been tied in with technology. A watershed moment in the transition from traditional to modern diplomacy was Neville Chamberlain's famous radio speech announcing the commencement of the Second World War in 1939 as a consequence of not receiving word in response to 'a final note' handed to them by 'the British Ambassador in Berlin... stating that unless we heard from them by 11 o'clock that they were prepared at once to withdraw their troops from Poland a state of war would exist...'⁴⁸⁴

⁴⁸⁴ BBC Archive 'The Transcript of Neville Chamberlain's Declaration of War' BBC Archive (London 1939).

This case is interesting in numerous respects; the government had been preparing for war for months, yet the extremely traditional procedure of the ambassador in Berlin handing a paper missive to the German Government was used to declare war. The German Government accepted the ultimatum of war in the action of not responding to the note. This was then relayed to London (by telegraph or telephone) and the Prime Minister then communicated the outbreak of war to the nation (and Empire) by the most commonly accessed technology at the time, 'wireless' (radio). The Second World War thus began with one diplomat handing a piece of paper to another in Berlin, and ended with atomic bombs.

In some respects, the advance of communications technology has rendered diplomacy more public, but in others, it has reduced the machinations of the professional diplomat to attendance at state dinners and covert and potentially shady business facilitation. This research has found that although even states that considered themselves superior to others, such as the Roman or Chinese empires, these countries still maintained diplomacy for economic purposes, and this remains the case today.

Chapter 3: E-Diplomacy: A New Way of Conducting International Diplomacy

3.1 Introduction

“Communication is to diplomacy as blood is to the human body”, and there has never been a good diplomat who was a bad communicator.⁴⁸⁵ Diplomacy is still primarily conducted between the national governments of each state, because they hold the keys to the law and power that enables things to happen; and the most vital discussions are still conducted on a face- to- face basis, as this is seen as the most appropriate way to establish the level of trust allowing high-level decisions to be taken.⁴⁸⁷⁴⁸⁶ However, technology has always played a role in international relations. The invention of new technological devices (e.g. transport and telecommunications) has meaningfully affected the procedure of diplomacy.⁴⁸⁷ One of the important effects of the IT revolution is “that diplomacy has lost its position as the main facilitator of contact and communication across state boundaries”.⁴⁸⁸ Another effect is that “the ease of relaying instructions has circumscribed the actions of diplomats”. Moreover, direct contacts between national leaders has increased in frequency with the advance in communications. “Shuttle diplomacy” among domestic politicians and leaders has become a common feature in many circumstances. George Ball, a senior US diplomat, lamented that jet planes, telephones and the bad habits of presidents and administrative personnel have mainly restricted ambassadors to “ritual and public relations functions”.⁴⁸⁹ Furthermore, a former British ambassador wondered whether “jet-set politicians” need the pedestrian ambassador anymore.⁴⁹⁰

Although communication is seen as an essential part of diplomacy, and the exact form of diplomatic communication varies according to time and place, communication itself is constant.⁴⁹¹ In this regard diplomacy has been defined as ‘the communication system of the international society’.⁴⁹² The development in technology started after the Cold War, which

⁴⁸⁵ Jönsson and Hall (n206) 195.

⁴⁸⁶ Nicholas Westcott ‘Digital Diplomacy: The Impact of the Internet on International Relations’ (2008) 16 Oxford Internet Institute 1.

⁴⁸⁷ Jovan Kurbalija ‘Diplomacy in the Age of Information Technology’ in J. Melissen, *Innovation in Diplomatic Practice* (Palgrave Macmillan 1999) 171.

⁴⁸⁸ Jönsson and Hall (n206) 159.

⁴⁸⁹ *Ibid* 159.

⁴⁹⁰ *Ibid* 159.

⁴⁹¹ *Ibid* 195.

⁴⁹² *Ibid* 196.

challenged the role of the state as the primary actor in the international system.⁴⁹³ One example of this is the ‘hotline’ established between the White House in Washington and the Kremlin in Moscow shortly after the Cuban missile crisis of 1961,⁴⁹⁴ which meant the two leaders could communicate on a secure phone line instead of going through their diplomats. The IT revolution has affected all the aspects of life, including diplomacy. A revolution can be defined as “any major social and political transformation, sufficient to replace old institutions and social relations and to initiate new relation of power and authority”.⁴⁹⁵ With regard to technological revolutions, the premises of diplomatic communication were transformed with the advent of the telegraph during the 19th century (e.g. enabling direct communication between Queen Victoria in the UK and the Viceroy of India), but diplomacy itself was still the preserve of ambassadors, who were themselves empowered by the advent of steamships and railways. By the 1930s diplomatic pouches were being conveyed by air, but most communications still moved by sea as late as 1945. The development of modern telecommunications, air travel and IT during the second half of the 20th century greatly accelerated the ease and speed of movement and communication.⁴⁹⁶

Numerous technological developments over more than a century have revolutionized communications and greatly facilitated diplomatic functions between ministries, the executive and embassies, as well as between states themselves, yet the essential norms of diplomatic activity have not fundamentally changed, despite the longstanding anticipation of a revolution in diplomatic affairs. In 1977, the Canadian Deputy Minister of Foreign Affairs Gordon Smith announced the advent of virtual diplomacy, describing the dynamic change by explaining how technology shortened time and costs such that the time taken to establish embassies or diplomatic posts to undertake diplomacy had been cut to a plane ticket, computer and dial tone, and maybe a diplomatic passport.⁴⁹⁷ The effect of technology was not limited to peace-time but also applied in time of conflict, which have always been critical in diplomacy. In a period of conflict, diplomats often have difficulty accessing information. Indeed, diplomats are often less informed than their home government, or are dependent on the same sources of information, such as the global news networks or websites. Hence, diplomatic reporting on the ground from conflict-zones often remains a symbolic activity performed from behind the walls of a heavily guarded embassy, repackaging information gathered from websites or at best through the narrow bullet - proof

⁴⁹³ Jan Melissen, *Diplomatic Studies*, (Martinus Nijhoff Publication 2008) 3.

⁴⁹⁴ Trevor Homer, *The Book of Origins: The first of everything - from art to zoos*. (Trevor Homer 2006) 10.

⁴⁹⁵ Melissen (n494) 2.

⁴⁹⁶ Jönsson and Hall (n206) 159.

⁴⁹⁷ Melissen (n494) 4.

windows of armoured military vehicles.⁴⁹⁸

According to some analysts, the functionalities of modern technology suggest that foreign ministries are no longer necessary, and diplomatic representation abroad can be coordinated by other agencies of the state's central administration.⁴⁹⁹ The projection of a digital future increasingly sets the tone and direction of states diplomacy. Its impact cuts across every other foreign policy issue, e.g. the protection of diplomats. The result will be a different type of diplomacy, both in terms of the problems it deals with and the way it is organized.⁵⁰⁰

Several countries rely on informal networks to facilitate good relations and high-level contact absent in formal diplomatic ties. Over the last twenty years (i.e. the evolution and popularization of Internet), there has been a change in both role and function of diplomacy whereby technology has played a major role developing the inter-connection of states. While there are some challenges facing Arab countries in this regard, as this chapter explains, opportunities exist to conduct relations between states without formal diplomatic ties, and the anomaly of the situation whereby states communicate without normal legal channels has received only slight attention.⁵⁰¹

In times of armed conflict and political disturbance, conducting relationships with states becomes difficult, and the protection of diplomats becomes complicated; this is special true for receiving states, particularly in the case of insurgency, as witnessed in numerous MENA contexts, particularly in Libya. The volatile situation in the Middle East often highlights the vulnerability and risk of diplomatic premises and missions, which often become key targets rather than zones of neutrality. Consequently, facilities are often evacuated at the onset of perceived unrest, and permanent institutions generally scaled back, and in the event of conflict, closed. Therefore, there is a real need to find new mechanisms through which to conduct diplomatic relationships, in a way that does not endanger the lives of diplomats. Virtual diplomacy might be the solution.

Technology has been used by many diplomatic personnel to liaise with the public. For example, British ambassadors are very active on Twitter, something that would be considered undignified according to traditional norms, a trend set by William Hague during his term as Foreign Secretary. Russia's Foreign Ministry has more than 40 Twitter accounts, and Israel is actively pursuing the use of e-diplomacy. Even China, which has heavy censorship of social media at home, is interested

⁴⁹⁸ Ibid 5.

⁴⁹⁹ Wilson Dizarad, *Digital Diplomacy; US. Foreign Policy in the information Age*, (1st end, Prager 2001) 187.

⁵⁰⁰ Dizarad (n500)188.

⁵⁰¹ Phil Deans 'Taiwan in Japan's Foreign Relations: Informal Politics and Virtual Diplomacy' (2001) 24 (4) *Journal of Strategic Studies* 151.

to use social media platforms as a diplomatic tool abroad.⁵⁰²

Another significant example is the “Virtual Embassy of the United States to Tehran” in Iran. The US State Department developed the Virtual Embassy after the closure of its physical Embassy. Whilst this Embassy has the same status as other traditional US embassies there is one major difference: its diplomacy operates on a virtual level, as discussed in this chapter.⁵⁰³ Also, President Trump presents the political situation of the US Executive toward other countries using Twitter, including for serious issues such as North Korea, the Iranian nuclear programme, the status of Jerusalem, and Pakistan’s alleged support for terrorist organisations.⁵⁰⁴ Based on this case, perhaps the technological facilitation of knee-jerk reactions by domestic politicians makes the role of ambassadors within foreign states even more essential, to conduct genuine diplomacy and avoid the conflicts that may inadvertently be stirred up by inappropriate online publications and dissemination of inflammatory remarks intended for domestic political consumption.

An embassy is essentially a place in a foreign state where a diplomatic mission represents the interests of an outside state by mutual consent. Many of the functions of diplomatic missions can be conducted in a virtual place (i.e. online), without the need for a bricks-and-mortar footprint. There are many obvious advantages of this, including substantial savings on the costs of lavish embassies and diplomatic and support staff, as well as increased safety from physical threats during times of conflict; consequently, the question arises of whether the traditional embassy can be largely or wholly replaced by the virtual embassy, given the great improvements in modern communications.

This chapter examines the informal institutions, used to maintain diplomatic ties in MENA, addressing the growing body of literature on the significance of informal politics within MENA between the US and other countries. It attempts to develop this by showing the importance of its use as an alternative mechanism to diplomatic premises in MENA, especially in the time of armed conflict and tension. Political sensitivities and conflict-related expediency mandate that states deal with each other through informal networks instead of established formal institutions to cover routine issues.

⁵⁰²The Economist ‘Digital diplomacy Virtual relations’ The Economist (US, Sep 2012). Available at <<http://www.economist.com/node/21563284>> Accessed 6 August 2017.

⁵⁰³ Artur Kluz and Mikolaj Firlej ‘The Impact of Technology on Foreign Affairs: Five Challenges’ (2015) Foreign Policy association. Available at <https://foreignpolicyblogs.com/2015/12/22/the-impact-of-technology-on-foreign-affairs-five-challenges/> Accessed 3 July 2017.

⁵⁰⁴James Oliphant ‘Trump says he would ‘absolutely’ Talk to North Korea’s Kim on Phone’ World News (US, 6th January 2018). Available at <<https://www.reuters.com/article/us-usa-trump-northkorea/trump-says-he-would-absolutely-talk-to-north-koreas-kim-on-phone-idUSKBN1EV0OC>> Accessed 7 January 2018.

3.2 The Importance of Technology in Diplomacy

There is a stark difference between the way diplomacy is practised in this millennium and the way it was practised before the introduction of IT, which can be seen as largely related to “the death of secrecy”. Even before the hacking by Edward Snowden and Julian Assange, judicious diplomats were recognizing that “strictly between ourselves” and “off the record” were nothing more than empty pleasantries. Young cadets in diplomatic academies today are taught never to write something in a diplomatic message that they would not want to see in the next day’s headlines.⁵⁰⁵

The complexity of the tools diplomats must be able to use and diversity of the audiences they have to address needs genuine specialist skills. Just to keep abreast of the public arena in which contemporary diplomacy operates needs “high- performance social media skills and the ability to interpret the output of big-data analytics”.

It also needs the level of proficiency in the use of focus groups and polling expected of a corporate marketing professional. Being a jack of all trades and master of none is not a winning hand in the modern- day diplomatic game, but “technology is making diplomacy a more dynamic, a far more exciting and creative profession”.⁵⁰⁶

The first, and probably the most important, change is a shift in balance from a “government- to-government” to a “people-to-people” diplomacy. Communication between political leaders by diplomatic proxy is still a vital role, but nations and their governments no longer play the preeminent role in our lives they did 100 years ago. Being a government official is no longer a uniquely privileged status, rather it exposes one to intense scrutiny and suspicion.⁵⁰⁷ In keeping with historical tradition, embassies were limited in their adoption of new media,⁵⁰⁸ but this became more important when it was recognised that one of the main purposes of the digital diplomacy is to advance foreign policy goals by influencing public opinion in the host country; in other words, to broadcast sending state foreign policy aims.⁵⁰⁹ However, even in terms of traditional diplomacy, the new media has enabled diplomats to perform their function even when the relationships with

⁵⁰⁵ Ido Aharoni ‘How Technology Has Revolutionized Diplomacy’ Time (New York, Sep 08, 2015). Available at <http://time.com/4015667/how-technology-has-revolutionized-diplomacy/> Accessed 2 July 2017.

⁵⁰⁶ Aharoni (506).

⁵⁰⁷ Ibid.

⁵⁰⁸ Lyesan F. Khakimova ‘Public diplomacy at Arab embassies: Fighting an uphill battle’ (2013) 7 International Journal of Strategic Communication 21. Available at <<http://dx.doi.org/10.1080/1553118X.2012.738446>> Accessed 2 August 2017.

⁵⁰⁹ Corneliu Bjola and Lu Jiang ‘Analysis of the Digital Diplomatic Strategies of the EU, US and Japan in China’ in Corneliu Bjola and Marcus Holmes (eds.), *Digital Diplomacy: Theory and Practice*, (Routledge 2015) 46.

host states have been otherwise restricted. In the case of Syria, the relationship between the Syrian government and the American public was restricted by limited political relations between the governments of both countries. However, the Syrian Ambassador to the US used his personal blog to communicate with the American public, focusing on the topics of Syrian art and culture. In addition,⁵¹⁰ despite these instances of embassies using Twitter, Facebook and blogs, the purpose was primarily to disseminate propaganda (i.e. communicate) rather than to listen to and engage in a conversation (i.e. consult).⁵¹¹

Social media began to be taken more seriously academically in the aftermath of the revolutions, uprisings and the ensuing political unrest in the Middle East in 2011, during which social media acted as a catalyst for grassroots political movements known as the “Arab Spring”. Largely because of this historical event, many studies called attention to the untapped potential of social media in mobilizing social and political activism against repressive regimes. However, the use of social media in diplomacy precedes the revolutionary upheavals of the Arab Spring and relates to an important conceptual innovation. Digital diplomacy represents a novel and practical extension of the concepts of soft power and public diplomacy. It builds on the first concept by expanding platforms on which governments launch campaigns of nation branding. It boosts the latter by enabling multi-directional communication between diplomats and foreign public. In short, digital diplomacy was linked from the very beginning to the credo of the “new” public diplomacy of maximizing engagement with increasingly interconnected foreign populations and moving away from one-way information flows toward dialogue and engagement.⁵¹²

Social media is now a powerful symbol of the new public diplomatic domain. Its application to diplomacy has been hailed as transforming international politics. Not only is it able to transcend the formal chains of diplomatic communication, but by allowing ordinary people into the spotlight of politics and letting their voice be heard, it also allows diplomats to directly engage foreign public in a sustained dialogue.⁵¹³ Diplomats are now able to promote both a unidirectional message and to carry on enlightening conversations with large sectors of the populace of the countries in which they operate.⁵¹⁴

Public diplomacy helps build a certain image of the country for foreign audiences by directing their

⁵¹⁰ Khakimova (519) 21.

⁵¹¹ Ibid 21.

⁵¹² Melissen (494)4; Bjola and Jiang (n510) 3.

⁵¹³ Bjola and Jiang (n510) 6.

⁵¹⁴ Ibid 9.

attention to certain topics, while downplaying others through well-selected news. Diplomats can thus construct an issue as salient and worthy of attention for their audience by repeatedly providing relevant information on that issue. Compared with traditional mass media, social media boasts a great advantage in “grabbing headlines” due to its reach, frequency, usability, immediacy and permanence.⁵¹⁵

If a government aims to develop a good relationship with a foreign audience, it first needs to be “out there” in the relevant public sphere. Diplomatic presence does not directly lead to a better image or favourable opinion, but without enough exposure, the public diplomatic strategy will ultimately fail. Traditionally, “presence” comes mainly from mass communication, cultural exchanges, or educational programmes. The birth of social media has extended the scope of diplomatic presence over both space and time. For example, the digital outreach team of the State Department has directly engaged citizens in the Middle East by the posting of messages discussing US foreign policy on popular Arabic, Urdu, and Persian language Internet forums.⁵¹⁶ In the digital age, the expansion of presence has become an even more critical condition for diplomats to make their voice heard. The credibility and authority of diplomats would likely suffer if they failed to stay abreast of the constantly changing digital technologies. Not only would their message not be heard, but also they would lose out to competing information campaigns.⁵¹⁷

Social media, with its interactive features, has much to offer in diplomatic relationships between states, including generating a quasi-continuous dialogue between diplomats and foreign public. Two-way conversations allow diplomats to readjust the focus of their agenda, reduce misinformation and enhance mutual understanding. This particular feature enables social media to realize the goal of public diplomacy in a different way from traditional methods.⁵¹⁸

The most important advantage of public diplomacy is that it brings with it a major shift in the approach one takes to it. It means you avoid taking actions and making statements you are unwilling to stand by in public, and dovetails into the change in focus towards public diplomacy explained previously.⁵¹⁹ The sheer volume of information has led to an increased professionalization and specialization in every productive sphere, whether it be medicine or

⁵¹⁵ Eugene Agichtein, Carlos Castillo, Debora Donato, and others, ‘Finding High Quality Content in Social Media’ (The 11th ACM International Conference on Web Search and Data Mining Los Angeles, California, USA, Feb. 5-9, 2018) 183.

⁵¹⁶ Bjola and Jiang (n510) 7.

⁵¹⁷ Ibid 7.

⁵¹⁸ Ibid 8.

⁵¹⁹ Aharoni (506).

marketing, and diplomacy is no exception. In the past, the role of a diplomat was to be a “well - rounded gentle man” with a broad education so as to be able to sustain elite dinner table conversations, but requiring no specialist professional training. This is, is increasingly inadequate to meet the demands of the 21st century.⁵²⁰

Although the advantages of using technology in the functions of diplomacy are obvious, this makes the tasks of diplomats more diverse, heavier and important. It should be noted that technological innovation relative to diplomacy is not synonymous with social media utilisation, which is but one aspect of the phenomenon; the emergence of the Internet and the seamless integration of digital information with real-world communications, transport, goods and services has immense implications for all aspects of life, including diplomatic functions. Better contact and communication reduces the risk of misunderstanding and misperception, also allowing direct communication between political elites. However, political leaders are very busy “and the time they allocate to diplomacy is quite limited. The daily work of the diplomats that constitutes the background to high-level summits is therefore very important. Any aspect of domestic policy can now be placed on the negotiating table”.⁵²¹

E-diplomacy can play an important role in encircling the challenges facing developing countries (such as Libya) concerning the protection of diplomats, especially when the state is lose control of most of its territory. Using e-diplomacy could on the most rudimentary level help save the lives of diplomats.

3.3 How the Internet Affects Diplomacy

The Internet and the IT systems it connects represents a quantum leap in people’s ability to communicate both one-to-one and one-to-many. It is one of the great leaps forward in communication analogous to the development of writing, the alphabet, printing and the telegraph; just as these primordial technologies completely transformed the world, the Internet is creating new sets of opportunities and risks at an accelerated pace.⁵²²

During most of the 19th century embassies were sparse, giving limited opportunity to reach the

⁵²⁰ Ibid.

⁵²¹ Cristina Archetti ‘Media Impact on Diplomatic Practice: An Evolutionary Model of Change’ (Paper presented at the American Political Science Association (APSA) Annual Convention Washington, DC September 2-5, 2010). Available at <<http://usir.salford.ac.uk/12444/>> Accessed 3 May 2017.

⁵²² Westcott (n 487) 1.

top level of the diplomatic corps. In the late 1860s Britain kept just seven embassies globally due to its practice of old diplomacy and the limitations of this practice in projecting national affairs in foreign roles and functions.⁵²³ While the development of the telegraph was ultimately more significant in revolutionizing communications in the long term, the advent of the Internet has profoundly transformed how diplomats communicate. Text and e-mail have replaced letters and faxes; websites are supplementing, and in some cases replacing, printed and broadcast media, although the relationship between them is evolving rapidly. Given the critical role of communication in the way, communities are organised and states are managed, this creates a fundamentally new dynamic.⁵²⁴

International relations have traditionally comprised trade and conflict, leavened by the role of diplomacy.⁵²⁵ The Internet enables more and different actors to become involved in political and diplomatic processes.⁵²⁶ Diplomacy has become democratized, as technology allows more people to play a part, increases the size of the playing field by an almost exponential amount, and changes the rules every day.⁵²⁷ Internationally, the Internet is also being more widely used as a platform to address and influence world opinion. This became prolific shortly after the popularisation of social media during the 2000s. In 2006, the Iranian President Ahmadinejad published an open letter to US President Bush on the Iranian government website appealing for dialogue, providing maximum access to his arguments. In April 2007, within hours of Abdullah Gul's withdrawal as a candidate for the Turkish Presidency, the military had posted a statement on its website invoking its role as the defender of the secular constitution in Turkey. When Nicholas Sarkozy won the French Presidential election in May 2007, Tony Blair posted his congratulatory message (in French) on his YouTube site.

The development of social media tools has changed the way diplomats interact with people, communities, non-governmental organizations and even foreign governments. The technology revolution has played a significant role in diplomatic relations among states. The political objective is an important element in international relations, and the World Wide Web is the unique medium of international media exchange, circumventing traditional boundaries and barriers.⁵²⁸

⁵²³ Watson (n221) 7.

⁵²⁴ Ibid 1.

⁵²⁵ Hedley Bull, *The Anarchical Society*, (London 1977) 26.

⁵²⁶ Katherine Ognyanova and Sandra Ball-Rokeach 'Political Efficacy on the Internet: A Media System Dependency Approach' In Laura Robinson, Shelia R. Cotton, and Jeremy Schulz (Eds.), *Communication and Information Technologies Annual: Politics, Participation and Production*, (Emerald Group Publishing 2015) 3.

⁵²⁷ Andrew F. Wood and Matthew J. Smith, *Online Communication: Linking Technology, Identity, & Culture*, (2nd ed, Psychology Press 2014) 26.

⁵²⁸ Jönsson and Hall (n206) 159.

As a system of communication between polities, diplomacy has been influenced by the development of available means of communication and transportation. Most importantly, the speed of diplomatic communication has varied greatly over time. In the ancient Near East, diplomatic missions could take years to complete. In the Amarna Letters, there is reference to a messenger being detained, and thus bilateral communication being interrupted, for six years.⁵²⁹

In the areas of foreign policy and diplomacy, technology has brought about a tremendous amount of change. As Hillary Clinton once said during her tenure as Secretary of State, “Just as the Internet has changed virtually every aspect of how people worldwide live, learn, consume and communicate, connection technologies are changing the strategic context for diplomacy in the 21st century”.⁵³⁰ Even if medieval diplomacy could put a premium on speedy communication – in 1496, for example, the Venetian Senate wrote to its orator keeping the death watch over the King of Naples that it wished for reports not daily, but hourly – communication over great distances travelled slowly well into the 19th century. At the end of the 18th century, the US President wrote a memorandum to his Secretary of State, lamenting the fact that the ambassador in Spain had not been heard from for two years, and suggesting that the US Government should write a letter to him if they did not hear from him within a further year. In 1838 US regulations instructed consuls “once in three months at least to write to the Department, if it be for no other reason than that of appraising the Department for being at their respective posts”.⁵³¹

Although many observers note how social media platforms such as Facebook and Twitter change global connectivity, the reality is that new technologies do not necessarily create democratic evolution online.⁵³² Breakthrough technologies enable instant contact and thus facilitate managing diplomacy and organizing political dialogue. Referring back to traditional 18th or 19th century diplomacy, formal representatives had to wait for weeks or even months to receive relevant instructions on courses of action. As such, the points on agendas covered only the most important items needing to be addressed, and long-term strategic priorities. Consequently, governments left diplomacy to discreet gentlemen (and sometimes ladies) with social and academic competence to undertake sensitive relations with foreign notables, who mostly met behind closed doors. Now they are also using Twitter, Facebook, YouTube and local social media services, such

⁵²⁹ Ibid 159.

⁵³⁰ Kluz and Firlej (n504).

⁵³¹ Jönsson and Hall (n206) 91.

⁵³² Kluz and Firlej (n504).

as China's microblogging site, Sina Weibo.⁵³³

Officials have continuous access to instantaneous and live networks empowering not only organizational dialogue, but providing international communications enhancing responsiveness, action and regulation.⁵³⁴ That being said, currently most ambassadors and politicians use Twitter to interact with officials, policymakers and citizens.⁵³⁵ "Twitplomacy" has been seen as a form of public diplomacy as it is used not only by officials but also millions of citizens across the globe. Twitter has two major positive effects on foreign policy: it fosters a beneficial exchange of ideas between policymakers and civil society; and it enhances diplomats' ability to gather information and to anticipate, analyse, manage, and react to events. The former Italian Foreign Minister Giulio Terzi commented on this. "Tweets" of 140 characters have changed drastically the way officials communicate with each other, and the way politicians (most famously President Trump) communicate with the public.⁵³⁶

After the attacks on the US Embassy in Libya and the murder of the US Ambassador, Christopher Stevens, many official condolences were sent via Twitter. Minutes after violent attacks on US missions in the Middle East, the country's Embassies (particularly in Cairo) were active on Twitter to alert US citizens to emergency conditions as well as to issue policy observations, such as criticism of Egypt's Muslim Brotherhood for supporting the protests on their Arabic feed, and thanking fellow tweeters for their condolences on the murder of the US Ambassador to Libya.⁵³⁷

Twitter is used to facilitate the role of diplomats in building networks with others. One of the main priorities of modern embassies is to establish and maintain a diverse network of stakeholders. The sixth communication strategy for diplomatic actors on social media is, thus, to build an extensive network with relevant stakeholders. On social media, this can be realised by linking with a diverse range of different organizations and individuals and important online opinion leaders. The latter are perceived as major contributors on Twitter who are substantially engaged with political information, and whose function is to collect, read, edit and disseminate information with others. Another feature of online networks is that they are dispersed. This means that regular people are not only connected to other regular people but also connected with popular accounts on Twitter, such as opinion leaders. This dispersal enables government institutions to attract large

⁵³³ The Economist 'Digital diplomacy Virtual relations' The Economist (US, Sep 2012). Available at <<http://www.economist.com/node/21563284>> Accessed 6 August 2017.

⁵³⁴ Ibid.

⁵³⁵ Ibid.

⁵³⁶ Ibid.

⁵³⁷ The Economist (n503).

communities of the general public via the network of popular accounts.⁵³⁸

While facilitating the exchange of diplomatic communications, these technological innovations have been seen as challenges to ingrained diplomatic procedures. As mentioned previously, modern communications make traditional diplomats superfluous in terms of basic communications functions, but the extensive and nuanced roles of modern diplomats – including outside of the realm public communication – mean that they are unlikely to become redundant, and expectations of the demise of diplomats due to developments in communications have historically proved false. For instance, when the first telegram arrived on the desk of British Foreign Secretary Lord Palmerston in the 1840s, he reputedly exclaimed “My God! This is the end of diplomacy”.⁵³⁹ Similarly, the Royal Commission of 1861, which investigated the British Diplomatic Service, dwelt on the influence of the telegraph and wondered whether it would make ambassadors unnecessary. The dramatic development of today’s media and IT has elicited similar concerns.⁵⁴⁰

During the Libyan civil conflict in 2011, India relies on digital diplomacy and more than 18,000 Indian citizens were evacuated successfully from Libya, facilitated by using Twitter.⁵⁴¹

However, the lack of use of IT in 2012 in conducting diplomacy between the US and Libya during the armed conflict, when Libya had no ability to protect the diplomats, basically facilitated the attack on US diplomats: the physical presence of the diplomats in Libya, given the prevailing conditions of conflict, was inappropriate relative to the US military presence.

3.4 The Effect of the Media on Diplomatic Relationships between States

Media diplomacy emerged as a consequence of technological development: radio, broadcasting and the Internet provided new opportunities to reach worldwide audiences. Voice of America, launched in 1942, was one of the first worldwide broadcast services to project American values,

⁵³⁸ Nadine Straub, Sanne Kruike-meier, Heleen van der Meulen, Guda van Noort ‘Digital diplomacy in GCC countries: Strategic communication of Western embassies on Twitter’ 32(4) (2015) *Government Information Quarterly*. Available at <<https://www.journals.elsevier.com/government-information-quarterly>> accessed 8 August 2017.

⁵³⁹ Jönsson and Hall (n1) 91.

⁵⁴⁰ *Ibid* 91.

⁵⁴¹ Olubukola S. Adesina ‘Foreign Policy in an Era of Digital Diplomacy’ (2017) 3 (1) *Cogent Social Science* 1. Available at <<http://www.tandfonline.com/doi/full/10.1080/23311886.2017.1297175>> Accessed 3 July 2017.

culture and lifestyle and advocate US policies. More recent US media diplomacy projects include Arabic Radio Sawa and Al-Hurra television. Examples of media diplomacy via state-sponsored broadcasters operating in foreign countries include Britain's BBC, France's France 24, Germany's Deutsche Welle, Iran's Press TV, Qatar's Al-Jazeera, and Russia's Russia Today,

Although the media provides new opportunities, it implies a certain level of complexity. First, with easy access to information on the Internet, governments have less control of information flow. Aside from egregious examples such as the exposure of top secret diplomatic cables in WikiLeaks revelations, general messages disseminated in and designed for particular countries and regions are universally viewable, which induces states to seek cohesion and consistency. Second, the interpretations of one message by the audiences inside and outside the country may differ significantly, which has been attributed to cultural differences.⁵⁴² States need to understand the culture of the audience to pass effective messages to them. The idea of cultural resonance suggests that communication is more complex between countries that have drastically different cultures than those that have similar cultural assumptions and values. It stands to reason that governments must have a good understanding of target audiences.⁵⁴³ To consider the impact of current media technology in the public domain in MENA has given rise to some interesting reflections in recent times. The rise of modern media has been seen to play a major role in emerging ideas, identities, and discourses that "are fragmenting and contesting" the hegemony of authoritarian political and/or religious centres.⁵⁴⁴

The media has positively affected the role of diplomats and made their task easier. On the most elemental level, diplomats can concern themselves with specialist analysis and reporting as the ubiquitous 24/7 rolling news media assume the burden of informing their recipient states of general events and developments.⁵⁴⁵

⁵⁴² Khakimova (n19) 21.

⁵⁴³ Ibid 21.

⁵⁴⁴ Dale F. Eickelman and Jon W. Anderson, *New Media in the Muslim World: The Emerging Public Sphere*, (1st ed, Indian university Press 1999) 1.

⁵⁴⁵ Cristina Archetti 'Media Impact on Diplomatic Practice: An Evolutionary Model of Change' (Paper

3.5 E-Diplomacy: A New Way of Conducting International Diplomacy

Social media are powerful channels for digital diplomacy and particularly suitable for making and maintaining contact with diverse stakeholders. Virtual diplomacy means public diplomacy, whereby governments communicate directly with the citizens of another country.⁵⁴⁶ Public diplomacy is defined as “a government’s process of communicating with foreign publics in an attempt to bring about understanding for its nation’s ideas and ideals, its institutions and culture, as well as its national goals and current policies”.⁵⁴⁷

Although diplomats customarily have diplomatic immunity, this doctrine of international affairs and the rules of war emerged only during the early modern era, and it is increasingly less relevant in the context of modern armed conflicts between states and non-state actors, such as the insurgency in Libya and analogous situations elsewhere in Libya, where diplomats and diplomatic premises (particularly US Embassies) become preferred targets rather than sacred and inviolable sanctuaries.⁵⁴⁸ For example, in the years since 2011 Western governments have intermittently (or permanently) rolled back their diplomatic presence throughout MENA. For instance, the French government temporarily closed premises, including embassies and schools, in 20 countries, and Germany shut down its embassies in quite a few Middle Eastern countries in September 2012. Following years of diplomatic and other sanctions, Canada, Israel, US and most of the EU countries ended their operations and closed their embassies in Iran.⁵⁴⁹

While such efforts are generally precipitated by deteriorating security conditions or relations between states, these can provide a pretext for the underlying rationale of cost-cutting. For

presented at the American Political Science Association (APSA) Annual Convention Washington, DC September 2-5, 2010). Available at <<http://usir.salford.ac.uk/12444/>> Accessed 3 May 2017.

⁵⁴⁶ Ibid

⁵⁴⁷ Khakimova (n19) 21.

⁵⁴⁸ Radu Cucos ‘Virtual diplomacy – a new way of conducting international affairs?’ (2012) The world Bank. Available at <<http://blogs.worldbank.org/ic4d/virtual-diplomacy-a-new-way-of-conducting-international-affairs>> Accessed 2 July 2017.

⁵⁴⁹ Ibid.

example, Britain decided to share embassies with Canada in many states owing to the cutting of costs required under their austerity measures. Romania closed fourteen embassies at the same time in Africa and South America.⁵⁵⁰ The Philippines government recently terminated the operation of its embassies and consulates in Caracas, Koror, Dublin, Barcelona and Frankfurt. Greece ended the operations of six embassies and three consulates around the world as part of sweeping cuts.⁵⁵¹ Thus, when deciding to close down missions around the world, governments have to find other mechanisms to enable them to continue and further develop international cooperation. A virtual embassy has great potential and these types of online presence don't only serve as a source of information for politics, economies, trade or cultural affairs between countries. A virtual embassy can be a platform providing e-services to citizens from both sending and receiving states. This new approach obviously does not have scope to perform all functions of a traditional embassy or consulate, but it can provide many services for its citizens and those of the host country.⁵⁵²

Diplomats have learned very quickly to understand that Facebook, Twitter and other social media tools create opportunities to spread important information rapidly and save money at the same time. Social media had the speed to deliver this. The rise of social media basically opens a new area for competition on the world stage. Social media has many diplomatic clients globally. It should be borne in mind that it is not only the US State Department, UK Foreign Office, Canadian Department of Foreign Affairs and International Trade and other foreign services of developed countries which are active on YouTube, Twitter, Facebook or LinkedIn; the embassies of states like Nigeria, Egypt, Afghanistan, Moldova or Belarus also try to promote their diplomatic interest in the virtual space.⁵⁵³

Those who believe that diplomacy can be conducted in the same old way will lose ground to those who understand the new dynamics and put in place policies to exploit them. This is digital

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

⁵⁵² Ibid.

⁵⁵³ Ibid.

diplomacy. It has implications for foreign policy-making in four areas: ideas, information, networks and service delivery.⁵⁵⁴ As mentioned previously, personal contacts remain a core role of diplomacy and diplomats, but this must be a complement to online activities. The greatest challenge to digital diplomacy in MENA is that the officials in embassies believe that personal relationships with decision makers and journalists as well as the establishment of trust are more important than online communication.⁵⁵⁵

3.6 Examples of Recent Virtual Embassies

In the absence of security in MENA (e.g. Libya), there is an increase in the proliferation of armed conflict and tension, accompanied by states often losing control, making it difficult or impossible for host states to protect diplomats. In this situation, MENA needs to find new mechanisms to protect diplomats. One expedient is to resort to virtual embassy technology to continue relationships worldwide without the risks of traditional embassies. The 2014 Arab Social Media Report gives wide-ranging information surrounding internet usage the use of the Internet and social networks in the Arab world.⁵⁵⁶

The information indicates that using virtual embassies to aid and promote dialogue between Israel and the wider Arab countries holds much potential, as it simply discovers that this target audience is online and seeks information and news. Moreover, up to now, Israel has not been unable to promote dialogue with the Arab world using tools of traditional diplomacy,⁵⁵⁷ and Iran promptly blocked the US social media account which was trying to reach out to the ordinary people of Iran,

⁵⁵⁴ Westcott (n33) 1.

⁵⁵⁵ Nadine Straub, Sanne Kruikemeier, Heleen van der Meulen, Guda van Noort 'Digital diplomacy in GCC countries: Strategic communication of Western embassies on Twitter' 32(4) (2015) *Government Information Quarterly*. Available at <<https://www.journals.elsevier.com/government-information-quarterly>> accessed 8 August 2017.

⁵⁵⁶ Including the GCC countries. According to this report, the vast majority of Arabs use Facebook as their main social network (91.28%), while Twitter comes in at fourth place (57.35%). The majority of respondents in this report indicated that they mostly use social networks to gather information and news. Ilan Manor 'Iran and Israel Establish Virtual Relations' (2014) *Explore digital diplomacy*.

Available at <<https://digdipblog.com/2014/03/15/iran-and-israel-establish-virtual-relations/>> Accessed 4 August 2017.

⁵⁵⁷ Ibid.

(discussed below). The figures question the use of Twitter as the medium to reach this grouping, given that the vast majority of Arab Internet users tend to use Facebook and it would be better to choose that as a medium.⁵⁵⁸ Furthermore, the predictable blocking of such social media outreach platforms makes it seem they are designed more for domestic political purposes than for realistic diplomacy initiatives.

While social media outreach to general populations is important to long-term diplomatic objectives, digital diplomacy between states is obviously of more immediate utility, particularly in cases where governments have no direct diplomatic relations (usually due to political sensitivities), as in the case of Israel's relations with most Arab and Muslim states.⁵⁵⁹ The aim of these virtual embassies is to facilitate the promotion of dialogue with international audiences.⁵⁶⁰

However, there are risks in using digital diplomacy, such as hacking, information leaks and potential anonymity for criminal activities.⁵⁶¹

Virtual embassies first emerged to reach remote Russian cities where the US did not have consulates. While their functions have largely been subsumed by the development of general Internet platforms, there are still some virtual embassies of this type.⁵⁶²

Face-to-face meetings are costly for hosting states in terms of economic resources, security implications and international prestige. In some MENA countries, armed groups specifically target diplomats with techniques displaying various forms of sophistication, with some armed groups having more effective power, weaponry and military experience than state governments. This was clearly evident in the case of Libya, whose government had no effective authority outside

⁵⁵⁸ Ibid.

⁵⁵⁹ Ilan Manor 'Iran and Israel Establish Virtual Relations' (2014) Explore digital diplomacy. Available at <<https://digdipblog.com/2014/03/15/iran-and-israel-establish-virtual-relations/>> Accessed 4 August 2017.

⁵⁶⁰ Ibid

⁵⁶¹ Olubukola S. Adesina 'Foreign Policy in an Era of Digital Diplomacy' (2017) 3 (1) Cogent Social Science 1. Available at <<http://www.tandfonline.com/doi/full/10.1080/23311886.2017.1297175>> Accessed 3 July 2017.

⁵⁶² Joe Johnson 'Internet Freedom South Asia State Department technology' (2011) Public Diplomacy Council. Available at <<http://www.publicdiplomacycouncil.org/commentaries/virtual-embassy-virtual-audience>> Accessed 5 July 2017.

its own compounds, with the majority of the country being controlled by various military factions.⁵⁶³

The US State Department realized the potential of virtual embassies in MENA when it launched Virtual Embassy Teheran in December 2011.⁵⁶⁴ This followed a more long-term reorientation of US diplomatic policy following 9/11.⁵⁶⁵

3.6.1 An Electronic Estonian Embassy in Luxembourg

Estonia was the first country to establish an electronic embassy in Luxembourg to keep important and sensitive information. According to the Estonian Prime Minister “Estonia is the world’s first country that uses this method to double-secure its digital consistency, in close cooperation with Luxembourg”.⁵⁶⁶ In 2017, the agreement was signed between the Prime Minister of Estonia Jüri Ratas and Prime Minister of Luxembourg Xavier Bettel on housing data and information systems between the two countries, thereby creating the world’s first data embassy. The data embassy was expected to start work at the beginning of 2018⁵⁶⁷ as Estonia still needed additional server resources.⁵⁶⁸

3.6.2 Israeli Virtual Embassy in the GCC Region

⁵⁶³ Jönsson and Hall (n1) 159.

⁵⁶⁴ Manor (n70).

⁵⁶⁵ Corneliu Bjola and Lu Jiang ‘Analysis of the Digital Diplomatic Strategies of the EU, US and Japan in China’ in Corneliu Bjola and Marcus Holmes (eds.), *Digital Diplomacy: Theory and Practice*, (Routledge 2015) 56.

⁵⁶⁶ Estonia Government Office ‘Estonia to establish the world’s first data embassy in Luxembourg’ Estonia Government Office (Estonia June 2017) Available at <https://www.eesistumine.ee/en/news/estonia-establish-worlds-first-data-embassy-luxembourg> Accessed 2 July 2017.

⁵⁶⁷ Ibid.

⁵⁶⁸ “For this, Estonia needs additional server resources that should be completely controlled by Estonia. This means that they should be subject to the same clauses as Estonia’s physical embassies (e.g. immunity) but should be situated outside Estonia’, therefore, ‘Luxembourg was chosen for the state-owned high-security, Tier 4 certified data centres the likes of which Estonia does not have and also because Luxembourg is ready to guarantee diplomatic privileges to Estonian data and info systems” Science Part ‘Estonia to open world’s first virtual data embassy’ Science Part (Estonia July 2017). Available at <<http://www.sciencepart.com/estonia-to-open-worlds-first-virtual-data-embassy/>> Accessed 5 July 2017.

Notwithstanding the absence of diplomatic relations between Israel and the GCC, there have been increasing unofficial business ties between them over the past decade.⁵⁶⁹

Although Israel has not opened embassies in the Gulf States, which do not officially recognize Israel, the Israeli Foreign Ministry used virtually embassies as a means of reaching out to the citizens of these countries via Twitter.

The Virtual Embassy describes itself as “the official account of the embassy of Israel with the Gulf states” online. It started its official activities by congratulating the people of the Gulf countries on the occasion of Ramadan, with a tweet saying: “Ramadan is Kaream for all the Gulf countries, we hope that peace and humanity will prevail among all Muslims”.⁵⁷⁰ The Virtual Embassy also congratulated Oman on the occasion of the Omani Renaissance Day, which is celebrated in July 2013.⁵⁷¹

In August 2013, the Israeli Foreign Ministry opened a Twitter account and defined it as “dedicated to promoting dialogue with the people of the GCC region” (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE).⁵⁷² The Twitter account launched another account on social networking site called “Israel Virtual Embassy in the Gulf States”.⁵⁷³ Israel tried to open direct conversation with GCC citizens, including the opinion of Israel about the GCC. This conversation was managed and conducted in Arabic and English. Within a few days of its launch, the Virtual Embassy had 1,043 followers, and had tweeted 57 times.⁵⁷²

⁵⁶⁹ Herb (n 549) 1. Thus, the Virtual Embassy was primarily intended to improve relations with the public. The existence of a conventional mission was highlighted when an Israeli Finance Ministry document presented to the Cabinet showed that one of 11 new Israeli representations set up from 2010- 2012 was established in the Gulf. Officials from the Foreign Ministry and Prime Minister’s Office would not, however, reveal where it was established.

⁵⁷⁰ CNN “Virtual Embassy” in the Gulf States’ CNN (Dubai 2013). Available at <http://archive.arabic.cnn.com/2013/middle_east/7/26/Israel.Virtual.embassy.GCC/index.html> Accessed 5 July 2017.

⁵⁷¹ CNN “Virtual Embassy” in the Gulf States’ CNN (Dubai July 2013). Available at <http://archive.arabic.cnn.com/2013/middle_east/7/26/Israel.Virtual.embassy.GCC/index.html> Accessed 5 July 2017.

⁵⁷² Ibid 1.

3.6.3 US Virtual Embassy in Iran

The diplomatic relations between the US and Iran were severed after the 1979 Islamic Revolution and the siege of US Embassy staff in Tehran.⁵⁷³ The US tried to find new mechanisms to strengthen its relationships with Iran by means of a US Virtual Embassy website and a Twitter account and Facebook page to reach Iranians. The virtual embassy is a website developed by the US State Department and launched in December 2011. It was intended to build bridges between Tehran and Washington.⁵⁷⁴ The State Department lamented that in addition to losing an embassy in Iran, the US was deprived of a relationship with “Iranian people, access to Iranian society, and this has caused thousands of daily interactions between American and Iranian citizens”.⁵⁷⁵ The information related to the Iranian people through the virtual embassy would allow them to make up their own minds about the US. It will also relay US concerns about the Iranian government’s actions with a view to “achieving a resolution to those concerns”.⁵⁷⁶

The US confirmed that the virtual embassy would not be a substitute for an official US diplomatic mission in Iran.⁵⁷⁷ Obviously, the Iranian government was outraged, and predictably accused the US of subversion⁵⁷⁸ and blocked the site immediately.⁵⁷⁹ Other MENA countries welcomed the idea. For example, Egypt welcomed the opening of the US Virtual Consulate in Ismailia.⁵⁸⁰

⁵⁷³ RT News ‘Iran Prevents Port to US "Virtual Embassy" online’ RT News (Iran July 2017). Available at <<https://arabic.rt.com/news/573514>> Accessed 3 August 2017.

⁵⁷⁴ US Virtual Embassy ‘Why Virtual Embassy?’ US Virtual Embassy. Available at <<https://ir.usembassy.gov/tehran/>> Accessed 2 August 2017.

⁵⁷⁵ Al Jazeera ‘US launches virtual embassy for Iran’ Aljazeera (Qatar Dec 2011). Available at <<http://www.aljazeera.com/news/americas/2011/12/2011126185647788952.html>> Accessed 3 August 2017.

⁵⁷⁶ Ibid.

⁵⁷⁷ US Secretary of State Hillary Clinton declared in impassive statement probably intended for domestic consumption within the US “We have lost important opportunities for dialogue with you because of the absence of diplomatic relations between Iran and the United States”, expressing hope that the portal would allow Americans and Iranians to communicate “openly and without fear” see RT News ‘Iran Prevents Port to US "Virtual Embassy" Online’ RT News (Iran July 2017). Available at <<https://arabic.rt.com/news/573514>> Accessed 3 August 2017.

⁵⁷⁸ Al Jazeera ‘US launches virtual embassy for Iran’ Aljazeera (Qatar Dec 2011). Available at <<http://www.aljazeera.com/news/americas/2011/12/2011126185647788952.html>> Accessed 3 August 2017.

⁵⁷⁹ Ellen Hallams ‘Digital diplomacy: the internet, the battle for ideas & US foreign policy’ 4 (2010) CEU Political Science Journal 538.

⁵⁸⁰ RT News ‘Iran Prevents Port to US "Virtual Embassy" online’ RT News (Iran July 2017). Available at <<https://arabic.rt.com/news/573514>> Accessed 3 August 2017

3.6.4 US Virtual Consulate in Egypt

Unlike the broad public relations approach of the Israeli Virtual Embassy in the GCC, the US Virtual Consulate is targeted to specific US interests. Consequently, it has more practical, consular support services, with information in Arabic and English. The Consulate explains how Egyptians can apply to study in the US, how business people can find opportunities for commercial and industrial activities and how to participate. The site provides information on US economic assistance projects in the governorate electronic links to websites that trace the institutions located in the Ismailia governorate. Users are also able to provide feedback to the US Embassy. The main role of this virtual consulate is to promote educational ties between the US and the denizens of Ismailia, with links to US economic support and aid proffered to Egypt to strengthen the relationship between the two countries.⁵⁸¹

3.7 Challenges to Technology Utilization in Diplomacy

New technology offers opportunities for countries in managing relationships with key publics. For example, Facebook is used to reach younger people, such as students, who regularly visit the site to communicate with their peers. However, governments may face several obstacles in using social media to communicate with foreign audiences. First, governments' organizational cultures and preferences public relations models may restrict them in trying other communication models that are more common and effective, such as the new media platforms. Second, new media sites loosen the control of the message. As discussed earlier, Arab governments closely monitor communication in the US and embassy engagement with US audiences, which may explain the limited use of new media by Arab embassies.⁵⁸²

The greatest challenge to digital diplomacy in MENA is that embassy officials believe that personal relationships with decision makers and journalists, as well as the establishment of trust, are more important than online communication.⁵⁸³ Social media is not necessarily easy to use as a tool of public diplomacy. In fact, it might involve even more human resources and financial investment than traditional media-based tools as its objectives, methods and operations require a complex digital infrastructure and well-trained staff to carry out the missions.⁵⁸⁴

⁵⁸¹ Ellen Hallams 'Digital diplomacy: the internet, the battle for ideas & US foreign policy' 4 (2010) CEU Political Science Journal 538.

⁵⁸² Khakimova (509) 21.

⁵⁸³ *ibid* 21.

⁵⁸⁴ Bjola and Jiang (n510) 7.

Although some Arab embassies use it to connect with audiences, the new media present them with another challenge.⁵⁸⁵ Diplomats might also face the problem of their personal and diplomatic lives blurring and converging with their engagement in social media, with some diplomats (as well as politicians) being compelled to resign as a result of inappropriate personal tweets and Facebook posts from investigative journalists.⁵⁸⁶ Nevertheless, the new media “offer new possibilities for public diplomacy”,⁵⁸⁷ which in MENA includes specifically greater scope for genuinely independent diplomatic work, such as engagement with citizens in host countries, while traditionally heavily restrained by the dictates of sending states’ foreign ministries. Indeed, even ambassadors may not issue statements without the permission of their government. Modern e-diplomacy enables embassies to activate a genuine role with greater autonomy, developing their own communication goals and strategies, and overcoming to some extent the problem of time difference, which ranges from 6 to 10 hours between Washington DC and Arab countries.⁵⁸⁸

However, electronic communications pose serious new risks, including whistleblowing (as discussed previously with regard to WikiLeaks) and more serious malicious breaches of state security by foreign states or non-state actors (such as terrorist organisations). Malicious attackers may try to hack into government systems and extract information of use to themselves. That this happens should surprise no-one. While the Internet makes it possible for a lone wolf teenager to execute cyber-attacks against government systems, to break into seriously secure systems requires the full resources of a state apparatus to manage the scale of attack and sophistication of software necessary for success. Some states are ready and willing to commit such resources to this kind of activity.⁵⁸⁹ For instance, it was alleged that Chinese hackers gained unauthorized access to the computer networks of the German Prime Minister’s office and the private e-mail inbox of Chancellor Merkel. This serious incident also involved remote electronic infiltration of the UK Foreign and Commonwealth Office and the Pentagon, where parts of the unclassified network had to be shut down for a week for repairs.⁵⁹⁰

Furthermore, the new communication technologies pose challenges. They appear to accelerate the pace at which diplomats are expected to react and deliver their analyses to their respective

⁵⁸⁵ Khakimova (509) 21.

⁵⁸⁶ Ibid 21.

⁵⁸⁷ Khakimova (509) 21.

⁵⁸⁸ Khakimova (509) 21.

⁵⁸⁹ Ibid 21.

⁵⁹⁰ Ibid 21.

governments.⁵⁹¹ Another challenge of the 24/7 media saturated society is that the diplomat must navigate the ever-increasing volume of available information and select what is important.⁵⁹² Diplomats need to be faster and quicker to respond than before. Diplomacy is now more dynamic; it is a fast-paced and highly responsive role (if performed appropriately), whereas traditionally it was a slow and stately process. Information technology helps diplomats to be better informed and they have no choice but to be speedy and able to brief ministers of the executive on pertinent details relating to emergent issues in the host state at any time.⁵⁹³

3.8 Conclusion

Technology clearly obviates some of the reasons diplomats were traditionally instituted, but it does not make diplomats themselves redundant in terms of their essential function in professionally mediating diplomatic relationships between states. The methods and mechanisms of conducting relationships between states as well as between politicians are given a fillip by modern communication methods and IT. In this respect, many of the traditional consular functions of state embassies can be immeasurably improved by the development of e-diplomacy (i.e. e-government services such as issuing e-visas). They also enable rudimentary diplomatic contact between states during conflicts or when the presence of physical embassies and diplomatic personnel is inexpedient for political or security reasons. In the case of MENA, which has traditionally been strongly characterised by personal relationships in diplomacy as well as in general politics, technology must be used to enable diplomatic functions during times of armed conflict, tension and disturbance, due to the manifest difficulties of protecting diplomats under such conditions (among other reasons).

Information globalization enabled by ICT and the popularization of the Internet since the 1990s has become an important and influential factor in contemporary international relations and one of the most effective mutual political influences in the world. The Internet is central to economic globalization, and the strongest guide in all political, economic, cultural and social interactions of globalization, including diplomacy. Indeed, diplomacy itself is increasingly shaped by the universal impacts of globalization, while it was traditionally determined by the interests of states in terms of ideological, social and economic systems.

⁵⁹¹ Ibid 95.

⁵⁹² Archetti (n522)181.

⁵⁹³ Archetti (n522)181.

Despite the obvious importance of technology, MENA is traditionally resistant to innovation and change, and the countries of the region require assistance and resources to overcome obstacles to the adoption and maintenance of technology and information preservation. Arab cultures have a very high level of uncertainty avoidance, and in the era of WikiLeaks the natural inertia of political elites is compounded by their paranoia about espionage and potential subversion; thus, social media may be viewed as a threat to sovereignty.

The communications revolution has deepened the role of diplomacy and made it more sophisticated and complex. It has given the diplomatic mission special features, such as accelerating bureaucratic functions and reducing the formalities associated with diplomacy in the past. It has enabled more openness to diverse segments of society and its activities, with diplomats developing the mission as envoys between civilizations.

E-diplomacy can be used to protect diplomats and prevent attacks against them, particularly in times of armed conflict where a nation loses control over its territory. The most critical role of diplomats is negotiation during armed conflicts, which can often be implemented online. Although face-to-face meeting and negotiation is important, online negotiation can be critical to save the lives of diplomats and conduct international relationships efficiently and economically. In the case of Ambassador Stevens, if the US had used e-diplomacy in its diplomatic relationships with Libya the diplomatic staff would not have been within the reach of militants, and both Libya and the US could have saved extensive resources by preventing the attack. As a developing country, Libya is less able to meet normal international obligations toward the protection of diplomats.

Although it lacks resources, has poor management structures and security challenges, Libya has made minimal use of the advantages of information and communications technology in its diplomatic practice to protect diplomats in time of armed conflict

Chapter 4: Transitional Justice

4.1 Introduction

TJ refers to the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large scale past abuse in order to ensure accountability, serves justice and achieve reconciliation.⁵⁹⁴ It is not a way of mending all that is wrong in society, or a special kind of justice (e.g. restorative, distributive or criminal justice), but it applies human rights policy in certain circumstances. It is also an attempt to provide as much justice as possible under the political circumstances at this time.

TJ is not a coherent idea or practice but its basis is the recognition of the principles of human rights. Certain mechanisms such as prosecution, fact-finding, investigations, reparation programmes and reform initiatives have been associated with this idea as the most effective means of rescuing the principles of human rights. The practice of TJ is therefore an attempt to facing up to impunity and to search for effective remedies and the prevention of repeat violations. It is not a routine application of standards but is done with careful and rigorous assessment.

For example, in the case of the killing the US Ambassador to Libya in 2012, it was possible that the perpetrator who killed the ambassador would have escaped, which is why the US implemented an extraordinary intervention to capture the offender, due to the likelihood that the Libyan government was unable to prosecute the perpetrators. In this situation if the Libyan government implemented TJ or adopted hybrid courts (which the Libyan government resorted to recently), Libya may have been able to solve the Stevens case by identifying, arresting and prosecuting the offenders. Therefore, TJ is not a blueprint to be applied by governments under certain circumstances, rather it is a tool to address impunity and redress harm away from the routine application of normal judicial standards.

As representatives of their home states in foreign countries, diplomats are placed in vulnerable positions in times of internal crisis or instability. Consequently, international law protects those exposing life and health for the greater good of the International office. Obligations to protect foreign envoys are among the longest - standing rules of diplomatic and consular law. Upon codification in the 1961 VCDR and the 1963 VCCR, personal inviolability was deemed so well

⁵⁹⁴ Noemie Turgis 'What is Transitional Justice is?' in Amina and others, *Transitional Justice and Human Rights*, (International Journal of Rule of Law 2010) 11.

established in customary international law that negotiators barely discussed its scope or formulation. The Conventions comprise a special positive duty of protection and a negative duty to abstain from exercising any enforcement right, in particular an arrest or detention of foreign envoys (Articles 29 VCDR and 40-41 VCCR). The obligations apply to state representatives on duty (e.g. the 2012 killing of the US Ambassador in Benghazi).⁵⁹⁵ Inviolability is to be respected in the first place by the receiving state's authorities. Any attack upon the person, freedom, or dignity of a diplomatic agent is prohibited, which implies that no arrest, abuse, or strip-search of a diplomat by armed forces or police officers can occur. As for consular officers, an arrest or detention pending trial is possible in case of a grave crime and pursuant to a decision by a competent judicial authority.⁵⁹⁶

Protection of diplomats, as discussed in Chapter 1, is the responsibility of the receiving state under any circumstances, thus it is responsible to take appropriate steps to remedy criminal actions against diplomats subject to the VCDR (Article 29).⁵⁹⁷ As explained with regard to the Tehran hostage case, the ICJ stated that the receiving state has a duty to take steps to pursue offenders and to pay compensation for injury to diplomats. According to the ICJ, Iran is under an obligation to make reparation for the injury caused to the US: 'The government of the Islamic Republic of Iran is under an obligation to make reparation to the United States of America for the injury caused to the latter by the events of 4 November 1979 and what followed from these events'.⁵⁹⁸ The problem of attack on diplomats can only be remedied by placing an affirmative obligation on the state to investigate and prosecute human rights violators.⁵⁹⁹

The case of violation of international obligation could be raised to the ICJ when only after the state has exhausted all internal means to find justice for the diplomat. In case of killing of ambassador Stevens, applying TJ mechanisms might help to find the truth and the circumstances that took place.

Furthermore, in some cases the ICC can rely on the investigation made by the truth commission.⁶⁰⁰ The investigation through the commissions of inquiry does not remove the

⁵⁹⁵ Sanderin Duquet and Jan Wouters 'The international protection of diplomatic and consular agents' (2017) OUPBLOG. Available at <<https://blog.oup.com/2017/04/international-protection-ambassadors-Vienna-convention/>> Accessed 3 June 2017.

⁵⁹⁶ Ibid.

⁵⁹⁷ Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

⁵⁹⁸ Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

⁵⁹⁹ Turgis (n608) 12.

⁶⁰⁰ Christopher D. Totten 'The International Criminal Court and Truth Commissions: A Framework for Cross-

criminal aspect of the case, therefore, after making sure that the amnesty laws are not provided for the perpetrators of the violations against the safety of the diplomat and embassy security, it is possible to adopt these investigations whether in the internal courts, if the state is capable of conducting the trial, or if the state is not capable as the situation in Libya, the case must be referred to the ICC.⁶⁰¹ Hence, it is possible to rely on the investigations conducted by the truth commission accompanied by the evidence and it is regarded as a supportive process and preparation for the task of the ICC. However, the state might establish a special court to charge those accused of crimes against diplomats. It should be noted that Libya is moving towards adopting a hybrid judiciary currently to develop and promote TJ in Libya. A truth commission is not focused on a specific event but attempts to paint the overall picture of certain human rights abuses, over a period of time.

If applied successfully, such mechanisms would be more effective than other internal laws which might not have such guarantees. However, internal laws themselves should be redesigned to apply to the citizens of the receiving state with regard to diplomats.

The most important feature of TJ, which makes it the best way to remedy injured diplomats, is that it is not limited to judicial procedures, rather it encompasses non-judicial procedures. Also, there are international procedures when states fail to meet their obligations in accordance with the internal procedures of TJ, as this chapter examines. International procedure or recourse to the ICC to charge offenders when states fail to do so is a good guarantor of non-impunity. However, TJ must be comprehensively reviewed and endorsed by the international community to become international law. The researcher also believes in the importance of considering diplomats to be victims of human rights abuses to ensure their fundamental human rights, especially with the increase the numbers of conflicts accompanied by an increased propensity to attack diplomats and their premises in recent years.

Justice is action in accord with the necessities of maintaining stability in society and the rule of law. It is universally acknowledged that fairness and equity in rendering justice improves the overall lives of members of a society, although there is great divergence in views on what constitutes fair justice. When justice loses transparency, society will suffer from different kinds of injustice and hatred, leading to conflicts.

Interaction in the Sudan and Beyond' 7 (1) 2009 North-western Journal of International Human Rights 1.

⁶⁰¹ Ibid 1.

Post-conflict circumstances often show signs of piecemeal and ad hoc legal frameworks that neglect international norms and which are distorted by political expediency, including discriminatory elements that do not meet fundamental requirements of international standards of human rights and criminal law. Conflict causes the suspension of political and legal norms, with an influx of emergency laws and executive orders that post-conflict regimes are often reluctant to give up. Furthermore, in case there is an appropriate law, the public may not know anything about it, and the new government does not have ability and essential means to implement these laws. Also, during such times, national systems such as judicial or police institutions and correctional systems lack human resources and material and financial support necessary for the complex institutionalisation of legal justice.⁶⁰² Moreover, regimes and their associated institutions of law often lack popular legitimacy due to having risen to power by means of conflict, generally associated with abuse and repression.⁶⁰³

Therefore, the international community has sought to find effective mechanisms to redress the past suffering of war-torn societies as well as to re-establish the rule of law under systems of TJ. TJ is an assertive approach to safeguarding the rights of victims, including diplomats, in order to know the truth and to hold criminals accountable, which generally involves institutional reform and satisfactory reparation for victims. In fact, TJ includes both judicial and non-judicial processes and mechanisms seeking redress for all kinds of injured diplomats' rights, for example civil, political, economic, social and cultural rights. TJ also focuses on the causality underpinning abuses of human rights and International Humanitarian Law (IHL).⁶⁰⁴ The international community needs to redress the problem of attacks on diplomats during conflict and in post-conflict situations for a long-term solution; it must seek to address the root of the problem, which can help to avoid the repetition of such crimes and help legislators develop suitable mechanisms to redress such problems. However, this must be squared with the realpolitik of trying to preserve some kind of normalcy of life (among former and continuing enemies) in post-conflict areas.

TJ might have international or internal mechanisms. Generally, the former are invoked when the latter prove inadequate, with governments resorting to treaty bodies, regional tribunals and

⁶⁰² UNSC (23 August 2004) UN Doc S/2004/616

⁶⁰³ Ibid.

⁶⁰⁴ Louise Arbour 'Economic and social justice for societies in transition' (2007) 40 *Journal of International Law and Politics* 1. Available at <<http://nyujilp.org/wp-content/uploads/2013/02/40.1-Arbour.pdf>> accessed 20 March 2016. ; UNGA 'Annual Report of the UN High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General' UN Doc A/HRC/10/48, (26 January 2009) 4. <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>> accessed 2 Jan 2015.

international courts.⁶⁰⁵ However, domestic justice systems should be the first resort in pursuit of accountability, although these are often unwilling or unable to prosecute violators due to the intensity of passions and power lobbies and competing interests in the immediate vicinity of the problem. The establishment and operation of the international and hybrid criminal tribunals over the last decade provide a forceful illustration of this point. These tribunals represent historic achievements in establishing accountability for serious violations of international human rights and humanitarian law by civilian and military leaders. They have proved that it is possible to deliver justice and conduct fair trials effectively at the international level, in the wake of the breakdown of national judicial systems. More significantly still, they reflect a growing shift in the international community, away from a tolerance for impunity and amnesty and towards the creation of an international rule of law. Despite their limitations and imperfections, international and hybrid criminal tribunals have changed the character of international justice and enhanced the global character of the rule of law.⁶⁰⁶

TJ processes are frequently designed and applied in fragile post-conflict and transitional surroundings. That means TJ processes do not operate in a political vacuum. However, the UN is keenly interested and aware of the political framework and the possible application of TJ process in complex situations worldwide. This knowledge is important to help post-conflict states to avoid unfair trials and dead-ends when regimes arbitrarily apply the processes and mechanisms of TJ, failing to observe the requirements of accountability, justice and reconciliation.⁶⁰⁷

Laws are instituted to preserve justice; whether based on human consensus or societal rules, fair treatment is supposed to be ensured for all members of society, including diplomats. Several issues of justice arise and play a significant role in causing, perpetuating and ending conflicts. Just institutions are likely to instil justice among members of a society, along with a sense of stability, which would otherwise lead to dissatisfaction, rebellion and revolution. Each of the different spheres expresses the principles of justice and fairness in its own way, resulting in different types and concepts of justice: distributive, procedural, retributive and restorative. These kinds of justice are important both at the national and international levels of the effects of political, civil and criminal

⁶⁰⁵ UNCHR, 'Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the UN High Commissioner for Human Rights' (24 January 2006) UN Doc E/CN.4/2006/101. 614UNSC (23 August 2004) UN Doc S/2004/616.

⁶⁰⁶ UNSC (23 August 2004) UN Doc S/2004/616.

⁶⁰⁷ UN, 'Guidance of the Secretary General; UN Approach to Transitional Justice', (March 2010) 4. Available at <https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf> accessed 2 May 2015.

justice.⁶⁰⁸

The history of modern TJ can be traced back to the aftermath of the Second World War.⁶⁰⁹ Major states had degenerated into authoritarian regimes and dictatorships with massive violations of human rights, in the wake of this, the international community (particularly the US, UK and France, who wished to contain the spread of Communism) sought to promote democratic governance to address and prevent these serious violations to prevent obstacles to security and development goals.

TJ mechanisms are not limited to judicial processes. According to a UN report, ‘justice and achieving reconciliation may include both judicial and non-judicial mechanisms, with different levels of international involvement (and none at all) and individual prosecutions, reparations, truth-seeking, institutional reform’.⁶¹⁰ A large number of TJ experiments took the form of the formation of ‘truth and reconciliation’ under the democratic power and local and international human rights organizations in order to support injured diplomats and their families. Committees often came at the stage of political development either after weakness or the fall or collapse of the former regime (military regimes and dictatorships in the case of the Middle East); in a democratic or political transition (as a case of South Africa, Argentina and Chile); or in the context of the continuity of the old system that consciously addresses its legacy to filter the past, without a radical rethink in the course of the old rules (the case of Morocco). In other cases, the establishment of committees with financial support from the international community came within the framework of the peace-building process after the civil war (e.g. in Guatemala).

Several countries use two methods of achieving justice in post conflict, namely TJ and reconciliation. The former often target three primary conceptual goals: protection of the historical facts and knowing the truth about violations; determining the limits of responsibility of the actors (politicians, security services, the army, the judiciary, the media and others); and ascertaining the fate of diplomatic victims. The responsibility of the actors, whether private individuals or state organs, is discussed in the following chapter, which examines the responsibility of states to protect diplomats in more depth. The current chapter explores what the concept of TJ means, why it is important and its main elements. It explains the experience of states that achieved TJ after long

⁶⁰⁸ Peter T. Coleman, Morton Deutsch and Eric C. Marcus, *The Handbook of Conflict Resolution: Theory and Practice: Theory and Practice*, (3rd ed., John Wiley & Sons 2011) 45-50.

⁶⁰⁹ Carlos Closa Montero, *Study on How the Memory of Crimes Committed by Totalitarian Regimes and Jon Elestra, Closing the Books Transitional Justice in Historical Perspective*, (1st ed., Cambridge University Press 2004) 2.

⁶¹⁰ UNSC (23 August 2004) UN Doc S/2004/616.

period of crises and human rights abuses, and finally considers the experience of some countries in this regard, with particular consideration of the impacts of the Arab Spring.

This chapter identifies some connections between the responsibility of states in armed conflict and times of political tension and disturbance under international law to protect diplomats and TJ. With particular reference as to how the latter excludes diplomats from appropriate consideration, this research reiterates that diplomats should be considered as victims of human rights abuses. This novel perspective may help identify mechanisms to grant justice and protection to diplomats. However, this chapter is going to rely on some examples, which is not related to.

Until recently, few scholars have evaluated and analysed TJ as a consistent system of implementation in the context of a process of transition from mass violation of human rights to a more peaceful and democratic state. Scholars have tried to establish a link between TJ and human rights abuses by focusing on the importance of the TJ system to achieve justice for victims of past human rights violations. Examples include Paige,⁶¹¹ Megret and Vagliano,⁶¹² and Rubin.⁶¹³ As explained early in Chapter 1 of this thesis. Diplomacy has a particularly strong link with TJ relative to other kinds of justice. For example, in 2006, diplomacy was key to legal redress for the conflict in Ugandan government; in August of that year, the parties signed a historic agreement on the cessation of hostilities, which led to a cease-fire.⁶¹⁴

This chapter discussed the background information on conflict situations in countries like post-war Germany, Chile and South Africa, but diplomats were not primarily affected by conflict events in those cases; nevertheless, they are instructive for the mechanisms of TJ.

4.2 The Concept of TJ

The concept of TJ can be affected by the repression and tyranny that characterized the former regime, and human rights abuses are typically carried out by government officials, which of course affect the quality of the mechanisms and the nature of the actions that will be relied upon for the application of TJ. The higher the degree of oppression and tyranny, as characterized by the

⁶¹¹ Paige Arthur 'How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice' (2013) 31 *Human Rights Quarterly* 321.

⁶¹² Frederic Megret and Raphael Vagliano 'Transitional Justice and Human Rights' in Dov Jacobs and Luke Moffett, *Research handbook on Transitional Justice* (Edward Elgar, 2016) 10.

⁶¹³ Barnett R. Rubin 'Transitional Justice and Human Rights in Afghanistan' (2003) 79 *International Affairs* 567.

⁶¹⁴ Rosalind Shaw, Lars Waldorf, Pierre Hazan, *Localizing Transitional Justice Interventions and Priorities after Mass Violence*, (2010 Stanford University Press) 149.

apartheid regime in South Africa or the Nazis, the greater the need for mechanisms employing greater severity in sanctions, as represented in the cleansing mechanisms, or criminal accountability and retribution. If power has been transferred in a peaceful and smooth way, the new government can resort to less 'hard' mechanisms, such as the acknowledgment of the truth, or the obligation of compensation or apology.⁶¹⁵

The definition of TJ is still unclear, especially the first part of this term ('transitional'); the question arises as to whether there is such a thing as TJ.

There have been international and local attempts to define the TJ. Many scholars have recognized the importance of using universal conceptions of justice.⁶¹⁶ For example, Teitel stated that TJ is associated with a universal rights discourse, and that the concept is broad enough to include international human rights and international humanitarian legal norms, but also encompassing more abstract rule of law standards.⁶¹⁷

In the international human rights (IHR) movement, TJ means the judicial process in the progress of democratic evolution in dealing with dictatorial regimes' human rights abuses. It was used in the post-conflict processing of war crimes and human rights abuses committed in conflicts.⁶¹⁸ The UN has played an important role in determining the framework of TJ through an approach based on respect for the rule of law in post-conflict periods. Former Secretary General of the UN, Kofi Annan, stated in his report of 2004 that the experience of the organization during the preceding decade clearly showed that the consolidation of peace in post-conflict in the short term and the maintenance of peace in the long-term cannot be achieved unless the population is confident of the possibility of detecting grievances through legitimate structures for the settlement of disputes by peaceful means, and of the fair administration of justice.⁶¹⁹

Although the ICC has in some cases depended on the internal investigation of the state (conducted by a truth commission),⁶²⁰ there is no existing definition of TJ, and a comprehensive understanding

⁶¹⁵ Eric A. Posner 'Transitional Justice as Ordinary Justice' (2003) 117 Harvard Law Review 762.

⁶¹⁶ Colm Campbell and Fionnuala Ni Aoldin 'Overview Local Meets Global: Transitional Justice in Northern Ireland'; Ruti G. Teitel 'Transitional Justice in a New Era' (2002) 26 (4) Fordham International Law Journal 893.

⁶¹⁷ Teitel (n623)893.

⁶¹⁸ Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol 2 (United States Institute of Peace Press 1995)45.

⁶¹⁹ UNSC 'The rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) UN Doc S/2004/616, Para (2).

⁶²⁰ Yav Katshung Joseph 'The relationship between the International Criminal Court and Truth Commissions: Some thoughts on how to build a bridge across retributive and restorative justices' (Transitional Justice and Human Security Conference organised, Lord Charles Hotel-Cape Town/South Africa 28 March-

of TJ and its aim of embedding peace and democracy is lacking.

States have tried to define the TJ in their own TJ law. According to the Tunisian Transitional Justice Law (2013), TJ is a complete path of the mechanisms and the means adopted to understand and address past human rights violations, to reveal the truth and to hold accountable those responsible, and to award reparation to and rehabilitate victims in order to achieve national reconciliation and preserve the collective memory. TJ mechanisms document and establish guarantees of non-repetition and the transition from state tyranny to a democratic system contributes to a devoted human rights system.⁶²¹ This definition is an all-encompassing one which outlines the ways to achieve TJ and its goals and its purpose.

The original function of TJ is to hold offenders accountable for serious violations of human rights during conflict; due to political interference, accountability occasionally involves only leaders, who are often convenient scapegoats, although truth commissions that investigate the crimes of the past in order to understand the reason behind such crimes and record them, and guarantee they are not repeated, can play a conciliatory as well as cathartic role, as in the case of South Africa.⁶²² It is clear from these considerations that the idea of TJ is not an academic issue; rather it is directly related to pragmatic concerns about the possibility of changes in social, economic and political structures through important negotiations taking place in a state.⁶²³

Scholars tried to define the TJ as a ‘set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law’.⁶²⁴ According to this concept, TJ is the potential of the new government to deal with the war-torn society in order to re-establish the rule of law far away from reprisals approach. TJ is not a special kind of justice; rather it is an approach to achieve justice in transition periods of conflict and/or state repression. By trying to achieve accountability and compensation for victims including injured diplomats, TJ provides recognition of the rights of victims and encourages civil trust, and strengthens the rule of law and democracy.

While some scholars tried to define TJ in accordance to its forms and procedure that TJ is ‘a

1April 2005). Available at <http://archive.iccnw.org/documents/InterestofJustice_JosephYav_May05.pdf> Accessed 2 June 2017.

⁶²¹ Tunisian Organic Law of establishing and organizing transitional justice, No 53 of 2013, December 24, 2013.

⁶²² M. Cherif Bassiouni ‘Editoria’ (2014) 8 *The International Journal of Transitional Justice* 325.

⁶²³ UNHR ‘Transitional Justice and Economic, Social and Cultural Rights’ (2014) 6.

⁶²⁴ Naomi Roht-Arriaza and Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, (1st ed, Cambridge University Press 2006) 2.

process of acknowledging, prosecuting, compensating for and forgiving past crimes during a period of rebuilding after conflict'.⁶²⁵ Also, TJ is 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.⁶²⁶

Teitel⁶²⁷ defined TJ as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes". This thesis defines TJ as a range of judicial and non-judicial processes of achieving justice in transition time or after a revolution and disturbance. This justice aims to find justice for victims of human rights abuses through telling them the truth of the reasons for targeting them. States are accountable for responsible persons, delivery preparation, and guaranteeing non-repetition. This entails that they carry out reforms that include all political, legal and even social aspects, in a way that guarantees human rights and reassures citizens of the sovereignty of justice and human rights.

It is clear from the above definition that TJ is a system of justice that focuses on the period of instability. However, there is not a great possibility of this justice applying to diplomats, since there is no legal text to prevent this application.

Regardless of the exact definition of TJ, peace is an internal issue but it could not be achieved if foreign countries intervened in the internal affairs of another state, as happens in MENA nowadays.

TJ measures that were adopted included prosecutions, usually of past regime leaders; truth-telling initiatives, such as opening up state archives and establishing official truth commissions; the creation of reparations programmes for victims; and the vetting of public employees, especially (but not exclusively) members of the security forces. TJ emerged as part of a recognition dealing with systematic or massive human rights abuses requires a distinctive approach that is both backward and forward-looking.⁶²⁸

The concept of TJ stems from the international human rights movement. At first, it referred to the judicial process of addressing human rights violations committed by dictatorial or repressive

⁶²⁵ United States Institute of Peace 'Transitional Justice: Information Hand book (September 2008) Available at <https://www.usip.org/sites/default/files/ROL/Transitional_justice_final.pdf> Accessed 4 June 2017.

⁶²⁶ UN SG 'The rule of law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the Secretary-General' (23 Aug 2004) UN Doc S/2004/616, at para. 8.

⁶²⁷ Teitel (n158) 70.

⁶²⁸ UN 'WHAT IS Transitional Justice?' (20 February 2008) Available at <http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf> Accessed 2 May 2017.

regimes in the course of democratic transition. Later on, the term also came to be used for processing war crimes and massive human rights abuses committed in violent conflicts.⁶²⁹ The concept has increasingly gained importance and gradually extended its meaning during the past two decades, and has been widely discussed by peace-building agencies engaged in human rights activities in war-torn societies. Today it covers the establishment of tribunals, truth commissions, settlement on reparations, and political and societal initiatives devoted to fact-finding, reconciliation and cultures of remembrance⁶³⁰

According to Bell,⁶³¹ the new law of TJ came as a result of the combination of peace agreement practice and legal developments. This “new law” draws on human rights law, humanitarian law, international criminal law and ordinary criminal law, but cannot be justified in terms of any one of these regimes on their own (and therefore remains controversial). The new law of TJ is a new developing practice rather than a new law. It finds some basis in soft law standards that are emerging with reference to TJ, and in the practice of states and international organisations.⁶³²

The absence of an international convention covering the rule of TJ led to more complexities. Hence, there is a real need for a unified international concept of TJ that includes the main elements that should apply to guarantee successful TJ. These basic elements include the procedure of finding justice for victims and public disclosure. Furthermore, some states might adopt the amnesty mechanism. Although amnesty might be a good choice according to the situation of a given country, it should not apply to criminals who attack diplomats and embassies. The state sometimes might find it better to encourage citizens to forget about the past (i.e. prioritising ‘reconciliation’ over ‘retribution’). However, serious crimes, including crimes against diplomats, remain offenses in conventional criminal law as well as international human rights law, and victims are entitled to justice and reparation.

During the occurrence of political transition after a period of violence and repression in a society, that society often finds itself faced with a difficult legacy of human rights violations, and therefore the state seeks to deal with the crimes of the past in order to promote justice, peace and reconciliation. Therefore, governments and NGOs activists pursue various judicial remedies and non-judicial methods to address human rights crimes; the latter are often more *practically* efficacious than the former, particularly in improving the material existence of victims.

⁶²⁹ Martina Fischer ‘Transitional Justice and Reconciliation: Theory and Practice’ 405

⁶³⁰ Ibid

⁶³¹ Bell (159) 1.

⁶³² Ibid 1.

There is also a close relationship between the concept of TJ and IHL, particularly as one of the most important goals of TJ is to address serious violations of human rights, which is the core of IHL. Indeed, TJ is the implementation of IHL arrangements to address those violations that emerge during armed conflict, holding accountable the perpetrators of such violations of the rules. However, the scope of the concept of TJ includes many more aspects; for example, it covers cases of human rights violations in times of peace as well, and includes many of the mechanisms that do not come under the remit of IHL, such as cleansing, institutional reform and reconciliation.

Another aspect of the jurisprudence in which TJ overlaps with criminal law emerged during the Nuremberg Trials (held between November 20th 1945 and October 1st, 1946), and became definite and clear according to the principle of individual criminal responsibility, which is governed by criminal law.⁶³³ TJ addresses serious violations of human rights during war and peacetime; it could be regarded as a kind of international criminal law. The absence of a legal form of TJ means it can be applied to all cases (e.g. both political and criminal cases), although the reverse of this coin is that TJ can be considered highly subjective (and potentially political).

According to a UN report on the rule of law and TJ for communities in the stages of conflict and post-conflict, the basic concepts in this area find primary sources in the Charter of the UN, along with modern international legal rules such as international human rights law, international humanitarian law, international criminal law, and international refugee law.⁶³⁴

Several scholars have different views of when exactly the concept of TJ emerged. Some argue that the concept emerged in 1995,⁶³⁵ while others stated that the first use of the term was in 1994, referring to the South Africa's transition from apartheid to a democratic system of government.⁶³⁶ This transition came after years of racial repression, and truth and justice were essential to realising a peaceful transition to democratic rule, which became a model for several societies undergoing post-conflict transition.⁶³⁷

Other scholars stated that the concept of TJ emerged after the end of the First World War, when its main features became evident through the attention of the international community to dispute and conflict resolution, and the urging of countries to follow the criminal justice system to address

⁶³³ Arbour (n 612) 1.

⁶³⁴ UNSC (23 August 2004) UN Doc S/2004/616.

⁶³⁵ Villalba (n 380) 1.

⁶³⁶ Bassiouni (n 630) 325.

⁶³⁷ Ibid 325.

gross violations of human rights. However, the evolution of this concept and the crystallization of the basic components began with the formation of democracies that took place in some countries of the world during the late 19th century;⁶³⁸ the researcher agrees with this view.

The UN High Commissioner for Human Rights is responsible for the policy area of TJ. The current incumbent, Navanethem Pillay, indicated that TJ efforts must be based on human rights and focused in a coherent manner on rights and needs of victims and their families, and the need for a national negotiation. Diplomats who have been affected as a result of acts of repression or conflict in the past need to express their views freely under TJ programmes, taking into account their experiences and determining their needs and entitlements.⁶³⁹

However, the most frequent criticism of TJ pertains to remedies for victims of violations of human rights. Although human rights are considered universal, TJ has generally been applied to non-Western, developing countries as part of Western cultural imperialism in international institutions, whereby its own mores and legal assumptions become universal requirements.⁶⁴⁰ Indeed, in foreign policy, the international community sometimes imposes on developing countries systems of justice that could not be countenanced in Western nations, such as the case of Iraq.

The US administrator in Iraq, Paul Bremer, established the Iraqi Special Tribunal arbitrarily.⁶⁴¹ It structurally ignored the mistakes of the US during their invasion of Iraq in 2003 and the accompanying human rights abuses, along with well-known, documented and acknowledged crimes of the US military such as the Abu Ghraib prison scandal.⁶⁴² This is the repetition of a familiar pattern in post-conflict legal procedures whereby the victors are not subject to the justice they mete to others (for example, US military personnel were held to be exempt from prosecution during and after WWII).⁶⁴³ In practice, TJ frameworks are primarily concerned not with conflicts per se, but with atrocities committed by former regimes in the past, usually gross

⁶³⁸ Teitel (n 158) 69.

⁶³⁹ UN (2015) 'Rule-of-Law Tools for Post-Conflict States: Archives, UN' Available at <<http://dx.doi.org/10.18356/02cd697f-en>> accessed 18 July 2016.

⁶⁴⁰ Emmanuelle Jouannet 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18(3) 379 *The European Journal of International Law* 407.

⁶⁴¹ Ramsey Clark and Curtis F.J Doebbler 'The Iraqi Special Tribunal: A Corruption of Justice' (2006). Available at <<http://iacenter.org/Iraq/hussein-5-102006.htm>> Accessed 2 May 2016; Rosemary Nagy 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 *Third World Quarterly* 275.

⁶⁴² Nagy (n655) 275.

⁶⁴³ Robinson O. Everett 'Persons who can be Tried by Court-Military' in Robinson O. Everett, *Military Justice in the armed Forces of the United States*, (the military publication company, 1956) 148; Anup Shah 'United States and the International Criminal Court' (2005) *Global issue* available at <<http://www.globalissues.org/article/490/united-states-and-the-icc>> accessed 20 June 2016.

violations of the civil and political rights of citizens under the jurisdiction of the offender.⁶⁴⁴ However, TJ is not special kind of justice, it covers specific crimes including genocide, sexual violence, disappearance, massacre, torture and other war crimes, and it is also concerned with criminal acts.⁶⁴⁵

TJ processes and mechanisms play a significant role in justice for the victims of conflict and human rights abuses.⁶⁴⁶ That is why the researcher believes it could play a significant role in finding justice for injured diplomats. The interests and inclusion of victims are the main aim of TJ. The contribution of the victims in the process of TJ and in the implementation of TJ processes could ensure its success as well as the success of the national reconciliation, establishing peace and accountability through appropriate TJ mechanisms.⁶⁴⁷ Furthermore, it could ensure the process of international and diplomatic reconciliation with the home countries of diplomats affected by the events. TJ is required to be sympathetic to the efforts of the international community to peacefully resolve conflict, resolve property disputes, promote human rights, keep personnel from fear and neediness, inspire economic progress and promote liable governance.⁶⁴⁸ Accountability for the abuse of human rights violations is important to support the rule of law in post-conflict. TJ, including trials, reparations, and truth commissions, helps strengthen the rule of law, particularly in post-conflict states. Brahm states that ‘For a peace process to succeed, it also must incorporate not just the combatants and victims, but the society generally’.⁶⁴⁹

The impact of serious violations of human rights warrants the right of victims to see the punishment of the perpetrators, to find out the truth and to be awarded compensation. Because *systematic* violations of human rights affect society as a whole in addition to particular victims, it is the duty of states to ensure that, in addition to the fulfilment of these obligations, such violations are not repeated, and thus TJ assumes a special duty to reform the institutions that either had a hand in these violations or were unable to prevent them.

⁶⁴⁴ Villalba C ‘Transitional Justice: Key Concepts, Processes and Challenges’ (2011) Institute for Democracy and Conflict Resolution. Available at <http://www.idcr.org.uk/wp-content/uploads/2010/09/07_11.pdf> accessed 10 September 2015.

⁶⁴⁵ Nagy (n 655) 275.

⁶⁴⁶ UNSC (23 August 2004) UN Doc S/2004/616

⁶⁴⁷ UNSG ‘Guidance Note of the Secretary -General; Approach to Transitional Justice’ (2010) 6.

⁶⁴⁸ UNSC (23 August 2004) UN Doc S/2004/616 Para 64.

⁶⁴⁹ Eric Brahm, ‘Transitional Justice, Civil Society, and the Development of the Rule of Law in Post - Conflict Societies’ (2007) 9 *The International Journal of Not-for-Profit Law* Available at <[SSRN: http://ssrn.com/abstract=1611723](http://ssrn.com/abstract=1611723)> accessed 4 May 2015.

Societies that have suffered from human rights violations, genocide, or other forms of violations including crimes against humanity or the civil war resort to TJ in order to build a more democratic society. In order to achieve justice, several approaches are applied, for example: resorting to lawsuits for violations of individuals, as happened in Kosovo; the establishment of fact-finding initiatives to address past abuses, as happened in Sierra Leone; providing compensation to victims of human rights violations, as in Morocco; or previous operations reconciliation in divided societies, as happened in East Timor and a number of Latin American countries.

Noted successes of the application of TJ approaches include achievements of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Darfur and the International Criminal Tribunal for Lebanon, and new types of international and nationally established courts convened to try war crimes, and the extensive ness of the list of countries which exercise universal jurisdiction over crimes against humanity in other countries. Most importantly, the establishment of the International Criminal Court completes evidence of this new phase of the *search* for international justice, although the latter is often criticised for having a negligible practical impact thus far.

International Human Rights law, International Humanitarian law, International Criminal law and International Refugee Law are the resources for achieving TJ aims. The principles of the IHRL have played a significant role in achieving justice in a transitional period in post-conflict as well as in reducing impunity. For example, Human Rights Law stated the responsibility of the state to achieve the goals of the TJ through investigating and prosecuting human rights abusers (i.e. criminals) and grave violations of International Humanitarian Law, as well as the state's responsibility to take appropriate steps to avoid repetition of such violence in the future. Also, the right of injured diplomats to know the truth about past abuses has been emphasized, which is a relatively novel issue in law as a right. Furthermore, the right of these injured diplomats to get the reparations for abuses of International Humanitarian Law and Human Rights Law has been well established. In order to fulfil these obligations, several measures have been taken, including international and national or mixed judicial mechanisms, reforming institutions, compensation and establishing truth commissions.⁶⁵⁰

Despite the challenges that TJ faces and the limitations of its resources, it has played a significant

⁶⁵⁰ UNHCR 'Transitional Justice and Economic, Social and Cultural Rights' (11 April 2014) UN Doc HR/PUB/13/5), 5- 6.

role in the international and internal community.⁶⁵¹ There are potential benefits offered by truth and reconciliation commissions such as establishing the truth regarding the past, holding accountable the perpetrators of human rights violations, and providing a platform for victims including diplomats to narrate their experiences and to stimulate public debate. It can recommend compensation for victims who are diplomats, and propose legal and institutional reforms when necessary, as well as promoting societal reconciliation and helping to strengthen the democratic transformation.⁶⁵²

TJ is an approach to systematic or massive violations of human rights that both provides redress to victims and creates or enhances opportunities for the transformation of the political systems, conflicts, and other conditions that may have been at the root of the abuses.

A TJ approach thus recognizes that there are two goals in dealing with a legacy of systematic or massive abuse. The first is to gain some level of justice for victims. The second is to reinforce the possibilities for peace, democracy, and reconciliation. To achieve these two ends, TJ measures often combine elements of criminal, restorative, and social justice.

TJ is justice adapted to the often-unique conditions of societies undergoing transformation away from a time when human rights abuse may have been a normal state of affairs. In some cases, these transformations will happen suddenly and have obvious and profound consequences. In others, they may take place over many decades.⁶⁵³ The concept of TJ is associated with periods of political change, characterized by legal responses to confront the wrongdoing of repressive predecessor regimes.⁶⁵⁴ TJ shares in the realization of truth, reparation and compensation for victims, in particular with regard to general political and civil issues. However, TJ is different from the traditional and frequent justice of being transitional. It may involve moving from an internal armed conflict or a civil war to a state of peace and democratic transition, or from the collapse of the legal system to its reconstruction. It is usually characterised by the reconstruction of the state from dictatorship to political and democratic transition, ideally toward openness and pluralism. TJ is essentially in contradiction to the path of criminal justice (both at the national and international level), although the choice of the first route does not mean excluding the second route, especially

⁶⁵¹ Ibid 17.

⁶⁵² Kevin Avruch and Beatriz Vejarano 'Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography' (2001) 2 *Journal of Peace and Conflict Resolution* 47.

⁶⁵³ UN 'WHAT IS Transitional Justice?' (20 February 2008) Available at <http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf> Accessed 2 May 2017.

⁶⁵⁴ Teitel (n158) 69.

for the victims and the impunity of the perpetrators.⁶⁵⁵

TJ can be regarded as a set of measures that must be taken by a state that has emerged from conflict or revolution and has suffered serious violations of human rights. The main obstacle to its implementation is the government's unwillingness or inability of the state to do so. The problems of the past are often more complex than the ability to solve them with one initiative or action without any truth or reparation efforts.

4.3 The Purpose and Importance of TJ

The primary objective of TJ is to end impunity and establish the rule of law in the context of democratic governance.⁶⁵⁶ TJ addresses challenges for societies emerging from violent pasts, i.e. bringing perpetrators to justice without endangering democratic progress; developing judicial or third party fora capable of resolving conflicts; and working out reparations.⁶⁵⁷ TJ creates or enhances opportunities for the transformation of the political systems, conflicts, and other conditions that may have been at the root of the abuses.⁶⁵⁸

If applied in a manner consistent with international guidance (including diplomats as victims of human rights abuses), TJ measures have the potential to mitigate the risk of further violence against diplomats, promote internal and international security, strengthen the rule of law, encourage respect for immunity of diplomats and address the needs of injured diplomats.⁶⁵⁹ Applying TJ to diplomats will provide some form of justice. For example, through TJ mechanisms a serious investigation of violations against diplomats can be conducted. In addition, it imposes suitable sanctions on those responsible for the violations, and ensures reparation for the victims of the violations.⁶⁶⁰ Furthermore, applying TJ enables victims to know the truth about what happened and why the diplomats were targeted, acknowledges injured diplomats' suffering, holds perpetrators accountable, compensates for past wrongs, and prevents future abuses against

⁶⁵⁵ Abdul Hussein Shaaban 'Transitional Justice: Arab approaches to international experience' Seminar / 99

⁶⁵⁶ Christina Binder 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' Report of the Secretary-General, 23.8.2004, S/2004/616, at para. 8.

⁶⁵⁷ Ibid.

⁶⁵⁸ UN 'What is Transitional Justice?' (20 February 2008) Available at <http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf> Accessed 2 May 2017.

⁶⁵⁹ United States Department of State (N613).

⁶⁶⁰ UN 'What is Transitional Justice?' (20 February 2008) Available at <http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf> Accessed 2 May 2017.

diplomats.⁶⁶¹

Based on these considerations, the researcher prefers applying TJ to find justice for diplomats rather than the normal justice because of the mechanisms of TJ, which in the criminal law context can punish offenders to ensure there is no impunity. The state responsibility aspect can be dealt with through diplomatic negotiations between the two states (e.g. the US and Libya), or at the ICJ if negotiations fail.

The truth commission is an important mechanism of TJ, which investigates crimes against diplomats. Truth commissions are set up to discover facts about broad patterns of abuse in order to increase understanding and acknowledge the size of atrocities committed, and to address changes needed to prevent future abuse. They are different to criminal investigations in that they focus on both victims and perpetrators – to get to the bottom of abuses committed against whom and why. This differs from a prosecutor's focus on individual perpetrators who committed specific crimes. Some of the main reasons to establish a truth commission include establishing facts about violations of the past, acknowledge past abuses, restore victims' dignity and respond to some of their major needs, prevent future abuses by recommending reparations or institutional reforms, and to promote accountability and justice.⁶⁶²

There are relationships between the truth commission and internal or international prosecution. A truth commission is complementary to national and international prosecutions, not a substitute for them.⁶⁶³ They are two sides of the same coin: transitional justice.

The responsibility of the receiving state to protect diplomats should be met, as examined in Chapter 5 in detail. States should make an effort to ensure their obligations have been met. The state sometimes after a revolution loses control over some territory (as happened in Libya), and it may be unable to punish offenders through the mechanisms of TJ. It should be recalled that when states fail to charge criminals then the hybrid courts can play an important role to avoid impunity. It is clear then that the main aim of TJ is to redress impunity.

4.4 Forms of TJ

4.4.1 Overview

⁶⁶¹ United States Institute of Peace 'Transitional Justice: Information Handbook' (September 2008)

⁶⁶² Ibid.

⁶⁶³ Joseph (n 16).

The concept of TJ brings together two concepts: justice and transitional, but the meaning and semantic accuracy of the concept means to achieve justice during the transitional stage in the state, for example what happened in Chile (1990), Guatemala (1994), South Africa (1994), Poland (1997), Sierra Leone (1999), East Timor (2001) and Morocco (2004). The lack of definition led to every society applying TJ in a different way in accordance with what was suitable for its situation.

TJ measures usually take place in situations where national and international efforts are targeted at enhancing the rule of law generally. The UN works to support post-conflict societies by strengthening national systems for the administration of justice and security, including official and informal societal resolution conflict, settlement processes, building capacity and providing technical advice and assistance. Due regard should be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their vital role and to do so in conformity with international legal standards. TJ measures, such as prosecution initiatives and institutional reform, are interdependent with these broader efforts. The UN must ensure that transitional justice programmes, by definition exceptional and of limited duration, are coordinated and positively reinforce the broader justice and security reform initiatives so as to strengthen the entire rule of law architecture of the country and, if applicable, the overarching peace-building framework.⁶⁶⁴

The reconciliation aspect of TJ should not be confused with passivity regarding prosecution of alleged offenders; TJ firmly asserts that those who committed mass atrocities in times of conflict need to be punished, but it holds that this cannot be easily achieved or attain the wider desired results (societal impacts) without necessary prerequisite steps and processes. The core processes of TJ are truth commissions to investigate the crimes of abuse of diplomats' safety in order to inform society about the truth of what happened during the conflict.

Under international law these processes of TJ are an obligation of the receiving State. These processes are important to do justice to the injured diplomats victims. TJ investigates cases, prosecutes alleged offenders, punishes criminals, determines and allots adequate reparation, and invokes accountability for past crimes as an obligation of the receiving state according to international law.⁶⁶⁵

In accordance with international law, TJ mechanisms need to seek to ensure that receiving states

⁶⁶⁴ UN 'Guidance Note of the Secretary-General; Approach to Transitional Justice' (2010)20.

⁶⁶⁵ Villalba (652)4.

undertake investigations and prosecutions of gross violations of human rights and serious violations of international humanitarian law, including attack against diplomats. Furthermore, they should guarantee the right of diplomat victims to compensations, the right of diplomat victims and sending state to know the truth about abuses, and guarantees of non-repetition of such abuses.⁶⁶⁶

According to the UN Secretary General's report TJ includes domestic, hybrid and international prosecutions; truth telling initiatives to determine and document violations that have occurred and promoting reconciliation within divided communities; reparations to diplomat victims, including collective and symbolic reparations; constructing a legacy and monuments for education of future generations, and institutional reform.⁶⁶⁷ As seen above, there are several forms of the TJ process. The most important ones are truth commission, prosecution initiatives, delivering reparations, and reforming institutions as explored below.⁶⁶⁸

4.4.2 Truth Commissions

Truth commissions are 'bodies set up to investigate a past history of violations of human rights in a particular country which can include violations by the military or other government forces or armed opposition forces'.⁶⁶⁹ According to this definition, truth commissions are temporary appointees looking for a pattern of diplomats' inviolability abuses in the past (particularly during conflict). This means that truth and reconciliation commissions must decide on appropriate specialists to investigate cases within a certain period.

The truth commission is often established by local government with missions such as investigating past violations of diplomat's inviolability and recording such crimes, and then reporting them.⁶⁷⁰

Reparation of victim of diplomats or their states involves listening to their grievances, recognition of their suffering, and apologizing to them and compensating them and their families and rehabilitation, all in order to facilitate reconciliation and pardon. Commissions must also advise or carry out political and institutional reforms to ensure non-recurrence of violations and the establishment of democracy through constitutional reform, and through legal reform and the

⁶⁶⁶ Elena Andreevska 'Transitional Justice and Democratic Change: Key Concepts' (2013) 1 *Lex ET Sciatica International Journal - Juridical Series* 55.

⁶⁶⁷ UNSC (23 August 2004) UN Doc S/2004/616

⁶⁶⁸ *Ibid.*

⁶⁶⁹ Priscilla B. Hayne 'Fifteen Truth Commissions - 1974 to 1994: A Comparative Study' (1994) 16 *Human Rights Quarterly* 558.

⁶⁷⁰ Teitel (156)69.

reform of the security, judicial and media systems in the state.

International law acknowledges the rights of injured diplomats and underscores the particular gravity of the violation of diplomats' inviolability. In this aspect, and in terms of the concept of society's right to know the truth, international law remains in development, because dictatorial regimes involved in gross violations of human rights have always sought to blur the facts through rewriting history and denying the facts of abuses. Therefore, the search for truth contributes to the historical record in order to avoid this kind of manipulation, helping victims to achieve closure such as by learning of the fate of missing individuals, or why some individuals were exposed to abuse. That can only come through access to information, the declassification of archives, and the investigation of the fate of missing diplomats.

Many countries that experienced serious violations of human rights in the past adopted non-judicial fact-finding, which often takes the form of truth commissions. The subject of the truth has constituted one of the most important experiences of the major challenges in the democratic transition and for the following reasons:

- The desire of the diplomats who are victims and their state to know who is responsible for violations and abuses, the fate of the disappeared and their places of burial.
- The desire not to forget the past and to preserve collective memory.
- The right of diplomats to know the truth about violations of diplomat's inviolability.

More than 30 such truth commissions have already been established, including those of Argentina, Chile, South Africa, Peru, Ghana, Morocco, El Salvador, Guatemala, Timor-Leste and Sierra Leone.⁶⁷¹ Not all truth commissions' experiences and reconciliations have been successful; some have decisively failed to reach the truth, to accord reparations to victims or to secure democratic transformations, as in the cases of Haiti, Sri Lanka and Nigeria, as well as investigation committees on disappearances in Algeria.⁶⁷² These failures were despite the use of diplomatic channels, as in the case of Haiti.⁶⁷³ However, in case of East Timor, diplomatic channels were used to find a solution to the conflict, and diplomatic pressure on Indonesia played an

⁶⁷¹ UNSC (23 August 2004) UN Doc S/2004/616

⁶⁷² Hayner, (n683) 77.

⁶⁷³ Joanna R. Quinn 'Haiti's Failed Truth Commission: Lessons in Transitional Justice' (2009) 8: 3 Journal of Human Rights 265.

important role to bring stability.⁶⁷⁴ Some have achieved mixed results between failure and success, as in the case of Morocco.

However, other truth commissions succeeded and helped to secure and strengthen democratic transition, as in South Africa, Chile, Argentina and Tunisia.

After the January 2011 revolution, Tunisia witnessed a number of activities in the context of TJ. Two truth committees were formed after the defeat of the former regime in order to disclose the truth of the violations committed during the revolution and in the time of the former regime: the National Truth Commission on Corruption and Bribery, and the National Commission to Investigate the Violations Committed. The commissions, composed of national figures, jurists and representatives of civil society, played a key role in disclosing the truth about the abuses of the former regime and its corruption⁶⁷⁵. However, neither of these specifically addressed the cases of diplomats who were victims of violence.

Truth commissions often focus on political and civil rights. However, despite the relatively limited mandates of TJ, it often has a significant impact on consideration of the main reasons of conflict or repression.⁶⁷⁶ Truth commissions play a major role in the resources of IHR, especially in the face of impunity, not only relating to criminal accountability but also in to the right to know the truth.⁶⁷⁷

Truth commissions are often temporary, operating for a year or two, officially recognized and mandated by the state, deriving their powers from it. They may be prescribed in a peace agreement, as non-judicial bodies enjoying a degree of legal autonomy, usually arising in the midst of a process of transformation and transition, from war either to peace or from authoritarian rule to democracy. They focus their attention on the past, investigating the patterns of certain violations committed over a period of time, not about one particular event, concluding their work to provide a final report with conclusions and recommendations, focused on human rights violations and as determined by the commonly understood international norms and standards.⁶⁷⁸

⁶⁷⁴ Olva Ofstad 'Reconciliation and Conflict Resolution in East Timor Lessons for Future Peace Operations' (2012) Oxford Institution for Ethics, Law, and Armed Conflict 1. Available at <<http://www.elac.ox.ac.uk/downloads/Reconciliation%20and%20conflict%20resolution%20in%20East%20Timor%20Apr%202012.pdf>> accessed 20 May 2016.

⁶⁷⁵ Omar Albubakri 'the Path of Transitional Justice Assessment of the experience and its prospects', Al-Sabah News (Tunisia 2017). Available at <<http://www.assabah.com.tn/article/119535/6-6>> accessed 2 July 2017.

⁶⁷⁶ Hayner (n683) 77.

⁶⁷⁷ Yasmin Naqvi 'The Right to the Truth in International Law: Fact or Fiction?' (2006) 88 'International Review of the Red Cross' 245.

⁶⁷⁸ Avruch and Vejarano (666) 47.

Clearly, truth commissions in war-torn societies, often helping those societies to develop from dictatorship to democracy, have played an important role. Its role is not only related to the accountability of the criminal, but also to the comfort and cathartic closure it can offer to victims (including diplomats), in addition to honouring their right to know the truth, and the allocation of appropriate compensation. However, reality indicates that there are frequently delays in the proceedings whereby victims need to wait entire generations, and there is a large degree of official or unofficial impunity still accorded to alleged offenders.

The truth commission's role is not only a disclosure of the fact of violations and an investigation of them, but also an analysis of the violations from the perspective of human rights standards, considering the direct and indirect effects on diplomats victims and society, in order to document this in the framework of the historical record of the country's past in order to preserve the memory of individuals and groups so that lessons can be learnt from past events to avoid their repetition.

4.4.3 Prosecutions Initiatives

New governments instituted after conflict and massive human rights violations find themselves responsible for establishing security and balancing power between the old and new orders during a time of transition. Furthermore, the matter of violation and the victims who waiting for their rights needs to be redressed. Several states were able to charge criminals, while other countries could not. For example, the Nuremberg Trials were possible in post-war Germany only because the Allies had militarily defeated the Nazi regime and apprehended most of its leaders, therefore they possessed sufficient power to guarantee the trial of the leaders of the Third Reich. Conversely, when the transition to democracy occurred in Chile, the new government was unable to prosecute those who had committed abuses of human rights during military rule because of on-going military protection accorded to the former dictator Pinochet as the head of the armed forces.⁶⁷⁹

A third approach is the amnesty one, as adopted by South Africa, which offers perhaps the best example of a genuine transition from a dictatorship to a democratic society without violence;⁶⁸⁰ however, the researcher does not agree with this view as the black citizens of South Africa had no choice but to deal with the former government because of the latter's monopoly of experience in operating the machinery of government as well as the powerful interests involved in the South

⁶⁷⁹ Paul van Zyl 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission (1999) 52 *Journal of International Affairs* 647.

⁶⁸⁰ *Ibid*, 647

African economy. One notable feature of South Africa was that there was at least some form of organised opposition, albeit viewed as criminal under apartheid, whereas in other cases the lack of organised opposition can result in civil war (as in Libya after the defeat of the dictatorial Gaddafi regime in 2012) or a transient and unsustainable democracy (as in Egypt, where after the 2011 revolution the Egyptians ultimately elected President Morsi, who was subsequently overthrown by a military coup in 2013 in a wave of military jingoism). This internal armed conflict affected the safety of the diplomats and their premises in both Egypt and Libya. Tunisia after the January 2011 revolution witnessed a number of activities in the context of TJ, including the trial of a number of former regime leaders and the passage of the amnesty law for the interest of former political prisoners.⁶⁸¹ Similar to South Africa, in 1991, Lebanon adopted an amnesty approach, however the amnesty applied to political crimes excluded crimes against diplomats.⁶⁸²

In action, TJ can be either internal, international, or a combination of the two (hybrid).⁶⁸³ Some measure of international prosecution is generally considered necessary for those bearing the greatest responsibility for international crimes such as war crimes, crimes against humanity and genocide.⁶⁸⁴ The credibility and legitimacy of prosecution initiatives mandates that they are conducted without discrimination and in an objective way, irrespective of who the supposed criminals may be. States have the main obligation to apply jurisdiction over these offenses. Thus, in relation to the supposed wrongdoings committed in the context of the conflict or repressive rule, TJ processes will aim to strengthen or progress national investigative and prosecutorial capacities, with independent and operative judges, adequate legal defence, witness and victims' protection and support, and humane correctional facilities.⁶⁸⁵

The state in post-conflict situations might not be able to mount a prosecution; in this situation, it can contribute to the International Criminal Court. For example, the Darfur Court failed to prosecute alleged criminals in human rights abuses and international humanitarian law violations committed during the conflict. Regardless of the form the prosecution takes, it must be based on a clear

⁶⁸¹ Albubakri (n683).

⁶⁸² Hugo Van der Merwe, Victoria Baxter and Audrey R. Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, (Endowment of the United States Institute of Peace 2009) 46.

⁶⁸³ Laura Davis 'The European Union and transitional justice' (2010) Initiative for Peace building 8 Available at <https://www.ictj.org/sites/default/files/ICTJ-IFP-EU-Justice-2010-English>> accessed 2 Jun 2016.

⁶⁸⁴ UNCHR 'Report of the independent expert to update the Set of Principles to combat impunity' (18 February 2005) UN Doc E/CN.4/2005/102; UNGA 'Report of the UN High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' 12th Session (21 August 2009) UN Doc A/HRC/12/18/Add.1; UNHRC 12th session 21 August 2009 'Annual Report of The UN High Commissioner for Human Rights United Nation Human rights and transitional justice' UN Doc A/HRC/RES/12/11, 9.

⁶⁸⁵ UN 'Guidance Note of the Secretary -General; Approach to Transitional Justice' (Geneva 2010),7

obligation to fight against impunity, focus on the needs of victims, and take into account international standards of fair courts.⁶⁸⁶

Impunity has been fought not only by internal jurisdictions, but also by the international community. That is why the accountable perpetrators of crimes against war, humanity and genocide are not limited within their own jurisdictions. The international community can also take action under the principle of universal jurisdiction to ensure that justice is done. International law has played a significant role in fighting the impunity. For example, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda were established to deal with atrocities including genocide, crimes against humanity and war crimes, as well as making international individuals accountable for such crimes.

The investigation and prosecution of international crimes (including genocide, crimes against humanity and war crimes) is an essential component of TJ. This fact is rooted in the international legal obligations arising from the Nuremberg Tribunal and developed with the International Criminal Tribunals for the former Yugoslavia and for Rwanda. Investigating and prosecuting influential leaders (both political and military) helps strengthen the rule of law and sends a strong message that crimes of this kind will never be tolerated in a society that respects rights. Trials continue to be a major demand for victims. When done in ways that reflect the needs and expectations of victims, they can play a vital role in restoring their dignity and achieving justice.⁶⁸⁷

Hybrid tribunals were established in the cases of the War Crimes Chamber in the State Court of Bosnia and Herzegovina, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Crime Panels of the District Court of Dili in East Timor.⁶⁸⁸ Accountability for human rights violations is important to support the rule of law in post-conflict scenarios. TJ, including trials, reparations and truth commissions, helps strengthen the rule of law.⁶⁸⁹ Libya turned recently to apply the hybrid tribunals, as explained later in this chapter.

Others established a special court to charge the offenders of human rights abuses, such as in the case of Iraq. However, the court's purpose was limited to charge the offenders of the previous regime (of Saddam Hussein), and measures to implement TJ since 2003 have been largely

⁶⁸⁶ UNGA 'Report of the UN High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' 12th Session (21 August 2009) UN Doc A/HRC/12/18/Add.1.

⁶⁸⁷ International Centre for Transitional Justice 'Criminal Justice' (2017). Available at <https://www.ictj.org/our-work/transitional-justice-issues/criminal-justice> Accessed 3 August 2017.

⁶⁸⁸ Villalba (n 652) 3.

⁶⁸⁹ Brahm (n657).

unsuccessful because TJ in Iraq was selective justice (i.e. it did not acknowledge the culpability of other Iraqi and international offenders during the period of the former regime or the aftermath of the invasion). That is why it cannot be described as a project to transition from dictatorship to a fair democratic system. The focus was on trial and punishment, while other basic forms were left out. While the Ba'athist regime is conventionally considered Sunni, it in fact included members and collaborators from all of Iraq's ethnic groups and minorities. While the Ba'athist regime committed numerous violations of the human rights of all Iraqi citizens, but the TJ applied in Iraq was limited to the crimes committed against the Kurds. While these were the most egregious, including ethnic cleansing and the Anfal Genocide, the uncomfortable fact that the regime was supported by the US and most of the international community at the time was not widely acknowledged, and the grievances of Arab Shias and Arab Sunnis against the Ba'athist regime were not addressed.⁶⁹⁰ The grievances of the Shia community, catalysed by Iranian influence and the de-Ba'athification of politics, ensuring strong Shia sectarianism in the government (particularly after 2005), thus subsequent efforts by the Iraqi government to promote reconciliation failed.⁶⁹¹

In regard to truth-seeking, many criminal files are still open and no investigations have been undertaken to determine who exactly was responsible. Who was in charge of the mass graves in the time of Saddam Hussein? Which group targeted Iraqi pilots after 2003? Who is responsible for the killing of more than 300 journalists? Who bombed the Shia holy shrine in Samarra in 2006, which was the cause of the outbreak of strife between Sunnis and Shiites?⁶⁹² The Sunnis were accused of doing this, while America claimed that Iran was behind it as a false flag attack, in order to provoke sectarian conflict.⁶⁹³

In terms of reparation, the question might arise of whether the easiest solution available to TJ – the award of financial compensation – can compensate for the violation of diplomats' inviolability (though often appropriate in itself for material loss associated with violation of inviolability of diplomats).

4.4.4 Delivering Reparation

⁶⁹⁰ Shaaban (663) 99.

⁶⁹¹ Ibid 99.

⁶⁹² Ibid 99.

⁶⁹³ Abdulalah Al-Rawi 'Who is behind the bombing of the military kindergarten in Samarra. An attempt to uncover the truth' Basra Network (Iraq 2013) Available at http://www.albasrah.net/ar_articles_2006/0206/abdal_250206.htm accessed 7 July 2017.

Reparation programmes seek to address the systematic violations of diplomats' inviolability violation by offering a set of material and symbolic benefits to injured diplomats. The UN General Assembly confirmed the right of victims to reparation in Resolution 147/60, entitled: *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law Violations and Serious Violations of International Humanitarian Law*.

The processing of reparation can take a variety of forms, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Experience have proven that the most successful programmes of reparation are those designed in consultation with affected communities, especially the victims (injured diplomats). The UNHCR provides technical assistance in the design and implementation of reparations programmes, supports the participation of NGOs in discussions on reparation, and calls for full implementation of reparation. For example, in Cambodia, the Extraordinary Chambers in the Courts of Cambodia established a process for the participation of victims, which allows victims who have become a party to the claimed reparation to ask for both moral and collective reparation; this was under the observation of the UN.

Another good example is the state of the Nepal. The Government of Nepal embarked on an 'interim relief to the victims of conflict program', which expected reparation to develop a more comprehensive policy in conjunction with the Truth and Reconciliation Commission. However, there were not any cases involving diplomats.

Furthermore, the truth commission in Timor-Leste recommended the development of a programme for reparation. In 2005, Timor-Leste and Indonesia jointly embarked on a new TJ relationship with bilateral truth commissions, with a diplomatic mandate. The Commission of Truth and Friendship of East Timor and Indonesia conducted truth-seeking activities for promoting reconciliation between East Timor and West Timor, and between Indonesia and Timor-Leste. The Commission's ostensible goal was to promote sustainable peace between the two countries.⁶⁹⁴

Colombia has a more active programme for reparation whereby victims could under the Justice and Peace Law; submit to claims of redress against a former fighter whose trial has ended. However, the law is applied in a limited scope and the court decisions in this regard were limited to two resolutions. In addition, the victims of human rights abuse committed by illegal armed groups can

⁶⁹⁴ Melissa S. Williams, Rosemary Nagy and Jon Elster, *Transitional Justice*, (New York University Press 2012) 297.

file for reparation under the Colombia Development Program, which started in 2008 and finished its mission in 2010. This programme granted several victims reparations, however it failed to apply to crimes of the officers of the State. Efforts made by the UN to develop the Colombian Program of Reparation, including the legislation whereby expropriated lands are restored to their owners (victims), adopted by Parliament in May 2011.⁶⁹⁵ However, injured diplomats were not involved in this programme.

As explained previously, the TJ process in Tunisia also defined the focus of reparation and compensation programmes, especially for the benefit of the ‘martyrs’ and victims of the revolution, which was established by Decree No. 1 of 19 February 2011 on amnesty and Decree No. 97 of 24 October 2011, January 2011 and its victims, which was later expanded to include victims of the mining basin. These decrees provide for victims’ compensation, treatment, and education for their families and free transportation.⁶⁹⁶ In Iraq, also the reparation was delivered to the victims. However, compensation of victims has been given indiscriminately and unfairly.⁶⁹⁷ Victims have been reported to be facing difficulties to get their right of compensation, and thousands of families must wait to have their files considered by the Political Prisoners Foundation.⁶⁹⁸ TJ in Iraq was retaliatory, which included not only those who attacked human rights, but also those who belonged to the Ba’ath Party and all those who worked in the important sectors of the state, even if they are not accused of any conventional crime. For the Sunni community in particular the political isolation of de-Ba’athification in Iraq was a disaster, which resulted in the rise of non-state and non-political militias – including ISIS – rising to fill the void of the lack of political leadership.⁶⁹⁹ Justice must be restorative and not retaliatory. Consequently, Iraqi TJ cannot be described as a real case of TJ, and the Iraqi government could not achieve peace and stability in the region.

Reparations programmes aim fundamentally to partially redress diplomats’ inviolability abuses.⁷⁰⁰ Under TJ, states were held responsible for atrocities and wrongful acts against their own citizens, which were regarded as an internal affair. Moreover, under the international law principle of state responsibility for injury to aliens when such states committed wrongful acts

⁶⁹⁵ UNGA ‘Report of the UN High Commissioner for Human Rights on the Rights of Rights and Transitional Justice’ (4 July 2011) Eighteenth session UN Doc A/HRC/18/23, P15

⁶⁹⁶ Alubakri (n683).

⁶⁹⁷ Ali Al Mamouri ‘Iraq Failed to Complete Transitional Justice Project’ Al-monitor (Iran, June 2014) Available at <http://www.al-monitor.com/pulse/ar/originals/2014/06/iraq-transitional-justice-failed.html> accessed 3 July 2017.

⁶⁹⁸ Ibid

⁶⁹⁹ Shaaban (663) 99.

⁷⁰⁰ OHCHR ‘the Rule of Law: Tools for Post-Conflict States, Reparations Programmes’ (2008) UN Doc 2008, HR/PUB/08/1, and P10.

against nationals of other states, the offending state may allow for claims by way of emphasizing its own rights.

After WWII, international human rights were no longer an internal matter. The international law framework progressively transformed from a law of involvement to one of cooperation, consequent to the establishment and development of the UN and the ratification of its Charter as the principal instrument of international law. This transformed human rights toward internationalization, reiterated by the adoption of the Universal Declaration of Human Rights 1948.⁷⁰¹

IHRL and ICL are the essential resources of redress and reparation for the victims of attack on diplomats. IHRL confirms the right of injured diplomats as a victim of human rights abuse to pursue their claims before national and international justice mechanisms, with the right to remedy and reparation.⁷⁰²

It is a fact that the traditional concept of responsibility of State has been altered because of the embodiment of human rights in international law. The international law Commission, in its current form of the law of state responsibility, focused on the wrongful acts of the state against other states. Under international human rights and humanitarian law, obligations of a state require legal consequences, not only concerning other states, but also regarding individuals and groups of persons who are under the jurisdiction of the state. The incorporation of human rights into state responsibility has brought about the basic principles that, in cases of breaches of international duties, redress and reparation are due not only to states but also to the harm suffered diplomats.

Under international law, the responsibility for reparation is twofold: firstly, the receiving state needs to apply appropriate internal remedy for crimes under its own legislation and obligations; secondly, the receiving state should provide redress for harm suffered by injured diplomats in the form of compensation, rehabilitation, satisfaction, and assurances of non-repetition.⁷⁰³ In this regard international law confirms the importance of the reparation as one of the effective remedies and as a right of the injured diplomats rather than a duty of states. For example, the Human Rights Committee stated that ‘without reparation to individuals whose Covenant rights have been violated,

⁷⁰¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR).

⁷⁰² OUNHC, *the Rule of Law: Tools for Post-Conflict States, Reparations Programmes* (UN New York and Geneva, 2008) 6

⁷⁰³ Emanuela Chiara Gillard ‘Reparation for Violations of International Humanitarian Law’ (2003) 85 (851) IRRC 529.

the obligation to provide effective remedy... is not discharged'.⁷⁰⁴ According to international law, states are responsible for wrongful acts and subsequent reparations.⁷⁰⁵ This principle has been confirmed by international courts and tribunals through judgments, for example in the *Chorzow Factory* case, the judgment of the Permanent Court of International Justice stated that 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'.⁷⁰⁶ According to international law, violations of human rights and International Humanitarian Law give injured diplomats a right to reparation, which is generally incumbent on the offending state. However, applying this right and corresponding obligation is subject to the internal law and policy of such states.⁷⁰⁷ This means that IHL obligations are first subject to internal legal systems for implementation; however, when the internal legal system breaks down during times of conflict, it becomes necessary to rely on TJ for the implementation of IHL principles.

Restorative justice practices are intended to rebuild not only the individual level but also at the social. A procedure brings together the parties affected by an event of wrongful act to cooperatively decide how to deal with the outcome of the happening and its consequences for the forthcoming. The issue of reparations after human rights violations are a delicate subject. Double efforts need to be taken in order to redress the problems of the past, which is why in order to avoid re-victimization when pursuing redress, extreme caution must be taken.⁷⁰⁸ The victims of serious rights abuses have massive suffering during and after conflicts, which is why multifaceted resolutions need to be formed. Injured diplomats must involve themselves in finding solutions, because it would help find the most effective remediation. Although, financial reparations might significantly improve access to the necessities of life, an apology is the supreme requirement of many victims, above all else; this entails emotional or symbolic reparations for civil plaintiffs such as dignity, emotional relief, participation in the social policy, or institutional reordering, all of which are of greater long-term significance for societies than immediate monetary compensation.

On most occasions, civil plaintiffs express their satisfaction with the procedures of reparation,

⁷⁰⁴ General Comment N0 31 (2004) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant.

⁷⁰⁵ OUNHC, the Rule of Law: Tools for Post-Conflict States, Reparations Programmes (UN New York And Geneva, 2008) 5.

⁷⁰⁶ *Factory at Chorzow (Germ. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9 (July 26) Publications of the Permanent Court of International Justice, Series A - No. 9, Collection of Judgments, A.W. Sijthoffs Publishing Company, Leyden, 1927 at p. 21

⁷⁰⁷ UNHCHR 'the Rule of Law: Tools for Post-Conflict States, Reparations Programmes' (2008) 8.

⁷⁰⁸ Thomas M. Antkowiak 'an Emerging Mandate for International Courts: Victim Centred Remedies and Restorative Justice' (2011) 11-18 *Stanford Journal of International Law* 279.

including financial reparation, accountability of criminals, apology for injured diplomats, and other effective reparation needs when appropriate and relative to the seriousness of the abuse and the situations of each occasion.⁷⁰⁹ Such reparations have several forms, such as rehabilitation, restitution, compensation, gratification and assurances of non-repetition. Furthermore, the Convention on the Rights of Persons with Disabilities 2006 states the rights of physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities in the event of exploitation and abuse.⁷¹⁰ The Inter-American Court of Human Rights confirmed that the recognition, restoration and accountability are the demands of the victims as well as some degree of financial reparation. Furthermore, protection of the injured diplomats as the victims of human rights and providing for the reparation of damages are the core aims of IHRL.⁷¹¹

Reparation is one of the mechanisms of the TJ to compensate injured diplomats, regardless of the criminal responsibility of the perpetrator. Both the responsibility of state and the responsibility of the individual might be invoked under the assumptions of TJ when considering attacks on diplomats. Receiving States are responsible for their human rights abuses or any a breach of international obligations.⁷¹²

Some victims might find the reparation is a good mechanism of justice. However, others find it is inadequate, because they are afraid that financial compensation somehow exiates the criminal offence perpetrated against them. For example, several mothers of the sons who disappeared during Argentine military Plaza de Mayo refused to accept financial compensation because they thought it would lessen the importance of their claims for justice (i.e. the criminal prosecution of alleged perpetrators).⁷¹³ Such doubts are based on the victims' feeling that their government does not really represent their interests, thus it resorts to blood money to avoid the embarrassment of victims' campaigns. However, other scholars believe that the true value of reparations is not their monetary worth, but their social and religious significance.⁷¹⁴

In state redress for victims of violations, the main demands of the latter are generally for their

⁷⁰⁹ Jeffrey J. Rachlinski, Chris Guthrie, and Andrew J. Wistrich 'Contribution in the Courtroom: Do Apologies Affect Adjudication?' Cornell Law Faculty Publications 614; Kenneth Clarke 'Punishment and Reform: Effective Community Sentences' (2012) Ministry of Justice 1. Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228573/8334.pdf> Accessed 2 May 2016.

⁷¹⁰ Convention on the Rights of Persons with Disabilities, (Adopted by UNGA on 13 December 2006, opened to sign on 30 March 2007) UN Doc A/RES/61/106.

⁷¹¹ Velásquez-Rodríguez v. Honduras, [1988] IACrHR (ser. C) No. 4, 134 [1988].

⁷¹² Ibid.

⁷¹³ Roman David and Susanne Y.P. Choi 'Human Rights Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic' (2005) 27 Human Right Quarterly 392.

⁷¹⁴ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, (Beacon Press, 1998) 110.

suffering to be recognized and their dignity to be restored, with government admissions and apologies, and public acknowledgment. Furthermore, after the abuses that the victim faced, the victim might suffer from other kinds of abuse such as social ostracism. The victims for this reason want to re-join the society that rejected them. Moreover, victims may have other demands, such as commemorations and memorials.⁷¹⁵ If victims are diplomats, who represent the sovereignty of their states, the sending state often demands reparation, which may consist of disowning the act, expressing regret, apologising to the injured state, punish the individuals responsible, and/or paying compensation for any material damage.⁷¹⁶ TJ could be particularly instrumental in assisting injured diplomats to achieve truth and guarantees of non- repetition etc.

Reparations programmes aim to guarantee the receipt of benefits by injured diplomats, regardless the level of the violation and the kind of the violation. There are several challenges that might face reparations programmes, frequently characterized by weak institutional capacity, fractured social relations, low levels of trust and a dearth of monetary resources.⁷¹⁷

However, the researcher finds that such programmes could be considered to be successful if they ensure that every victim actually receives the benefits, although not necessarily at the same level or of the same kind. If this is achieved, the programme is complete. Completeness refers to the ability of programmes to reach every victim, such as turning every victim into a beneficiary of some kind. Whether this happens depends, to some extent, on the way in which the categories of violations that give rise to benefits are determined. Hence, completeness can be approached only if the goal is articulated early on and steps meant to guarantee it are put in place from the very outset of the process and via the duration of reparations programmes.

The most basic elements of TJ are based on IHL and HRL with the aim of supporting accountability for abuses, and to build on the principles of peace, democracy and considering the victims' rights for redress, equity and design strategies based on the evolution of social, cultural, local political and historical elements. The competent authority charged with the implementation of these principles and foundations are local courts, where jurisdiction includes criminal cases (local and international) based on local laws and international laws, especially if the judiciary and internal law are unable to secure justice themselves. Nevertheless, if the judiciary and other legal apparatus are unwilling to prosecute those accused of a crime of violation of IHRL and IHL, then

⁷¹⁵ UNHCHR 'The Rule of Law: Tools for Post-Conflict States, Reparations Programmes' (2008)10.

⁷¹⁶ Carol Edler Baumann, *The Diplomatic Kidnappings: A Revolutionary Tactic of Urban Terrorism*, (Martines Nijhoff 1973) 48.

⁷¹⁷ UNHCHR 'The Rule of Law: Tools for Post-Conflict States, Reparations Programmes' (2008)10.

a resort to international courts is warranted.

4.4.5 Reforming Institutions

Institutional reform is very important in guaranteeing the rights of injured diplomats. Post-conflict states often navigate a democratic transition in which justice and legislation are essential, which could include establish truth commissions and enacting laws which confirm the rights of victim and how to find justice for them. Justice is not limited to redress for crimes, but also as a way of coming to terms with the past and building a new future.

Institutional reforms have to include both justice and security, preventing the recurrence of serious abuses of diplomats' inviolability and the impunity of offenders, entailing vetting, identification and removal from public office of individuals responsible for abuse. Institutional reforms might contribute to non-repetition of abuse and longer-term reform. Reform might also include increasing the representation of different religious, ethnic, regional groups and women within institutions. Institutional reform is one of the most important forms of the TJ process. That TJ might be unable to prevent heinous crimes and human rights violations from occurring again without resorting to the reform of institutions. In other words, there is a positive relationship between non-repetition of abuses and the reform of institutions applying the law through the TJ process.⁷¹⁸

For Libya, some institutional changes have been instituted to improve political and human rights conditions. The Libyan authorities enacted a number of important laws, the most important of which was the Libyan Anti-Terrorism Law (2014), as explained in the previous chapter, which specifically criminalizes attacks against diplomats, but which did not apply retroactively to the notorious attack on the US Ambassador in 2012, although the Law specifically referenced this incident. This was preceded by the Libyan Transitional Justice Act (2013), which affirms justice for victims of human rights abuses, but this did not specify diplomats.

There are several factors that influence the approach of TJ that countries apply. Authorities must consider the circumstances surrounding the customs and traditions of the society in which TJ is applied, and the scope for democratisation and human rights progress that can be achieved in such contexts. Determining the most suitable TJ mechanism or combination of them for a given context is dependent on many factors as well as the unique circumstances of the abuse. Such questions as

- 'Are crimes widespread, or focused on one region or ethnic group?

⁷¹⁸ Davis (n 691) 1.

- Are many perpetrators responsible, or only a few?
- Were the crimes acts of the state, of insurgents, or both?
- Are the perpetrators still more or less in power, or has there been a clean transition to a new government?
- Does the state have sufficient resources to implement a justice mechanism?
- Are the courts credible?
- Can the state afford individual reparations?⁷¹⁹

Depending on the answers, certain options are more viable than others. The most important point is for a careful assessment to be carried out on the circumstances of the event(s) and the positions and interests of the victims, leaders, and the public. These are all required prior to a TJ mechanism being applied. Often the easiest way to determine different group needs is via consultations and, ideally, public debate on the different TJ options available.⁷²⁰

It is important to acknowledge that each post-conflict situation is unique. As such, it needs different combinations of measures to address wrongs. Comparative information about how other countries approached similar post-conflict justice problems can help design and implement the most appropriate TJ strategy. No matter what violence and forms of abuse have taken place, similar questions crop up in the wake of past atrocities:⁷²¹ a country's decisions about how to deal with its past should depend on many things: the type of dictatorship or war endured, the type of crimes committed, the level of societal complicity, the nation's political culture and history, the conditions necessary for dictatorship to reoccur, the abruptness of the transition, and the new democratic governments.

States are therefore different in the way they apply TJ. No one model is appropriate for every case; there are few, if any, universal guidelines.⁷²² Each country must carefully work out the substance or content, timing, and nature of national policies required to face difficult and often painful events in its past.⁷²³ While there is no universal blueprint, it has been suggested that one TJ

⁷¹⁹ United States Institute of Peace 'Transitional Justice: Information Handbook' (September 2008).

⁷²⁰ Ibid.

⁷²¹ Ibid.

⁷²² Abdul Hussein Shaaban 'Transitional Justice: Arab approaches to international experience' 413 *the Arab Future Journal* 99. Available at <<http://www.caus.org.lb/Attachments/Transitional%20Justice.pdf>> accessed 3 July 2017

⁷²³ Shaaban (n 730)99; North Ireland Human Rights Commission 'Dealing with Northern Ireland's Past towards a Transitional Justice Approach' (2013). Available at <http://www.nihrc.org/uploads/publications/NIHRC_Transitional_Justice_Report.pdf> Accessed 4 June 2017; North Ireland Human Rights Commission 'Dealing with Northern Ireland's Past Towards a Transitional Justice Approach'

document can be designed for Arabic countries, due to the similar conditions and factors of countries throughout the MENA region.⁷²⁴ The judicial and non-judicial mechanisms of TJ differs from one territory to another, but they should share a common thread rendering them “comprehensive, complementary and coherent”. It is on that basis that TJ is able to perform a substantial part in consolidating peace and building a new and respectful society that honours the life and dignity of all members.⁷²⁵

Most experiences of TJ indicate that knowing the truth was the greatest requirement of societies and victims. The families of victims were very interested to know the truth about why such abuses of human rights occurred, who committed them, and where the places of burial were. In addition, there was a desire to not blur the facts and to know the whole truth. However, there was no evidence that any of the states, which experienced TJ, found out the whole truth about past human rights abuses. This could be a theoretical rather than practical aim of TJ.⁷²⁶ Knowing the truth should be important for injured diplomats as well as their state and their families. Attacks on diplomats are attacks on the sovereignty of the sending state itself, as this thesis explained in Chapter 1. That is why knowing the truth is in the interests of the sending state and the receiving state, because it provides closure for all parties involved. In the case of attack on Ambassador Stevens, the truth is still unknown.⁷²⁷ There is an urgent need to address the case of Libya if TJ is to be achieved for Stevens, his family, the US and Libya itself.

Several post-conflict countries attempted to apply the reconciliation and TJ system in order to achieve a convergence of views between the new government and supporters of the former regime. The international and domestic community are of importance in this transition, which is highly sensitive politically. TJ in post-conflict situations is new to Arab countries; however, it was welcomed as a culturally congruent and politically expedient solution to the dilemmas created by the Arab Spring from 2011, including its consistency with the principles of Sharia and ethics as well as international norms.⁷²⁸ The Arab Spring exposed, exacerbated and in some cases created continuing political tensions and internal conflicts throughout MENA, including Yemen, Libya, Syria, the Gaza Strip, Iraq and Egypt. However, other Arab countries achieved some post-conflict justice, such as Morocco and Bahrain. Actually, the Bahrain Independent Commission of Inquiry

⁷²⁴ Shaaban (730) 99.

⁷²⁵ Ibid.

⁷²⁶ Ibid.

⁷²⁷ Ross Elder ‘Updated: Chris Stevens Torture Photo – Not Chris Stevens’ the elder statesman (December 2014). Available at <<https://ross-elder.com/contact-me/>> accessed 3 July 2017.

⁷²⁸ M. Cherif Bassiouni, ‘The “Arab Revolution” and Transitions in the Wake of the “Arab Spring”’, *UCLA Journal of International Law and Foreign Affairs* 17 (2013) 133; Bassiouni (630) 325.

(BICI) is the only a commission of inquiry in the Arab countries which can be described as a comprehensive commission.⁷²⁹

Each Arab country follows a different approach and system of TJ, according to its culture and understanding of the concept. For example, Morocco established a ‘truth commission’, while Algeria adopted an ‘amnesty, peace and reconciliation’ programme.

A notable stumbling block of TJ in the Arab world was identified by Bassiouni, who observed that in Arabic the term ‘transitional justice’ implies a temporary (and revocable) condition of justice rather than a permanent solution. However, the true meaning of TJ has now come to be understood in Arab societies and public discourse.⁷³⁰ The researcher disagrees with this assumption that the Arab nations are now neatly unpacking TJ and the notions of IHRL and citizens’ rights; traditionally, it was inconceivable for tyrannical and murderous despots in the Arab world to be held accountable for their crimes. Only successful prosecutions could demonstrate this notion, with accountability taking place and some victims getting reparation.

Drawing on the universal Arab-Islamic heritage of MENA, the religious and legal precedent of the Treaty of Hudaibiyyah (6 H/ 628 CE) is germane to the explanation of the concept of reconciliation in Arab discourse. Briefly, the nascent Muslim community, having been expelled from Mecca and living as refugees in the open desert and in Abyssinia prior to establishing a city-state in Madinah, went to perform the ancient Ishmaelite custom of Hajj. Although non-violent, this was perceived as provocative by the custodians of Mecca (the Quraish tribe and their allies). There was deep distrust between the sides, following closely after an attempt by the Quraish to terminate the Muslims in Madinah, and at one point the Muslims believed their envoy Uthman ibn Affan (later the third caliph) had been murdered by the Meccans. Despite the profound mistrust between the two sides, they managed to agree that: people would be free to follow Islam, but any member of Quraish who converted without the permission of his or her guardian must be returned to Mecca, while apostates would be free to leave the Muslims in Madinah; and that there would be no war for ten years.⁷³¹ Although this later proved to be strategically beneficial for the Muslims (who did not themselves break the Treaty), it was perceived at the time to be a major concession by the Prophet who also consented to the demand of Quraish that he not be referred to by his epithet ‘Messenger of God’ in the document. This reconciliation, is similar to the modern concept

⁷²⁹ Bassiouni (n 630) 325.

⁷³⁰ Ibid 325.

⁷³¹ Abd-Al-Hakhem Sadaq, *Reconciliation of Khudaibiya - Political studies in the Biography of the Prophet* (3rd edn, Dar Al-Madani, Saudi Arabia 2005) 5-15.

of TJ.

Many of the Arab countries today need to enter into a new phase of TJ, especially those countries that have seen significant violations of the human rights standards, such as Tunisia, Egypt, Libya and Yemen. The fundamental challenge facing these countries is TJ, and how they deal with serious violations in the past to help a peaceful transition to the stage of a pluralist democracy rather than being plagued by political instability, and sliding into civil war.

The Arab Spring countries need to decide whether the TJ will lead to conciliatory or punishment justice. The punishment of the perpetrators of violations is of particular help victims overcome the violations they suffered during the former regime, but dictators typically depend on a particular group identity and affiliation, thus punitive measures can stoke the flames of conflict. However, this research focuses on Libyan TJ and how it is struggling to achieve justice in a post-conflict scenario.

It is clear from the discussion of the forms of TJ above that the states applied different forms of TJ. Tunisia witnessed a successful transition to democracy alongside its application of different forms of TJ, including the truth commission, reparation, institution reform and prosecution. Tunisia's experience was different from other experiences in MENA where different forms of TJ were applied, including prosecution, amnesty for the interest of former political prisoners, truth and compensation, and reparation and compensation programmes. For example, the experience of Iraq was the worst experience in MENA.⁷³² It emerged from the decision of another state (US) to transfer Iraq from a dictatorship to a democracy. In 1998 the US Administration issued the Iraq Liberation Act.⁷³³ This is the only law in the world that has been issued by a state to change the regime of another state. Article 3 of this law stated that 'Policy of the United States is to support efforts to remove the regime headed by Saddam Hussain from power in Iraq and to replace that regime'. Also, paragraph b of this Article stated that 'The US president is to provide military and financial support to that aim, additionally to provide radio and television facilities'.⁷³⁴

The US drew the plan for the future of Iraq and appointed Iraqis to implement its plan, including a process of TJ beginning with prosecutions, de-Ba'athification (including purging officials who were not accused of any conventional crimes) and the dissolution of the Iraqi Army. This was

⁷³² Asia Atros 'David Tupler, President, International Centre for Transitional Justice Transitional Justice is a Long Path. Success is not Always Guaranteed' Al-Sabah (Baghdad, Nov 2016). Available at <http://www.assabah.com.tn/article/127589> Accessed 3 July 2017.

⁷³³ ILA, H.R. 4655, P.L. 105-338, signed into law October 31, 1998

⁷³⁴ Ibid.

particularly significant in Iraq, which like Egypt and Turkey conventionally has a large standing army that plays an important role in the state. The prosecution approach was selective, as discussed previously, ignoring the crimes and human rights abuses committed by the US and its allies (including Iraqi opposition militias) during the invasion of Iraq. Also, Iraq adopted the reparation approach, however, this approach was based on discrimination that excluded many families.⁷³⁵ The TJ experience in Iraq was vengeful.⁷³⁶

On the other hand, sectarian tensions in the country caused some state institutions to act in bad faith with regard to TJ, which led to further violence in the past years. The partisan way the government dealt with Sunni and Shia militias is further evidence of this situation.⁷³⁷ For instance, Sunni armed groups are targeted as terrorist groups, while equivalent Shia paramilitary organisations, such as the Asaib Ahl Al-Haq, were received material and political support from the former Prime Minister Nouri Al- Maliki's government.⁷³⁸ The successive cycles of violence in Iraq have led to additional complications in the TJ project, as the executioner and victim have traded roles. This rearrangement of power has deepened the gap between Iraq's communities and made it harder for parties to find ways to achieve justice.⁷³⁹ It seems Libya has adopted a similar approach of Iraqi TJ. The Libya government did not take lessons from the wrong steps taken by Iraq, which led to disaster and an on-going civil war.

4.5 The Practice of TJ in Western European Countries

The war for the unification of Ireland has been going on for centuries, but this study is concerned with the protracted violence seen in the Northern Ireland conflict during the late 20th century.⁷⁴⁰ The Belfast (Good Friday) Agreement was signed in 1998, and was born from peace negotiations chaired by US Senator George Mitchell.⁷⁴¹ It was highly successful in stopping the cycle of violence, although it did not contain a formal mechanism to deal with former abuses and

⁷³⁵ Ali Al Mamouri 'Iraq failed to complete transitional justice project' Al-monitor (Iran, June 2014) Available at <http://www.al-monitor.com/pulse/ar/originals/2014/06/iraq-transitional-justice-failed.html> accessed 3 July 2017.

⁷³⁶ Abdul Hussein Shaaban 'Transitional Justice: Arab approaches to international experience' 413 the Arab Future Journal 99. Available at <http://www.caus.org.lb/Attachments/Transitional%20Justice.pdf> accessed 3 July 2017

⁷³⁷ Mamouri (n 743).

⁷³⁸ Ibid.

⁷³⁹ Ibid.

⁷⁴⁰ Colm Campbell and Fionnuala N'I Aolain 'Local Meets Global: Transitional Justice in Northern Ireland' 26(4) 2002 Fordham International Law Journal 871. Available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1886&context=iltlj> accessed 3 May 2017.

⁷⁴¹ Ibid

violations.⁷⁴² It is a multi-party agreement which was done with a majority of Northern Ireland's political parties, and a constitutional settlement where the governments of the UK and Ireland agreed to introduce and support changes in British legislation as well as the Constitution of Ireland as was required for changes in the constitutional status of Northern Ireland.

The Agreement sought to resolve many issues relating to the conflict. It made provision for “devolved political institutions, reform of policing, security and justice, decommissioning, and enhanced protection of human rights.”⁷⁴³ Support for the Agreement by the British and Irish governments and most of Northern Ireland's political parties was seen as a marked and significant turning point in the conflict.⁷⁴⁴ TJ in Northern Ireland affected practically all aspects of societal function and identity. Transition in the province has been a long, ongoing and organic process, with elements of reform and change which ran throughout the course of the conflict.⁷⁴⁵ However, as being largely “forward-looking”, it does not set out a strategy for dealing with the province's past, nor does it propose a structured mechanism for truth recovery or reconciliation. While it recognises victims' rights and acknowledges the necessity to provide financial and other support, it does not state specifically what the government is required to do beyond providing ‘sufficient resources to meet needs of victims’. There are commitments to supporting reintegration of prisoners and community-based initiatives to help young people facing difficulties as a result of the Troubles. Similarly, the Agreement pledged support to organisations that aim to improve reconciliation and mutual understanding.⁷⁴⁶

The Weston Park Agreement (2001), negotiated between governments of the UK and Ireland was an agreement to fill certain holes identified in the Good Friday Agreement. Under the Weston Park Agreement the two governments were committed to measures including a review of the Parades Commission, a commitment to look at issues surrounding police reform and policing arrangements, an intention to consider the status of ‘on the runs’, and a formal investigation by a selected judge into some unexplained deaths. The St Andrews Agreement (2006) between the UK and Ireland governments cleared the path for a return of devolution in Northern Ireland in 2007. In addition, it established a Victims' Commissioner, announced an initiative to aid

⁷⁴² North Ireland Human Rights Commission ‘Dealing with Northern Ireland's Past towards a Transitional Justice Approach’ (31 July 2013). Available at <http://www.nihrc.org/uploads/publications/NIHRC_Transitional_Justice_Report.pdf> Accessed 3 November 2017.

⁷⁴³ Ibid.

⁷⁴⁴ Campbell and Aolain (n748) 871.

⁷⁴⁵ Ibid

⁷⁴⁶ Ibid.

employment and reintegration of ex-prisoners, and addressed a number of specific issues with relevance to the transition. These included “support for Irish and Ulster-Scots languages, passing, equality legislation, the powers of the NIHRC, deprivation and poverty”.

The Hillsborough Agreement (2010) negotiated between the Democratic Unionist Party (DUP) and Sinn Fein allowed the devolving of policing and justice powers to the Northern Ireland Executive. In doing so, it touched on several of the issues relevant to the transition, including interests of victims, and introduction of a Victims’ Code of Practice would be. While these agreements did not address in detail past human rights abuses, they did not exclude a possibility of the development of such policies. A review of peace agreements in other national areas shows that the text of one agreement can serve as a starting point, and that future consultation, debate and policy work must follow. Indeed, there can sometimes be advantages in leaving issues to be worked through during the consultation process, rather than having policies limited by constrained, and often pressured, political negotiations.⁷⁴⁷

The North Ireland experience involve providing justice to the victims of past abuses of human rights, which was part of addressing physical and psychological injuries under the Victims and Survivors Northern Ireland Order 2006.⁷⁴⁸ In 2012 the Victims and Survivors Service was established in replacement of the Northern Ireland Memorial Fund and the Community Relations Council Victims and Survivors Programme. This service came into being in April 2012 and is the awarding body for funding for survivors. Regarding the issue of gravesites alluded to previously, in 1999 the TJ procedure included establishing the Independent Commission for the Location of Victims’ Remains. The task of this Commission is to obtain information on the whereabouts of remains of victims, and disclosing such to aid finding of victim’s remains. At least 17 individuals are believed to have been murdered and secretly buried; nine bodies have thus far been located. Several memorial projects have tried to acknowledge those murdered and give comfort to their families.

Other remembrance initiatives include a £300m redevelopment proposal for the notorious Maze prison which will include a conflict resolution centre. The centre is expected to undertake education and research, provide a venue for conferences on conflicts, and include exhibition hall

⁷⁴⁷ North Ireland Human Rights Commission ‘Dealing with Northern Ireland’s Past towards a Transitional Justice Approach’ (2013). Available at <http://www.nihrc.org/uploads/publications/NIHRC_Transitional_Justice_Report.pdf> Accessed 4 June 2017.

⁷⁴⁸ Ibid.

and archive. Under the aim of non-repetition of the action of abuse of human rights, the 21st of June has been set as the “annual Day of Reflection”, promoted by the NGO Healing through Remembering. This is one of a number of initiatives by the group that aims to create opportunities for personal reflection, to acknowledge grief caused by the conflict and to reflect on personal attitudes.⁷⁴⁹ Several non-governmental storytelling projects have been established. Also, information, research and analysis of the conflict and politics in Northern Ireland was provided by universities and websites and archive.⁷⁵⁰

The UK government made a public apology for ‘unjustified and justifiable’ killings in Derry/Londonderry in January 1972; Prime Minister David Cameron also issued an official apology to the Finucane family in 2011 and again in 2012 for the state collusion in the murder of Pat Finucane. More than 450 qualifying former prisoners have been released on licence.⁷⁵¹ There is also further action required for victims and survivors in the area of reparations. Whilst most injured or bereaved received compensation just after the event, many live in poverty now as a result of these initial events. Some have had no compensation, for differing reasons. One of the obstacles to progression in this area is defining what constitutes a victim, which is controversial. For example, the reaction to the recommendation by the Consultative Group in the Past regarding reparations overshadowed the many other recommendations made in that report. There would be merit in carrying out at least some process of reflection and consultation surrounding reparation.⁷⁵²

The experiences of Poland and Hungary witnessed peaceful democratic transitions based on the negotiation between the previous government and the new government. In this regard several political and constitutional exchanges were made, especially after the debates and conversations between the previous regime and opposition in 1988 and 1989.⁷⁵³ For example, in Hungary the most important development to achieving TJ was that the Socialist Labour Party accepted recognition of political multiplicity and abandoning authoritarianism or monopoly of power.⁷⁵⁴ In 1989, Hungary’s Parliament passed a special law granting citizens the right to demonstrate and to gatherings which led to establishing several political parties and NGO’s. Finally, the power peacefully transferred to the opposition.⁷⁵⁵ Similarly, in Poland the negotiations conducted between the government and the opposition was represented by the Solidarity movement. The

⁷⁴⁹ Ibid.

⁷⁵⁰ Ibid.

⁷⁵¹ Ibid.

⁷⁵² Ibid.

⁷⁵³ Ibid 99.

⁷⁵⁴ Ibid 99.

⁷⁵⁵ Ibid 99.

requirements of the opposition were simple and were all about fundamental human rights. This is similar to the requirements of the protestors of the Arab Spring revolution. Between 1980 and 1981, the Solidarity Syndicate raised the issue of abolishing censorship, demanding freedom of the press, allowing the opposition to work in the media, abolishing the monopoly of power and regulation, establishing freedom of assembly, independent local administration and economic reform.⁷⁵⁶ The government recognized this movement and started negotiations with them. In June 1989 Solidarity came to power and defeated the previous government at the elections which Solidarity won.⁷⁵⁷

4.6 Theoretical and Practical Development of Transitional Justice

While modern TJ is inevitably traced to the Nuremberg Trials, its current form began to be delineated during the 1970s in Greece, then in follow-ups to military rule in Argentina and Chile through the committees of fact-finding in Argentina and Chile in 1983 and 1990 (respectively), and then in many countries in South America.⁷⁵⁸ The most famous example is the experience of South Africa, which pioneered the Truth and Reconciliation concept of TJ in the mid-1990s to redress the structural oppression of black people in South Africa.

The objective of giving examples of the application of TJ is to highlight key issues and lessons learned from previous empirical experiences the promotion of justice and the rule of law in conflict and post-conflict societies. This section explores the examples of successful practice of TJ in Morocco, South Africa and Argentina due to their generally successful experiences, which other states (especially in MENA) should take into account when applying TJ according to their own circumstances, possibly involving choosing multiple elements from different experiences, which can be derived with regard to TJ mechanisms to find justice for injured diplomats, although diplomats were not specifically considered in these cases (which underpins the rationale for this research). Also, this section examines the Libyan experience of unsuccessful TJ.

4.6.1 Morocco

Morocco was notable among the former French colonies (or regions of interest) in North Africa

⁷⁵⁶ Ibid 99.

⁷⁵⁷ Ibid 99.

⁷⁵⁸ Martina Fischer 'Transitional Justice and Reconciliation: Theory and Practice' in: Beatrix Austin, Martina Fischer, and Hans J. Giessmann (eds.) *Advancing Conflict Transformation*, in: *The Bergh of Handbook II* (Barbara Budrich Publishers 2011) 407.

for its ability to maintain control over situations of political tension and internal disturbance in a troubled region.⁷⁵⁹ Citizens considered a threat to governance were subjected to persecution, including torture, arbitrary detention and enforced disappearance. However, in November 2003 significant steps were taken to redress this legacy. As a result of such efforts the Truth Commission for Moroccan Reconciliation was established by King Mohammed VI.⁷⁶⁰ In January 2004 this commission began to undertake its duty of investigating the crimes of the violation of human rights and international humanitarian laws committed under the previous regime and to allocate compensation to the victims and their families. The experience of Morocco is unique because the new king is the son of the previous king, and the son is essentially investigating the wrongdoing of his father and his government. Furthermore, several members of the Commission were themselves victims. Moreover, this commission enjoys the authority to offer the compensation directly to victims. For these reasons, the Commission enjoys the ability to exercise a significant impact at the international and regional levels over the short and long term. In the period in which the Commission carried its work it assembled an archive including 22,000 personal testimonies of victims and their families. The Commission also held various conferences, meetings and seminars on a large number of issues, which opened the way to understand the past of Morocco, and allowed victims to speak about their suffering to others through public hearings. It also documented the roots of the crisis and this analysis helped Morocco to come to terms with its past.

After gaining independence from France in 1956, the various factions in the revolutionary movement began to vie for power and influence. To maintain its supremacy, the monarch inflicted large-scale repression, called the 'Years of Lead'. King Mohammed V was punitive in his suppression of all opposition to his rule, with a significant number of arrests and the persecution of entire regions deemed to be subversive. For example, Jabala Al-Raff Al-Shamiliya areas were key in the anti-French struggle, but their attempts to oppose the persecution of the regime resulted in them being crushed by the Royal Armed Forces. This had a long-term, debilitating impact on the region, which remains plagued by unemployment, lack of investment and isolation from the rest of the Morocco.⁷⁶¹ When King Hassan II succeeded to the throne in 1961 he adopted a less severe style of repression comprising sanctions and lavish rewards. It was a successful approach that led many opponents into compliance. However, by the 1970s the regime had resorted to massive human rights abuses, particularly after failed attempts to overthrow the regime in 1970 and 1971.

⁷⁵⁹Veerle Opgenhaffen and Mark Freeman, *Transitional Justice in Morocco: A Progress Report*, (2005) International Centre for Transitional Justice 3.

⁷⁶⁰ *Ibid* 3.

⁷⁶¹ Opgenhaffen and Freeman (n 767)15.

Show trials of alleged revolutionaries resulted in mass executions.⁷⁶²

However, this situation eased during the 1980s and 1990s, and in 1991 the government released 330 of 'the disappeared',⁷⁶³ most of whom had spent 18 years in prison. This prompted Moroccan demands for official and public investigations into the existence of secret prisons. For this reason, in 1990 King Hassan II established the Advisory Council for Human Rights. The Council's duty was to offer advice to the King in regard to human rights. This was an important step to end the violation of human rights in Morocco.

The Council initially focused on political and legal reforms, and it could not address the violations of the Years of Lead. In 1998 the King asked the Council to look at the cases of the forced disappearances, to redress such problems. However, the result of the investigation indicated that there were only 112 cases, of whom 56 were deceased and 12 were living either inside or outside Morocco; there was no information about the remaining 44.⁷⁶⁴ These unsatisfactory results led to the contempt of the people and criticism by local and international organizations. In response the Council declared these results to be preliminary, and they asked the King for the resources for a deeper investigation and the allocation of death certificates for families and reparation. Demands for human rights continued to increase, and two organizations were established for human rights, namely the Moroccan Association for Human Rights (1979) and the Moroccan Organization for Human Rights (1989). A dedicated Ministry of Human Rights was established in 1993.⁷⁶⁵

Furthermore, during the 1990s attempts were made to include opposition groups in the national administration, for example the appointment as prime minister of one of the main defenders of human rights who spent a long time in exile. In April 1999, the Council of Human Rights recommended that the King establish a commission to pay compensation to the victims of past abuses, which was authorised by him two weeks before he died, becoming incumbent upon his son and heir Mohammed V to complete the process. In his maiden speech, Mohammed VI stated the State's responsibility for disappearances, and declared his condemnation of past human rights abuses. Furthermore, he formed an independent commission to investigate enforced disappearances and other human rights violations for period 1956 to 1999. The members of this

⁷⁶² Ibid 15.

⁷⁶³ Amnesty International, "Turning the page": Achievements and Obstacles, (22 June 1999), Doc MDE 29/01/99. Available at <<http://www.refworld.org/docid/3ae6a9ca0.html>> accessed 21 November 2016.

⁷⁶⁴ Ibid.

⁷⁶⁵ David M. Mednicoff 'Think Locally – Act Globally? Cultural Farming and Human Rights Movement in Unisia and Morocco' *The International Journal of Human Rights* 7(3) 72.

commission asked the King for amnesty for past crimes for the public good.⁷⁶⁶ However, the Commission started its mission in September 1999, and gave only one month for the victims to register their complaints. This unjust situation led to a more chaos in Morocco.

Nevertheless, establishing such a commission was regarded as positive progress in the human rights field, particularly because it based its work on an implicit acknowledgment of the responsibility of the State for past wrongdoing. As a result, a large number of victims gained massive reparation. However, this reparation was limited to monetary compensation, despite the demands of victims, their families and advocates for treatments, certificates of death, return of the bodies of deceased victims and other requirements. Furthermore, the amount of compensation was not equal to all victims. However, the Commission was important in investigating human rights abuses by the State itself, and was the first step toward the establishment of the later Commission of Truth and Conciliation.⁷⁶⁷

In 2001, the King responded to the demands of human rights defenders by extending the authority of the Advisory Council for Human Rights. Then, in November 2001 after the seminar organized by several human rights organizations, which recommended the formation of a truth commission by the King, he established the Truth and Conciliation Commission to end the suffering of the past. In January 2004 the Commission started its mission and aimed to finish its work within one year.⁷⁶⁸

Morocco's experience is one of the most important Arab and international experiences demonstrating the possibility of a democratic and peaceful transition by incorporating dissenting and opposing voices in mainstream political discourse, such as the appointment of Yousfi (The popular Moroccan political activist and opponent of the government of Hassan II) as Prime Minister, investigating forced disappearances and torture, and ultimately compensating victims and reforming official institutions.

The Advisory Council on Human Rights (*Conseil Consultatif des Droits de l'Homme*, or CCDH) was established by King Hassan II in 1990, because of domestic and international criticism of Morocco's human rights abuses since independence in 1956. Later on, in 1998, the Independent Arbitration Commission was formed in accordance to the CCDH recommendations. Its mission was to compensate victims of arbitrary detention and forced disappearance.⁷⁶⁹

⁷⁶⁶ Opgenhaffen and Freeman (n 767) 17.

⁷⁶⁷ Ibid 17.

⁷⁶⁸ Ibid 20.

⁷⁶⁹ Bassiouni (n 630) 325.

Morocco had a unique experience in dealing with TJ, which has not been implemented after civil wars or revolutions. Morocco focusing on a truth commission and reforming national institutions. The successful experience of Morocco can be attributed to resorting to most requests of the victims, which is knowing the truth. It was a very special experience in Morocco when King Hassan II enacted the transformation and delivery of government to the opposition in 1995, which led to the establishment of the Equity and Reconciliation Commission to investigate the facts; it concluded by advocating the payment of compensation to victims and working to repair and rehabilitate some national institutions in 2005, which included promoting the right to education, constitutional reform and establishing a ministry of human rights.⁷⁷⁰

4.6.2 South Africa

The Republic of the Union of South Africa was one of the foremost examples of structural, institutionalised racial discrimination whereby a population of four million white inhabitants ruled over 29 million non-whites in a system that proclaimed and entrenched the racial superiority of the former. During the 1980s, the tensions between two black African organisations, the African National Congress (ANC) and the Inkatha Freedom Party (IFP), on an increasingly violent form. Especially after the beginning of the peace negotiations in 1989, these conflicts escalated into open conflict and the arming of Self-Defence Units and Self-Protection Units. These units were armed and received basic combat training, but were subject to very little formal control. While the conflict was apparently between the ANC and the IFP, the state security forces were directly implicated in supplying arms and other support to the latter.⁷⁷¹

Between 1990 and 1994 South Africa was experiencing the difficult transition from minority rule to democratic government. The transition from minority rule to majority rule was an extensive and painful procedure of bilateral and multiparty negotiations. Several bilateral talks were held between the National Party, which had established apartheid in 1948, and the ANC, which was the largest liberation group providing the base for the establishing of multiparty negotiations on the future of the country, including matters of ending political viciousness, temporary power mechanisms and the amnesty of political prisoners.⁷⁷²

⁷⁷⁰ UNGA ‘Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural, Including the Right to Development’ (6 May 2008) UN Doc A/HRC/8/10/Add.2.

⁷⁷¹ Hugo van der Merwe and Guy Lamb ‘Transitional Justice and DDR: The Case of South Africa’ (2009) ‘Research Unit International Centre for Transitional Justice’ (2009) International Centre for Transitional Justice, 1 Available at <<https://www.ictj.org/sites/default/files/ICTJ-DDR-South-Africa-CaseStudy-2009-English.pdf>> access 25 May 2015.

⁷⁷² Ibid 1.

The Truth and Reconciliation Commission played a significant role in recording the abuses of human rights committed by all parties. Victim statements were the main documentary resources of the Commission, including records of 33,713 gross humanrights violations from the 21,296 statements of victims.⁷⁷³ The Commission stated that the KwaZulu-Natal region witnessed the extensive abuse of human rights, and that the period 1990 to 1994 was the most violent. This abuse, especially sexual violence, affected men and women alike. Most of the perpetrators were aged between 30-36 years old. The State was also implicated in such abuses, particularly due to its disproportionate and deadly reaction to the risk in the region. Furthermore, the State itself committed gross abuses of human rights, including, torture, kidnapping, inhumane treatment, sexual assault, extra-judicial executions, incitement to violent clashes, and arming, training, and funding violent rebel units or hit squads for deployment internally against opponents of the government.⁷⁷⁴ On the other hand, the Truth and Reconciliation Commission recorded that the one-third of all the violations from the late 1980s to 1994 were committed by the IFP.⁷⁷⁵

With the progress and severity of the conflict, it became difficult to differentiate between political and criminal violence. The state employed criminal networks in its actions against the liberation groups, and state security forces themselves became involved in wrong deeds. Similarly, the liberation forces engaged with criminal networks in pursuit of their goals. The lack of accountability to political leaders or the local community created the space for criminal acts by those professing to be political combatants.

After the release of Nelson Mandela in February 1990, and the legalization of several political parties, initial talks led to an agreement on, among other things, an indemnity process that would release certain political prisoners from South African jails and ensure that political exiles were not arrested when they returned to South Africa to participate in the peace process. This agreement, called the Groote Schuur Minute, led to the enactment of the Indemnity Act of 1990, which provided a temporary amnesty for individuals, mainly the ANC members accused of political violence.⁷⁷⁶ The Further Indemnity Act of 1992 followed this, allowing members of the National Party security forces to receive amnesty through a wholly secretive procedure. The Further Indemnity Act of 1992 was passed despite opposition from the ANC and international scorn. With the passage of these two acts, those who wanted to benefit from indemnity had to provide

⁷⁷³ Ibid 1.

⁷⁷⁴ Ibid 1.

⁷⁷⁵ Ibid 1

⁷⁷⁶ Ibid 1.

information about the acts they had committed.⁷⁷⁷

These negotiations also led to the establishment of a National Peace Accord in 1991, which outlined a framework for dealing with political protests and community conflict. It also established various local peace accord structures, such as local dispute resolution measures, to address the high level of on-going political violence. These local measures were needed, as this four-year transition process was marked by escalating violence, particularly among political factions in the black townships where militarized youth played a key role in the conflict.⁷⁷⁸

The South African experience is one of the best known experiments in achieving TJ, seeking to eliminate an old and entrenched system of racial discrimination in the wake of what amounted to a political civil war under the slogan “amnesty in exchange for the truth”. While the amnesty system of the South African experience was praised for its associations of forgiveness (being championed internationally by Christian leaders such as the Anglican Bishop Desmond Tutu), the lack of compensation for victims was a serious shortcoming, along with the absence of trials for most perpetrators of crimes.⁷⁷⁹

Africa has served as a challenging ground for new systems to resolve the problem of impunity in 1990s, pursue truth and justice, and enable reconciliation in broken societies. However, the consequences of these accountability efforts have been mixed and dissimilar. African experiences contributed to the emergence of a plethora of internal and international TJ initiatives.

As in South America, other African countries’ experiences of the circumstances around the adoption of TJ and its mechanisms was challenged by false starts and political manipulation before the construction of advanced and active accountability systems. The TJ approach included the both judicial and non-judicial mechanisms. For example, the international tribunals, hybrid courts, and domestic trials as a judicial mechanisms, and truth commissions, reparations, and traditional based processes as a non-judicial mechanisms.

The TJ in South Africa is a relatively successful example of the transformation of repressive to democratic rule. It provides not only a rich sample of the public role that a truth commission can play in reconciliation, but also suggests an admonitory tale about the efficacy of amnesty authorities. In 1995 the South African transition from apartheid to democracy was crystallised in

⁷⁷⁷ Ibid 1.

⁷⁷⁸ Ibid 1.

⁷⁷⁹ Ibid 1.

the adoption by the government of the Promotion of National Unity and Reconciliation Act. To achieve the peace and democracy amnesty was wanted. The amnesty system contributed to balance between the political truths and the desire to discover crimes committed and hold to account those who ordered these crimes.

Through amnesty in exchange for full disclosure, the South African Truth and Reconciliation Commission wanted to provide a motivation for offenders to come forward of their own volition. The Commission released its final report in 1998, which found that both previous government, the ANC and other liberation movements had committed human rights violations as well as being guilty of terrible human rights abuses. However, this Commission was criticised for failing to address the socioeconomic properties of discrimination, such as the oligarchy who profited from apartheid, and it did not hold individual and established beneficiaries of racism liable.⁷⁸⁰

The provision of amnesty made by the new government had important impacts in successful negotiations between the parties of conflict. The amnesty was temporary and accompanied a wider truth and reconciliation procedure. This amnesty was from civil claims and criminal charges. It could be offered to only individuals, not groups or organizations. Furthermore, it had provisos, such as the requirement that individuals provide complete disclosure about the events, as well as they need to show that they the acts for which they requested amnesty were politically motivated.

According to the legislation establishing the TRC, a large number of members of the Amnesty Committee had to be judges and legal specialists. Although part of the TRC, the Amnesty Committee had a large measure of independence in making decisions to grant amnesty or not, based on an administrative review, investigations and public trials. Due to the requirement that applicants prove political motivation for their crimes, more than 7000 requests were rejected during a preliminary administrative review because they were criminal cases deemed lacking in political motivation.⁷⁸¹

The Truth Commission, however, continued its investigation on crimes against human rights that occurred under apartheid. Such investigations and prosecutions mostly considered the actions of the Liberty Movements, however prosecutions of their members were frequently tainted by the political bias of adjudicators, by the admissibility in court of forced confessions and the

⁷⁸⁰ African Union Panel of the Wise, 'Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity', (2011) International Peace Institute, 31.

⁷⁸¹ Merwe and Lamb (n 779) 17-18.

intimidation of witnesses.⁷⁸²

4.6.3 Argentina

Argentina has had a rich experience of democratic transformation and the application of the concept of TJ, so that the emergence of the term itself was born from within Argentina, which offers a pioneering experience in this field, especially for the countries of the Third World in general, and for Latin America in particular. Thus, the study of the Argentine model is really important for any country undergoing similar conditions of the transition to democracy after a period of repressive authoritarian system, which is the case of most Arab countries, such as in Libya, Egypt and Iraq. The Argentine model has three stages in applying TJ systems.

The first stage began with the military coup led by General Jorge Videla against the Government of the Head of Argentina, Izabella Peron, in 1976. Martial law was imposed by Videla, under a military council of nine generals.⁷⁸³ Several suspensions of human rights were imposed, and the constitution was suspended. Demonstrations and gatherings were prohibited, and the press and media were censored. Military dominance was established in unions and civil society organizations, and finally the ‘dirty war’ began, lasting until 1983.⁷⁹²

The main reason for the enactment of this coup by the Argentine army was to protect Argentina from the dangers of socialism, under the slogan ‘protect the security of Argentina’.⁷⁸⁴ Left-wing politicians, activists, journalist, students and trade unionists were all victims of the political violence of the regime.

This stage was noted for 10,000 to 30,000 disappearances, mainly of young people.⁷⁸⁵ All information concerning status or the right to burial was withheld; bodies were thrown in the sea or burned so as not to leave behind any evidence.⁷⁸⁶

In addition, arrest and torture were the norm. Given the state of severe repression, it was not possible to establish any party or protest movement in Argentina during this phase, with the exception of one unique movement: Mothers of the May Square Association (*Association*

⁷⁸² Ibid 20.

⁷⁸³ Rebecca Lichtenfeld ‘Accountability in Argentina 20 Years Later, Transitional Justice Maintains Momentum’ (2005) International Centre for Transitional Justice, 1 Available at <<https://www.ictj.org/sites/default/files/ICTJ-Argentina-Accountability-Case-2005-English.pdf>> accessed date 20 Mar 2015.

⁷⁸⁴ Ibid 1.

⁷⁸⁵ Ibid 1.

⁷⁸⁶ Ibid 1.

Madres de Plaza Mayo). This movement began in 1977 as a gathering of 14 in the yard called May Square in front of the Presidential Palace to demand to know the fate of their disappeared children. They were just a group of mothers, which is why the military forces ignored or were reluctant to deal with them using brute force. The movement became a locus for the taciturn opposition to the military junta.⁷⁸⁷

Largely in order to divert the attention of the Argentine population from the increasingly dire internal situation of Argentina, the junta launched a jingoistic campaign to seize the Falkland Islands (*Islas Malvinas*) from the UK in April 1982. When the British unexpectedly mounted a full-scale expedition to retake the Islands, the Argentine forces were routed and the military rule could not justify its stranglehold on Argentina, thus the first democratic elections were held in the country, resulting in the election of Raul Alfonsin, who began a democratic transition in the country, but it was imperative to address the thorny issue of the disappeared persons.⁷⁸⁸

For this reason the National Committee for the Study of the Problem of Missing Persons was established to investigate the truth. This Committee was able to develop a report on the disappearance of 9,000 people in spite of the lack of adequate documentation, due to pursue the military regime's policy to hide evidence and documents constantly.⁷⁸⁹ When the completed report was published in the official magazine, Argentines were shocked at the horror of what had been perpetrated, and then the trials began against members of the military accused of humanitarian abuses against the Argentine opposition.⁷⁹⁰

Although Morocco, South Africa and Argentina had very successful TJ and were able to successfully transfer from the conflict to peace, those states did not witness significant injury of diplomats and cases relating to them in their TJ system. However, they do offer useful insights for enhancing TJ mechanisms to develop practical minimum standards of TJ.

4.6.4 Libya

Libya witnessed a bad experience of TJ. Since Muammar Gaddafi's removal, successive interim governments have paid little attention to building accountable institutions, while militias with regional, tribal, religious and financial objectives have gained more control and operated with an

⁷⁸⁷ Ibid 1.

⁷⁸⁸ Ibid 1.

⁷⁸⁹ Juan Méndez (afterword), in Horacio Verbitsky, *The Flight: Confessions of an Argentine Dirty Warrior* (The New Press 1996) 171; Lichtenfeld (n 791) 1.

⁷⁹⁰ Lichtenfeld (n 791) 1.

impunity that defines the new fragmented and volatile country.⁷⁹¹ Libyans can neither reconcile with their past nor with each other while they fear for their lives. Libyan TJ law involves mechanisms that are supposed to address all issues concerning the redress of victims and the establishment of national reconciliation, and that measures have been taken to rehabilitate the judiciary and the security services, which are the most important elements for the application of any law.⁷⁹²

The Middle East has witnessed in recent times a state of confusion with regard to the question of the trial of former regime figures who committed human rights abuses, and often the citizens demand the need to complete these trials as a preliminary to national reconciliation, turning a new page and presenting these ideas as the only way to build a new life.

Libya, which has negligible minorities, was the most homogenous society in MENA, but the 2011 civil war led to the division of society into numerous groups, initially supporters of the regime and rebels, and later a plethora of competing militias vying for control of resources and political influence. All of these groups committed numerous human rights violations, including rape, extra-judicial killings, torture and disappearances. These crimes might be accounted international war crimes.

The Libyan authorities have to deal with the militias, who are seasoned and experienced fighters and former revolutionaries, to help enforce the system, instead of giving priority to domestic law enforcement and implementing the process of TJ. These militias, including the Libya Shield Brigades and the Supreme Security Committee, have been working under the command of Chief of Staff of the Army and the Interior Ministry, respectively, and are operating in parallel with the state security forces. Increased attacks from unknown groups against foreign diplomatic missions in Tripoli and Benghazi, including the attacks on the embassies of France and the United Arab Emirates in Tripoli, and the Egyptian consulate in Benghazi, expose the utter chaos of the security situation.⁷⁹³ In the midst of this confusion the judicial system and TJ continue to face significant challenges, including the slow pace of screening detainees held by militias in their jails and transferring them to the custody of the state; such detainees may be common criminals, political prisoners, terrorists or perpetrators of attacks on diplomats and diplomatic premises in Libya, but in the absence of due legal processes they cannot be processed without TJ procedures to address

⁷⁹¹ Hanan Salah 'Libya's Justice Pandemonium' (2014) Human Rights Watch

⁷⁹² Ibid.

⁷⁹³ UNSC 'Report of the Secretary-General on the UN Support Mission in Libya' (26 February 2015) UN Doc S/2015/144.

their cases.⁷⁹⁴

The Libyan Transitional Justice Law No. 29 of 2013⁷⁹⁵ sought to establish a truth commission (the Fact-Finding and Reconciliation Commission), a reparations scheme for victims and survivors of violence and rights abuses.⁷⁹⁶ Article 1 of this law explains what TJ means and its aim of dealing with the past human rights abuses committed by the Gaddafi regime.⁷⁹⁷ This could be through legislation, judicial, social, and administrative procedures. This law clearly defines the serious violations, which are any abuses of human rights by murder, abduction, physical torture or confiscation of funds.⁷⁹⁸ This law set out that the Truth Commission should be established.⁷⁹⁹ The Commission has to provide the government with detailed information about the cases with evidence and recommendations, and it should inform the government about its efforts and attempts to seek conciliation between the parties.⁸⁰⁰

There are many rights for the victims of human rights abuse according to this law. The victim has the right to know the truth and document their suffering,⁸⁰¹ reparation,⁸⁰² treatment, rehabilitation and provision of social services, and others.⁸⁰³ This law of 2013 dealt with problems faced when applying TJ by qualifying the statute of limitation, whereby crimes committed before the enforcement of Law 11 of 1997, and those committed for political, security or military reasons, would not lapse or be halted by the statute of limitation.⁸⁰⁴

Libya has seen many international and domestic prosecutions for human rights abuses and international crimes, and it cannot be claimed that Libya has ignored TJ. However, almost six years

⁷⁹⁴ United States Department of State, 'The weakness of the state and the control of the militias' Annual Report of the Organization of the victims of human rights in Libya' (2013)3. Available at <<http://www.qurynanew.com/58596>> accessed 25 Mar 2015.

⁷⁹⁵ This law replaces NTC Law 17/2012 on Transitional Justice of 26 February 2012. This law cancelled Law No. 34 of 2012 Art 32 of Law No 29 of 2013 on Transitional Justice.

⁷⁹⁶ Mark Kersten 'Transitional Justice without a Peaceful Transition—The Case of Post Gaddafi Libya' (2015) CRPD Working Paper No. 38 Centre for Research on Peace and Development (CRPD) 1. Available at <<https://soc.kuleuven.be/crpd/files/working-papers/working-paper-kersten.pdf>> accessed 4 July 2017.

⁷⁹⁷ Law No 29 of 2013 on Transitional Justice.

⁷⁹⁸ Article 2 of Law No 29 of 2013 on Transitional Justice. 'Severe and Systematic Violation: violating human rights through murder, abduction, physical torture or confiscation or damage of funds, if committed by an order of an individual acting out of a political motive. It also means the violation of the fundamental rights in a manner that results in severe physical or moral consequences'.

⁷⁹⁹ The Commission accepted that cases of violation of human rights abuse took place from 1 September 1969 (the time of Gaddafi took power) until the end of the transitional period following elections to the legislative council according to the permanent constitution Art 3 of Law No 29 of 2013 on Transitional Justice.

⁸⁰⁰ Art 11 of Law No 29 of 2013 on Transitional Justice.

⁸⁰¹ Art 4(10) of Law No 29 of 2013 on Transitional Justice.

⁸⁰² Art 4 (8) and art 23 of Law No 29 of 2013 on Transitional Justice.

⁸⁰³ Art 23 of Law No 29 of 2013 on Transitional Justice.

⁸⁰⁴ Art 27 of Law No 29 of 2013 on Transitional Justice.

since the Libyan uprising, very few TJ goals have been achieved. In the wake of the civil war in Libya, the new Libyan government was floundering in its application of TJ and in its steps to achieve peace and stability in the region. The transitional authorities passed Amnesty Law No. 38 protecting participants in the revolution from prosecution as well as Libya's Political Isolation Law in an effort to cleanse Libya of all who supported the former regime.⁸⁰⁵ UN and Human Rights Watch criticized these laws. In addition, Libya has witnessed some traditional and informal justice and reconciliation processes.⁸⁰⁶ However, as in Iraq, Libyan TJ is selective justice based on retributive criminal justice, replicating the injustices of the Gaddafi era.⁸⁰⁷ It resorts to vengeance against those associated with the regime into the transitional phase. For example, as explained previously, the Libyan courts have passed tough sentences, including the death sentence, for crimes committed by members of the Gaddafi regime and his loyalists during the 2011 conflict,⁸⁰⁸ while TJ law clearly excluded revolutionaries from punishment for the same crimes committed during the 2011 revolution. Law 38/2012 on Some Procedures for the Transitional Period, enacted on 12 May 2012 by the National Transitional Council, protects from prosecution perpetrators of serious crimes if their actions aimed at "promoting or protecting the [2011] revolution" against Gaddafi.⁸⁰⁹

This is reflected in a selective use of the TJ mechanisms implemented in Libya. The victor's justice of Libya led to a divided country with two governments, the first being in Tobruk and the second in Tripoli, each claiming to be the legitimate authority and each conducting military operations against the other.⁸¹⁰

The division of Libyan society, latently the most homogenous population in the world, resulted from the sudden defeat of Gaddafi after decades of totalitarian despotism. The sharp division between the pro- and anti-Gaddafi factions prevented a peaceful democratic transfer after the revolution, which led to the practice of repression, exclusion and subjugation of those who associated with the previous government. For example, the Libyan Authority enacted the Political Isolation Law (PIL) (No. 13 / 2013) against those who served in the former regime between September 1, 1969 and 20 October, 2011. According to this law, these people were excluded

⁸⁰⁵ Kersten (n 805) 1).

⁸⁰⁶ Ibid1.

⁸⁰⁷ Ibid1.

⁸⁰⁸ The Nation 'Libya Court Sentences Gaddafi Son to Death' The Nation (US 29 July 2017).

Available at <http://nation.com.pk/29-Jul-2015/Libya-court-sentences-Gadhafi-son-to-death> accessed 3 July 2017.

⁸⁰⁹ Human Rights Watch 'Priorities for Legislative Reform a Human Rights Roadmap for a New Libya' (2014)40. Available at

https://www.hrw.org/sites/default/files/reports/libya0114ForUpload_0.pdf accessed 3 June 2017

⁸¹⁰ Kersten (n 805)1.

from public service for ten years.⁸¹¹ As well as removing the entire civil service and all skilled bureaucrats and public servants from their roles, this law entrenched the bitter divisions among the public. Sharqieh suggested an alternative to this Law, which might be more conducive to a successful TJ: a comprehensive national reconciliation process that helps in securing a successful transition to sustainable peace and stability.⁸¹²

The current scenario of granting amnesty for crimes committed *against* the Gaddafi regime perpetuates a culture of impunity that encourages further violations.⁸¹³ This covers abuses committed under cover of the state, its agencies or individuals acting on its behalf.⁸¹⁴

This law clearly enshrines double standards and distinguishes between citizens, whether victims or perpetrators of criminal acts, which makes it contrary to international standards and constitutional principles and establishes a state that does not respect its citizens equally.⁸¹⁵

TJ Prosecution in Libya only investigates the crimes of the previous regime, and does not include the crimes committed after the defeat of Gaddafi. For example, the crimes committed during the revolution were justified by TJ Law because it was necessary activities to protect the revolution. However, it is not possible to regard such crimes as not subject to TJ law and disregard them.⁸¹⁶ This distinction between the offenders in time of Gaddafi and offenders of new government was

⁸¹¹ Ibid 1.

⁸¹² Ibrahim Sharqieh 'Reconstructing Libya: Stability through National Reconciliation' (2013) Reconciliation Brookings Doah Centre Analysis. Available at <<https://www.brookings.edu/wp-content/uploads/2016/06/Libya-National-Reconciliation-English.pdf>> accessed 2 June 2017

⁸¹³ Law No. 38 on "Certain transitional procedures" of 2 May 2012, entered into force on 12 May, stated that there was no punishment "for the acts of military, security or civil action committed by the Revolution of 17 February, by revolutionaries in order to make the revolution a success or to protect it" 'Libya is a state party to the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which requires signatories to remove all such limitations to the prosecution of war crimes and crimes against humanity' see Human Rights Watch 'Priorities for Legislative Reform a Human Rights Roadmap for a New Libya' (2014)40.

Available at https://www.hrw.org/sites/default/files/reports/libya0114ForUpload_0.pdf accessed 3 June 2017.

⁸¹⁴ Article 1 of the law 'Includes some effects of 17 February as it specifies only acts and attitudes that caused a rift in the social fabric, acts that were necessary to protect the Revolution but showed conduct inconsistent with its principles, reconciliation, establishing social peace and laying the foundations for a state of rights and law' Human Rights Watch 'Libya: Libya's new special procedures law must be amended' (2012) available at

<https://www.hrw.org/sites/default/files/reports/libya0114ForUpload_0.pdf> accessed 30 May 2017

⁸¹⁵ This Article means impunity for offenders and *carte blanche* for more violations of human rights; it is an obstacle to obstructs peace building and TJ in Libya. Libyan TJ distinguishes between crimes at the time of their commission and offenders according to their political affiliations. The perpetrators of violations after the collapse of the former regime are treated differently in law to those committed under the latter. Hedi Bouhramra 'Notes on the amended Transitional Justice Bill' (2013) Libyan Women's Platform for Peace.

⁸¹⁶ The current TJ Law emphasized this distinction when it provided for the establishment of TJ Prosecution and defined its jurisdiction only with the gross and systematic violations committed by the former regime from the date of 1 September 1960 until the declaration of liberation. This means that it has no jurisdiction over the serious violations committed after the defeat of the old regime. This clearly violates the Constitutional Declaration and the principles of the international law of human rights and the principles of Sharia. The latter is the source of TJ, as the TJ Law itself states. Ibid.

impeded by the reconciliation process among the groups within Libyan society and thus hindered the peaceful transition.⁸¹⁷

The former Libyan justice minister Salah Al-Marghani stated that Libya has not had a successful experience of TJ,⁸¹⁸ which he attributed to the existential power and political influence of the militias and the breakdown of the Libyan state. Indeed, the latter is the backdrop for all of the association damage to property, assassinations, kidnappings, and threats against army officers, police, activists, judges and journalists. The establishment of different forces, each according to the interests of particular factions and militias, has brought the national judiciary into political battles. All of this has cast a shadow over the TJ process, especially in light of some examples that have been brought to justice in cases that were supposed to be an important part of justice and truth. The security conditions that accompanied the fighting and the political conflict preventing the successful application of TJ.⁸¹⁹

Another reason for the instability in Libya that prevents TJ is the collective punishment and displacement of those allied with Gaddafi, including those who did not commit crimes, which led to an increased number of displaced people and refugees. Another collective punishment was the enacting of the Political Isolation Law No. 13 of 2013.

Libyan authorities instead of reforming its local laws in a way that confirmed the human rights and cessation of an unfair life for all citizens resorted to revenge from all those loyal to the former regime of Gaddafi. The law, which prevents those who served in the former regime between 1 September, 1969, 20 October, 2011, from holding public office for ten years, is a barrier to Libya's post-war reconstruction. The law prevents social cohesion within Libya and destroys the state's institutional memory, greatly undermining the ability of the Libyan state to function. The Political Isolation Law must be significantly mitigated, adjusted, or simply cancelled.

The revolutionary militias generally refuse to participate in government and public affairs, preferring to lambast the government from the side-lines while effectively controlling their own areas. This exacerbates the culture of division inside society and government. However, there is a

⁸¹⁷ Ibid.

⁸¹⁸ Morocco News 'Salah Al-Marghani, the former Libyan justice minister to "Morocco": The Size of the Western Intervention and Its Objectives the Truth in Libya is Unclear' Morocco News (Morocco 2016). Available at <<http://ar.lemaghreb.tn>> accessed 7 July 2018.

⁸¹⁹Sharqieh (n821)1; Marach Noah 'Transitional Justice in the Libyan Constitution Draft' Libya Future (Libya February 2017).

legitimate grievance and lack of understanding of the Libyan population in general concerning awareness of the full extent of the crimes committed by the Gaddafi dictatorship over his “42-year reign”. When reforming state institutions, particular attention should be given to the security services in light of their responsibility for preventing torture and violating human rights; the administrative apparatus and bureaucracy, especially considering the endemic corruption within it; the media, which spent the forty plus years of being responsible for the glorification of Gaddafi; and the judiciary, which has been handed the trust to faithfully and honestly implement transitional justice.⁸²⁰ Furthermore, the absence of national dialogue between the two sides has widened gaps between Libya’s different parties as well as reinforced mistrust, and exacerbated an already disastrous security situation.⁸²¹

The weakness of the Libyan government and lack of means of implementation of TJ required international assistance. Libya requires technical assistance from outside on “how best to run a reconciliation process, investigate past crimes, hold transparent and fair trials, repair injury done to victims and their families, and engage in deep institutional reform to prevent human rights violations from being repeated”.

Furthermore, Libya needs international assistance in building a strong police force and army – a necessary step for restoring state authority. Security collaboration with neighbouring countries – particularly Egypt and Tunisia, who can help control their borders with Libya – can aid Libya in its quest for a more secure environment for reconstruction and reconciliation.

In 2017, Libyan authorities tried to promote TJ by introducing three articles in the Libyan Constitutional Draft of Transitional Justice. This would make TJ more compelling and enforce the Libyan government to implement it.⁸²² The Draft provides a set of transitional measures in Chapter 11. Article (197) contains six paragraphs detailing the principles of transitional justice and mechanisms for triggering them. This Article also states the Libyan government’s obligations towards the victims, and that the Libyan government should maintain national memory by exposing and documenting human rights violations.⁸²³

⁸²⁰ Ibid.

⁸²¹ Ibid.

⁸²² Noah (n 829).

⁸²³ The Constitution Drafting Assembly, Draft Libyan Constitution Art 197 (1) stated that ‘Preserve national memory through uncovering and documenting human rights violations including linguistic and cultural violations, crimes of corruption, the fate of missing persons, victims, and persons harmed by violations, military operations and armed conflicts on the individual and regional level’.

The Draft explains that the Libyan government should undertake to compensate victims of systematic violations of human rights and fundamental freedoms. Compensation shall be awarded under material and symbolic compensation, individual and collective compensation, psychological and social treatment, and rehabilitation of victims, taking into account administrative procedures, without prejudice to the right of the state to prosecute persons who committed these violations. This means that compensation is one of the forms of reparation based on recognition of the harm suffered by victims of violations and the adoption of policies to give compensation, in kind, or symbolic, for loss and suffering victims, and their families, helping to overcome the consequences of violations, or focus on the future, by working to rehabilitate the victims and to ensure a better life for them.⁸²⁴

Other paragraphs concern the right of compensation for victims, a return of the remains of war victims and criminal prosecution of all contributors to violations of human rights and corruption crimes, all in accordance with international standards and the requirements of national reconciliation within the framework of Sharia.⁸²⁵ It is understood that criminal prosecution is an accounting mechanism. During the periods following the radical political changes from tyranny to democracy, the process of purging state institutions and excluding officials who are suspected of having committed human rights crimes can accompany accounting.

It is also important for the state to prepare national staff specialized in various fields, who are capable of implementing TJ mechanisms according to the highest international standards, whilst taking into account national privacy and research in the components of national justice, especially

⁸²⁴ Paragraph 2 of Art 197 stated that ‘The State shall commit to compensate victims and persons harmed by systematic violations to human rights and fundamental freedoms a compensation proportionate to the harm. Compensation may be financial or symbolic and may be individual or collective. Treatment of the psychological and social effects and rehabilitation of victims, while taking into consideration the administrative and judicial measures that have already been taken, without prejudice to the right of the State to prosecute persons who committed these violations’.

⁸²⁵ Paragraph 3 stated that ‘Ensure the rights of persons whose property and movable assets were violated or seized provided that the State shall ensure the rights of the original owner by restitution or compensation, taking into consideration the financial status of the occupant of the property and the construction added to it, the previous administrative and judicial measures in accordance with the law. Paragraph 4 stated that ‘Return the remains of war victims from abroad’; Paragraph 5 stated that ‘Prosecute criminally all those who had a role in human rights violations and corruption crimes provided that all of this is in accordance with international standards and national reconciliation requirements within the framework of the Islamic Sharia. Legal provisions that are in conflict with the mechanisms of transitional justice shall not be applied’, and paragraph 6 stated that ‘A body for transitional justice and reconciliation shall be established for the implementation of the programs of transitional justice. The law shall regulate its structure and the duration of its work. Programs on truth, justice and reconciliation shall be designed in accordance with the rules of effectiveness and comprehensiveness and to represent the components of the Libyan people in a way that guarantees impartiality, independence and efficiency’.

in the field of accounting. The study confirms its consistency with the principles of Islamic Sharia, and that in-depth study of the provisions of the Islamic Sharia in light of international provisions can contribute to the development of the jurisprudence of TJ in an Arab-Islamic format.⁸²⁶

Accountability in TJ safeguards the rights and freedoms of citizens. One of the most important considerations to be taken into account when choosing such mechanisms is to achieve the main objectives of TJ, namely to reduce gross violations of human rights and to prevent their recurrence.⁸²⁷ Reforming security institutions is one of the most important benefits of TJ because it involves restructuring institutions associated with the monopoly of the law enforcement in society, so that they become fairer and transparent, follow the rule of law and the culture of good human rights, and are held accountable for past violations. The Draft contains texts that support this trend, including Article 198, which is marked by guarantees of non-repetition, as well as the section of the judiciary and its contents, which entrench the independence of the judiciary, which is considered a major guarantee. The most pertinent requirements state that the armed forces and police must be subject to the national government, and that it is prohibited for any individual, party, or group to maintain armed or semi-armed paramilitary forces.⁸²⁸ This is the most immediately prerequisite for effective TJ in Libya, and the most difficult to achieve due to the mistrust and caprice of armed militias, who are reluctant to lay down their arms and submit to the national government.

Aside from this, the Draft is idealistic in its proclamations focused on the necessity of eradicating tyranny and oppression by consolidating and spreading the values of justice, equality of opportunity and equality, and spreading the culture of human rights and fundamental freedoms, as enshrined in Article 60, entitled “The right to education, citizenship, social harmony, peaceful coexistence and human rights education”. However, based on the analysis presented in this thesis, the Libyan authorities are unable to practice these articles or even to agree on them. The Draft Constitution was to be approved in December 2017, having been issued for approval in 2012 after the uprising. This massive delay in even agreeing to the fundamentals of a political process and post-conflict dialogue reflects the intractable divisions in Libyan society and politics.

There is only one reason why the situation in Libya has been more difficult to stabilise after the

⁸²⁶ Corri Zoli, M. Cherif Bassiouni, and Hamid Khan, ‘Justice in Post-Conflict Settings: Islamic Law and Muslim Communities as Stakeholders in Transition’ (2017) 33(85) *Utrecht Journal of International and European Law* 38.

⁸²⁷ Noah (n 829).

⁸²⁸ *Ibid* 829.

Arab Spring - the oil factor. Regional militias consequently sought to control oil reserves in anticipation that they could ultimately benefit from this economically. This mirrors the resort to sectarian and tribal affiliations in Iraq following 2003. Similarly, in Syria and Yemen the conflicts arose due to long-standing oppression and a lack of economic development, but in their military and political form they have also assumed a sectarian character. Egypt and Tunisia have no significant oil deposits and no pronounced sectarian differences in their societies, so it has been easier in these countries to make relative progress in peace and reconciliation during the post-conflict era. As of 2018, Libya still lacks an inclusive national reconciliation process to secure a successful transition to sustainable peace and stability.⁸²⁹

⁸²⁹ Sharqieh (n 821) 10.

4.7 Conclusion

TJ comprises a set of steps or procedures undertaken by states emerging from a period of war, conflict or revolution, during which they suffered from the abuse of human rights. The most common challenge that TJ might face is the impotence of new governments or a lack of serious inducement to achieve justice in post-conflict situations.

On several occasions it can be difficult to solve the problems of the past by choosing one approach without knowing the truth or delivering reparation. Sometimes the accountability of the offender seems to be no more than a form of exacting political revenge. Also, the delivery of reparation without real accountability for offenders means the government buys the satisfaction of victims. Thus the fundamental elements of TJ are indivisible (institutional reform, delivering reparation, prosecutions initiatives, and truth commissions). Institutional reform can be disingenuous and/or ineffective, particularly in judicial trials without compensation, while compensatory “blood money” can be interpreted as an attempt to buy the silence of the victims (or their satisfaction) without legal justice.

In many practices of states in post-conflict periods, mechanisms of TJ are commonly used to resolve disputes. However, TJ is not a wholly new form of justice; rather it is a novel combination of very well established judicial and non-judicial means of resolving conflict and post-conflict scenarios. It is fundamentally a pragmatic approach, and there is no uniform theoretical model for TJ; it must be devised and implemented according to the particular context in which it is applied. Nevertheless, similar societies can learn good lessons from previous experiences of successful and unsuccessful TJ.

While in principle TJ is mainly derived from International Law, International Humanitarian Law and Human Rights Law, in practice it is concerned with the redress of aggrieved parties, uncovering the truth and allotting reparation and compensation for victims. However, TJ is different from the traditional justice in being concerned with periods of the transition, such as the transition from an internal armed conflict or civil war to peace and democracy, or the case of the collapse of the legal system and rebuilding it in conjunction with the reconstruction of the state, or the transition from a dictatorship to a democratic system.

One of the most important challenges that might face the victim to achieve justice in a post-conflict environment is that TJ processes take time. TJ is instituted to promote security and avoid revenge by promoting peaceful coexistence within states, and often between factions who were formerly enemies. TJ has several elements, the most important of which are truth commissions, delivering reparation and prosecution initiatives. Truth commissions play a significant role in investigation in the crimes of the past human rights abuse, the reasons behind such abuses, and their consequences. They give special attention to the accounts of victims, as well as giving them special protection, and they also play a significant role in prosecution initiatives and delivering reparation after submission of reports, resulting in obligations and recommendations for governments. The program of reparation means returning rights to their owners.

Several states have been unsuccessful in their experience of TJ, while others have been largely successful, such as South Africa, Argentina and Morocco. The experience of South Africa is the most famous successful experience in achieving the aims of TJ. It led to end of structural discrimination, with acknowledgement and investigation of past abuses of human rights in the context of an amnesty for politically motivated crimes (i.e. those attributable to the structure of apartheid rule rather than to individual criminality). The amnesty was implemented in exchange for truth, to highlight the abuses which occurred during apartheid. Such decisions initially upset many victims because they did not receive reparation and they did not see the criminal as being subjected to justice, but the long-term stability and relative peace of South Africa is substantial evidence of the efficacy of the reconciliation approach.

According to international law, the hosting state (Libya) is obliged to protect diplomats and find justice for them. The state has to take all appropriate steps to protect diplomats from any attack that may occur. According to the ICJ, the state-receiving diplomats has responsibility when attacks occur to cease such attacks and find justice for diplomats (as in *the US v Iran case*). During armed conflict, especially when a state loses control over the territory, the duty of protecting diplomats and of providing justice for injuries committed against them becomes more difficult. A developing country such as Libya lacks resources and the ability to charge the criminals of an attack on diplomats, even where political realities and goodwill enable a commitment to this in principle. The receiving state is obligated to arrest and try suspected offenders and to pay compensation to injured diplomats and their state. TJ aims to find justice for the victim of human rights abuse by using different instruments such as prosecution, reparation and truth finding. Through applying TJ to find justice for diplomats, the receiving state should be able to find the truth.

States, including Libya, did not include the injured diplomats as victims of human rights abuses in their TJ laws, because diplomats were not considered to be directly pertinent to issues of TJ, due to their traditional protection under conventional international laws. However, the reality that diplomats are now targeted and not protected persons in MENA conflicts – particularly when targeted by non-state actors such as paramilitary forces and terrorist organisation – it is incumbent upon governments to be creative and active in seeking justice for diplomats.

TJ can be applied if the sending and receiving state agree to that, in which case an injured diplomat or family members of a murdered diplomat are compensated by their own country (i.e. the sending country). The sending country then claims compensation or reimbursement from the receiving country through a process of diplomatic negotiations. If diplomatic negotiations fail, the sending country takes a case to ICJ (as in the US v Iran case) under the principle of state responsibility. The sending country also asks for the perpetrators to be brought to justice by the receiving state. If, as in the case of Libya, the receiving country is unable to do so because of political instability, then TJ process could be inclusive, with injured diplomats or family of killed diplomats taking part (but only if they and the sending country choose to do so).

In effect, TJ processes to provide remedy in cases of injured diplomats are more geared toward truth finding and reconciliation rather than criminal punishment of offenders or compensation of victims (as compensation would already have been paid by the sending state as part of the diplomats' contract of service). In the event that attacks on diplomats take the form of war crimes or crimes against humanity, a prosecution of suspects at the ICC can also be considered if the receiving state is unable or unwilling to prosecute them. At the same time, the protection of diplomats and finding justice for them by applying appropriate law could help in diffusing law and order in conflict and post-conflict situations, and facilitate the stability of the international community. TJ can only work with regard to diplomats if it is discretionary (i.e. sending states and the victims involved have a choice whether or not they wish to take part) and limited to truth finding (i.e. does not include punishment and reparations, which are covered by international law (under the ICJ) regarding state responsibility for reparations, and criminal law in the case of punishment).

Chapter 5: International Legal Impacts of Attacks on Diplomats

5.1 Introduction

The Vienna Convention on Diplomatic Relations 1961 (VCDR) plays a role in determining the responsibility of particular states for attacks on diplomats, whether committed by state officials or by individuals. The VCDR in general refers to the duties of the host state regarding protection of foreign diplomats. The law on the protection of diplomats can be traced to various other sources. These include the treaties between particular diplomats' the sending and receiving states of particular diplomats. This research also refers to other international conventions, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973. As with the VCDR, this convention does not determine the responsibility of particular states, but focuses on criminalizing selected actions which it regards as crimes. It then asks the relevant state to set out in its internal law the appropriate punishment. Art 2(2) states that 'each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature'.⁸³⁰ Similarly, Art 2 of the International Convention against Taking of Hostages 1979 provides that the state should set out suitable penalties for such crimes.⁸³¹ Although Art 6 of this particular Convention states that a 'state party... shall in accordance with its laws take him into custody or take other measures ...'⁸³² it does not confirm state whether the state, in addition to the criminal, still incurs responsibility for that individual's crimes. Furthermore, Denza stated that as the VCDR does not specify or regulate how to deal with situations in which diplomats are victims of crimes, it is accepted that the receiving state authorities should take all necessary precautions to protect diplomatic officers.⁸³³ These ambiguous situations are considered in this chapter by examine the responsibility of the state through other sources of international law than the conventions already discussed.

⁸³⁰ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, (adopted by the General Assembly of the UN on 14 December 1973, entered into force on 20 February 1977) UNTS, vol. 1035, and p. 167.

⁸³¹ (Adopted by the General Assembly of the UN on 17 December 1979, entered in force on 3 June 1983) UN, Treaty Series, vol. 1316, No. 21931.

⁸³² Ibid.

⁸³³ Denza (n154) 183.

5.2 The Definition of State Responsibility

As explained in Chapter 1, the VCDR does not define state responsibility in the context of protection of diplomats, simply enumerating the duties of receiving states in protecting them. Nor do other international conventions determine this responsibility.

The responsibility of a state is one of the principles of international law. Shaw explains that several essential criteria must be met before state responsibility can adequately exist.⁸³⁴ These include the existence of an international legal obligation in force between two particular states. There must also have been an act or omission, which violates that obligation. In the *Case concerning United States Diplomatic and Consular Staff in Tehran*⁸³⁵ the responsibility of Iran was raised because of the breach of the VCDR. The Court, in its Judgment of 24 May 1980, found that Iran had violated and was still violating obligations it owed to the US under conventions in force between the two countries as well as rules of general international law, and that the violation of these obligations engaged its responsibility.⁸³⁶

As for the International Law Commission, discussion about the responsibility of states for wrongful acts carried out intentionally led to a report to the UN General Assembly in 2001 which provided a definition of international responsibility. Art 1 stated that ‘Every internationally wrongful act by a State entails international responsibility’.⁸³⁷ This definition of state responsibility, which includes both action and omission being breaches, contrasts with TJ, which sets out punishment only for past crimes, and does not refer to omissions. This was confirmed by the ICJ in its decision in the case of the *United States Diplomatic and Consular Staff in Tehran 1980*,⁸³⁸ as explained later in this chapter.

Shaw added an act or omission imputable to the state responsible.⁸³⁹ Art 2 of Responsibility of States for Internationally Wrongful Acts 2001⁸⁴⁰ says that states actually commit an intentionally wrongful act if ‘the goal of that act or omission attributable to the state under international law

⁸³⁴ Shaw (n 27) 781.

⁸³⁵ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3.

⁸³⁶ Ibid.

⁸³⁷ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. Of ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted on 10 August 2001 (2001 ILC Articles).

⁸³⁸ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3.

⁸³⁹ In *Eureko BV v Republic of Poland*, the judge stated that such wrongful acts may include actions or omissions or may be a combination of both of them. Hence, the word ‘act’ is estimated to include omissions. See Partial Award (2005) Ad Hoc Arbitration. ; Shaw (n 27) 781;

⁸⁴⁰ UN General Assembly, Responsibility of States for internationally wrongful acts : resolution / adopted by the General Assembly, 8 January 2008, A/RES/62/61, available at: <http://www.refworld.org/docid/478f60c52.html> [accessed 7 January 2018]

constitutes a breach of the obligation of the state'.⁸⁴¹ Similarly, the ICJ in the *United States Diplomatic and Consular Staff in Tehran* case⁸⁴² stated that one of the foundations of the law of state responsibility is that conduct of any state organ must be thought an act of the state under public international law giving rise to the responsibility of the state if it establishes a breach of an international duty. According to the ICJ, Iranian authorities did not try to prevent the offender from the seizure of the Embassy right up to the point of completion. During the events of November 1979, Iran did not ask offenders to stop or avert their action or withdraw from the US Embassy.⁸⁴³ Article 8 of the UN General Assembly Resolution on Responsibility of States for Internationally Wrongful Acts (2001) states the wrongful act committed by a person(s) is attributable to the state, when such acts were under the direction or control of the state or in accordance with its instructions.⁸⁴⁴

Furthermore, loss or damage arising from that unlawful act/omission is considered the responsibility of the state. The state is responsible for its wrongful acts committed against other states. In case of proof that the act or omission has been committed and caused harm to others, the consequence of an unlawful harmful act is to provide compensation.⁸⁴⁵ Several contemporary authors consider that responsibility can be seen in contemporary society as a general principle of law. Both the Permanent Court of International Justice and its successor, the ICJ, confirmed very early on that the consequence of an unlawful harmful act was the duty to provide compensation.⁸⁴⁶ Furthermore, the ICJ in *Case concerning United States Diplomatic and Consular Staff in Tehran*⁸⁴⁷ stated that one of the principles of international law is that appropriate compensation is required for breaches of international obligations. The ICJ decided that as a consequence of the Iran causing injury to the US, Iran was obliged to make reparation for this injury caused.⁸⁴⁸ It is

⁸⁴¹ Ibid.

⁸⁴² *Case concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

⁸⁴³ Ibid.

⁸⁴⁴ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. Of ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted on 10 August 2001 (2001 ILC Articles).

⁸⁴⁵ Shaw (n 27) 778; 1927 PCIJ (ser. A) No. 9, at 21 (July 26), reaffirmed in *Reparation for Injuries Suffered in the Service of the UN*, Advisory Opinion, 1949 ICJ REP. 174; *CMS Gas Transmission. Company v Republic of Argentina* (CMS v Argentina) [2007] ICSID, ARB/01/8; this was confirmed also by the case of *The Democratic Republic of the Congo v Uganda*. Which stated the international responsibility of Uganda owing to Uganda's committing internationally wrongful acts and the legal consequences which such responsibility brought about. See *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda) (Judgment) [2005] ICJ Rep 168.

⁸⁴⁶ Eric Mongelard 'Corporate civil liability for violations of international humanitarian law' (2006) 88 (863) *International review of the Red Cross*, 665.

⁸⁴⁷ *Case concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

⁸⁴⁸ Ibid.

clear there is a significant relationship between state responsibility and reparations. Consequently, a state is responsible for the wrongful acts committed by its organs. This responsibility exists even if there is no fault on the part of the state itself. After the event, Iran was bound to release the hostages and to make reparation to the injured diplomats or their states,⁸⁴⁹ as the violations were considered Iran's responsibility.⁸⁵⁰

To summarise, the general responsibility of the host state for attacks on diplomats and their premises is subject to several conditions. First, breach of international obligation should have occurred, whether by act or omission. Second, this act or omission should be attributable to the state. Third, this act or omission should cause harm to the other state (i.e. its representatives). If these three elements of state responsibility can be proven then the host state is obliged to provide compensation to the injured diplomats or their states.

5.3 International Responsibility and the Protection of Diplomats

To determine the responsibility of states regarding the protection of diplomats, in circumstances where the attack on diplomats was caused by individuals or armed groups, a critical analysis of international laws and cases is required.

Receiving states have an international obligation to prevent any abuses against diplomatic personnel. A state then incurs international responsibility for any harm caused to diplomatic personnel.⁸⁵¹ According to the ICJ, the purpose of such protections from a long historical view is reflective of the international state system itself. Diplomats are the means for conducting and strengthening relationships between states. Diplomacy has an important role in shoring up the core stability goals of the international system⁸⁵²

International responsibility for protecting diplomatic missions and their personnel is attributable to the receiving state and when an attack occurs against this target the state is guilty. A state is responsible for the wrongful acts committed by its nationals if they occurred under its order and

⁸⁴⁹ Ibid.

⁸⁵⁰ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.*

⁸⁵¹ Dapo Akande and Sangeeta Shah 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21(4) *The European Journal of International Law* 815.

⁸⁵² *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3. (Para 38-40).*

direction.⁸⁵³ An example is the case of *United States v. Iran (1980)*.⁸⁵⁴

In brief, this case found that on 4 November 1979 the militants forcibly entered the US diplomatic mission and the ground floor of the Chancery building during an internal armed conflict. Iranian militants forcibly stormed the United States Embassy and overtook it. During this action six persons were killed and the US Ambassador to Tehran along with 70 diplomats and citizens was held as a hostage.⁸⁵⁵ The militants attempted to set the building on fire and cut through the upstairs steel doors with a torch, eventually gaining control of the main vault. In addition to the Chancery building, the surrounding mission premises were seized. All the diplomatic staff and other persons present were taken hostage. US nationals from other places in Tehran were brought to the Embassy and added to the number of hostages. The militants justified the taking of hostages as retaliation against the US for years of supporting the Shah of Iran and his totalitarian rule, and for giving him entrance to the US (in order to receive medical treatment). During October 1979 the Americans repeatedly sought assurances from the Iranian authorities that their diplomatic premises would be properly protected and the Iranian authorities repeatedly gave those assurances.⁸⁵⁶ Although the Iranian authorities (host state) under international law had responsibility to protect diplomats, and undertook to honour this responsibility; it then subsequently showed blatant disregard for the safety of foreign diplomats and thus for the Vienna Convention's guarantee of their protection. According to the VCDR (1961) Article 29, 'the person of a diplomatic agent shall be inviolable'. Article 22 (2) also states that the receiving state has a special duty to take all appropriate steps to protect the diplomats and their premises. However, the Iranian Government seems to have failed in every aspect by not taking any of the 'appropriate steps'. At the time of the attack, the Iranian security personnel simply disappeared.⁸⁵⁷

The invaders or militants after the attack on the US Embassy in Tehran and Consulates at Tabriz and Shiraz detained diplomatic and consular staff of the USA in Tehran as hostages. A dispute then arose as a consequence of the militants' attack. The US initiated a suit against Iran.⁸⁵⁸ It claimed that the Government of Iran, in permitting, encouraging, tolerating, adopting, and making no effort

⁸⁵³ (Akande and Shah) n861) 815.

⁸⁵⁴ Bezen Balamir-Coskun, Birgül Demirtaş- Coşkun, Neighbourhood Challenge: European Union and Its Neighbors, (Boca Raton 2009) 204; Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

⁸⁵⁵ Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

⁸⁵⁶ Barker (n3) 9.

⁸⁵⁷ Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

⁸⁵⁸ Ibid.

to prevent the action, along with failing to restrain and punish the conduct described in the Statement of the Facts, violated its international legal responsibilities to the United States.⁸⁵⁹ The ICJ held Iran responsible for the acts of its citizens.⁸⁶⁰ Although there was no proof that the militants were acting on behalf of the Government of Iran, it was held that Iran was responsible for the wrongful acts of its nationals as it did not take any action to prevent the revolutionaries or to release the hostages, and by its delay, it supported the revolutionaries⁸⁶¹. For not taking the appropriate steps to prevent the attack on the US diplomats or their premises by these militants and for not stopping the attack, the Iranian Government was held responsible.⁸⁶²

This violation of the international obligation to protect diplomats on the part of the Iranian government was confirmed by the ICJ, which stated that ‘the Iranian security personnel is reported to have simply disappeared from the scene; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the embassy’s premises’⁸⁶³

The attack on diplomats in Iran were not limited to the US Embassy; the British Embassy in Tehran was occupied on 5 November of the same year and the following day an Iraqi Consulate was also invaded.⁸⁶⁴

Under international law the host state (Iran) had a responsibility to take proper steps to protect the diplomats. Iran therefore incurred the responsibility for not making any effort, whether positive or by omission. The US arranged to meet the Iranian authorities to discuss the release of the hostages; however, these efforts were unsuccessful. The US later ceased relations with Iran, stopped US exports and oil imports, and Iranian assets were frozen. Although the militants were not acting on behalf of the state, neither did the state uphold their duty to protect US nationals. The revolutionaries said they would hold the hostages until the Shah (the previous ruler of Iran), who was receiving medical treatment in the US, was returned to Iran.⁸⁶⁵

The embassy personnel and other persons captured during the attack were held hostage for over 14 months until 20 January 1981, with the exception of 13 persons released on 18 and 20 November 1979,

⁸⁵⁹ Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

⁸⁶⁰ Ibid.

⁸⁶¹ Ibid.

⁸⁶² Ibid.

⁸⁶³ Ibid. paragraph 19, 20.

⁸⁶⁴ Ibid.

⁸⁶⁵ Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

and the vice-consul who was released in July 1980.⁸⁶⁶

The ICJ in its decision considered the acts incompatible with the obligations of Iran under treaties and rules of international law, as explained earlier. Also, the ICJ determined to what extent the acts of the armed groups could be regarded as imputable to Iran. The action of the armed groups was not attributed to Iranian authorities until 17 November, when Ayatollah Khomeini issued a decree declaring that the hostages would (with some exceptions) remain 'under arrest' until the US had returned the former Shah and his property to Iran, and forbade all negotiation with the US on the subject.⁸⁶⁷ Ayatollah Khomeini described the Embassy as a 'centre of espionage'.⁸⁶⁸ This decision makes it clear that the action of the armed group was considered a *de facto* action of the state of Iran due to the tacit compliance given by the official government position; thus the actions of the non-state armed group were attributed to the Iranian authorities.

According to the ICJ, the Iranian authorities during the attack on 4 November were fully aware of their obligation under international law to take all appropriate steps to protect the US Embassy and its diplomatic staff and other persons inside premises from any attack during the armed conflict.⁸⁶⁹ The Iranian authorities also understood the urgent need for action to be taken by them to protect the US Embassy. However, they were completely unsuccessful in complying with their obligations of protection despite having the means at their disposal to complete their duties.⁸⁷⁰ Iran could not claim that it had no knowledge of how to meet its international obligations towards the US to protect their diplomats and premises. This can be contrasted with the lack of means in Libya to protect diplomats and the inability of the state to protect them; Iran had the ability to protect diplomats and the means to do so, but it failed to provide the necessary protection. Iran intentionally neglected to cooperate with the sending state to protect diplomats, while in Libya the lack of means of protection prevented the government from fulfilling this same obligation. However, it is still the standard of due diligence which determines whether or not a host state meets its international obligations.

The ICJ decision was to hold Iran responsible for failing to protect the embassy against the assault,

⁸⁶⁶ Barker (n 3) 85; Rudolf Bernhardt, *Decisions of International Courts and Tribunals and International Arbitrations*, (North-Holding Publishing Company 1981) 284.

⁸⁶⁷ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3.(paragraph 74)

⁸⁶⁸ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3. (Paragraph 74).

⁸⁶⁹ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3 (paragraphs 67, 68).

⁸⁷⁰ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3 (paragraphs 67, 68).

for not taking steps to protect the diplomatic and consular staff, for not stopping the attack before it reached its conclusion and for not initiating any action against the militants. Iran was asked to make reparation, the form and amount of which were to be settled by the court failing agreement between the parties.⁸⁷¹

Furthermore, as explained in Chapters 1 and 2 as an Islamic state Iran is responsible not only under international law but also in accordance with Sharia. Sharia has an early and powerful tradition of respect for diplomatic envoys and relations in the concept of *aman*, safe conduct, which legally compels the state to protect such personnel until their departure from its territory. Technically Iran is an Islamic Republic governed by the Sharia principles of Shia Islam, for whom the decree of an Ayatollah constitutes a Sharia ruling in itself, overriding the general principle of *aman*. In reality, this was clearly a politically motivated decision that reveals the deep influence of the thought of Sayyid Qutb in the Iranian Revolution.⁸⁷²

5.4 Responsibility of State and Individuals under Public International Law

International law provides several articles on the protection of diplomats. Art 1 (b) of the International Convention against the Taking of Hostages 1979, grants diplomats special protection from any attack on their person or their families, their freedom or dignity.⁸⁷³ According to Article 2 of this Convention, the state has to take every possible measure to ensure that offenders are brought to justice and subject to punishment.⁸⁷⁴ Also, the state is required not just to free the diplomat who has been taken hostage, but also to ensure his or her safe departure from the receiving country.⁸⁷⁵

Furthermore, Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, outlines the crimes

⁸⁷¹ Ibid 285.

⁸⁷² Abu.Iyaad 'The Iranian Rafidah (Nawab Safawi, Khomeini and Khamenei), the Books of Sayyid Qutb, Mohammad Qutb, Abu A'la Mawdudi and the Qutbiyyah Khaarijyyah of the Gulf Posted' (Egypt January 2018). Available at <<http://www.ikhwanis.com/articles/dayvwoc-the-iranian-rafidah-khomeini-and-khamenei-and-the-books-of-sayyid-qutb-and-abu-ala-mawdudi.cfm>> Accessed 4 July 2017; Luke Loboda, 'The Thought of Sayyid Qutb, Region' (PhD thesis, University of Ohio 2009) 3; Martin Kramer 'Fundamentalist Islam at Large' in Martin Kramer (ed) Arab Awakening and Islamic Revival, (Transaction Publishers 1996) 37.

⁸⁷³ Article 1 of the International Convention against the Taking of Hostages (Adopted by the General Assembly of the UN on 17 December 1979, entered in force on 3 June 1983) UN, Treaty Series, vol. 1316, No. 21931.

⁸⁷⁴ Ibid.

⁸⁷⁵ Art 3 of the of the International Convention Against the Taking of Hostages (Adopted by the General Assembly of the UN on 17 December 1979, entered in force on 3 June 1983) UN, Treaty Series, vol. 1316, No. 21931.

against the diplomats. These include murder, kidnapping or any other form of attack against a person or the freedom of a person; the use of violence on the official diplomatic or consular premises, private accommodation or means of transportation of an internationally protected person or member of his family, which exposes a person or freedom of the person to the threatened.⁸⁷⁶ Several states responded to these terms and made efforts to free diplomats by meeting the demands of the abductors, even though in some cases this might affect the national interest of the receiving state, while the others were unsuccessful in meeting the kidnappers' demands. For example, Charles Burke Elbrick, the American ambassador to Brazil was kidnapped in September 1969 by members of the October 8th Revolutionary Movement, as described in Chapter 1. Brazil responded to pressure from the US to meet the demands of the kidnappers in order to ensure the release of Ambassador Elbrick.⁸⁷⁷

International law requires states to cooperate with each other in the prevention of crimes against international persons, including diplomats. Art 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, rules that states party to this convention need either to extradite the offenders or subject him or her to prosecution without delay in accordance with its competent authorities.⁸⁷⁸ An example is the events of 1973 in Sudan, when the gunmen (the Palestinian terrorist group Black September) stormed the Saudi Arabian Embassy and took several diplomats hostage. After a few hours, a number of important diplomatic personnel including the US Ambassador to the Sudan, his deputy and the Belgian *chargé d'affaires* were killed. Although the Sudan judiciary punished the offenders,⁸⁷⁹ the sentences were later commuted from life to a lenient seven years.⁸⁸⁰ Also, the Convention of 1973 requested that states set out in their local legislation suitable punishment(s)

⁸⁷⁶ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents stated that 1. The intentional commission of:

‘(a) A murder, kidnapping or other attack upon the person or liberty of an internationally protected person; 3 b) A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty; (c) A threat to commit any such attack; (d) An attempt to commit any such attack; and (e) An act constituting participation’

⁸⁷⁷ Barker (n 3) 3.

⁸⁷⁸ ‘The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay...’ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, (adopted by the General Assembly of the UN on 14 December 1973, entered into force on 20 February 1977) UNTS, vol. 1035, and p. 167.

⁸⁷⁹ Barker (n 3) 7.

⁸⁸⁰ ‘The State Party ... alleged offender is present shall, if it does not extradite him, submit, without exception ...’ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, (adopted by the General Assembly of the UN on 14 December 1973, entered into force on 20 February 1977) UNTS, vol. 1035, and p. 167.

for crimes against diplomats.⁸⁸¹

In this regard, Art 203 of the Iraqi Civil Code stated that in the case of the killing of a person by an organ of state, the offender is not only subject to punishment but also has to pay compensation.⁸⁸² Although the Iraqi Civil Code did not refer specifically to diplomats, this article could be applied to them. Nevertheless, under Art 219 of the Iraqi Civil Law, the victim could charge the state itself according to the state responsibility for wrongful acts committed by its organs or officials.⁸⁸³ However, when crimes against diplomats are committed by private individuals, the individuals are responsible for their crimes.⁸⁸⁴ The question then arises as to whether the state has any responsibility in this situation.

The State incurs civil responsibility when there is a breach of a previous obligation or it fails to meet its obligation under international law, for instance, failure to meet its obligation to protect diplomats. This failure includes preventing the occurrence of the crimes mentioned above against diplomats, failure to punish the offenders, and failure to remedy the violation of international law by private persons which might have caused injury to a diplomat.⁸⁸⁵ Hence, the protection of diplomats is not limited to due diligence by the receiving state to prevent injuries but extends to the prosecution, punishment, apology and redress for injuries which it was unable to prevent.⁸⁸⁶ If this special protection stated by the VCDR has not been granted by the receiving state, and there is no local remedy, then the injured diplomat or his or her state has the right to claim reparation. Article 44 of the VCDR does not limit the duties of the receiving state for special protection in time of peace, but also when the state is faced with a civil war, mob action, or an insurrection. These circumstances do not affect the duty of the host state in the prevention the crimes and the punishment of offenders as the state still has the responsibility to protect diplomats.⁸⁸⁷

⁸⁸¹ Art 2(2) of Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, (adopted by the General Assembly of the UN on 14 December 1973, entered into force on 20 February 1977) UNTS, vol. 1035, and p. 167. Stated that 'Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature'.

⁸⁸² Iraqi Civil Code [Iraq], No. 40, 18 September 1951 'in case of murder and in case of death resulting from wounds or any other injurious act renders the perpetrator liable to pay compensation to the dependants of the victim who have been deprived of sustenance on account of the murder or death'.

⁸⁸³ Iraqi Civil Code [Iraq], No. 40, 18 September 1951, 'Government municipalities and other institution which perform a public service as well as every person who exploits and industrial or commercial enterprise are responsible for the damage (injury) caused by their employees if the injury resulted from an encroachment committed by them in the course of their service'

⁸⁸⁴ Marina Spinedi 'State Responsibility V Individual Responsibility for international Crimes: Tritunon Datur?' (2002) 13(4) EJIL 895.

⁸⁸⁵ Baumann (n 131) 46.

⁸⁸⁶ Ibid 44.

⁸⁸⁷ Ibid 44.

State are also responsible for the wrongful act of its agent. Acts of State could be represented by the acts of agents and/or representatives.⁸⁸⁸ State responsibility then arises from the actions taken by its officials or organs of state. For example, in the case for violation of the immunity and privileges of diplomats by its officials, the state is responsible for violation of international law. Hence, the arrest or detention of diplomats is an abuse of diplomatic immunity, and the state is responsible.⁸⁸⁹

The state is not only responsible for commission but also for omission when its officials, organs of state or any other person representing the state commit violations.⁸⁹⁰ These could be carried out by individuals or by a group of individuals (whether officials or private individuals), whose characteristics will determine the responsibility of the state or otherwise. The action under question must be a clear violation of international law before the state can be held liable. This means that the state is responsible whether the action is allowed under its local law or not. These acts of commission or omission must have caused injury to the diplomats (whether this injury is moral suffering or material loss) in order for the state to be held responsible. Compassion, however, for moral suffering has not been consistently awarded.⁸⁹¹

However, it is not easy to say whether the State is responsible for its commission or omission without first determining whether is practised due diligence.⁸⁹² For example, in the case of the killing of American diplomats to Libya in 2011, Libya had exercised reasonably due diligence to try and prevent their injury, with 'Libyans fighting alongside US personnel during the assault'.⁸⁹³ The Libyan authority also apologized to the US over the murder.⁸⁹⁴ Furthermore, Libya has taken serious steps after the murder to make sure such crimes would not be repeated in future. For example, Libya enacted the Libyan Anti-Terrorism Law 2013 which includes punishment for attacks on diplomats and their premises, as explained early in Chapter 1. This law is unique in the MENA region as Libya is the first and currently the only receiving state in that region to take steps to guarantee the protection of diplomats and seek redress for them. The Libyan authorities took these important steps to avoid breaching international obligations to protect diplomats, even though the actions against the US diplomats were committed by Libyan non-state actors without

⁸⁸⁸ Ibid 44.

⁸⁸⁹ Ibid 53.

⁸⁹⁰ J. L. Brierly, *The Law of Nations* (6th end, Oxford University Press, New York and Oxford, 1963) 289.

⁸⁹¹ Baumann (n 131) 44.

⁸⁹² Ibid 44.

⁸⁹³ Clay Claiborne 'US Ambassador to Libya, Chris Stevens Murder Timeline' *Daily Kos News* (US, Oct 22 2012).

⁸⁹⁴ BBC News 'US Confirms its Libya Ambassador Killed in Benghazi' *BBC News* (London, 12 September 2012). Available at <<http://www.bbc.co.uk/news/world-africa-19570254>> accessed 2 May 2015.

the knowledge or approval of the Libyan authorities. However, the degree of such protection and the amount of the reparation is still not clear.⁸⁹⁵

Whether discussing responsibility for internationally wrongful acts, or liability for acts prohibited by international law, damage remains the central trigger of both responsibility and liability; the object of both mechanisms being to ensure reparation for damage, whether that damage results from a violation of an obligation, or from an activity involving risk to diplomats.⁸⁹⁶

If an element of responsibility exists, then the state is responsible for repairing the damage caused by its wrongful act. The state is also responsible for making full and appropriate reparation for any loss or damage it has caused, whether material or moral,⁸⁹⁷ and for restoring the situation to what it was.⁸⁹⁸

In practice, several states have paid reparation to injured states. For example, in 1962 the British Embassy in Jakarta was attacked; the Ambassador was hit by stones and 23 staff were immolated, while the Indonesian authorities did nothing to try to protect the diplomatic personnel or even to extinguish the fire. Consequently the Indonesian government paid £600,000 to the British government. Similarly, Pakistan paid compensation for the 1979 looting of the US Embassy in Islamabad.⁸⁹⁹

Furthermore, *in the Case concerning United States Diplomatic and Consular Staff in Tehran*, the ICJ stated that ‘Iran is under an obligation to make reparation for the injury caused to the United States, and that the form and amount of such reparation, failing agreement between the parties, shall be settled by the Court’.⁹⁰⁰ The consequence of the Iranian violation of international law was not limited to reparation, as the ICJ also decided that the government of Iran should prosecute those persons responsible for the crimes committed against the premises and staff of the United States Embassy and against the premises of its Consulates.⁹⁰¹

⁸⁹⁵ Ibid 46.

⁸⁹⁶ James Crawford, Alain Pellet, and Simon Olleson, *The Law of International Responsibility* (Oxford University Press 2010)11.

⁸⁹⁷ Article 31 (2) of the ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted on 10 August 2001 (‘2001 ILC Articles’ stated that ‘Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State’

⁸⁹⁸ Article 31 (1) of ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted on 10 August 2001 (‘2001 ILC Articles’ stated that ‘The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act’.

⁸⁹⁹ Ibid 276.

⁹⁰⁰ Ibid paras. 93 and 94.

⁹⁰¹ Ibid.

As explained above, responsibility falls on the state when an act or omission is committed by an organ of the state or its officials. The state does not incur direct responsibility for the acts of private individuals. For example, in cases where crimes are committed by individuals and the state fails to either prevent this act or to punish the criminals, or in the case where the state encourages such acts, indirect responsibility will be incurred by the state. If by negligence or by omission, the state's police fail to prevent such an act and this leads to the injury of diplomats, then this omission by the state's police may be attributable to the state. This implies that to determine the state's responsibility, a distinction needs to be made between the direct responsibility incurred by state agents, those authorized, or controlled by it or acting on its behalf, and / or the indirect responsibility of the private individual.⁹⁰²

However, states are still obligated under international law to employ due diligence to prevent the commission on their territory of certain acts by persons injurious to diplomats. Hence, state responsibility could arise from failure either to punish the offender or to provide a proper legal remedy for the diplomats. Reparations and punishment are also required in this case. The reparation could include several acts, such as apologies to the injured state, disowning the act, or expressing regret. It is the responsibility of the state to repair any material or moral damage caused by the violation of international law. Although individuals could be subject to punishment and pay compensation for any material damage, the state is still liable.⁹⁰³

Proper diligence needs to be undertaken by the state to prevent the injury of diplomats. The question then arises as to the level or degree to which local protection should be provided by the state to determine that it has exercised due diligence. As Baumann has pointed out, 'in normally well-ordered states governmental liability is dependent upon its ability to protect the injured person in any given case'.⁹⁰⁴ Also, the circumstances around the case might determine the degree of protection to be provided by the state. For example, in some cases a state might need to double its effort to protect diplomats, such as the instance Baumann gave where 'the moving cause of the injury is notorious, e.g. bandits in a certain locality, a greater degree of protection is incumbent upon the government than in cases of sudden violence which the best-organized government could not foresee'.⁹⁰⁵ To determine the level of the culpability of state in not providing the proper amount of protection, diplomats need to present the receiving state with details of their movements, to determine the degree of danger and the degree of protection that might be needed. For example,

⁹⁰² Baumann (n 131) 45.

⁹⁰³ Ibid 45-46.

⁹⁰⁴ Ibid 46.

⁹⁰⁵ Ibid 46.

two Serbian Embassy employees, the communications officer, Sladjana Stankovic, and driver Jovica Stepic, were kidnapped by gunmen in the north-west Libyan coastal town of Sabratha.⁹⁰⁶ Ambassador Oliver Potezica, who escaped unharmed and was travelling in the three-vehicle convoy with his wife and two sons aged 8 and 14, later reported the attack, which occurred when one of the embassy cars was hit from behind and the convoy was ambushed by an armed group. When the driver came out to check what had happened, he was dragged into one of the attackers' cars. Although the Libyan authorities made efforts to secure the hostages' release, they argued that it was not safe to travel through the area unguarded, and that the embassy had not notified the local authorities in advance about the trip.⁹⁰⁷ This would lead to the conclusion that the receiving state (Libya) was not responsible for the incident, because the diplomatic mission had not informed the authorities that suitable and ample protection was required. Otherwise, a prior request for sufficient police protection may afford a legal basis for reparations if such protection is not provided and injuries incur.⁹⁰⁸ Liability is predicated on the failure to prevent the injury, regardless of ability to prevent it.⁹⁰⁹ As at the time of writing, the case is still progressing and no feasible outcome has been reached.

Injurious acts such as attacks or insults against diplomats are regarded as injuries against the sending state itself and any claim for redress is brought by that state on its own behalf. This was clear in the case of *Respublica v. 'de Long-champs* in which the judge stated that 'The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations: he is guilty of a crime against the whole world'.⁹¹⁰

The special protection provided to diplomats by the receiving state consists of the government's obligation to prevent violations of their personal dignity, their personal safety, and their intercourse with their government at home. If this protection cannot to be met by the receiving state, then that state should punish the offenders harshly.

It is recognized that this protection is provided for in both the general principles of international law and the local laws of some receiving states. Several States have enacted laws outlining the

⁹⁰⁶ BBC News 'Libya Air Strikes: Two Serbs killed in US Attack on IS' BBC News (London, 20 February 2016). Available at <<http://www.bbc.co.uk/news/world-africa-35621426>> accessed 2 May 2016.

⁹⁰⁷ Associated Press, 'Gunmen in Libya abduct 2 Serbian Embassy employees' Mail online (London, 8 November 2015). Available at <http://www.dailymail.co.uk/wires/ap/article-3309271/2-Serbian-Embassy-employees-abducted-Libya.html> Accessed 2 June 2016.

⁹⁰⁸ Baumann (n 131) 46.

⁹⁰⁹ Ibid 46.

⁹¹⁰ (Judgment) Court of Oyer and Terminer [1784] 1 US 111. Para 111-118.

sentence for offences committed by individuals against diplomats. For example, in the United States, the law provides that ‘...assaults, strikes, wounds, imprisons, or offers violence to... ambassador... shall be fined not more than \$5,000, or imprisoned not more than three years, or both... uses a deadly or dangerous weapon, shall be fined not more than \$10,000, or imprisoned not more than ten years, or both’.⁹¹¹

The question then arises as to whether, in the absence of any laws directly providing for the punishment of attacks on diplomats, the domestic criminal laws can be applied. Applying these laws would provide appropriate trial procedures and sentences. The state is obligated to punish offenders according to their local laws for violation of the international obligation of providing special protection for diplomats. This holds whether the crimes are committed by an organ of state or by a private individual. Such violations must be remedied by the offending state through any rational means which will bring the offenders to justice; otherwise, the right of reparation might arise.⁹¹²

However, the sending state cannot demand this right of reparation unless all local remedies have been exhausted. This means that sending state needs to give the receiving state which failed to prevent the assault or attack on a diplomat, the opportunity to punish the individuals who committed the crime.⁹¹³

In cases where local remedies are absent, insufficient, or are applied indifferently, direct diplomatic action could be taken. Such cases include: the receiving state after reasonable opportunity fails to bring the offenders to justice; insufficient sentence for responsible persons; escaping of offenders due to neglect on the part of the state or an unjustifiable delay in inspecting the facts. Also included is an amnesty to criminals or avoiding the punishment of offenders. Direct action might be taken by the state of an injured diplomat by demanding redress or reparations. This usually occurs only if local remedies are not afforded or are insufficient, or if they have been exhausted without provision of satisfactory justice.⁹¹⁴ In cases where there is a lack of special protection either as a failure of prevention or inadequate punishment, the injured diplomat’s state may claim reparations for injury to itself through its official representative, and it becomes an international issue. From this point, states may resolve the issue either amicably or otherwise, using

⁹¹¹ United States Code Annotated: Crimes and Criminal Procedure (1-370), Title 18, 112, p. 180 (R.S. 4062). West Publishing Co., 1969.

⁹¹² Baumann (n 131) 46-51.

⁹¹³ Ibid 46-51.

⁹¹⁴ Baumann (n 131) 46-51.

methods ranging from diplomatic negotiations down to the use of force. The amicable methods that might be used include the as use of good offices, diplomatic interposition, mediation and arbitration. Unfriendly methods that might be used by the injured state include withdrawal of diplomatic representatives, a show of force, and the use of armed force.⁹¹⁵

Under the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the core legal consequences of an internationally wrongful act set out in part two are the obligations of the responsible state to cease the wrongful conduct,⁹¹⁶ and to make full reparation for the injury caused by the internationally wrongful act.⁹¹⁷

Where the internationally wrongful act constitutes a serious breach by the state, it is held responsible under international law and the breach may entail further consequences both for the responsible state and for other states. In particular, all states in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible state in maintaining the situation so created.⁹¹⁸

International law requires that the wrongful act committed by the state should cease and that further action should be taken by the responsible state (for example, non-repetition of this wrongful act needs to be guaranteed).⁹¹⁹ The injured state is to invoke the cessation by another state if the wrongful act of this state is continued until the time of claim.⁹²⁰

For example, in the case concerning *United State v. Iran* the ICJ ⁹²¹ stated that Iran needed to secure the immediate release of all United States nationals detained within the premises of the its Embassy in Tehran, and to guarantee that those persons and all other United States nationals in Tehran be safely allowed to leave Iran.

Expressions of condolence and solidarity following violations of the safety of diplomats are common, as in the case of the murder of a US Vice-Consul by terrorists in Cyprus, or the murder of an employee in the US Embassy in Damascus by a terrorist bomb, after which the nations

⁹¹⁵ Ibid 46-51.

⁹¹⁶ Article 30 of International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

⁹¹⁷ Ibid article 31.

⁹¹⁸ Ibid article 40, 41.

⁹¹⁹ Shaw (n 27) 800.

⁹²⁰ *Rainbow Warrior (New Zealand v France)* Arbitration Tribunal [199] 82 ILR 499,537.

⁹²¹ *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3.

involved offered full cooperation and support for criminal investigations and prosecutions.⁹²² The Cuban who murdered a Spanish diplomat in Mexico in 1950 was sentenced to 16 years in prison.⁹²³ Remuneration was paid in the case of the murder of a British Military Attaché in Baghdad.⁹²⁴

That state have responsibility to take serious steps to protect diplomats was confirmed by the General Assembly No 136/38. In accordance with this decision of the General Assembly, several states took important steps, including France, which in 1982 set up a centralized system for the registration of terrorism, and established a central office to counter the transfer of weapons, explosives and sensitive materials.

Lebanon took important steps to protect diplomats and their premises on 24 March 1982, when legislation No (5018) covered the establishment of special troops called troops for the security of embassies. The duties of these troops were protection of diplomatic premises in Lebanon, protection of the head of the diplomatic mission and the diplomatic staff when it is necessary, and accompanying the mission's special documents during transfer when necessary. According to Article 3 of this law, these troops were made up of commandos, soldiers, detectives' forces, guard forces, general reserves and emergency services. Similarly, the Metropolitan Police in London has a special branch known as the Diplomatic Squad. This comprises police officers who are specially trained and specifically assigned to protect diplomats and diplomatic premises.⁹²⁵

5.5 Responsibility of States in Time of Civil War and Civil Commotion

Although receiving states are under an international obligation to grant adequate protection to diplomats, including measures taken by the State such as the posting of police guards at the embassy or the provision of an armed escort for envoys, the definition of adequate protection is still an ambiguous and confusing term in cases of political turmoil, mob action, insurrection and civil war.⁹²⁶

Baumann stated that in times of insurrection and civil war, and especially when a government is

⁹²² Baumann (n 131) 71.

⁹²³ Ibid 71.

⁹²⁴ Ibid 71.

⁹²⁵ The Parliamentary and Diplomatic Protection Command (PaDP) was formed in April 2015, with the merger of the Diplomatic Protection Group (SO6) and the Palaces of Westminster (SO17). Available at <<http://content.met.police.uk/Site/diplomaticprotectiongroup>> Accessed 2 June 2016.

⁹²⁶ Baumann (n 131) 51.

unable to prevent injurious acts by individuals in conditions of civil commotion, the receiving state is not directly responsible for injuries which may be received by aliens in the course of such struggles.⁹²⁷ This means that proof of the level of effort taken by the receiving state is needed in order to decide whether it is culpable. Similarly, Hollis stated that to accuse Libya of being responsible for the killing of an American diplomat to Libya, or Egypt of being responsible for the attack on the US Embassy in Cairo, it was necessary first to determine whether they had taken all the necessary measures to protect the diplomats and their premises.⁹²⁸

Again under international law, when the state fails to meet its obligation of preventing, punishing or remedying any abuse by individuals which caused injury to a diplomat, the receiving state is indirectly responsible for protection of the diplomats.

As explained above, the injured diplomat's state may demand reparations from the receiving state when receiving state fails to afford special protection and/or if adequate local remedies are absent. The state is also obligated under the VCDR to provide diplomats with special protection.

The receiving state in time of civil war is responsible for providing special protection for diplomats, and when a wrongful act is committed by a private individual, and the state had failed to provide this protection, then the state is responsible for prosecution, punishment, apology, and redress for injuries, as stated earlier. With reference to the case study, in the time of insurrection and civil war, the responsibility of the Libyan authority could be determined in accordance with whether it had met its duty before and after the crimes were committed. Before the crimes against US diplomats were committed, Libya should have provided special protection for diplomats (due diligence), while its duty after the crimes against was to find justice for the injured diplomats.⁹³⁹ The Libyan authority was thus indirectly responsible for murder of the American ambassador by the Libyan rebels. Again, the Libyan authorities had exercised reasonably due diligence to try and prevent the killing, and also took satisfactory steps to ensure that there was no repeat of the crime. The US Homeland Security & Governmental Affairs Committee Report of 30 July 2014 confirmed the inability of the Libyan government to adequately provide security for the Mission in Benghazi.⁹²⁹ Furthermore, the new Libyan government apologized to the US and promised that it would take appropriate measures to protect diplomats.⁹³⁰ It is generally accepted that the state

⁹²⁷ Ibid 51.

⁹²⁸ Duncan Hollis 'The Duty to Protect Diplomatic and Consular Premises' (2012) NYU Journal Law and Political. Available at <<http://opiniojuris.org/2012/09/12/the-duty-to-protect-diplomatic-and-consular-premises/>> accessed date 20 July 2015.

⁹²⁹ Baumann (n 131) 44.

⁹³⁰ Alex Tiersky and Susan B. Epstein 'Securing US Diplomatic Facilities and Personnel Abroad: Background

performed its due diligence,⁹³¹ and therefore, could not be held responsible for the wrongful acts committed by the rioters or rebels if it was proved that they acted in good faith and without negligence.

The question might arise as to whether the state is responsible in cases where they could not prevent injurious acts by individuals against diplomats in times of civil commotion. While the state is generally responsible for injuries incurred by foreigners resulting from its failure to protect them during disturbances, clearly it cannot be held directly responsible for such acts in themselves, and common standards of due diligence come into play.⁹³² Due diligence can take different forms and require serious action by the state as diplomats are faced with various forms of attack or assault. Due diligence will vary according to the situation and the special set of circumstances that come with it. Take for instance one common form of attack, kidnapping. The question arises as to whether the payment of ransom to the kidnapper for the return of diplomats is part of the duty of special protection falling on the receiving state?

On several occasions, kidnappers have demanded for a ransom as a condition of releasing the diplomats, and states have responded to these demands in different ways. Some give in to the demands in order to release the diplomats, while others refuse to do so because they believe it is not in the national interest. However, prioritizing the national interest in most cases leads to breaking off diplomatic relationships between the receiving and sending states. For instance, in 1970 West German diplomats to Guatemala were abducted and subsequently killed by the Rebel Armed Forces (RAF). This killing happened after the Guatemalan government refused to comply with the RAF's demands of releasing 25 prisoners and paying \$700,000 in ransom.⁹³³ Thereafter West Germany withdrew its diplomatic mission from Guatemala and asked the Guatemalan mission staff to leave Bonn. This was because the West German government claimed that Guatemala had breached international law by not making an effort to save the life of West Germany's diplomats, and that its refusal to deal with the rebels in order to release the diplomat was a breach of Article 22(2) of the VCDR, which obligates receiving states to take all necessary measures to protect diplomats. As a humanitarian gesture, sending states have in some cases advanced the price of the ransom for payment to the kidnappers.⁹³⁴

and Policy Issues' (July 30, 2014) CRS report, p 5. Available at <<https://fas.org/sgp/crs/row/R42834.pdf>> Accessed 2 August 2016.

⁹³¹ Baumann (n 131) 47.

⁹³² Ibid 51.

⁹³³ Barker (n3) 4.

⁹³⁴ Baumann (n 131) 52.

Where the sending state protests, no special protection of diplomats is required from the receiving state. However, receiving states are under an obligation to afford diplomats the same security from any assault or attack which it grants to other residents.⁹³⁵ Although the state might have difficulty in controlling angry protesters, this researcher argues that the state is still responsible for protecting the diplomats. Article 44 of the VCDR states that even in the case of war between the sending and receiving states, the receiving state is responsible for the safe departure of the diplomats from its territory. Therefore, although mob actions, insurrection and civil war often complicate the legal picture, the rules of due diligence in the prevention and punishment through local remedies generally continue to apply. However, the situation in MENA areas is different, as there is generally a lack of relevant legislation, and in cases where it does exist, there is a lack of mechanisms to implement these laws. There are regions where the government has lost control of the territory, with armed groups taking over several areas and controlling the prisons, judiciary and other government systems. This leads to impunity and makes it difficult to charge the offenders. That is, in cases where the state has lost control over its territory, due diligence will not be possible.

As explained earlier, another problem that might arise in the case of civil war or internal disturbance and political tension, is the absence of international observation, which increases the chances of the violation of human rights. For these reasons, this researcher suggests that the TJ system be applied as explained in Chapter 4, to ensure the punishment of offenders, and to avoid impunity when the armed groups take control of most of the territory of the receiving state.

5.6 International Responsibility of State during Armed Conflicts

During periods of armed conflict, diplomats enjoy the same protection that ordinary persons or citizens of the receiving state enjoy. This is in addition to any protection provided specifically to diplomats under international law, such as diplomatic protection. This means that diplomats enjoy the protection provided for by the international humanitarian law (IHL) which implies that the receiving state incurs responsibility for any violation of the IHL. The protection of diplomats is based on the IHL along with international law represented by the VCDR. This double basis of protection elevates the status of diplomats above that of ordinary persons or the citizens of the receiving state.

However, those enjoying the protection of IHL, whether ordinary persons or diplomats, should be civilians. A civilian is one who does not bear arms and does not engage in armed combat, or who

⁹³⁵ Ibid 52.

might have done in the past but has laid down his arms.⁹³⁶ The judiciary has a similar definition of civilians to that of the International Criminal Tribunal for the Former Yugoslavia, which defines civilians as ‘persons who are not, or no longer, members of the armed forces’.⁹³⁷

The Geneva Convention of 12 August 1949 provides for the protection of civilians, during armed conflict. This is based on the principle of distinction between combatants and civilians during military operations and the classification of diplomats as civilians, confirming that the rights provided by this convention are also applicable to diplomats.

Article 3 of the Geneva Convention 1949, which gave civilians protection from any attack, defined civil persons as those who does not involve themselves in conflict.⁹³⁸

One of the most important aims of the IHL is protecting civilians during different kinds of conflict. Hence, distinguishing between civilians and combatants is one of the important obligations that the parties in conflicts have to respect. The IHL mentions the protection of the civil person in several laws. For example, Article 48 of Additional Protocol I states that the importance of this distinction between civilian and combatant is in the interest of civilians, to allow them to enjoy protection and requiring the parties in the conflict to bear in mind this distinction: ‘In order to ... protection of the civilian population and civilian objects, Parties to the conflict shall ... distinguish between the civilian population and combatants and between civilian objects and military objectives ...’⁹³⁹

Furthermore, the Declaration on the Rules of International Humanitarian Law 1990 governing the

⁹³⁶ Geneva Convention relative to the Treatment of Prisoners of War [Adopted on 12 August 1949, held in Geneva from 21 April to 12 August, 1949 entry into force 21 October 1950] 75 UNTS 135.

⁹³⁷ Prosecutor v. Tihomir Blaskic IT-95-14-T (3 March 2000).

⁹³⁸ Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. State that ‘(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat ‘by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’. ‘In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking of hostages; c) outrages upon personal dignity, in particular humiliating and degrading treatment; d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’.

⁹³⁹ Council of the International Institute of the Humanitarian Law, Declaration on the Rules of international humanitarian law governing the conduct of hostilities in non -international armed conflicts, (San Remo, 7 April 1990). A6

conduct of hostilities in non-international armed conflicts paid special attention to the distinction between combatants and civilians and to the immunity of the civilian population during non-international armed conflicts.⁹⁴⁰

These rules ban launching any attacks on the civilian population as such or against individual civilians, as is the general rule applicable in non-international armed conflict.⁹⁴¹

Also, Article 51(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949 prohibits ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’.⁹⁴² Moreover, Article 8(e) (i) of the Rome Statute prohibits that ‘Intentionally directing attacks against the civilian population as such or against individual civilians, not taking direct part in hostilities’⁹⁴³

The difference between civilians and the military was made when international law provided civilians protection from the objectives of military operations. For instance, Para 3 of Article 51 of Additional Protocol I of Geneva Convention grants protection to civil persons on condition that they do not engage in the war. Similarly, Para 3 of Article 50 of the Additional protocol to the Geneva Conventions stated that ‘Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities’.⁹⁴⁴

Article 52 (1) of Protocol Additional to the Geneva Conventions of 12 August 1949 states that ‘Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2’.⁹⁴⁵ Also, Article 52 (2) prohibits attacks on civilian locations; for this purpose, military places are described as places used for military activities or for military purposes. The article states that attacks should be ‘limited strictly to military objectives ... , military objectives are limited to those objects which ... contribution to

⁹⁴⁰ International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, 2005, Volume I, Rule 15 ‘In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects’.

⁹⁴¹ Ibid, Rule 14 ‘Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited’.

⁹⁴² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁹⁴³ Rome Statute of the ICC, UN Doc A/ CONF.183/ 2/ADD.1 (adopted 17 July 1998, entered into force 1 July 2002).

⁹⁴⁴ International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

⁹⁴⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.⁹⁴⁶

The Committee of Human Rights states that the International Covenant on Civil and Political Rights 1966 can be applied in armed conflict. Furthermore, the ICJ and the UN Commission on Human Rights confirm that the human rights laws remain applicable in times of armed conflict, and are complementary to the IHL. An exception is through the provisions on derogation of the kind contained in Article 4 of the International Covenant on Civil and Political Rights.⁹⁴⁷

Furthermore; international law states that when there is doubt about a person's real status, the person will be taken to be a civilian. This is set in Art 50 (1) of the Protocol Additional to the Geneva Conventions, and relates to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 which confirms the protection of individuals whose status is not clear. That is, in case of doubt about their status, they should be regarded as civil persons. Similarly, Protocol II (draft) Article 25(4) states that 'In case of doubt as to whether a person is a civilian, he or she shall be considered to be a civilian'.⁹⁴⁸

Under IHL, diplomats are prohibited from bearing arms or participating in hostilities, and they have no military attributes and not violate the laws of the state of occupation in order to benefit from the civil person protection.⁹⁴⁹

The protection provided to diplomats is provided only on condition that they take no action that will adversely affect their status as civilians, and this protection is lost in cases of their direct action in the on-going hostilities between the parties to the conflict. This was confirmed in part 3 of Article 51 of the Protocol Additional to the Geneva Conventions of 12 August 1949,⁹⁵⁰ and Rule 6 of

⁹⁴⁶ Ibid.

⁹⁴⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories (Advisory Opinion) [2004] ICJ Rep 136.

⁹⁴⁸ 959 Also United States of America According to the Report on US Practice, the US military manuals do not adopt the position that in case of doubt a person shall be considered as civilian, Egypt on the basis of a proposal submitted by Egypt during the CDDH, the Report on the Practice of Egypt states: 'To ensure more protection for civilians, Egypt is of the opinion that in case of doubt as to whether a person is a civilian, he or she shall be deemed to be so', and International Red Cross and Red Crescent Movement (ICRC) to fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that: 'In case of doubt whether a person is a civilian or not, that person shall be considered as a civilian'.

⁹⁴⁹ Article 41 of the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964). stated that '1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State..'. '3. The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State'.

⁹⁵⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), [signed on 12 December 1977. Entry into force on 7

the Customary International Humanitarian Law applicable to international and non-international armed conflicts that ‘Civilians are protected against attack unless and for such time as they take a direct part in hostilities’⁹⁵¹

The protection of civil persons under international law was set out in Art (4) (I) of the Fourth Geneva Convention, as the persons who are not nationals and find themselves during the conflict under the authority of the conflict or occupying parties.⁹⁵² This Article also states that nationals of states that are not bound by the Convention cannot be protected by it.⁹⁵³ Both Libya and America are parties of the Geneva Convention.⁹⁵⁴

It has often been observed that armed conflicts are usually accompanied by a massive number of IHL violations. This gives the international community a clear signal that there is a need for deterrent measures in order to deter the perpetrators of these violations. The Fourth Geneva Convention of 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, describe what acts are considered as violations, including assaults on the lives of people who are not involved in hostilities. Article 85 of the Protocol states that serious violations of the Geneva Conventions and this Protocol will be considered war crimes while Article 147 of the Fourth Geneva Convention 1949 and Article 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Article 8 of the Statute of the International Criminal Tribunal (1998) provide lists of serious irregularities that constitute war crimes. These include; murder, torture and inhuman treatment, including tests for knowledge of life such as biological experiments, wilfully causing great suffering and serious damage to physical or mental integrity, the kidnapping and hostage-taking of diplomats, intentionally directing attacks against diplomats in their capacity as individual civilians not taking direct part in hostilities, illegal detention of diplomats, and intentionally launching an indiscriminate attack affecting the premises of the diplomats with the knowledge that such an attack will cause excessive loss of life of diplomats, or injure the diplomats, or cause damage to their premises and their facilities.

December 1979].

⁹⁵¹ International Committee of the Red Cross (ICRC), Customary International Humanitarian Law , 2005, Volume I: Rules

⁹⁵² ‘Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’.

⁹⁵³ ‘Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co -belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are’.

⁹⁵⁴ 196 states are parties of this convention include Libya, which signed since 22.05.1956. America also signed since 12.08.1949. Available at<<https://www.icrc.org>>accessed 20 February 2015.

Article 146 of the Fourth Geneva Convention of 1949 points out the criminal aspects of international responsibility: where contracting states are committed to taking the necessary legislative measures to impose sanctions on persons committing, or ordering to be committed, any of the grave breaches mentioned above and to bring them to trial regardless of their nationality.⁹⁵⁵ On the other hand, the terms of article 146 state that each contracting party if it prefers, and in accordance with the provisions of its legislation can deliver these defendants to the other contracting party concerned for trial as long as they provide such party with sufficient incriminating evidence against these persons. Article 157 of Customary IHL stipulates that states have the right to empower national courts with universal jurisdiction to look into war crimes.⁹⁵⁶

Receiving states can be subject to tort liability for the targeting of diplomats during armed conflicts while individuals also incur responsibilities for their actions which are deemed as war crimes. The tort liability of the state could be a result of the actions of its officials or organs, as explained earlier.⁹⁵⁷

In accordance with a breach of the obligations of IL (VCDR), the civil or tort responsibility of the receiving state can exist as a result of attacks against diplomats in the event of a proven breach of any of the following obligations:

- 1 The obligation to facilitate the departure of diplomats and their family members from the territory of the receiving state as soon as possible (as soon as the outbreak of military operations).⁹⁵⁸
- 2 The obligation to take all preventive security measures to ensure the protection of

⁹⁵⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

⁹⁵⁶ International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, 2005, Volume I: Rule 157. 'States have the right to vest universal jurisdiction in their national courts over war crimes'.

⁹⁵⁷ Article 4 (1) of International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. Of ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted on 10 August 2001 ('2001 ILC Articles'). The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, and judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'.

⁹⁵⁸ Article (44) of the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964) stated that 'The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property'

diplomatic envoys and their premises from any of the dangers of the current military operations in the receiving state.⁹⁵⁹

- 3 Again, the responsibility of the state to protect the diplomat is not limited to preventing crimes from occurring but extends to the arrest, prosecution and punishment of offenders of crimes against diplomats.

It is known that the state incurs responsibility if it does not carry out its duty in preventing crime or fails to prosecute offenders, or is deliberately negligent in their search of offenders, or refuses to try or punish, or failed to monitor him/her enabling them escape, or is quick to pardon him/her after sentencing.⁹⁶⁰

Under international law, the responsibility of the receiving state to protect diplomats is required both in times of peace and in times of armed conflict. The receiving state in a time of conflict needs to make efforts to let the diplomatic staff and their families leave in good time. This has to be done even in cases where the relationship between the receiving and sending state might be broken off.⁹⁶¹ Article 44 requires the receiving State, even in the case of armed conflict, to provide the necessary means of transport for diplomats to enable them to leave at the earliest possible moment. This was confirmed by judgments such as in the case of *Congo v. Uganda*.⁹⁶² Uganda claimed that a force from the Democratic Republic of the Congo (DRC) invaded and seized the Ugandan embassy and that Ugandan diplomats to the DRC were mistreated by the receiving state in direct violation of the Vienna Convention of 1961. The court held the DCR responsible for this violation of Articles 22 and 29 of the convention, stating that ‘With respect to the question of admissibility, the Court finds that its Order of 29 November 2001 did not preclude Uganda from invoking the Vienna Convention on Diplomatic Relations since the formulation of the Order was sufficiently broad to encompass claims based on the Convention. It further observes that the substance of the part of the counterclaim relating to acts of maltreatment against other persons on the premises of the Embassy falls within the ambit of Article 22 of the Convention and is

⁹⁵⁹ Article (45) of the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (Entered into force 24 April 1964). Stated that ‘The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives’

⁹⁶⁰ Article 29 of the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964). Stated that ‘The person of a diplomatic agent shall be inviolable... The receiving State shall... take all appropriate steps to prevent any attack on his person, freedom or dignity’; Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

⁹⁶¹ Article (44) and (45) of the Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95, (entered into force 24 April 1964).

⁹⁶² Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment) [2005] ICJ Rep 168.

admissible... ‘The Court finds that there is sufficient evidence to prove ... acts of maltreatment against Ugandan diplomats on Embassy premises... It finds that, by committing those acts, the DRC breached its obligations under Articles 22 and 29 of the Vienna Convention on Diplomatic Relations.’

Also, as the ICJ confirmed in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*,⁹⁶³ the inviolability of diplomatic personnel is essential for the conduct of relations between states even in the situation of armed conflict.

The dispute between Eritrea and Ethiopia was similar. In this Diplomatic Claim and in its defence in Eritrea’s Diplomatic Claim, Ethiopia took the position that a state of war must modify the application of the international diplomatic law. In turn, Eritrea argued for strict application of the standards in the Vienna Convention on Diplomatic Relations despite a state of war.⁹⁶⁴

A caveat to these considerations is that diplomatic relations are generally severed between combatant nations in conflicts; while a period of grace is generally allowed to decommission properties etc. and for diplomatic personnel to vacate the country, this cannot always be expediently achieved (and may be abused in bad faith by receiving states). However, the VCDR obliges states to protect diplomatic premises for the duration of hostilities, viewing conflict as an extraordinary situation.⁹⁶⁵

Such obligations cannot be waived on the grounds of the exigencies of war. Furthermore, the reciprocal nature of diplomacy, as the VCDR (Article 2) notes, entails that relations between states depend on mutual consent, which also pertains to the protection of diplomatic personnel and properties.⁹⁶⁶

To determine the responsibility of the state or individuals for violation of IHL in times of armed conflict, the attribution of an act by the state or individuals is required. Under Rule 149 of the Customary International Humanitarian Law 2005,⁹⁶⁷ the state is responsible for any violation of IHL attributed to it. This article also determines other cases where violation is attributed to the

⁹⁶³ *Case concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

⁹⁶⁴ UN ‘Reports of International Arbitral Awards; Eritrea-Ethiopia Claims Commission – Diplomatic Claim’ (Ethiopia’s Claim 8) (Partial Award, December 19, 2005) VOL XXVI pp. 407-428 Para 21 available at <http://legal.un.org/riaa/cases/vol_XXVI/407-428.pdf> accessed date 20 July 2015

⁹⁶⁵ Ibid 407-428, Para 22

⁹⁶⁶ Ibid 407-428, Para 24

⁹⁶⁷ International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, 2005, Volume I: Rules, available at <<http://www.refworld.org/docid/5305e3de4.html>> accessed 8 December 2016.

state: when an official of the state commits the violation; when this act is committed by these officials in the course of carrying out their official duties; when the state adopts these actions; or when this action or violation is committed under its orders or instructions.⁹⁶⁸ If this attribution is confirmed, then the burden of responsibility falls on the state, which must make reparation for any loss or injury sustained.⁹⁶⁹

Individuals are also responsible for any violation of IHL; however, this responsibility is criminal and is considered as a war crime.⁹⁷⁰ The criminal responsibility lies with the commanders under whose order the violation was committed.⁹⁷¹ Commanders are thus criminally responsible for violations committed by their subordinates, if they did not take suitable action to prevent the violation. This requires commanders to know that the violation is about to be committed.⁹⁷²

To summarise; diplomatic missions during armed conflicts enjoy double protection based on international law and IHL. Within the scope of the latter, diplomats are considered as civilians and have the right to protection of civilians afforded under the Fourth Geneva Convention 1949 responsible for the protection of civilians in time of war. According to the principle of distinction between civilians and combatants and between civilian objects and military targets during armed conflicts, the parties engaged in the conflict cannot target diplomatic premises or diplomats. Targeting civilians is considered a war crime entailing international responsibility, as a gross violation of the rules of IHL. The ICJ insists that the VCDR should be applied in times of armed conflict, even though several states have claimed that this was impossible. To recap, IHL applies alongside the VCDR in times of armed conflict.

On the other hand, it should be noted that in accordance with international law, whenever two or

⁹⁶⁸ International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, 2005, Volume I: Rules, Rule 149. 'A State is responsible for violations of international humanitarian law attributable to it, including: (a) violations committed by its organs, including its armed forces; (b) violations committed by persons or entities it empowered to exercise elements of governmental authority; (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and (d) Violations committed by private persons or groups which it acknowledges and adopts as its own conduct'.

⁹⁶⁹ Ibid Rule 150. 'A State responsible for violations of international humanitarian law is Required to make full reparation for the loss or injury caused'.

⁹⁷⁰ Ibid Rule 151. 'Individuals are criminally responsible for war crimes they commit'.

⁹⁷¹ Ibid Rule 152'. Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders'.

⁹⁷² Ibid Rule 153. 'Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible'.

more norms deal with the same subject matter, priority should be given to the one that is more specific.⁹⁷³ The doctrine of *lex specialis derogat legi generalis* states that when two pieces of legislation, or in this case two separate bodies of law, purport to legislate on the same issue, the more specific legislation is overriding. IHL is exclusively applied during times of armed conflict, while the VCDR is applied during both armed conflict and peacetime. IHL is a general law applied for all injured people during the conflict, while the VCDR specialises in diplomatic cases. The rationale is that special law (VCDR) has priority over general law (IHL), justified by the fact that such special law (VCDR), being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law (IHL). Its application may also create a more equitable result and better reflect the intent of the legal subject⁹⁷⁴ This means that the case of diplomats injured during armed conflict is exclusively a matter for the VCDR (as *lex specialis*), which overrides IHL.

To put the responsibility for the action or omission on the state, the action needs to be attributed to the state, in which case the state incurs tort responsibility. Although this responsibility in local laws often refers to reparation or restoring relationships to their status before the action, under international law the tortious liability implies much more. This includes an apology to the injured state, expression of regret, disapproval by the receiving state of the acts in question, or any other deeds to satisfy the state of the injured diplomats.

5.7 Armed Non-State Actors Responsibilities for Reparation

The most recent attacks on diplomats have involved armed criminal groups, albeit motivated by different objectives. Such attacks are not new. As mentioned in Chapter 1, the US Ambassador John Gordon Mein was killed in 1968 in a bungled kidnapping attempt in Guatemala by the Rebel Armed Forces (RAF).⁹⁷⁵ Similarly, in 1969, Charles Burkert Elbrich, the US Ambassador to Brazil, was kidnapped and later released after the demands of the group were met.⁹⁷⁶ In most cases of the kidnapping of diplomats by organised groups, an exchange of political prisoners is involved.

1970 proved to be a significant year for diplomatic kidnappings. In Brazil in December of that

⁹⁷³ UNGA 'Report of the Study Group of the International Law Commission' International Law Commission, Fifty-eighth session (18 July 2006) A/CN.4/L.702 page 8

⁹⁷⁴ UNGA 'Report of the Study Group of the International Law Commission' International Law Commission, Fifty-eighth session (18 July 2006) A/CN.4/L.702 page 9.

⁹⁷⁵ Barker (n 3) 3.

⁹⁷⁶ Ibid 3.

year Giovanni Enrico Bucher, the Swiss Ambassador, was kidnapped by members of the Peoples' Revolutionary Vanguard. In response, the Swiss Government demanded that the Brazilian Government take immediate steps to secure the release of Ambassador Bucher, and close contact was maintained between the Swiss and Brazilian authorities.⁹⁷⁷ Such instances were common in Brazil until an amnesty was agreed whereby the Brazilian government released 129 political prisoners.⁹⁷⁸ The unusual selection of a Swiss diplomat as a target was perhaps inspired by learning the concessions that could be achieved by kidnapping diplomats from 'imperialist' countries, particularly the US, which gave them greater leverage in influencing the government of the host state.

For instance, the kidnapping of Lt. Col. Donald J. Crowley, an Air Attaché at the US Embassy in Santo Domingo in 1970, was undertaken to extort the release of 20 political prisoners; he was subsequently released unharmed following negotiations by the Dominican Republic⁹⁷⁹. Also in 1970 in Guatemala, five armed men of the guerrilla RAF group kidnapped Sean M. Holly, a political secretary in the US Embassy. This armed group demanded that governments (typically the host country) meet their requests for the release of four political prisoners, otherwise they vowed to kill the captive; they honoured their pledge and released him after the demand was met.⁹⁸⁰ Similarly, Brazilian terrorists kidnapped the Japanese Consul-General in Sao Paulo; however, he was released after the Government released five political prisoners and allowed them to seek political asylum in Mexico.⁹⁸¹ In 1979, in Turkey, the Israeli Consul-General was shot dead by kidnappers when Turkey did not meet the demands of the kidnappers.⁹⁸²

As can be inferred from this brief catalogue of some notable instances, terrorist groups learn and dynamically respond to the ways in which states respond to their activities, explaining the increased number of attacks on diplomats when they learned they could extort concessions, particularly the release of political prisoners. The act of kidnapping itself, and the implied threat of intent to murder if demands are not met, is an intense format of violence compared to general paramilitary activities, which is why it is so closely associated with the release of prisoners, with perceived equivalency.

⁹⁷⁷ Baumann (n 131) 81.

⁹⁷⁸ Barker (n 3) 4.

⁹⁷⁹ Baumann (n 131) 83; Brian M. Jenkins and Janera Johnson, 'International Terrorism: A Chronology. 1968-1974' The Rand Corporation (March 1975) R-1597. DOS/ ARPA, 19. Available at <<https://www.ncjrs.gov/pdffiles1/Digitization/28210NCJRS.pdf>> accessed 2 August 2016.

⁹⁸⁰ Baumann (n 131) 83.

⁹⁸¹ Ibid 83.

⁹⁸² Barker (n 3) 6.

Regardless of the dubious ethical framework within which terrorists and other criminals operate, states are obliged by the VCDR to protect diplomats and take all appropriate steps to protect them, rendering them liable for their safety and ultimately culpable for their failure to protect diplomatic personnel from non-state violence. That is why the receiving states make every effort to ensure the release of diplomats, especially when the latter represent locally or internationally important states and interests (which is why personnel from such countries are typically targeted). In the examples cited above, US diplomatic personnel are universally considered as the holy grail of kidnapers due to the leverage implied by US international political hegemony, which kidnapers hope to wield against the host state government, or against the US itself. Japan is a particularly important trading partner for Brazil, and Turkey's diplomatic relationship with Israel is especially fragile and acutely important in the Middle East peace process.

While receiving states generally take all reasonable efforts to protect diplomatic personnel in good faith, clearly it is impossible to prevent all possibility of attack; however, the line between unavoidable events and failure to protect diplomats according to the terms of the VCDR is ambiguous. For instance, as stated in Chapter 1, in 1970 Guatemala refused to meet the demands of the kidnapers responsible for taking the West German ambassador Von Sprei, which ultimately led to his death. This resulted in the severance of diplomatic ties between Guatemala and West Germany.⁹⁸³

While there is a perfectly sound argument against negotiating with terrorists that runs contrary to the fundamental premise of the post-event duty to protect under the VCDR, the OAS delineates proper responses to terrorism, such as taking a hard-line approach to dealing with kidnapers; this is regarded as fulfilment of the host state's duty to take all appropriate steps to protect diplomats under the VCDR. The OAS thereby acknowledges that acceding to the demands of kidnapers encourages such criminal activities, and tries to establish the expectation that kidnapers will not have a free hand in negotiating with host states; however, in terms of pure protection, meeting the demands of kidnapers has been found to be the surest way to guarantee the safety of kidnap victims. The OAS was thus essentially preoccupied with holding armed groups to account for attacks on diplomats rather than with resolving primary hostage-taking crises, with a long-term view of protecting diplomats during conflict between armed groups and their own governments and making diplomats less attractive targets⁹⁸⁴

⁹⁸³ Ibid 3-6.

⁹⁸⁴ Ibid 7.

In practice, however, while generally espousing a position of not negotiating with terrorists in order to deter activities such as the kidnapping of diplomats, it appears that most states engage in behind-the-scenes haggling in order to resolve hostage crises. For example, Turkey was the scene of three major incidents of political kidnapping involving foreign hostages during the years 1971-1972, all of which were perpetrated by local terrorist groups drawn from leftist student activist movements (specifically, the Turkish People's Liberation Army and the Turkish People's Liberation Front) opposed to US economic, military and political influence in Turkey. The victims included four US airmen, an Israeli diplomat, two British and one Canadian civilian employee of NATO. The US and Turkish governments claimed that no ransom had been paid in any of these cases, but the peaceful resolution of the crises was not accounted for.⁹⁸⁵

Similarly, in July 2013, an Iranian diplomat was kidnapped in Yemen; no group publicly claimed responsibility, and Iran announced its refusal to deal with the kidnapers, but the ambassador was subsequently released.⁹⁸⁶

While it is possible that in such cases the frustrated kidnapers release their victims to avoid later prosecution, it seems more likely that some kind of accommodation has been reached.

The number of cases increased throughout the period 1961-1979, particularly after enactment of the VCDR (1969), raising the question of states' responsibilities when faced with the prospect of negotiating with armed groups.⁹⁸⁷

Under international law, as explained previously, the state has to take all appropriate steps to protect diplomats. Under Article 29 of the VCDR, receiving states are obliged to prevent any attack occurring against a diplomat, in terms of his or her person, freedom or dignity. Based on this, the West Germany claimed then the Guatemala was in breach of International Law by refusing to deal with the kidnapper of the West German ambassador, who was subsequently murdered. However, others have alleged that the responsibility of the receiving state is limited to securing the proper function of diplomatic relationships, not the safety of the person of the diplomat.⁹⁸⁸

Under this approach, if the state fails to protect the diplomat from kidnapping, despite having taken all appropriate steps, the state does not need to negotiate with the kidnapper or put its national

⁹⁸⁵ Margaret Krahenbuhl 'Political Kidnappings in Turkey, 1971-1972' R-2105-DOS/ ARPA July 1977. Available at <<https://www.rand.org/content/dam/rand/pubs/reports/2007/R2105.pdf>> access 20 July 2015.

⁹⁸⁶ BBC News, 'Iranian "operation" in Yemen frees kidnapped diplomat' BBC News (London, Mar 2015). Available at <<http://www.bbc.co.uk/news/world-middle-east-31744613>> accessed 3 June 2015.

⁹⁸⁷ Barker (3) 3.

⁹⁸⁸ Barker (n 3) 4.

interest at stake.⁹⁸⁹ Hence, according to this view, the receiving state does not breach international law by washing its hands of the unfortunate diplomat. Although this approach is rationally responsible, it has only occasionally been taken by the receiving state, as the life of diplomats is too important to be dismissed so lightly, both as the human representative of the sending state, and in practical terms due to the importance of their role in mediating conflicts. International law therefore needs to take into account the humanitarian aspect of this matter, which pertains to the meaning of special protection, requiring that the receiving state is under a duty of due diligence rather than achievement of ideal results.

While receiving states are held responsible for the protection of diplomats, the accountability of paramilitary organisations such as armed militias and terrorists is a complex issue; this is particularly the case in MENA and other areas with relatively weak state institutions and strong political and military factions, ranging from the comparatively mild case of fractional interests in countries such as Lebanon (where the Shia political party Hezbollah has a democratically elected parliamentary presence and an associated paramilitary organization that is active both nationally and internationally) to cases such as Egypt (and Iraq prior to 2003), where the political system is a fiefdom of the armed forces. While states dominated by strong military factions with effective control over the country can function as conventional states with regard to the duty to protect diplomats, the situation is more complex when the state is a political institution whose power does not match that of external military factions, as in the case of Libya.

Since 2011 Libya has seen numerous attacks on diplomats by armed groups, mainly on US and Arab nations' personnel, but it is impossible for the 'state' to take punitive action against these groups because the power of the latter effectively exceeds that of the local government.⁹⁹⁰ Even in cases where the state has extensive military capabilities, such as Iraq after 2003, concerted efforts by well-armed, coordinated and financed non-state actors can result in the situation of foreign diplomats becoming untenable due to the persistent threat to their lives and safety. For instance, the Philippine Embassy staff were relocated from Iraq to Jordan following threats from Al Qa'ida. A more comprehensive explanation of the course of violence against diplomats in Iraq was given in Chapter 1.⁹⁹¹

⁹⁸⁹ Ibid 6.

⁹⁹⁰ Al Arabiya, 'Libya: Jordanian ambassador kidnapped by masked men' Al Arabiya (Qatar, April 2014). Available at <http://www.yourmiddleeast.com/news/jordan-ambassador-to-libya-kidnapped_22889> accessed 3 May 2016.

⁹⁹¹ Anthony H. Cordesman 'Iraq's Evolving Insurgency: The Nature of Attacks and Patterns and Cycles in the Conflict' (2006) CSIS Available at <http://csis.org/files/media/csis/pubs/060203_iraqicombattrends.pdf> accessed date 20 July 2016.

The case of Libya is particularly illustrative as it pertains to the international proliferation of Islamist terrorism since the year 2000. For instance, in April 2014 two cars attacked the Jordanian Ambassador's convoy and kidnapped the personnel, with no obvious motive for this coordinated attack. Jordan is internationally respected for its diplomatic expertise and uncompromising foreign policy stance, having an extensive history of mediating conflicts, assisting refugees and brokering peace (e.g. in the Israel-Palestine conflict, as well as opposing the US invasion of Iraq in 2003, despite being a key US ally). It could be that the Jordanian convoy was the only one available, opportunistically attacked by a zealous militia; however, it could equally be part of the general pan-Arab insurgency against all governments, possibly linked to Libyan prisoners in Jordan. The Libyan and Jordanian governments have not commented on such links.⁹⁹²

While this and other attacks appear to have no rhyme or reason – such as the unexplained kidnapping of staff from the Egyptian and Tunisian embassies in January and March of 2014 (respectively),⁹⁹³ the kidnappers' demands in June 2014 for freeing the Tunisian diplomat included the release of Libyan terrorist suspects in Tunisia. This resulted in the closure of the Tunisian mission in Libya; the Foreign Minister Taieb Baccouche noted that the Tunisian government 'decided to close the consulate in Tripoli because they [the Libyan government] are unable to provide protection for our staff, and as long as armed groups are not deterred by the law in Libya'.⁹⁹⁴

Armed groups have long attacked and continue to attack diplomatic personnel, but the problem becomes more risky when the host states lose control over the situation and armed groups control part (or indeed all) of the state territory during internal political tensions and disturbances. Such scenarios have become increasingly prevalent or potentially likely throughout MENA since the beginning of the Arab Spring in 2010, with a spate of abductions and murders of diplomats throughout the region; clearly diplomats have become a favourite target for armed groups as they present a relatively easier prospect than the conventional armed forces of targeted countries.

The accountability of armed groups can only be enforced under conventional criminal law when the state has effective control over the situation, which includes military force as well as legal

⁹⁹² Al Arabiya 'Libya: Jordanian Ambassador Kidnapped by Masked Men' Al Arabiya (Qatar, April 2014). Available at <http://www.yourmiddleeast.com/news/jordan-ambassador-to-libya-kidnapped_22889> accessed 3 May 2016.

⁹⁹³ Ibid.

⁹⁹⁴ Tarek Amara, 'Tunisia closed its consulate in the Libyan Capital after the Kidnapping of Diplomats Crisis' Reuters (Tunisia, June 2015). Available at <<http://www.reuters.com/article/us-libya-security-tunisia-idUSKBN0OZ0OT20150619>> accessed 2 June 2016.

jurisdiction over the perpetrators of crimes. For example, in the event mentioned above, when the Palestinian Black September stormed the Saudi Arabian embassy in Sudan, the offenders were ultimately apprehended and punished;¹⁰⁰⁶ this was possible largely because the group had no international political support (unlike for instance the IRA in the UK, which was protected by the Sinn Fein political party), and no logistical base in Sudan to prevent capture.

Several scholars have tried to draw the attention of the international community to the responsibility of armed groups as a part of conflict, but this research is concerned with their specific responsibility for reparation of victims (diplomats). International law deals with the responsibility of both states and individuals for reparation, but it has neglected reparation for harm by the institution of armed groups. Based on the cases of Northern Ireland, Colombia and Uganda, Moffet found that much more effort was needed to bring issues of reparation to victims of armed groups to the attention of the international community, particularly when the proliferation of armed conflicts makes such harm more common. However, even if legal provision were made for the accountability of armed groups, actually bringing the latter to justice is a difficult challenge. Moffett pointed out that implementation of legal obligations such as the protection of diplomats by armed groups is difficult but not impossible, with a comprehensive approach and state support. He added that the main elements of an internationally accepted wrongful act of armed groups are: acknowledgment of the wrongful act against a victim; reparation of such wrongful act; and attribution of the wrongful act to an armed group.⁹⁹⁵

Under secondary rules of international law, it is difficult to hold armed groups responsible for reparation. For example, Article 10 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) confirms the responsibility of the armed group to make reparation on the condition that they subsequently gain power (i.e. become state actors). This means that the Article does not cover the multiple parties in any civil conflict who do not later assume power. Furthermore, during the debate on the allocation of responsibility of armed groups by the International Law Commission under Draft Article 14(13), such allegations were found to have exceeded the limit to the articles on state responsibility. Article 10(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) described the responsibility of armed groups in the following terms: ‘The conduct of an insurrectional movement which becomes the new Government of a state shall be considered an act of that state under international law’. This means a state is responsible for the wrongful acts committed by armed groups once the state

⁹⁹⁵ Luke (n198) 20.

has general control over the situation. Hence, under Article 10 (2) of this law, the acts of these armed groups are regarded as the actions of states when those groups gain power and grant the authority 'The conduct of a movement, instructional or other, which succeeds in establishing a new state in part of the territory of a pre-existing state or in a territory under its administration, shall be considered an act of the new state under international law'.

Clearly such provisions are pertinent only to insurrectional movements who succeed to power and create a new state. This was confirmed by the ICJ, which found in *US v. Iran*⁹⁹⁶ that the Iranian regime was retrospectively responsible for the wrongful acts of revolutionaries prior to seizing power (i.e. for crimes committed before they became the governing regime). As the previous regime (in this case, that of the Shah) had lost control over the situation, the subsequent losses and damage were attributed to the new state authorities who established a government. This ICJ judgment is in line with the customary international law doctrine of state succession.

However, other areas of international law have always considered the responsibilities of armed groups; for instance, they are generally held accountable for respecting international humanitarian law. For example, Common Article 3 of the Geneva Conventions⁹⁹⁷ deals with parties of conflicts which include armed groups, while Additional Protocol II on Internal Armed Conflicts deals with such groups under two conditions: first, responsible command has to be organized; and second, part of the group has to have effective territorial authority. This means that this article will not apply in all circumstances, although all individuals are responsible under customary law.⁹⁹⁸

Under Article 91 of Additional Protocol 1 of the Geneva Convention, the parties to an internal conflict are responsible for reparation if they breach the rules, but that does not pertain to internal conflict.⁹⁹⁹ The ILA Committee on Reparation for Victims of Armed Conflict stated the responsibility of armed groups in violation of breaking the IHL, but despite advocating remedy to victims, there are no appropriate legal procedures to confirm such remedy. This responsibility has

⁹⁹⁶ Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment) [1980] ICJ Rep 3.

⁹⁹⁷ Geneva Convention relative to the Treatment of Prisoners of War [Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949 entry into force 21 October 1950]

⁹⁹⁸ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) 1125 UNTS 609 [Entry into force on 7 December 1978, adopted at Geneva on 8 June 1977].

⁹⁹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (signed on 12 December 1977. Entry into force on 7 December 1979).

been developed under the IHL. However, the situation of this group is still unclear under this law. Despite the fact that these groups are not parties to humanitarian treaties, they become liable when they establish territorial authority; however, in practical terms, these groups may have difficulty in paying compensation due their lack of resources.

Sometimes states do not acknowledge the obligations of armed groups to incur responsibility, in order to avoid granting them statutory rights. The violent activities of non-state armed groups have been escalating since the year 2000.¹⁰⁰⁰ Although their responsibility is debatable, International Criminal Law (ICL) confirms that they have responsibility, and it does not distinguish between non-state armed groups and state agents in terms of accountability under the Rome Statute of the International Criminal Court.¹⁰⁰¹ However, this accountability of members and leaders of armed groups does not include reparation for victims. The members and leaders of armed groups were subject to the ICC as of April 2011.

In 2014 the ICC initiated investigations into how successful prosecutions of human rights violations could be implemented. For instance, in 2014, in the case of Thomas Lubanga Dyilo who had been found guilty in 2012 of the war crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities in the DRC, the ICC confirmed the verdict and sentenced him.¹⁰⁰² Furthermore, 'Germain Katanga, commander of the Force de Résistance Patriotique en Ituri, was found guilty of crimes against humanity'.¹⁰⁰³ This criminal liability arises from the responsibility of commanders for the actions of their subordinates.

Therefore, armed groups are accountable for crimes they commit during conflicts, and these may be tantamount to crimes against humanity and war crimes, such as the reported atrocities committed in the Central African Republic.¹⁰¹⁶

To summarize, armed groups have responsibility in respect of IHRL and IHL and should obey these laws during the armed conflict; however, this does not confer legitimacy on armed

¹⁰⁰⁰ J. Joseph Hewitt, Jonathan Wilkenfeld and Ted Robert Gurr, *Peace and Conflict*, (Paradigm Publishers, Boulder CO, 2010) 27.

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¹⁰⁰² Art 7(2)(a) of the Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force on 1 July 2002.

¹⁰⁰³ Amnesty International 'International Criminal Court: Bemba verdict a historic step forward for Victims of sexual violence' (21 March 2016). Available at <<https://www.amnesty.org/en/latest/news/2016/03/international-criminal-court-bemba-verdict-a-historic-step-forward-for-victims-of-sexual-violence/>> accessed 20 Nov 2016.

groups.¹⁰⁰⁴

5.8 Conclusion

Diplomats are under the protection of international law, including the Vienna Convention on Diplomatic Relations (1961), the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents 1973, and the International Convention against the Taking of Hostages 1979.

However, despite the existence of protection for diplomatic staff, diplomats are frequently specifically targeted, especially in a time of internal armed conflict. States under international law incur responsibility for any attack on diplomats; even in a time of armed conflict between the receiving and sending states, the former needs to secure the departure of the latter's diplomats from its territory.

The state is responsible for protecting diplomats and preventing crimes against them; this means exercising due diligence to prevent such crimes, and states are not necessarily culpable if attacks against diplomatic personnel materialize after they have taken all reasonable measures. The state is directly responsible for acts committed against diplomats by the state itself (e.g. by its armed forces or security personnel), its officials or organs, or by other parties with the knowledge and tacit acceptance of the state.

When private individuals or unknown persons commit actions against diplomats it is their own private criminal responsibility. However, the state has indirect responsibility for prosecuting and punishing such criminals and providing proper court remedy for the injured diplomat. In cases where diplomats are attacked, the host state needs to punish offenders through its local laws. This explains why some receiving states have enacted legislation in advance for punishing such criminals. In the case of the non-existence of such private laws, the receiving state depends on its general criminal laws.

Attacks on diplomats, whether by a particular state's organs or by individuals, are generally a state responsibility under international law. However, diplomats are required to ensure that they are not legitimate targets in any conflict, as in such cases they would no longer enjoy immunity and privileges; for example if their actions put them in jeopardy by withdrawing the assumption of

¹⁰⁰⁴ Ibid 10.

non-participation in violence. Examples include where diplomats take sides in the conflict, such as by engaging in espionage or arming rebels, or generally encouraging opposition and sedition against the legitimate government.

Chapter 6: General Conclusion and Recommendations

6.1 Research Findings

Diplomacy is important, not only for the strength of relationships between the sending and receiving state, but also for the safety of the international community. Diplomacy is as old as humanity's beginnings; it originated with the needs of the individual (especially relating to food), and gradually developed towards different purposes, such as economic, social, exchange and culture. The diplomat is a professional person who conducts diplomacy between the considered states. His/her duty, according to Article 3 of the VCDR, is to strengthen the relationships between the states, protect the interests of his/her country, express protest, request explanations or clarification of a situation, or the attitudes of the receiving state, among many other duties.

However, this duty is considered to be legal and is far-removed from the duties of a spy. Diplomats have had important roles throughout history in bringing conflict to an end. The states, therefore, grant him or her immunity and privileges. Diplomats, however, are a favoured target of terrorism and other acts of violence, which is why the international community has tried to find the best mechanism to protect diplomats throughout history. International law, as a result of this targeting of diplomats, enacted the VCDR in 1961. Despite the enacting of this convention, the diplomats are still targeted. Thus, the international community tried another mechanism to protect diplomats, namely, to ask states to cooperate between themselves and to criminalize action against diplomats in their local legislation. The sending states themselves tried to find mechanism to protect their diplomats. An important example of this is what the US has done - i.e. training their diplomatic and consular staff to face any attack against them as well as have its officers protect all their staff in US embassies and consular offices all over the world. For example, the last event in Libya (of killing an American ambassador to Libya) is a worthy example of how this mechanism may not be adequate enough to protect diplomats. Such mechanisms needs more effort and more finances. Hence, it may not work with other countries, especially developing countries. As per international standards, the receiving state has responsibility for any attacks on diplomats. The Vienna Convention on Diplomatic Relations 1961 confirms this responsibility. Also, such responsibility is confirmed by draft articles on the responsibility of states for internationally wrongful acts, 2001. Furthermore, there are other laws that deal with terrorism that also indirectly dealt with the protection of diplomats. This includes the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents

1973 and International Convention against the Taking of Hostage 1979.

Recently, there has been an increase in the number of internal disturbances and political tensions, as well as internal conflict. It is difficult to recognize a difference between these two situations. However, the time when an American ambassador to Libya, Steven, was killed during the time of internal conflict when the Libya government lost control over the territory. This circumstance is sometimes compared with an attack against diplomats. It is a clear signal to the international community that the diplomats have become the most favourite target of rebels or armed groups. There are many reasons for this kind of targeting. One of the most important purposes of such targeting is to ensure their requirements are met. In many occasions, the kidnapper succeeds to pursue the states to meet their requirement. That is why the number of killing or kidnapping of diplomats has increased. The receiving states under international law have a responsibility to take all appropriate steps to protect diplomats. That is why the receiving state mostly deals with kidnappers and attackers. However, sometimes, receiving states avoid dealing with the abductors, which often leads to killing the diplomats.

When merely an attack on diplomatic agents occurs, this is not enough to incur the receiving state responsible. The violation of the rules of international law must be proved. The receiving states might be suffering from internal disturbances and political tensions or internal armed conflict, and may have lost control over territory. In this case, the receiving states need to prove it did all it could to protect diplomats. For example, the circumstances surrounding the issue of Libya are totally different from others. Libya lost control of the entire country after the defeat of the former government of Al-Gadhafi.

The state is obliged to make an effort, but this may not necessarily end in a desired result. Libya took all appropriate steps to protect diplomats or the premises of the mission. According to the above, it can be concluded that no wrongful act can be attributed to Libya under these circumstances.

However, that does not mean there is not any accountability for those who acted out the violations. That is why Libya began to deal with this problem by enacting the Anti- Terrorism Law 2013. This law clearly criminalizes the actions against the diplomats and their premises. This law considers these kinds of crimes against diplomats as terrorist offences. This is the first law in the Middle East and South Africa that provides direct punishment provisions for crimes against diplomats.

However, Libyan authorities also enacted the law of Transitional Justice. This local law provides the victim of human rights abuse with guarantees for justice. The TJ mechanism is preferred because of its unique characteristics. The TJ approach includes judicial and non-judicial mechanisms. These mechanisms give an opportunity to the victims or their families to tell their story about the violence that they faced, ensuring this provides effective redresses to victims. This law enables the victims or their families to know who conducted the violation, what the reason for these wrongful acts was, ensuring reparation to the victim and guaranteeing there is no repetition of such acts. It is recognized that such a law is important to ensuring the redress to victims. However, this law does not include foreign diplomats caught up in similar circumstances as victims and does not include them in the TJ process in the same as nationals who are victims of such violence. It is important for such a law to deal with this problem and also include clear punishment for those who are involved in acts of violence against foreign diplomats. Such effective measures adopted by receiving states may help to enhance the protection of diplomats. However, this TJ law is not international in nature. This researcher strongly recommends the international community to set out the minimum standards of the rules covering the TJ, in order to easily apply these for diplomats.

Most war-torn societies adopt TJ, which is a set of procedures in order to achieve stability in time of post-conflict, strife, and/or revolution. The most common challenge that a TJ process might face is the impotence or inexperience of new governments, or a lack of serious inducement to achieve justice in post-conflict situations. It is the right of the diplomat (victim of human rights) to know the truth of the reason behind targeting them, to see the punishment of the offenders, and to ensure reparations for them or for their state, and to receive guarantees that such action is not repeated in the future. The TJ mechanism is not limited to the judicial procedure, but also to non-judicial procedure, which mean that the state needs to redress the problem of the injured diplomats under the mechanisms of the TJ, which would be much more open and could be according to what the receiving state (state of the offender) and the sending state (state of injured diplomat) agrees. More or fewer actives might be required by the sending state from the receiving state, (i.e. apology, gratification, rehabilitation, non-repudiation in future, etc.). Although, this is important for the TJ

mechanism, TJ might face the problem of an unstable situation in the time of post- conflict and the control of armed groups in some territory of a state, which facilitates impunity.

Also, the lack of the ability of a government that reaches power after the conflict in a divided society, as with what happened in Libya, may enable the procedure of TJ to fall apart. However, the researcher believes the TJ could provide a good solution for the injured diplomat, because of its variety of approach and flexible mechanism especially in time of tension and disturbance when there is no functioning legal framework or judicial institutions except for international human right law and internal emergency laws, which in the most cases apply the law of emergency. This law does not include the guarantee that any transitional regime could provide remedies for the injured diplomat, and it is mostly designed for internal crimes to protect citizens. Also, in a time of internal armed conflict, when the state loses control over all, or part of the territory which was not covered by international law, this gives the state a good opportunity to apply the TJ mechanism.

Also, in a time of internal armed conflict, when the state loses control over all, or part of the territory which was not covered by international law, this gives the state a good opportunity to apply the TJ mechanism. Whereas countries ruled by a dictator in developing countries may not have a good environment for applying TJ. Moreover, the availability of means to apply TJ mechanisms and the ability of states in developing countries to do so might not satisfied. However, in accordance to the VCDR the receiving state, under any circumstance, needs to take all appropriate steps to protect the diplomats, (e.g. Article 44) and this would even be the case after the events of an attack on the diplomat. This was confirmed by the decision of ICJ in *Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980* (Judgment) [1980] ICJ Rep 3, p6 stated that ‘Iran is under a particular obligation immediately to secure the release of all United States nationals ... and to assure that all such persons and all other United States nationals in Tehran are allowed to leave Iran safely’

Although the Libyan authorities adopted anti-terrorism laws, which refer to the injured diplomats and sets out the punishment for the crimes against them, the researcher finds that the TJ, with its variety mechanisms, could be a good solution for the rights of injured diplomats. The punishment of the offenders will already be one of its mechanisms. However, there are relationships between IHL and IHRL and TJ mechanisms in their aim of finding justice for the victims of human rights abuse and violations of international law.

The discussion revealed that Libya faces many obvious barriers to protecting diplomats, including lack of experience, loss of control, control of armed groups, and lack of implementation of laws.

Libya as an Islamic country is obligated not only by international law (VCDR 1961 and VCCR 1963) but also by the Sharia to comply with the term and condition of the treaties that are entered into and signed by the head of state. As discussed at length in Chapter 2, Sharia has an unassailable emphasis on the duty to protect diplomats, yet modern Islamist groups specifically target diplomats while claiming to be attempting to implement Sharia, as in the case of the attack on the US Ambassador to Libya in 2012. In fact, these groups lack any legal or political expertise and the situation on the ground in Libya is one of chaos and incoherence, with the government unable to wield conventional state authority across the country. In this case, alternative sources of justice for injured diplomats such as TJ can be considered. The fundamental advantage of TJ in this case is that it has judicial procedures and mechanisms not available in customary international or national law, which can be expedient to conflict and post-conflict situations. This can facilitate the fulfilment of international obligations by states through truth commissions investigating the crimes against diplomats to reveal the truth. The circumstances of the killing of the US Ambassador to Libya are still unclear, and the investigation – if it is being conducted at all – is ongoing.

The situation in Libya leads us to several questions about the difficulties of trying the accused within the state and the lack of control over armed groups that have the greatest influence in Libya. The implementation of domestic laws, such as the Libyan Criminal Code 1956 or the Libyan Anti-Terrorism Law of 2014, which criminalises assaulting diplomats, is not easy in times of armed conflict when the state loses effective control over the territory (while retaining nominal sovereignty under international law). Therefore, the researcher sought to propose TJ for the availability of elements to enable justice for the diplomat. As explained in Chapter 4, TJ is a national law concept and was never meant for integration into international law. The application of TJ to diplomats can therefore only be optional as a way of *complementing* other international law mechanisms, not to replace them. To be specific, in the international law context, TJ can be used as an optional mechanism to complement criminal law in terms of evidence gathering and truth finding. States can claim reparations through diplomatic channels or legally by the ICJ. Consequently, the US can ask Libya to prosecute and punish the offenders who attacked the US Embassy and diplomatic staff; if Libya could not (or would not) undertake this then prosecution could take place at the ICC.

Investigation by commissions of inquiry does not remove the criminal aspect of the case, therefore, after making sure that the amnesty laws are not provided against the perpetrators of the violations against the safety of the diplomat and embassy security, it is possible to adopt these investigations whether in the internal courts if the state is capable of conducting the trial. If the state

is not capable, in Libya, the case must be referred to the ICJ. It should be noted that states cannot be expected to declare their own impotence in prosecuting such cases for political reasons, and indeed they may be hostile to such measures. This was clear in the face-saving attempt by the government of Libya to object to the US security intervention regarding the attacks in 2012, as explained previously (i.e. Libya claimed it was a violation of sovereignty etc.). Where the state is capable of prosecuting, it might establish a special court to charge those accused of crimes against diplomats. It should be noted that as of 2017 Libya was moving towards adopting a hybrid judiciary to develop and promote TJ in Libya.

Truth commissions are not focused on a specific event but attempt to paint the overall picture of systematic human rights abuses over a period of time. There is no universal guide of exactly what to do in those situations, the important thing is that the receiving state provides protection proportionate to the threat. However, even if the host state does not believe there will be a disturbance of the peace or impairment of the dignity of the diplomatic mission, they should still exercise reasonable due diligence to try and prevent the injury to diplomats. It is appropriate to do as the Libyan authorities did on 11 September 2012 in the event of the killing of American diplomats in Libya, in the matter of demonstrations and attacks on diplomatic missions: Libya had exercised reasonably due diligence to try and prevent the injury of diplomats with ‘Libyans fighting alongside US personnel during the assault’. The Libyan authorities also apologized to the US over the murder, and took serious steps after the murder to make sure such crimes would not be repeated in future. This includes the Libyan Anti-Terrorism law 2013, which stipulates particular punishments for attacks on diplomats and their premises, as explained in Chapter 3. This law is unique in the MENA region as Libya is the first and only receiving state in that region so far to take steps to improve the protection of diplomats and seek redress for them. The Libyan authorities took these important steps to avoid breaching its international obligation to protect diplomats, even though the actions against the US diplomats were committed by Libyan non-state actors without knowledge and approval of the Libyan authorities (unlike in the case of the US Embassy in Iran, as discussed previously).

Given these steps taken by Libya, the question arises of what role is left for TJ to play. The role of TJ in the Libyan case would be searching the truth of what has been happened in September 2012 and why the armed groups targeted the US Ambassador. Applying TJ mechanisms can make it easier for Libya to meet its obligations under international law in respect of knowing the truth about the events of the attack on the US Embassy in 2012. For example, the reason behind being targeted would be given to the injured diplomats, their families, the US and indeed Libya itself and its people.

Although, TJ mechanisms could offer a good resource of providing justice for injured diplomats, the researcher further suggests another mechanism to protect diplomats during the internal armed conflict or time of tension and disturbances, especially when states lose control over their territory, as in Libya in 2012, by relying on virtual embassies. The problems of attacks on diplomats can be resolved by adopting preventative measures such as virtual embassies. The virtual embassy in the absence of formal relations between the sending and receiving states has been attempted by many states when relationships between them deteriorate, as in the case of Iran and US, or when there is no existing embassy in a state, as in the case of Israel in the HCC.

This thesis finds that the protection of diplomats might be achieved using digital diplomacy and virtual embassies to conduct diplomacy between states during a time of armed conflict when a state loses control over its territory. In this regard, the development of technology can play an important role for diplomatic relationships. These new methods and modes of conducting diplomacy are done with the help of the Internet. Diplomatic activities are increasingly supported by the Internet and digital tools, and other information and communications technologies. Diplomats already rely on the Internet to find information, communicate with colleagues via e-mail, and negotiate draft texts in electronic format; diplomats are also increasingly using new social networking platforms such as blogs, YouTube, Twitter and Facebook.

Since time immemorial the defining characteristic of diplomacy has been establishing the credentials of individuals based on documents establishing their official status, including that of diplomatic representatives chosen by a state to be represented in another state. However, the concept of the virtual embassy eliminates these norms. e-Diplomacy may become a future alternative for diplomats, entailing a redefinition of diplomacy. During armed conflict, states need to be more active in their efforts to protect diplomats, which can be facilitated by removing the physical presence of diplomats altogether and relying on e-diplomacy. This saves immense costs incurred in contracting and deploying elite security forces to protect diplomatic missions and provides the optimum protection for diplomatic staff.

As reiterated throughout this thesis, there is no guide or existing international law specifying what host states should do when they lose control over their territory during a time of tensions and armed conflict, yet the state is still obliged to protect diplomats. This is conventionally interpreted as obliging states to exercise due diligence. Although the Libyan authorities meet the obligations of due diligence, by enacting several laws to protect diplomats, there is still the problem of implementation of these laws. It is not only because of the lack of mechanisms for implementation in developing countries in general, but also because of the weakness of the new government in Libya and the control of the armed groups over several territories and control of important offices dealing with implementation. For example, some armed groups control prisons and courts. That is why the suggestion of applying the TJ mechanisms and law in Chapter 4 of this thesis might be difficult in the situation of Libya.

Consequently, it was suggested that it is necessary to use a virtual embassy to protect diplomats. Chapter 3 explained examples of existing virtual embassies in MENA. The rapidly developing technology affects the current diplomacy system by facilitating the functions undertaken by

diplomats. A potential problem which could arise from e- diplomacy is that the use of social media tools such as Facebook, Twitter and YouTube etc. gives foreign diplomats direct access to local citizens, which this could lead to interference in the domestic affairs of countries (e.g. Trump's tweets about demonstrations in Iran). A possible solution would be to adopt international protocols on e-diplomacy, maybe through revision or amendment of the VCDR.

There are varied laws that can apply to crimes against diplomats. The laws that apply are different from one situation to another. However, IHRL is the common law that applies to all situations. For example, in a time of peace, the laws that could apply is VCDR, and internal laws - mostly the internal criminal laws and civil laws of the concerned state. However, these laws often do not cover crimes against diplomats directly. In a time of internal tensions and political disturbance, the VCDR can still be applied along with IHRL and the internal laws; mostly the law of emergency and martial law. The main flaw of this law is that it does not extend to diplomats and their protection, and it is difficult to apply this law and prosecute the offenders because sometimes the armed groups seize control over several territories and the state might lose control over this territory. In addition, such armed groups may exercise control over important institutions of in the state, such as judiciary, the police and prisons.

Furthermore, there is no justice in applying these laws, since these laws might apply only to ordinary citizens, but may not apply to powerful individuals or corrupt officials. Therefore, finding justice for diplomats within the context of these internal laws might be impossible in most cases. For these reasons, the researcher argues for the importance of the internationalization of the TJ in order to make it possible to apply the concept to diplomats, which can then provide justice for them as has been explained earlier. The researcher's reason for arguing in favour of TJ law is because of its mixed approach of judicial and non-judicial mechanisms. However, the relationship between international law and this mechanism is still non-existent. This mechanism has not dealt with the breakdown of IHLR that accompanies conflict. Transitional justice processes need to include the issues of gross human rights violations. In order to do this a connection needs first to be established between international law and TJ – e.g. TJ could be extended, internationalised and made a concept of international law specifically for use when dealing with cases involving diplomats.

The private individuals responsible for war crimes, including diplomat targeting crimes during armed conflict, is not limited to those who just conducted a war crime, but also extends to all those who incite them or have issued orders. Despite these differences in law which can apply to each

conflict, there are several laws that can be applied for both kinds of conflicts. Hence, recently, it has become generally accepted that some rules of international law can be applied to both internal and international conflicts. Several laws can be applied in these two types of armed conflicts. For example, most rules of customary international humanitarian law that might be applied to international armed conflicts can be applied also to non-international armed conflict. Furthermore, international humanitarian law, international criminal law, and IHRL apply to both kinds of conflicts.

However, it can be noted that the number of rules set out in international humanitarian law treaties which govern internal armed conflict are much fewer than those applicable in international armed conflicts. Furthermore, there is no international law governing the time of internal tensions and political disturbances. In a time of armed conflict, the receiving state incurs the responsibility for reparation of violations of international humanitarian law (IHL). This violation of (IHL) is attributable to a state: in case the actors of a state committed this violation, or violations committed by persons or entities empowered to exercise elements of governmental authority; persons or groups acting under the direction or control of the state or under instruction of the state, and if this act was under acknowledgement of the state or the state adopted such act. In the case that the violation was attributed to the state, then the state is responsible for reparations for the loss or injury caused. Meanwhile, individuals are criminally responsible for violations of IHL. This violation is regarded as a war crime. Similarly, the commanders are criminally responsible for violations of IHL if this violation is committed following their orders. Also, commanders are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes. However, they did not take all necessary and reasonable measures in their power to prevent this crime from occurring.

The inviolability of diplomatic staff and premises is required even in the situation of armed conflict between the sending state and receiving state. The receiving state is obligated to facilitate and secure the departure of the diplomats from the receiving state. Also, in cases of revolutionary activities by persons against the diplomat, the receiving state is under the obligation to afford diplomats with the same security grants to others residents. Furthermore, in the time of insurrections and civil wars, the responsibility of the state is determined in accordance with and on with the basis of due diligence and by the existence and effectiveness of local remedies and justice. Whether due diligence has been exercised in the attempted preclusion of injuries caused by civil wars is essentially based on the presumption that the government is rationally well-ordered, and that the insurrection and disturbances are unusual circumstances.

Although, international law states that the parties to conflict should respect the law, under International Law, the rioters or rebels are not responsible for their wrongful acts unless they gain power. The state is under an obligation of due diligence. Consequently, the state is not responsible for the wrongful acts committed by the rioters or rebels if it is proven that they have acted in good faith and without negligence. Therefore the receiving state may not be held directly responsible for the action taken by the rebels. In a time of insurrections and civil war, and especially when a government is unable to prevent injurious acts by individuals in conditions of civil commotion, they are not technically responsible for injuries which may be received by diplomats in the course of such struggles. This requires careful observation of the efforts taken by the receiving state in order to decide the responsibility of the state is very important. Therefore, to determine the responsibility of Libya for the killing of an American diplomat requires an investigation as to whether Libya took all appropriate steps to protect the diplomats and their premises. The research explained previously that Libya had made efforts to protect the diplomats but the weakness of the new government and the existence of armed conflict prevented this. Armed groups are under an international obligation to respect both the IHRL and the IHL. However, there is no written law to provide their responsibility. The international community still avoids incurring the armed group's responsibility, because they are concerned about giving them legitimacy. These armed groups were not responsible for their actions until 2014, when ICC attempted to find a resolution for such problems of violation of human rights by armed groups. However, this prosecution did not include the reparation for victims.

6.2 Contribution

The main contribution of the thesis is as follows:

1. Using e-diplomacy to prevent attacks against diplomats occurring, as explained in Chapter 3. If this method does not prevent attacks occurring, TJ could be applied to find justice to injured diplomats.
2. TJ could be Serve as a complement or support to state responsibility and criminal law for injured diplomats and their states when attacks occur, as explained in Chapter 4.

6.3 Recommendations

In view of the findings of the research as summarised in Section 6.1 above, the researcher would like to make the following recommendations with the objective that they may help to improve the

legal framework for the protection of diplomats in times of internal conflicts and political tensions.

1. The International Law Commission (of the General Assembly of the UN) should include in its agenda an item concerning the protection of diplomats in the course of armed conflicts and internal tensions and political disturbances, when the state loses control over certain areas in order to reach a framework of agreement in this regard.
2. The researcher recommends applying the TJ mechanisms as a supporting tool to redress the problem of attack on diplomats and to find justice to injured diplomats as a victim of human rights. The mechanisms of TJ can be an important resource for finding justice and for making the diplomats and their family or state know the truth as to why they were the victim of human rights abuse. The state, therefore, needs to apply the TJ instead of other internal laws, which may be limited simply to the punishment of offenders.
3. The USA possesses a system of diplomatic security training. This training teaches the diplomats how to protect themselves against any attacks. The killing of ambassador Chris Stevens, despite this system, sends a clear signal to the international community that more effort needs to be paid to protect diplomats. This requires new mechanisms of protection.
4. It is recommended to use virtual embassies to conduct diplomacy between states to save the lives of diplomats during armed conflict, especially when states lose control over the territory. Specific protocols need to be developed to avoid problems such as interference by diplomats in the domestic affairs of the receiving state.
5. It is necessary for armed groups to incur responsibility for reparations due to diplomats who are victims of attacks or abuse, particularly when states lose control over the administration of the part of their territory in which the attacks or abuse have taken place. This has to be through national law (i.e. the receiving government pays reparations and then seeks to recover it the sum from non-state groups under national law, or through a complementary TJ process).
6. The responsibility of armed groups needs to be regulated by written law in the form of an international convention rather than be left to customary international law. This may help to

lessen the problem of targeting diplomats, by dissuading any other groups or individuals who may consider such as course of action in the future.

7. According to Sharia, foreign embassies and personnel are protected; this position is beyond dispute in the corpus of Islamic jurisprudence and historical experience – where diplomats have been mistreated in ostensibly Islamic states, this has been in violation of and not accordance with Sharia. However, the marginalisation of traditional Islamic institutions of learning and law in Muslim-majority countries during the colonial and post-colonial eras has drowned out the voice of reason, leaving populist political actors to exploit the masses with emotive appeals to brute violence specifically targeted to minorities and diplomats. Such factors include Islamist parties, paramilitary organisations and terrorists, who are united with Islamophobia lobbies. There

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